

Joint Standing Committee on the Corruption and Crime Commission

Discontinuance of contempt proceedings against members of the Coffin Cheaters Motorcycle Club

**Report No. 27
June 2012**

Parliament of Western Australia

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contempt proceedings
against members of
the Coffin Cheaters
Motorcycle Club

Report No. 27

Presented by

Hon Nick Goiran, MLC and John Hyde, MLA

Laid on the Table of the Legislative Council and
Legislative Assembly on 14 June 2012

Chairman's Foreword

On Wednesday 6 April 2011, the Committee learned that proceedings in the Supreme Court against two members of the Coffin Cheaters Motorcycle Club for contempt of the Corruption and Crime Commission had been discontinued without proceeding to trial. Later that day the Committee learned from the CCC that the decision by the Honourable Chief Justice Wayne Martin QC to discontinue the contempt proceedings was driven by an application to do so by the CCC.

The contempt proceedings had originally arisen out of a series of organised crime examinations convened by the CCC on application by the Commissioner of the WA Police, Dr Karl O'Callaghan. The conduct of two witnesses in some of these examinations had caused the then CCC Commissioner, the Honourable Len Roberts-Smith RFD QC, to cite them both for being in contempt of the CCC. Specifically, in the view of the then Commissioner, both had failed to answer a question relevant to the investigation.

Of particular concern to the Committee was the reported fact that the proceedings had been discontinued as a result of a failure by the CCC to provide discrete pieces of evidence to the defence in preparation for a trial. Accordingly, the attendance of the Acting CCC Commissioner, Mr Mark Herron, and the Executive Director of the CCC, Mr Mike Silverstone, was sought before a closed hearing of the Committee, to enable the Committee to learn more about exactly what had transpired. The Parliamentary Inspector of the Corruption and Crime Commission, the Honourable Chris Steytler QC, was also asked to attend that hearing, to serve as an aide to the Committee.

In the hearing, which took place on 18 May 2011, the Committee learned that the reported reason for the contempt proceedings being discontinued was incorrect: it was not a failure by the CCC to provide discrete pieces of evidence to the defence, but rather an assessment by Mr Herron that the proceedings had little chance of achieving a successful conviction that had caused the CCC to apply for the proceedings to be discontinued.

The Committee then had an opportunity to further discuss this revelation with the Parliamentary Inspector at a subsequent hearing on 25 May 2011. Following this discussion with the Parliamentary Inspector, the Committee resolved to prepare this report, a draft of which was prepared and provided to the CCC and to the Parliamentary Inspector, along with a request for comments pertaining to the draft report for consideration by the Committee.

In responding to the draft report, Acting CCC Commissioner Herron requested that the Committee defer any decision as to whether or not to proceed with tabling the report, as there were (at the time of the Acting Commissioner's response) "numerous prosecutions on foot in relation to [the] matter."¹ Concerned that the tabling of the report may result in prejudice to a possible jury trial, the Committee resolved to defer tabling the report until such time as this were no longer of concern. In advising the CCC of this decision, I requested that the Committee be kept informed by the CCC as to

¹ Mr Mark Herron, Acting CCC Commissioner, *Letter*, 5 August 2011.

ongoing status of the outstanding charges at intervals not less than after each interlocutory appearance.

Correspondence between the Committee and the CCC was subsequently exchanged in relation to this matter through the remainder of 2011 and in the early part of 2012. On 7 May 2012 the Committee was advised by the CCC that, at a trial allocation hearing on 10 April 2012, the Office of the Director of Public Prosecutions had confirmed its preference that a single trial take place before a Magistrate, and that all charges relating to this matter be dealt with summarily. As such, the Committee's concern about prejudice to a possible jury trial fell away, and the Committee resolved to proceed with tabling this report.

It is the view of the Committee that being in contempt of the CCC is a most serious offence: the Parliament has equipped the CCC with exceptional powers of investigation, and any flagrant attempt to thwart these powers – as had been the case leading to the original initiation of these contempt proceedings – is an act by someone who has no respect for the rule of law in this state. Indeed, the seriousness of this offence was clearly demonstrated in February and March 2011 when the Chief Justice, the Honourable Wayne Martin QC, sentenced each of the five persons who were found guilty of being in contempt of the CCC to at least two years of imprisonment.²

The Committee has trouble reconciling the fact that the previous Commissioner of the CCC, the Honourable Len Roberts-Smith RFD QC, would initiate proceedings of such a serious nature with the fact that these same proceedings would then be abandoned on application by the Acting CCC Commissioner before proceeding to trial. Even more concerning for the Committee, however, is that the assessment by the Acting Commissioner that the proceedings had only a remote chance of success was based on a series of procedural failings both on the part of the CCC and the WA Police during and subsequent to the organised crime examinations in which the alleged contempts occurred.

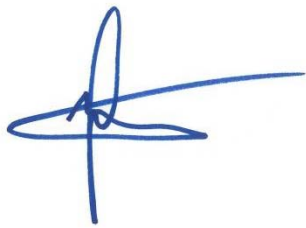
This episode has also served to again highlight some of the significant flaws that are inherent to both the *Corruption and Crime Commission Act 2003* and to the stated intent of the government to amend the Act so as to see independent use by the CCC of its organised crime function. With respect to the former, the Committee notes that the CCC consistently narrowly construes the CCC Act so as to render itself impotent of engaging substantially during organised crime examinations. It is on this basis that the Committee recommends that the Act be amended.

With regard to the notion that the CCC ought to be granted a wider jurisdiction, the Committee regards criticism of the WA Police by Acting CCC Commissioner Herron during the 18 May 2011 closed hearing, to the effect that the contempt proceedings failed because of poor performance by counsel assisting the WA Police during organised crime examinations, as one of the obvious and likely persistent negative outcomes of asking the CCC and WA Police to work together in investigating organised crime. It is the experience of the Committee that it is exceedingly rare for law enforcement agencies to take direct responsibility for failed investigations, and the

² An appeal against four of these sentences was dismissed by the Court of Appeal on 13 April 2012.

Committee believes that this phenomenon is unlikely to be lessened with the misguided implementation of a model that demands a sharing of this responsibility.

The Committee provides this report both as a correction to the public record with respect to the discontinuance of these contempt proceedings, and to re-emphasise the Committee's belief that the CCC Act ought to be amended to ensure that similar obstruction to the important investigative capacity of the WA Police via the CCC is not allowed to occur in the future.

A handwritten signature in blue ink, consisting of a stylized 'N' and 'G' followed by a horizontal line.

Hon Nick Goiran, MLC
Chairman

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Ministerial response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Joint Standing Committee on the Corruption and Crime Commission directs that the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendation of the Committee.

Finding and Recommendation

Finding

Organised crime examinations are sometimes achieving less than optimal outcomes because:

1. The questions asked by counsel are at times inadequate; and
2. The CCC considers itself statutorily restricted from training counsel for the WA Police on optimal questioning methods.

Recommendation

The Corruption and Crime Commission Act 2003 be amended to clarify and ensure that:

- The CCC can actively assist the WA Police in preparing for Organised Crime Examinations.
- The CCC Commissioner and counsel representing the CCC can ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police.
- In the event that a witness is evasive, there is no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings.
- If the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.

Chapter 1

Background

A simmering feud between rival bikie gangs is believed to be behind a bloody clash at a public motorsport event in Perth's southern suburbs yesterday.

