COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

Correspondence on Primary Facts Issue

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INDEPENDENT COMMISSION AGAINST CORRUPTION

COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

COMMISSION'S RESPONSE TO QUESTIONS CONTAINED IN LETTER OF 22 DECEMBER 1992

January 1993

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COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

COMMISSION'S RESPONSE TO QUESTIONS CONTAINED IN LETTER OF 22 DECEMBER 1992

1 *Does the ICAC have a concluded position on the question of whether statements should be made by the Commission that consideration be given to the prosecution or dismissal of some person. If so what is that position? (Compare Mr Temby's statement on 09 November 1992 [p.44 of transcript] with ICAC submission [p.23].)*

There is no inconsistency between the Commission's position as stated in its submission to the Committee (at pp.18-23) and the Commissioner's evidence to the Committee on 9 November 1992 (p.41 of transcript). The Commission's position is that it would prefer to have a discretion, not an obligation, to recommend that consideration be given to prosecution or disciplinary action in respect of individuals. As the Committee knows some such statements made by the Commission in the past, particularly as to disciplinary action and dismissal, have been misconstrued as being more than recommendations that such action be considered, and have in some cases been given excessive weight by the decision makers. In many cases it is, and will be, neither necessary nor appropriate to make such statements; and there is therefore a danger that such statements, if the Commission is obliged to make them, can be misconstrued by decision makers, to mean something the Commission did not intend, to the detriment of individuals.

There may be cases where it is necessary or appropriate that such statements be made. That would be in cases of serious conduct which contravened the criminal law or an employee's duty of loyal and faithful service to his employer (**Blythe Chemicals v Bushnell** (1933) 49 CLR 66). It is therefore necessary that the Commission retain the power, to be available in such cases. Royal Commissions have traditionally made such statements where considered necessary and appropriate. For example, in the Final Report of the Royal Commission into Productivity in the Building Industry in New South Wales, Commissioner Gyles QC recommended proceedings for deregistration of the BWIU (p24 Volume 7) and that disciplinary proceedings should be brought against Messrs Jubelin and Clarke of the Building Services Corporation (p98 Volume 7).

His Honour Mr Justice Clarke referred in his evidence to the Committee (at p.5) to the Commission's position that in respect of Ministers, Members of Parliament and Judges the Commission should find the facts and leave to Parliament any action which followed. His Honour suggested that the Commission should adopt that procedure in respect of all public officials - that the Commission only find the facts and not "label" the conduct. That is what the Commission has been advocating to the Committee. However the questions of "labelling" conduct, and making recommendations to public authority employers or the DPP that they consider action

in respect of individuals, are distinct and different questions. The Commission's position vis a vis the Parliament is different from its relationship with public authorities and the Director of Public Prosecutions.

The Commission's view is that it must be able to formally bring matters to the attention of the DPP and public authority employers, where warranted. In the Parliament's case that can be done by the Commission's report to Parliament. In respect of the others the mechanism is the recommendation of consideration of prosecution or disciplinary action. It may be that there is a mechanism by which that can be done, in s14 of the ICAC Act. That section apparently contemplates private communications between the Commission and the relevant authorities. There may be occasions when it is necessary, in the public interest, that a public recommendation be made, as the Royal Commission did in the examples noted above. It is for those reasons that the Commission would say it should have the discretionary power, but not the obligation, to make such statements.

2 *Does the ICAC have a response to the proposition that appropriate appeal procedures might be able to be established in relation to its findings of fact? (See evidence of Justice Clarke to Committee on 08 December 1992.) If so what is that response?*

The Commission's position is that in theory appeal procedures could be established in relation to its findings of fact, but that as a matter of principle they are not appropriate, there would be grave practical difficulties, and that appeal procedures in relation to Commission findings of fact should not be established.

His Honour Mr Justice Clarke's evidence was that if the Commission simply made findings of fact "there would be little area for appeals and there would be no reason for suspecting that the review procedures which presently apply would not be adequate" (pp.6 and 8). The Commission's position, and the Committee's position as the Commission understands it from its statement of 21 December 1992, is that the Commission should make findings of fact. The Commission's view is that there is therefore no need for any appeal process greater than presently exists. Royal Commissions and commissions of inquiry, which are the closest available analogy, have never had their factual findings appellable.

His Honour contemplated that there might be a need for appeals, more extensive than on questions of law, if the Commission made "ultimate findings", that is, labelling conduct. The Commission's position is that it should not make such findings.

The practical difficulties in establishing an appeal regime from factual findings of the Commission were raised by the Commissioner (pp.35-36 of his evidence) and discussed by Mr Justice Clarke (p.7). The Commission maintains that they are relevant, and His Honour's consideration of them bears that out. To recapitulate, they are what form would the appeal hearing take, that is, on the record of the Commission hearing or a hearing de novo in which witnesses are called, whether

fresh evidence would be permitted in the appeal, whether the Commission should be a party to the appeal and if not who would be the contending party.

A primary consideration, well recognised in the many appeal authorities, is the advantage the primary fact finding tribunal has in seeing and hearing witnesses, and thus forming opinions about the reliability or otherwise of witnesses and their evidence.

In **Turnbull v NSW Medical Board** (1976) 2 NSWLR 281 Glass JA of the Court of Appeal listed six categories of "appeal" (cited by Kirby P in **Clarke & Walker P/L v Secretary Department of Industrial Relations** (1985) 3 NSWLR 685 and **Watson v Hanimex Colour Services Pty Ltd** (unreported, 28 November 1991)):

> "Appeal is a term loosely employed to denote a number of different litigious processes which have few unifying characteristics. They vary greatly in the extent to which the appellate court may interfere with the result below. Graded in ascending order, in accordance with the width of the corrective power exercised by the appeal court, they are as follows:
>
> (a) *Appeals to supervisory jurisdiction.* Only errors going to jurisdiction or denials of natural justice can be ventilated.
>
> (b) *Appeals on questions of law only,* for example, from the Workers' Compensation Commission. Undetermined or wrongly determined issues of fact must be remitted.
>
> (c) *Appeals after a trial before judge and jury.* The result below will be disturbed if the judge fell into error of law, of if the jury's errors of fact transcend the bounds of reason. But, except for the assessment of damages, issues of fact must be redetermined in a new trial. [The Criminal Appeal Act provides, for a person convicted on indictment after a jury trial, an appeal against conviction on a question of law alone, or, with the leave of the court, on a question of fact alone or a question of mixed fact and law. The court may quash the conviction and direct a verdict of acquittal or order a new trial.]
>
> (d) *Appeals from a judge in the strict sense,* for example, appeals to the High Court. If the judge has fallen into error of law, or has made a finding of fact which is clearly wrong, the appellate court will substitute its own judgment. Only such judgment can be given as ought to have been given at the original hearing. Later changes in the law are disregarded and additions to the evidence are not allowed: *Victorian Stevedoring and General Contracting Co Pty Ltd* and *Meakes v Dignan* (1931) 46 CLR 73 at 107.

(e) *Appeals from a judge by way of rehearing*, for example, appeals under s75A of the *Supreme Court Act* 1970. Judicial opinion differs on whether a power to receive fresh evidence is implied: *Ex parte Currie; Re Dempsey* (1968) 70 SR (NSW) 1; 88 WN (Pt 2) 193. Almost invariably, however, it is expressly conferred. If errors of law or wrong findings of fact have occurred below, the appellate court will try the case again on the evidence used in the court below, together with such additional evidence as it thinks fit to receive. Since it will decide the appeal in the light of the circumstances which then exist, changes in the law will be regarded.

(f) *Appeals involving a hearing de novo*, for example, appeals from a Court of Petty Sessions to a Court of Quarter Sessions [now from a Local Court to the District Court]. All the issues must be retried. The party succeeding below enjoys no advantage, and must, if he can, win the case a second time: *Sweeney v Fitzhardinge* (1906) 4 CLR 716."

Appeals are creatures of statute and therefore it is necessary to consider the relevant statute to observe what powers are conferred upon the appellate court in each circumstance.

In **Azzopardi v Tasman UEB Industries Ltd** (1985) 4 NSWLR 139 Kirby P noted that the legislature has seen fit to impose limits on the facility of appeal, either by requiring leave of the appellate court or limiting the appeal to points of law. His Honour commented that the legislature might limit appeals to questions of law from decisions of specialist bodies where appeals on questions of fact to courts of general jurisdiction might be inefficient or even harmful.

Appeals from the Administrative Appeals Tribunal to the Federal Court are on questions of law only. The Federal Court has said that it should approach its task, when hearing appeals from administrative tribunals, in a sensible and balanced way and with restraint: **Politis v Federal Commissioner of Taxation** (1988) 16 ALD 707, **Blackwood Hodge (Aust) Pty Ltd v Collector of Customs (NSW) (No. 2)** (1983) ALD 38, **Tabag v Minister of Immigration and Ethnic Affairs** (1982) 5 ALNN 8.

In appeals in the strict sense the appellate court applies the law as it existed at the time of the initial decision, but in an appeal by way of re-hearing the court applies the law applying on the date of the appeal and may receive additional evidence not heard in the primary hearing. An appeal by way of re-hearing does not mean the issues and evidence are at large; the substantial issues between parties are ordinarily settled at the trial: the High Court in **Coulton v Holcombe** (1986) 162 CLR 1.