The West Australian, Monday 4 October 2010, page 1

Operation Tri-Star

On Sunday 3 October 2010 a violent altercation between spectators broke out at the Perth Motorplex in Kwinana, where a street bike drag race event was taking place. The fight, which occurred at about 1.30 pm in the middle of the public staging area, saw a number of persons hospitalised for surgery on a range of injuries, including stab wounds, serious head trauma and gunshot wounds. It is not known exactly how many persons were involved in the fight, but it later became apparent that some of the persons hospitalised were members of the Finks and Coffin Cheaters Motorcycle Clubs. This was reported in the media on Monday 4 October 2010:

Bikie war erupts with bloody racetrack clash

A simmering feud between rival bikie gangs is believed to be behind a bloody clash at a public motorsport event in Perth's southern suburbs yesterday.

Three men, all in their 20s and members of the fledgling Finks bikie gang, were in hospital having surgery last night. One had been shot in the leg, another had multiple stab wounds and all three had serious head injuries.

The violence has put police on high alert, with the State's biggest gang, the Coffin Cheaters, suspected of being the other group involved in the brawl at the Perth Motorplex in Kwinana about noon.

Gang crime squad officers were last night at the Finks' Balga clubhouse.

Earlier in the day, two of the injured Finks admitted themselves to Fremantle Hospital for treatment while the man with stab wounds was treated at Royal Perth Hospital.

The rival gang members were at the Motorplex for the inaugural Harley Street Bike Drags, which attracted almost 200 entries.

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Two men began fighting before others armed with what was believed to be at least one handgun and a knife joined in.

When volunteer first aid officers at the track went to the scene of the bloodshed, they were told by those involved that their help was not needed.

[...]

One senior police source said last night the violence between the Cheaters and Finks came down to a question of “when, not if.”

It is understood police became aware of yesterday’s violent clash only when the men were admitted to hospital.

The men have so far refused to talk to police.³

The WA Police launched Operation Tri-Star and began investigating the incident, and officers of the WA Police conducted a series of raids on Coffin Cheaters and Finks properties in the ensuing weeks. As part of this investigation, WA Police also sought an exceptional powers finding, which was granted by the then CCC Commissioner, the Honourable Len Roberts-Smith RFD QC, on 31 October 2010. Subsequent to this finding, a number of private CCC examinations were convened in November 2010, at which members of both the Finks and Coffin Cheaters Motorcycle Clubs attended.

The Finks

On 24 November 2010 the CCC issued a media release stating that five Finks members were facing Supreme Court proceedings over a total of 40 charges arising out of some of the private examinations, being 24 allegations of contempt for refusing or failing to answer questions, two of contempt for refusing to take an oath, and 14 of insulting the CCC. The media release noted that:

The hearings were conducted under the exceptional powers part of the Commission’s organised crime function.

Under this function the Commissioner of Police may apply to the CCC Commissioner to use exceptional powers to investigate serious and organised crime. The exceptional power in this case involved summoning witnesses to compulsorily give evidence at a private examination before the Commission.⁴

³ Gabrielle Knowles, Gary Adshead and Luke Elliot, ‘Bikie war erupts with bloody racetrack clash’, *The West Australian*, Monday 4 October 2010, p 1.

⁴ CCC media release 24 November 2010.

The media release also emphasised that it was an unusual step for the CCC to release information to the public about private examinations, but that it had done so in this instance because:

CCC Commissioner Len Roberts-Smith QC issued a direction to allow the fact that there had been private examinations and details of the charges to be revealed so the prosecutions could proceed and be reported on fairly and accurately.⁵

Essentially each of these men had either refused to be sworn in by the CCC Commissioner, or else had flatly refused to answer the questions put to them during the examination. This put them in breach of section/s 160(1)(a) and/or 160(1)(b) of the CCC Act. Section 160(1) of the CCC Act states:

160. Failing to be sworn or to give evidence when summonsed

(1) A person served with a summons under section 96 requiring the person to attend and give evidence who —

(a) refuses or fails to be sworn or make an affirmation; or

(b) fails to answer any question relevant to the investigation that the Commission requires the person to answer,

is in contempt of the Commission.⁶

Accordingly, the CCC prepared certificates for the Supreme Court citing the five men for contempt arising out of their refusal to answer questions during a CCC examination.

Ultimately these charges were sustained, with all five members being found guilty on Monday 13 December 2010. Four of the members were sentenced by Chief Justice Wayne Martin on Friday 4 February 2011; the fifth was sentenced on Tuesday 8 March 2011. All five members were sentenced to two years imprisonment for contempt, with one of the five members also being sentenced to an additional three months imprisonment for abusing the CCC Commissioner during the examination. In sentencing the first four of the five members, the Chief Justice noted that:

All four men have persistently refused to provide information which could assist to bring the perpetrators of serious offences committed in the course of organised crime to justice.⁷

⁵ *Ibid.*

⁶ *Corruption and Crime Commission Act 2003*, s 160.

⁷ Quoted in an article by Belle Taylor, 'Bikies' code of silence leads to jail', *The West Australian*, Saturday 5 February 2011, p 13.

The Coffin Cheaters

The exceptional powers finding made by Commissioner Roberts-Smith also saw some members of the Coffin Cheaters Motorcycle Club appear before private CCC examinations, and two of these persons were subsequently also cited for being in contempt of the CCC. Yet where the five Finks members had simply refused outright to be sworn in and/or answer questions, the two Coffin Cheaters did provide responses to the questions put to them during their respective examinations. In so doing, however, they gave Commissioner Roberts-Smith cause to believe that they were constructively refusing to provide answers: one of the accused stated that he could not remember the fight taking place; the other, when shown a photograph of the fight and asked whether or not it depicted a fight, suggested that the persons involved might have been dancing.

As a result, the CCC again prepared certificates for the Supreme Court citing the men for contempt, and on 10 February 2011 these two men appeared before the Supreme Court, each facing one charge of failing to answer truthfully a question relevant to the investigation.

The two men pleaded not guilty and the Chief Justice, who was also presiding over this case, set a trial date of 6 and 7 April 2011. On 6 April 2011, however, the CCC moved a motion of discontinuance and the charges were dropped. It was reported that the motion stemmed “from the CCC’s failure to disclose all the available evidence for a public trial,” after the lawyers for the accused had sought CCTV footage and photographs of the fight to assist with their defence, and the CCC refused for “operational reasons.”⁸

The CCC issued a media release later that day, stating that:

*Following a directions hearing on Friday 1 April 2011, the CCC made an application to discontinue the charges.*⁹

The Committee considered the news of the discontinuance of the contempt proceedings at a meeting on 13 April 2011, and resolved to seek the attendance of Mr Mark Herron, Acting CCC Commissioner, and Mr Mike Silverstone, CCC Executive Director, before a closed hearing of the Committee in order to learn more about the issue. The Committee was concerned that, as had been reported, the discontinuance of the contempt proceedings may have been due to some failing on the part of the CCC relating to the disclosure of evidence. The Committee was further concerned about the outcome of this matter impacting future matters.

⁸ Nick Sas, ‘CCC bikie contempt case dropped’, *The West Australian*, Wednesday 6 April 2011, accessed on 23 June 2011 at <<http://au.news.yahoo.com/thewest/a/-/breaking/9146779/ccc-bikie-contempt-case-dropped/>>

⁹ CCC media release 6 April 2011.

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Closed Committee hearings

There is no compulsion if there is no belief by the individual that there is a genuine ability to follow through. That would be the concern at the moment, which perhaps was not there until this latest incident.