Appellate courts will be mindful of the advantages of primary judges in seeing and hearing witnesses and will be reluctant to part from the conclusions of the trial judge about witness credibility unless convinced he was wrong: **Jones v Hyde** (1989) 63 ALJR 349; **Abalos v Australian Postal Commission** (1990) 171 CLR 167.

The function of the appellate court is not to re-examine the evidence before the primary judge to decide whether the court would have made the same or a different decision, but only to interfere if satisfied that the decision by the primary judge was wrong in law or mistaken as to the facts: **Concrete Constructions Group Pty Ltd v MacNamara** (1990) 92 ALR 427; **Gronow v Gronow** (1979) 144 CLR 513 and **House v The King** (1936) 55 CLR 499. When an appellate court is reviewing a judicial discretion a mere preference for a different result will not suffice for the court to intervene.

Appellate courts are reluctant to interfere with findings of primary fact but consider they can more readily reconsider inferences or conclusions of ultimate facts.

Provided a judge has not misunderstood evidence but has based his findings of fact on acceptance of some evidence and rejection of other evidence, for reasons distinctive to the trial process, the scope of appellate intervention is limited: Barry, Appellate Review of Procedural and Factual Error (1991) 65 ALJ 720.

Of course caution must be exercised in seeking to apply statements made about appeals from decisions of trial judges when considering appeals from Commission findings, but there is no direct analogy, or even close analogy, because bodies such as Royal Commissions have never been subject to appeals from their findings of fact.

The remaining issue to be canvassed is whether the Commission should be a contending party in appeals from its findings. There is an expectation or convention that when prerogative writs are sought or like review proceedings are taken against courts or tribunals, the courts or tribunals should not actively oppose the application for review, but rather submit to such order as the reviewing court makes.

There is no rule of law which requires that practice. Professor Enid Campbell (Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review (1982) 56 ALJ 293) argues that if the court is considering a tribunal's jurisdiction, the legality of its actions or the fairness of its procedures the tribunal will in most instances be more familiar with its empowering statute and its history and purposes than the reviewing court and more familiar with the legal issues it confronts in its day to day activities, so that its explanation of why it assumed jurisdiction in a particular matter or interpreted a section of its empowering statute a particular way is likely to be extremely useful to the court if the court wants to perform its reviewing task in as informed a manner as possible. Professor Campbell notes that if the tribunal or court does not participate in the proceedings the reviewing court may not have before it all the information and arguments relative to the case. She raises the question whether the Attorney-General should appear in such proceedings, not to represent the tribunal, but to represent the public interest, which is that

statutory authorities should observe legal limitations on their powers but should be permitted to use their authority as the legislature intended. She identifies the danger that the Attorney-General could be perceived as a partisan appearing to represent the court or tribunal.

3 *Does ICAC accept that its finding of corrupt conduct in ordinary language amount or could amount to "thinly veiled convictions"? (See comments of Adrian Roden QC to Institute of Criminology seminar on 15 October 1992.) If not, how does ICAC perceive such findings in terms of harm or damage to the individual concerned? How does this harm or damage fit within the constitutional principle of the rule of law?*

The Commission does not wish or intend to make findings of "corrupt conduct" in ordinary language. The Commission stated in its submission (at p.21) that it would want to make findings and express conclusions using ordinary language, as Royal Commissions do. The Commissioner's evidence to the Committee was that the language in Commission reports should be restrained, judicious, balanced, that the Commission has no desire to "castigate individuals in extravagant language" (p.32).

The Commission does not accept that findings in ordinary language will amount to "thinly veiled convictions". In making findings in ordinary language the Commission would be doing no more, and perhaps significantly less than Royal Commissions have done and continue to do. Findings that two people "may be guilty of offences" against specified sections of a specified Act, made by the Building Industry Royal Commission, more closely approach thinly veiled convictions; they exceed the findings which the Commission can presently make and the Commission would not consider it appropriate to make such findings.

The Report on the Royal Commission into Productivity in the Building Industry included findings in ordinary language that one person was "both corrupt and a liar", that an offer of money by one person to another was in the nature of a bribe, and that there was a corrupt arrangement between two individuals which involved one making payments to the other for the corrupt purpose of inducing the dishonest performance of the recipient's duties.

The Commission does not say that its findings would go so far as findings by Royal Commissions have, but there can be no reason in principle or logic why the Commission should be more restricted in its findings than Royal Commissions, given the similar public policy reasons for the establishment of Royal Commissions, ad hoc, and the Commission.

The Commission understands that its reporting of the conduct of individuals may cause harm or damage to the reputation of those individuals, but the Commission's findings are made not in a vacuum, but in a context, and its findings must be considered in that context. The context is the public policy reasons and the serious purposes for which the Commission was established and the serious conduct which

the Commission is to investigate: corruption in the public sector. The public interest in the public being informed about inappropriate conduct by its public officials must be weighed in the balance with the private interests of the individuals who engage in such conduct.