Hon Nick Goiran MLC, Committee Chairman, 18 May 2011

Closed hearing with the CCC

Acting Commissioner Herron and Mr Silverstone appeared before a closed hearing of the Committee on 18 May 2011. The Parliamentary Inspector of the Corruption and Crime Commission, the Honourable Chris Steytler QC, also appeared at that hearing, as an aide to the Committee.

During this hearing, the Committee was told that the reported reason for the discontinuance of the contempt proceedings was inaccurate. It had been reported that charges against the two Coffin Cheaters members were discontinued after the CCC had, for operational reasons, refused to disclose evidence to defence lawyers for the accused. During the hearing, however, the Committee was informed by the Acting CCC Commissioner that he had formed the view that the contempt proceedings in question were unlikely to be successful, and as such he had applied for the charges to be discontinued, rather than have the matter proceed to trial.

During the hearing, the Committee heard evidence that was operationally sensitive, which was disclosed by the Acting CCC Commissioner for the purposes of assisting the Committee with its enquiries; publication of this information would not be in the public interest. With the exception of this information, however, the relevant portions of this transcript follow.

The Committee Chairman, Hon Nick Goiran MLC, began the hearing by seeking confirmation as to the origins of the motion of discontinuance:

***The CHAIRMAN:** My understanding is that pursuant to some media reports, on 6 April this year the Chief Justice moved a motion of discontinuance, in effect dropping charges against two members of the Coffin Cheaters motorcycle club. It was reported that the motion stemmed from the CCC's failure to disclose all the available evidence for a public trial after the lawyers for the accused had asked for CCTV*

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footage and photographs of the fight to assist with their defence. It was reported that the CCC refused for operational reasons. Is that a fair summary of what occurred?

Mr Herron: No

The CHAIRMAN: *In which case could I get you to elaborate on the circumstances which led to the discontinuance?*

[...]

Mr Herron: *It was not the Chief Justice who moved the motion; it was a motion moved by the CCC. The Chief Justice granted the motion for leave to discontinue the two contempt applications in respect of two members of the outlaw motorcycle gang. The background to it was that there were a series of private hearings. Members of the committee would be aware that four or five people proceeded to a hearing before the Chief Justice and ultimately were convicted of contempt, and sentenced. They were from one outlaw motorcycle gang. Then these two charges were brought against members of the other outlaw motorcycle gang.*

Acting Commissioner Herron then explained the difference between the two sets of contempt charges:

[T]he Chief Justice indicated at an earlier directions hearing that this matter was not as straightforward as the earlier matters [involving members of the Finks Motorcycle Club] because of the way the certificate was issued under the Corruption and Crime Commission Act, which certifies there has been a contempt in the questions in respect of which you seek a contempt finding. The issues were not straightforward. With the people who had been convicted, their response was in effect not to answer any questions. They dealt with the former commissioner in a very offensive way, and basically some of them refused to be sworn—those sorts of things. That was a relatively straightforward process to say, “There’s a series of questions and there is contempt.”

In respect of the two individuals [members of the Coffin Cheaters Motorcycle Club] about whom we are talking, they had not refused to answer questions; they had answered them in a way which was unhelpful, to say the least. They were shown some photographs. They were dealing with it in a way denying that they were there, they did not understand what was in the photograph and their memory was

not good. The former commissioner warned them that he regarded their answers as potentially leading to a constructive contempt.

[...]

The questions which were framed as a part of the contempt proceedings were framed in a way that there was a series of questions asked and there was this toing and froing in terms of the questions and the answers given. The certificate which was filed in support of the application did not precisely identify each question in respect of which it was sought that there be a contempt finding. It was not at all the same situation as with the previous contemnors where it was quite straightforward. There was a real argument here about whether they had answered the questions and whether there was a contempt being committed.

The matter was brought before the Chief Justice for a directions hearing. It was adjourned to a hearing, I think the following week. I then received advice later that day—because I had not seen or taken much notice of the certificate which had been filed—there were significant difficulties with the way in which the certificate had been framed. The advice was generally to the effect that the chances of success were unlikely. I also independently formed the view that there were significant difficulties and I was not confident that we were going to succeed. I made the decision, [...] that it was not worth proceeding with.

The Acting Commissioner concluded by explaining to the Committee that the decision to move a motion of discontinuance was based upon the belief that the chances of securing a conviction for contempt against either of the two Coffin Cheaters was remote:

The overriding issue was I formed the view—partly the view I took and also very much on the advice I was given—that the chances of succeeding on these applications was remote, so I made a decision to seek leave to discontinue.

[...]

Contempt is a very difficult charge to establish. It is a charge of last resort. In this situation I formed the view we were unlikely to be successful.

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The Chairman then asked about the relative importance of the drafting of the certificates, by which the contempt charges were brought:

The CHAIRMAN: *Is it the case that it boils down to the drafting of the certificate itself in this instance?*

Mr Herron: *In part. A difficulty we were very much presented with here was the way in which the questions had been asked of the witnesses. The questions were not, with the benefit of hindsight, as precise and as directed as you would want. It was difficult to identify precisely in which question there was a contempt. It is also the way in which the certificate had been framed. I do not know whether you have seen the certificates but the certificate refers to a series of answers and questions and then at the end says, "the question asked in table 1 was relevant to the investigation". There are a number of questions but it does not identify precisely the question in concern. Part of this process is that the contemnors must be given the opportunity to purge their contempt and if you do not know precisely what the question is, it is very hard to get that opportunity.*

This prompted the Deputy Chairman, Mr John Hyde MLA, to seek assurance that the failing on this occasion was not simply a repeat performance of a past similar failing:

Mr J.N. HYDE: *While we do not have the intimate details of this situation, it does appear that if we look at the precedent of the Metropolis issue when the CCC went down a contempt path, it is a mirror image of that. The Coffin Cheaters were examined then and they used the ploy of "I don't recall". Why did the CCC begin contempt proceedings in a situation in which I think you had failed before and had brought a lot of public criticism of the CCC?*

Mr Herron: *I was not part of the decision-making process at the time. I am advised—it seemed to me quite clear—that the matter was considered in detail. It was not a decision that was made lightly. The principles that emerged from the Aboudi decision to which you referred were taken into account. The questions were framed in a far more specific way than they were in Aboudi. Many of the criticisms addressed in Aboudi would have been addressed here, I think, [...] It came back, I think, to the way in which the questions were framed that created difficulties with us.*

Under questioning from both the Parliamentary Inspector and the Committee Chairman, it became apparent that while the drafting of the certificates citing the

individuals for contempt was problematic, the source of the failed charges was the questioning put to the witnesses during the organised crime examinations:

Mr Steytler: *Mr Herron, would I be correct in summarising it in this way? Under section 160(1)(b) of the commission's act, a certificate by the commission is prima facie evidence of the truth of its contents. What the commission did in this case was issue a notice of motion for contempt against the two individuals, relying solely upon the certificate as the evidence. The notice of motion of contempt required the contempt to be based on the failure to answer truthfully a question that the commission required a person to answer in each case. The question was then identified in the certificate as being the question set out below, which, in effect, simply repeated aspects of the transcript and demonstrated beyond any question that a number of questions were answered, no specific question was identified and the net result was that the summons was bad for vagueness and it did not identify the specific question. [...] It was nothing more than that in effect.*

Mr Herron: *With respect, in a nutshell, that is exactly the view I formed.*

The CHAIRMAN: *If I understand correctly, Acting Commissioner, I had understood that it was not only the framing of the certificate, but also the asking of the questions in the hearing itself. Is it the case that there could have been success in this matter notwithstanding the questions asked during the hearing so long as the framing of the certificate was adequate?*

Mr Herron: *No. The framing of the certificate was a significant problem. I do not think we were going to be able to get around that. Even if the certificate had been framed in a different way, looking at the questions and answers, we were going to have difficulties.*

The CHAIRMAN: *That is fine if that is the position of the commission. My concern is that publicly what will be understood is that if you say nothing to the commission and refuse to answer or use inappropriate language, you will find yourself incarcerated for two years. If you say something, even if it is absurd and suggests that there has been dancing occurring, that is satisfactory.*

Mr Herron: *With respect, that is not quite right. It is a judgement looking at it in each particular instance.*

[...]

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I also need to emphasise that I criticised the way in which the questions were asked. They are not asked by counsel assisting the commission; they are asked by counsel appointed by the police whose application it is and who are conducting these examinations. In this instance, [...] the examination is being conducted by the commission but it is the police's examination.

[...]

I suppose I should also make the point that the purpose of these examinations is not to try to achieve convictions for contempt. That is not the purpose and that would be an abuse of this process, it seems to me, to bring contempt proceedings. The purpose is to try to compel people to answer questions and to get to the bottom of what we are trying to pursue. Any criminal proceedings are almost a by-product of the private examinations. It is important that we retain that ability to lay contempt charges in appropriate circumstances.

The Committee agrees that organised crime examinations are never convened for the purpose of achieving convictions for contempt of the CCC; they are – as indeed they were in this instance – legitimate investigative tools by which the WA Police can enhance their ability to fight organised crime in Western Australia by compelling witnesses with knowledge of organised criminal activity to give evidence. It is similarly clear, however, that the strength of an organised crime examination rests upon the ability of the CCC to compel answers from the witness being examined, as the Committee Chairman explained:

The CHAIRMAN: *There is no compulsion if there is no belief by the individual that there is a genuine ability to follow through. That would be the concern at the moment, which perhaps was not there until this latest incident.*

Mr Herron: *It comes back to counsel who is doing the examining being capable and competent, attuned to these things, still trying to achieve proper answers to these things. If you are not going to get to that, you are not really seeking to lay the groundwork for contempt proceedings. You need to make sure that the questions are framed precisely.*

The CHAIRMAN: *Have there been any discussions with WA Police following this incident as to their willingness to continue to use this mechanism?*

Mr Herron: *I am not sure. [...] I do not think there is anything in particular.*

The Parliamentary Inspector then posed a series of questions to the Acting CCC Commissioner pertaining to the need for the CCC to actively ensure that witnesses are compelled to answer questions during organised crime examinations:

Mr Steytler: *I just wish to follow up on what the Chairman was asking you, Mr Herron. You would agree that it is possible to have a constructive refusal to answer a question.*

Mr Herron: Yes.

Mr Steytler: *In the end, if it becomes patently apparent that somebody is constructively refusing to answer but plainly avoiding the issue, would you agree that in that circumstance it would be quite proper for counsel then to move to put a direct question and say, "Look, answer it or otherwise"?*

Mr Herron: Yes.

Mr Steytler: *It might in fact in that circumstance be a good thing for the police to bring a contempt charge rather than a hindering charge just to send out a message to people that they cannot get away with doing that. If you are going to do that, you need to have a precisely formulated question which was then shown to have been constructively refused to answer by a series of questions and answers and you would have to be able to establish that beyond any reasonable doubt.*

Mr Herron: *It comes back to questions being framed with precision.*¹⁰

Closed hearing with the Parliamentary Inspector

One week later, on 25 May 2011, the Committee convened a closed hearing attended by the Parliamentary Inspector, at which the evidence of the Acting CCC Commissioner Herron was further discussed:

The CHAIRMAN: *If I can move to the first matter, which is the debriefing on the closed hearing with the CCC last week: in essence I understood from the evidence provided by the acting commissioner that the commission's position was that the reasons the matter was discontinued before the Supreme Court ought not be publicly known. The rationale for that was that by doing so, it may alert other*

¹⁰ Mark Herron, Acting Commissioner and Mike Silverstone, Executive Director, CCC, *Transcript of Evidence*, (before a closed hearing of the Joint Standing Committee on the Corruption and Crime Commission also attended by the Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission), 18 May 2011, pp 3-6.

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prospective witnesses to a methodology or a strategy as to how to defeat the questioning procedure at the commission, and prospective contempt proceedings. My initial reaction was that that was not really a satisfactory reason for not making the information publicly available as to why those proceedings were discontinued, simply because I think that strategy or rationale would already be known and this would not shed any new light in that regard. However, since you were at the hearing and were an aide to the committee, the committee would value your views on that issue.

Mr Steytler: *Mr Chairman, I can see no reason why what happened should not have been made public. What happened, as was clear from the evidence of the acting commissioner, was essentially the commission made a mess of the certificate and that was the reason it failed—nothing else. My understanding is that the chief justice raised that issue when the matter came on for a directions hearing. It was then considered by the acting commissioner, Mr Herron. He got some advice—I forget who from, but he told me who from—and the advice confirmed they had made a mistake. They made the same mistake they had made previously in the Aboudi matter—they did not specifically identify the question which was said to constitute the contempt. If a contempt application is to succeed, you have to be precise. Really, all they did was ask a number of questions in the one case, none of which was satisfactorily answered, and then referred all of them as being “the” question which gave rise to the contempt. That was doomed to fail from the moment they did that.*

In the second instance, it was a bit better, but still the contempt arose out of failing to answer a particular question. Again they did not identify the question with any precision, although it was arguable that it was precise enough. But the questioning itself left something to be desired with a view to contempt proceedings. I can see no reason why a constructive refusal to answer a question cannot ground a contempt. It is more difficult because you have to establish not only that there has been a refusal to answer, but that the answers given amount to a refusal, notwithstanding that prima facie the questions have been answered. But it is not beyond the bounds of imagination to frame a certificate for contempt in such circumstances where someone obviously knows something and is refusing to answer.¹¹

¹¹ The Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 25 May 2011, p 3.

Subsequent to this hearing with the Parliamentary Inspector, the Committee resolved to prepare this report.

The Committee also sought and received from the CCC copies of the certificates by which the contempt proceedings against the two men were initiated; these certificates are reproduced at Appendix One to this report.¹²

Subsequent developments

Subsequent to meeting with the Parliamentary Inspector on 23 May 2011, a draft of this report was prepared and provided to the CCC and to the Parliamentary Inspector on 30 June 2011, along with a request that any comments pertaining to the draft report be provided to the Committee by 29 July 2011.

The Parliamentary Inspector provided the Committee with two comments in relation to the draft report, both of which were incorporated into this final report. In providing the CCC's response to the draft report, Acting CCC Commissioner Herron requested that the Committee defer any decision as to whether or not to proceed with tabling the report, as there were (at the time of the Acting Commissioner's response) "numerous prosecutions on foot in relation to [the] matter."¹³ Concerned about the possibility of prejudice to a jury trial, the Committee resolved to defer tabling the report until such time as this were no longer of concern.

In advising the CCC of this decision, the Committee Chairman requested that the Committee be kept informed by the CCC as to ongoing status of the outstanding charges at intervals not less than after each interlocutory appearance.

Correspondence between the Committee and the CCC was subsequently exchanged in relation to this matter through the remainder of 2011 and in the early part of 2012. On 7 May 2012 the Committee was advised by the CCC that, at a trial allocation hearing on 10 April 2012, the Office of the Director of Public Prosecutions had confirmed its preference that a single trial take place before a Magistrate, and that all charges relating to this matter be dealt with summarily. As such, the Committee's concern about prejudice to a possible jury trial fell away, and the Committee resolved to proceed with tabling this report. The Committee wrote again to the Parliamentary Inspector and to the current CCC Commissioner, the Honourable Roger Macknay QC, on 16 May 2012, informing them of this decision and requesting any final related comments. Letters were received from both the CCC Commissioner and the Parliamentary Inspector; these letters are both reproduced at Appendix Two to this report.¹⁴

¹² The Committee has elected to redact names and other irrelevant details from these certificates.

¹³ Mr Mark Herron, Acting CCC Commissioner, *Letter*, 5 August 2011.

¹⁴ The Committee has elected to redact names and other irrelevant details from the CCC's letter.

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The rationale behind this report

If, in the CCC's view, the WA Police are not up to the mark in conducting organised crime examinations, then there is a need to address this inadequacy. As the CCC have expertise on how to conduct coercive hearings in the exercise of its misconduct function, then clearly the answer lies in permitting the CCC to provide this assistance, whether by training or otherwise.

Report 10 of the Joint Standing Committee
on the Corruption and Crime Commission
9 September 2010, page 90

Transparency

Of immediate concern to the Committee was the revelation that the real reason behind the CCC's discontinuance of contempt proceedings had not been correctly reported in media coverage of the matter. The Committee is acutely aware that there is a real need to maintain a high degree of secrecy as to many of the operations of the CCC, in accord with the role it performs and the powers it possesses.

Joint Standing Committee on the Corruption and Crime Commission, *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to Combat Organised Crime*, 9 September 2010, pp 90-91.

Nevertheless, the Committee is of the opinion that it is of no benefit to anyone for public misconceptions pertaining to the work and/or role of the CCC to be perpetrated or left unaddressed. While it is clearly not the responsibility of the CCC to correct the public record whenever incorrect information pertaining to its role appears in a media report, the Committee believes that the danger of allowing a less than fully transparent set of facts to inform public opinion is that this will likely beget the perpetration of misconceptions. In this case, the reported fact that there had been a "failure" by the CCC "to disclose all the available evidence for a public trial" reflected poorly upon the CCC - without justification.

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The view of the Committee was elucidated by the Committee's Deputy Chairman during both closed hearings pertaining to this inquiry:

18 May 2011:

Mr J.N. HYDE: *I guess my issue is the perception that the CCC is incompetent because there is something on the CCTV footage.*¹⁵

25 May 2011:

Mr J.N. HYDE: *It was my concern, which is in the transcript, that they allowed the deception that the real reason was they did not want to disclose red-hot CCTV footage. I think I am more disappointed that they have allowed that to be portrayed without being corrected. Normally when there is something wrong, the CCC is within a nanosecond of putting out a press release or correcting something inaccurate in the media. I have got transparency issues with the way this has been portrayed.*¹⁶

Acting CCC Commissioner Herron cautioned the Committee that, if it were to publish the real reason why the contempt proceedings were discontinued, this would be counter-productive in the overall fight against organised crime in Western Australia:

*That alerts members of outlaw motorcycle gangs to the way in which they might approach their examinations and the way they can get around possible contempt proceedings. [...] If the real reason becomes apparent, it just encourages members of these outlaw motorcycle gangs to continue to thwart the process of these private examinations.*¹⁷

The Committee does not subscribe to this view. Rather, it is the view of the Committee that most, or at least all leading, persons associated with organised crime syndicates would have followed the proceedings arising out of Operation Tri-Star, and would by now be well aware of the outcome of the strategy employed by the two members of the Coffin Cheaters Motorcycle Club. Ultimately it is the fact of the discontinuance of

¹⁵ Mark Herron, Acting Commissioner and Mike Silverstone, Executive Director, CCC, *Transcript of Evidence*, (before a closed hearing of the Joint Standing Committee on the Corruption and Crime Commission also attended by the Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission), 18 May 2011, p 7.

¹⁶ The Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 25 May 2011, p 3.

¹⁷ Mark Herron, Acting Commissioner and Mike Silverstone, Executive Director, CCC, *Transcript of Evidence*, (before a closed hearing of the Joint Standing Committee on the Corruption and Crime Commission also attended by the Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission), 18 May 2011, p 7.

contempt proceedings - irrespective of the CCC's reasons for doing so - that will encourage efforts to thwart the coercive examination process.

Organised crime examinations

One objective of the CCC Act is to combat and reduce the incidence of organised crime; this objective is achieved by allowing the WA Police Commissioner to make applications to the CCC Commissioner for, and to be granted access to, a suite of exceptional powers to combat organised crime.¹⁸ If the CCC Commissioner grants an application to make use of the suite of exceptional powers, this is known as an exceptional powers finding.¹⁹ One of the exceptional powers available to the WA Police once an exceptional powers finding has been made is the power to summons and coercively examine a witness.

If an exceptional powers finding is made by the CCC Commissioner and a coercive examination is sought by the WA Police, the witness named by the WA Police will be summonsed by the CCC to participate in an organised crime examination. Organised crime examinations are convened by the CCC, and section 140 of the CCC Act requires that all organised crime examinations are held in private. In such an examination, a legal practitioner representing the WA Police Commissioner will examine the witness in the presence of the CCC Commissioner. The role of the CCC Commissioner in this process is to ensure that the examination of the witness remains relevant to the investigation at hand, and that the witness is not examined about any matter she or he may already stand charged with.²⁰

It is therefore important to note that while an organised crime examination is a CCC examination convened by the CCC, it is the WA Police (specifically counsel assisting the WA Police) who will examine the witness.

It is a combination of four sections of the CCC Act that give the CCC the power to compulsorily examine witnesses: section 96 empowers the CCC to summons witnesses, and section 137 empowers the CCC to conduct examinations. These two powers are buttressed by sections 159 and 160: section 159 states that a person who fails to obey a CCC summons is in contempt of the CCC, and section 160 states that a person who complies with a summons but then either refuses or fails to be sworn or affirmed and/or refuses or fails to answer a question in a CCC examination is similarly in contempt of the CCC.

It is clear, then, that the power to compel evidence from a witness turns upon the ability to successfully punish anyone who is held in contempt of the CCC. While the Committee agrees with Acting CCC Commissioner Herron that it is never the ultimate purpose of any CCC examination to convict a witness for contempt, it is clearly of utmost importance that witnesses who are - in the eyes of the Commissioner of the day - in contempt of the CCC be properly brought to account.

¹⁸ This suite consists of six powers, which are detailed under section 4 of the CCC Act.

¹⁹ The specific requirements for making an exceptional powers finding are detailed under section 46 of the CCC Act.

²⁰ CCC Act sections 49 and 50.

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The Committee believes that there always exists the strong possibility that a witness appearing before a CCC examination - and especially before an organised crime examination - will seek to constructively refuse to answer the questions put to them by way of providing unsatisfactory answers. Accordingly, the Committee takes the view that this possibility must be planned for: that is, the CCC must be adequately prepared to cite persons who constructively refuse to answer questions put to them in CCC examinations for contempt. It is for this reason that the Committee finds the CCC's apparent unwillingness to train or educate counsel for the WA Police as unsatisfactory. Acting CCC Commissioner Herron informed the Committee:

I also need to emphasise that I criticised the way in which the questions were asked. They are not asked by counsel assisting the commission; they are asked by counsel appointed by the police whose application it is and who are conducting these examinations.²¹

Former CCC Commissioner Roberts-Smith had previously stated to the Committee that it is not the role of the CCC to help improve the quality of organised crime examinations, or to intervene in the examination of the witness to pose his own questions. In 2010, Commissioner Roberts-Smith said to the Committee that:

The current scheme under the legislation is to enable the Commissioner of Police to have a counsel representing the Commissioner of Police at those part 4 hearings who conducts the examination of the witnesses. It has been the practice for the Commissioner [of Police] to brief people at the private bar to do that, and I am not critical of them in any way, but the result is that those people tend to be coming in for the first time to conduct examinations of that kind.

We have a limited capacity—in fact, I suppose, really no capacity—under the legislation, under the scheme of it as it stands at the moment, to train counsel up when they are representing the Commissioner of Police. That is not our role.

If we have that oversight role, if it is a commission hearing, I will have counsel assisting me there, but their role is essentially limited to ensuring, or assisting me to ensure, that nothing that happens in the organised crime hearing steps outside the legislation. It is not to conduct the examination of the witnesses.²²

²¹ Mark Herron, Acting Commissioner and Mike Silverstone, Executive Director, CCC, *Transcript of Evidence*, (before a closed hearing of the Joint Standing Committee on the Corruption and Crime Commission also attended by the Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission), 18 May 2011, p 5.

²² Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, pp 2-3.

Accordingly, the Committee makes the following finding:

Finding

Organised crime examinations are sometimes achieving less than optimal outcomes because:

1. The questions asked by counsel are at times inadequate; and
2. The CCC considers itself statutorily restricted from training counsel for the WA Police on optimal questioning methods.

The Committee's view is that if the CCC considers itself to be statutorily prevented from training or educating counsel for the WA Police, then it should at least intervene in the organised crime examination process under section 143 of the CCC Act. In its report entitled *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*, which was tabled on 9 September 2010, the Committee stated:

If, in the CCC's view, the WA Police are not up to the mark in conducting Organised Crime Examinations, then there is a need to address this inadequacy. As the CCC have expertise on how to conduct coercive hearings in the exercise of its misconduct function, then clearly the answer lies in permitting the CCC to provide this assistance, whether by training or otherwise.

As noted previously, the CCC point to a legal opinion obtained from State Counsel in 2005 to the effect that the CCC's role in an Organised Crime Examination is not an investigative one, and is more akin to a quasi-judicial role, and that this limits the CCC's ability to assist the WA Police in preparing for an Organised Crime Examination, and prevents the CCC Commissioner from asking his own questions in an Organised Crime Examination.

As an interim measure, it would surely be open to the WA Police to brief the same barristers at the bar that the CCC currently briefs in conducting CCC misconduct examinations.

The Committee is of the view that it is clearly desirable:

- *for the CCC to actively assist the WA Police in preparation for Organised Crime Examinations;*
- *for the CCC Commissioner and counsel representing the CCC to ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police;*

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- *in the event that a witness is evasive, for there to be no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings; and*
- *if the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.*²³

This led the Committee to make a recommendation, which it now re-asserts:

Recommendation

The Corruption and Crime Commission Act 2003 be amended to clarify and ensure that:

- The CCC can actively assist the WA Police in preparing for Organised Crime Examinations.
- The CCC Commissioner and counsel representing the CCC can ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police.
- In the event that a witness is evasive, there is no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings.
- If the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.

The Committee notes that in the past the CCC has pointed to a legal opinion obtained from State Counsel in 2005 to the effect that the CCC's role in an Organised Crime Examination is not an investigative one, and is more akin to a quasi-judicial role, and that this limits the CCC's ability to assist the WA Police in preparing for an Organised Crime Examination, and prevents the CCC Commissioner from asking his own questions in an Organised Crime Examination.

²³ Joint Standing Committee on the Corruption and Crime Commission, *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to Combat Organised Crime*, 9 September 2010, pp 90-91.

In a letter to the Committee dated 20 July 2011, the Parliamentary Inspector made the following comment in relation to this point:

The fact that a role is quasi-judicial (or even judicial) does not preclude the person performing that role from asking questions directed at clarifying evidence given by a witness or from rephrasing a question asked by counsel in order to ensure that it is unambiguous.

In the case of a refusal to answer a question, whether directly or by obfuscation, there is nothing to prevent the Commissioner from ensuring that the question has been properly put and understood or from informing the witness that he or she regards the witness as having effectively refused to answer a particular question and requiring the witness to do so. Conduct of that kind is entirely consistent with a quasi-judicial role or even a judicial role. The Corruption and Crime Commission Act 2003 consequently does not need to be amended in this respect.²⁴

The Committee concurs with the Parliamentary Inspector on this point. It is the view of the Committee that the CCC Act does not prevent the CCC Commissioner - or indeed, any authorised Commission officer - from also questioning the witness during an organised crime examination. That is, if the CCC Commissioner feels that the WA Police are not adequately examining the witness, there is nothing in the CCC Act preventing the CCC Commissioner from further examining the witness. This is made clear by a combination of sections 49 and 143 of the CCC Act:

49. Examination of witnesses by Commissioner of Police

*(1) In participating in an **organised crime examination**, the Commissioner of Police is to be represented by a legal practitioner instructed for that purpose, who may be assisted by others not so qualified but who are under the direct supervision of a legal practitioner. [emphasis added]*

(2) A person representing the Commissioner of Police may, so far as the Commission thinks proper, examine any witness summoned under an organised crime summons on any matter that the Commission considers relevant to the investigation.

*(3) **This section does not limit the operation of section 143.** [emphasis added]*

²⁴ The Honourable Chris Steytler QC, Parliamentary Inspector, *Letter*, 20 July 2011.

143. Examination of witnesses

(1) When a witness is appearing at an examination a lawyer, or any other person, appointed by the Commission to assist the Commission may, so far as the Commission thinks proper, examine the witness on any matter that the Commission considers relevant.

(2) A person representing a witness before the Commission may, so far as the Commission thinks proper, examine that witness on any matter that the Commission considers relevant.

(3) This section does not prevent the Commission from allowing any other examination that the Commission considers relevant.²⁵

In the view of the Committee, it is both correct and proper under the current CCC Act that the CCC Commissioner is the gatekeeper of the exceptional powers.

The Committee believes that the CCC would do well to foster greater engagement with relevant officers of the WA Police, so as to ensure that the exceptional powers are used appropriately and effectively by the WA Police in the fight against organised crime.

²⁵ *Corruption and Crime Commission Act 2003*, s 49 and s 143.

Appendix One

Certificates prepared by the CCC

Certificate one:

<p style="text-align: center;">CORRUPTION AND CRIME COMMISSION</p> <p style="text-align: center;">CERTIFICATE</p> <p style="text-align: center;"><i>Corruption and Crime Commission Act 2003</i> Sections 160(1)(b) and 163</p> <p>TO: The Supreme Court of Western Australia</p> <p>I, Leonard William Roberts-Smith RFD QC, having been appointed by commission dated 8 May 2007 to be the Commissioner of the Corruption & Crime Commission ('the Commission') with effect from 5 June 2007 allege that [REDACTED] of [REDACTED] in the State of Western Australia is in contempt of the Commission.</p> <p>On the application of the Commissioner of Police, I made an exceptional powers finding on 31 October 2010 pursuant to section 46 of the <i>Corruption and Crime Commission Act 2003</i> ('the CCC Act').</p> <p>I CERTIFY that the acts or omissions detailed below constitute the alleged contempt:</p> <p><u>Failure to answer a question</u> – section 160(1)(b)</p> <ol style="list-style-type: none">1. An organised crime summons in writing under my hand was served on [REDACTED] pursuant to sections 48 and 96 of the Act on 12 November 2010 requiring him to attend the Commission at the time and place named in the summons, namely, at 186 St Georges Terrace, Perth at 1.00pm on 16 November 2010.2. On 16 November 2010, [REDACTED] attended and reported himself to the Commission and was affirmed. At the end of the examination, he was not released from his summons and told there may be a requirement to re-attend at a later stage.3. By virtue of the summons [REDACTED] was required to give evidence for the purposes of an investigation under section 137 of the CCC Act, the scope and purpose of that investigation being to facilitate the investigation of section 5 offences by the Western Australia Police allegedly committed in the course of organised crime on 3 October 2010 by members, nominees and associates of the Coffin Cheaters Outlaw Motorcycle Gang (OMCG) namely:<ol style="list-style-type: none">(a) acts intended to cause grievous bodily harm against [REDACTED] and [REDACTED] contrary to section 294 of the <i>Criminal Code</i>; and <p style="text-align: right;">1</p>
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(b) acts or omissions causing bodily harm or danger against [REDACTED] and [REDACTED] contrary to section 304 of the *Criminal Code*.

4. [REDACTED] was subsequently required and notified, through written correspondence from the Commission dated 13 January 2011, to re-attend at the Commission to give further evidence at 10.30am on 18 January 2011.
5. On 18 January 2011 [REDACTED] attended and reported himself to the Commission and was affirmed.
6. During the course of the Commission's examination, [REDACTED] failed to answer truthfully the following question set out in Table 1 below, contrary to section 160(1)(b) of the CCC Act.

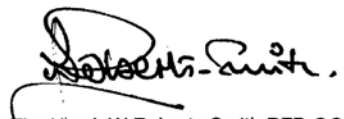
TABLE 1			
Item No:	Questions and directions by counsel/Commissioner and responses by the witness, if any, relevant to failing to answer any questions relevant to the investigation	Page ref	Para ref
1	<p><u>Commissioner</u>: I have to tell you again, [REDACTED] that I regard that answer and the answers generally that you can't remember anything about this fight or having seen the fight or been part of it as quite unsatisfactory and capable potentially of constituting a contempt of the Commission on the basis that it's a constructive refusal to answer the question honestly. Do you understand what I'm saying to you?</p> <p><u>Witness</u>: I do, sir. I'm not - - -</p> <p><u>Commissioner</u>: Do you maintain your evidence - and clearly these questions are relevant to the investigation which is the subject of this inquiry and you understand that?</p> <p><u>Witness</u>: Yes, sir.</p> <p><u>Commissioner</u>: And that I require you to answer the questions truthfully?</p> <p><u>Witness</u>: I am, sir, I'm answering you truthfully.</p> <p><u>Commissioner</u>: All right?</p> <p><u>Witness</u>: I'm sorry I've got a bad memory.</p>	132	32-43
		133	1-13

<p><u>Counsel</u>: I will ask you the questions directly?</p> <p><u>Witness</u>: Yes.</p> <p><u>Counsel</u>: Did you see the fight that occurred in that location on that day?</p> <p><u>Witness</u>: Not to my recollection.</p> <p><u>Counsel</u>: No, you said that's my recollection. Did you see it?</p> <p><u>Witness</u>: Not to my recollection.</p>		
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7. The question asked in Table 1 was relevant to the investigation.

8. [REDACTED] was required by me to answer the question.

DATED the 28th day of January 2011


The Hon L W Roberts-Smith RFD QC
COMMISSIONER

Certificate two:

<p style="text-align: center;">CORRUPTION AND CRIME COMMISSION</p> <p style="text-align: center;">CERTIFICATE</p> <p style="text-align: center;"><i>Corruption and Crime Commission Act 2003</i> Sections 160(1)(b) and 163</p> <p>TO: The Supreme Court of Western Australia</p> <p>I, Leonard William Roberts-Smith RFD QC, having been appointed by commission dated 8 May 2007 to be the Commissioner of the Corruption & Crime Commission ('the Commission') with effect from 5 June 2007 allege that [redacted] of [redacted] in the State of Western Australia is in contempt of the Commission.</p> <p>On the application of the Commissioner of Police, I made an exceptional powers finding on 31 October 2010 pursuant to section 46 of the <i>Corruption and Crime Commission Act 2003</i> ('the CCC Act').</p> <p>I CERTIFY that the acts or omissions detailed below constitute the alleged contempt:</p> <p><u>Failure to answer a question</u> – section 160(1)(b)</p> <ol style="list-style-type: none">1. An organised crime summons in writing under my hand was served on [redacted] pursuant to sections 48 and 96 of the Act on 12 November 2010 requiring him to attend the Commission at the time and place named in the summons, namely, at 186 St Georges Terrace, Perth at 1.00pm on 17 November 2010.2. On 17 November 2010 [redacted] attended and reported himself to the Commission and was affirmed. At the end of the examination, he was not released from his summons and told there may be a requirement to re-attend at a later stage.3. By virtue of the summons [redacted] was required to give evidence for the purposes of an investigation under section 137 of the CCC Act, the scope and purpose of that investigation being to facilitate the investigation of section 5 offences by the Western Australia Police allegedly committed in the course of organised crime on 3 October 2010 by members, nominees and associates of the Coffin Cheaters Outlaw Motorcycle Gang (OMCG) namely: (a) acts intended to cause grievous bodily harm against [redacted] and [redacted] contrary to section 294 of the <i>Criminal Code</i>; and <p style="text-align: right;">1</p>

(b) acts or omissions causing bodily harm or danger against [REDACTED] and [REDACTED] contrary to section 304 of the *Criminal Code*.

4. [REDACTED] was subsequently required and notified, through written correspondence from the Commission dated 13 January 2011, to re-attend at the Commission to give further evidence at 2.00pm on 18 January 2011.
5. On 18 January 2011 [REDACTED] attended and reported himself to the Commission and was affirmed.
6. During the course of the Commission's examination, [REDACTED] failed to answer truthfully the following question set out in Table 1 below, contrary to section 160(1)(b) of the CCC Act.

TABLE 1			
Item No:	Questions and directions by counsel/Commissioner and responses by the witness, if any, relevant to failing to answer any questions relevant to the investigation	Page ref	Para ref
1	<u>Counsel:</u> Having seen that photo, [REDACTED] do you now accept that you did see the fight on 3 October at the Kwinana Motorplex?	150	52- 54
		151	1-55
	<u>Witness:</u> Well, assuming that is me there - is that a fight happening or a fight finished or what is it? It's a still photo. You tell me.	152	1-28
		153	1-6
	<u>Counsel:</u> There's clearly a fight going on isn't there, in the photo?		
	<u>Witness:</u> There's definitely something going on.		
	<u>Counsel:</u> A fight. Do you agree with me or not?		
	<u>Witness:</u> Not a hundred per cent, no.		
	<u>Counsel:</u> You don't think a hundred per cent that there's fighting going on in that picture?		
	<u>Witness:</u> Could be dancing. Who knows?		
	<u>Commissioner:</u> [REDACTED] I have to tell you that I regard your answers to these questions as quite unsatisfactory. They are very relevant to the course of this inquiry. I require you to answer them honestly, and at the present time I have to say I regard your answers as a constructive		

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<p>refusal to answer?</p> <p><u>Witness:</u> Is it a fight in progress or is it the end of a fight, or after a fight? Is it a fight in progress or is it after a fight? I mean, you know, I've got to be careful what I answer to.</p> <p><u>Commissioner:</u> [REDACTED] if you were one of those two people who we have been talking about in these photographs, you would clearly remember being involved and present at whatever is shown in this photograph and the questions that you are being asked are for you to tell us what is shown and what you did and what happened. That is the purpose of these questions and these are the questions I require you to answer?</p> <p><u>Witness:</u> Well, it could be a fight, yeah.</p> <p><u>Counsel:</u> The two people that you accept could be you and [REDACTED] are both looking in the same direction aren't they?</p> <p><u>Witness:</u> Well, generally. If - their heads look like they're turned in a similar direction, yeah.</p> <p><u>Counsel:</u> And the direction that they're looking at is at the people who are in the foreground of the picture, aren't they?</p> <p>Could we just zoom in a little?</p> <p><u>Witness:</u> It looks like I'm looking towards the camera actually, where the photo was taken from; but my head's not turned as much as the bloke next to me, but anyway.</p> <p><u>Counsel:</u> You're looking towards the people in the picture, aren't you?</p> <p><u>Witness:</u> Am I?</p> <p><u>Counsel:</u> I'm putting to you that that's what you're looking towards. There's a man there holding a knife and another man with blood all over his hands. You can see that, can't you?</p> <p><u>Witness:</u> No.</p> <p><u>Counsel:</u> You can't see a man holding a knife, facing a man with red all over his hands?</p> <p><u>Witness:</u> In the middle. I can see a bloke with his hand up.</p>		
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<p><u>Counsel:</u> A bloke with his hand up - - -?</p> <p><u>Witness:</u> Yeah, right there.</p> <p><u>Counsel:</u> - - - who has got the cross on him at the moment?</p> <p><u>Witness:</u> Yep.</p> <p><u>Counsel:</u> There's red all over his hands?</p> <p><u>Witness:</u> Okay.</p> <p><u>Counsel:</u> Can you see that or not, [REDACTED]?</p> <p><u>Witness:</u> Well, not clearly but it looks like there's something on his hand, yeah. Whether it's something wrapped around it or something, I don't know.</p> <p><u>Counsel:</u> And the person facing him has got a knife in his right hand?</p> <p><u>Witness:</u> Is it?</p> <p><u>Counsel:</u> Are you going to be that unhelpful - - -?</p> <p><u>Witness:</u> I don't know if there's a knife in his hand. I can't see what it is in his hand.</p> <p><u>Counsel:</u> What do you think it is, [REDACTED]?</p> <p><u>Witness:</u> I've no idea what it is.</p> <p><u>Counsel:</u> That's the fight - - -?</p> <p><u>Witness:</u> You're telling me it's a knife. I don't know what it is.</p> <p><u>Counsel:</u> That's the fight that you witnessed on the day, isn't it?</p> <p><u>Witness:</u> Perhaps the end of a fight. Or the aftermath of a fight or something. I don't know whether it's actually a fight happening or not. It's hard to tell.</p> <p><u>Counsel:</u> That event, that scene that is shown in document 0061, was witnessed by you on the day, wasn't it?</p> <p><u>Witness:</u> What are you saying, a fight from - from the - - -</p>		
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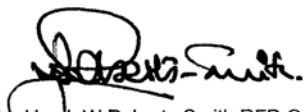
Appendix One

	<u>Counsel:</u> What we can see in that picture was witnessed by you on that day?		
	<u>Witness:</u> Was it?		

7. The question asked in Table 1 was relevant to the investigation.

8. [REDACTED] was required by me to answer the question.

DATED the 31st day of January 2011


The Hon L W Roberts-Smith RFD QC
COMMISSIONER

Appendix Two

Final letters from the Parliamentary Inspector and the CCC
Commissioner prior to the tabling of this report

Letter from the Parliamentary Inspector:



PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

29 May 2012

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee on the Corruption and Crime
Commission of Western Australia
Level 1, 11 Harvest Terrace
PERTH WA 6000



Dear Mr Chairman

**RE: COMMITTEE REPORT REGARDING THE DISCONTINUANCE OF
CONTEMPT PROCEEDINGS AGAINST MEMBERS OF THE COFFIN
CHEATERS MOTORCYCLE CLUB**

Thank you for your letter dated 16 May 2012. I have no comments regarding the content of the draft report, nor concerns about the timing of its tabling.

Yours faithfully,

A handwritten signature in black ink, appearing to read "C D Steytler".

C D STEYTLER QC
PARLIAMENTARY INSPECTOR

Letter from the CCC Commissioner:



Your Ref:
Our Ref: RM.SA

6 June 2012



The Hon. Nick Goiran MLC
Chairman
Joint Standing Committee on the
Corruption and Crime Commission
Floor 1, 11 Harvest Terrace
WEST PERTH WA 6005

Dear Chairman

COMMITTEE REPORT REGARDING THE DISCONTINUANCE OF CONTEMPT PROCEEDINGS AGAINST MEMBERS OF THE COFFIN CHEATERS MOTORCYCLE CLUB

I acknowledge receipt of your letter of 16 May 2012. I make the following comments:

- With due respect, I am unable to see how the matter under consideration could warrant a formal Report to Parliament.
- In the Chairman's foreword, reference is made to an incorrect media report on the discontinuance of the contempt proceedings, and that is said to justify in part the report as "a correction to the public record".
My understanding is that this was an error in one on-line newspaper website which was corrected before the newspaper went to print. With respect, that is scarcely the "public record".
- The recommendations in the report do not require any amendment to the *Corruption and Crime Commission Act 2003* and are matters of which the Commission is already cognisant, and was at the relevant time.
- I do not necessarily accept there was any error of law in this case. If, however, it be assumed for the purpose of the discussion that there was an error, that could scarcely be regarded as an extraordinary event such as to bring about the need for a report. No detriment resulted to any person. Legal proceedings, including those brought by prosecution authorities, are routinely discontinued in the courts of Western Australia. Not infrequently that will be because some flaw in the proceedings is discovered. Further, there is an elaborate appeals structure in our system of law, which exists specifically to consider and where appropriate deal with asserted errors of law. To treat an error of law by the

Commission as though it was a matter of considerable concern and something exceptional is to ignore the realities set out above.

[...]

If you wish to discuss any of these matters, I am of course available.

Yours faithfully

A handwritten signature in black ink, appearing to be 'R. Macknay', written over the words 'Yours faithfully'.

Roger Macknay QC
COMMISSIONER

Appendix Three

Hearings

Date	Name	Role	Organisation
18 May 2011	Mr Mark Herron	Acting Commissioner	CCC
	Mr Mike Silverstone	Executive Director	
	The Honourable Chris Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the CCC
23 May 2011	The Honourable Chris Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the CCC

Appendix Four

Committee's functions and powers

On 25 November 2008 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.