As to the rule of law, the Commission strictly applies its governing statute, and any other relevant statute or common law principle, in the process of making its findings and the processes which precede the making of findings. As the Act presently stands that requires the Commission to consider, inter alia, the criminal law, the laws relative to discipline of public officials and the law concerning the duty of employee to employer.

The Commission is subject to the control of the courts, which can give a remedy if the Commission exceeds the powers which the law gives it.

4 *If such findings of corrupt conduct are to be made in isolation of any criminal charge what purpose is achieved, precisely, by such finding? How is the interest of the community served by allowing the ICAC merely to affix a label of "corrupt conduct in ordinary language" upon such individuals?*

The Commission does not wish to "affix a label of corrupt conduct in ordinary language" upon individuals. The Commission has said, and its position remains, that it would prefer to not make findings of "corrupt conduct", or in any other statutory term, but must be able to report what happened, that is make findings of fact, using ordinary language. Ordinary language is the only alternative to statutory terminology.

Examples can again be found in the Report of the Royal Commission into Productivity in the Building Industry: "The clandestine nature of the payments is indicative of dishonesty" (p.40, Volume 4) and "There is evidence of widespread lack of integrity and probity amongst the management of contractors and others in the industry" (p.xiv, Volume 4).

Examples can also be found in Commission reports: "The matter can only be put bluntly. He participated in the awarding of a valuable contract by the MSB to himself" (Report on the Investigation into the Maritime Services Board and Helicopter Services). The Report on the Investigation into Driver Licensing contains conclusions about individuals that they accepted illicit payments during the discharge of their public duties. Findings from the Commission's Report on the Investigation into the State Rail Authority - Trackfast Division, are extracted below.

The Commission could be, but in its submission should not be, prohibited from using particular words in the ordinary language, in describing conduct where it is appropriate to do so.

The interests of the community are served by the community being informed of the manner in which public officials are performing their public duties, which it is in the public interest to know.

5 *Do you perceive any limitation in the effectiveness of ICAC's investigative powers if those powers are limited to making findings of "primary facts"? If so, what is that perceived limitation and how does it arise?*

Findings of fact can include primary facts proved, inferences or secondary facts inferred from the primary facts, and ultimate facts, which may involve a term used in a statute and may involve consideration of a question of law.

Primary facts are facts which are observed by witnesses and proved by testimony: **Bracegirdle v Oxley** (1947) KB 349. Conclusions from those facts are inferences deduced by a process of reasoning from them. The evaluation of conduct, such as might be made in ultimate findings, is a value judgment upon facts rather than an inference of fact: Windeyer J in **Da Costa v Cockburn Salvage and Trading Pty Ltd** (1970) 124 CLR 192.

The distinctions in the decision making process have otherwise been described as finding the facts, stating the law and applying the law to the facts.

The Commission does not wish to make ultimate findings, that is findings in terms of a statutory, defined or legal formula. The Commission would wish to have the power to make secondary findings of fact, as primary findings of fact would be limiting. The Commission will demonstrate this by examples below.

The following are examples of findings of primary fact drawn from **Da Costa v Cockburn Salvage and Trading Pty Ltd**, an appeal to the High Court in a case of damages for negligence:

> "The defendant company is a contractor engaged in the demolition of buildings.
>
> The plaintiff was a labourer employed by it
>
> On 28 August 1967 the plaintiff and one Pedri, another servant of the defendant, were removing the corrugated iron roof of an old building at Fremantle which the defendant was demolishing
>
> The plaintiff and Pedri had done work of this kind for the defendant on other occasions
>
> They were each provided with a pinch bar with which to extract the nails holding the iron sheets to the purlins

At the critical time they were working at a fairly steep gable of the roof, one on each side

The plaintiff fell to the ground

He sustained a fracture of his right elbow resulting in some impairment of function of his right arm."

The following are findings taken from the Commission's Report of its Investigation into the State Rail Authority - Trackfast Division ("the Trackfast Report"), the Commission's most recent published report. The following are primary facts:

. Extran was formed or acquired by Taylor and Chapman as the corporate vehicle to enter into and carry out contracts for the SRA (p.24).

. On 30 June 1989 the SRA and Extran entered into an Interim Contract for the collection, carriage, consignment, delivery and storage of Trackfast freight to and from the Trackfast centre at Chullora. The contract was signed by Taylor and Chapman on behalf of Extran (p.25).

. Wilson made no independent inquiries as to value [of their assets] and simply put down what Taylor and Chapman told him (p.53).

. On 13 December 1990 Wilson forwarded a letter, as Strategic Planning Manager and Development Manager, Trackfast, to the Commonwealth Bank at Penrith. The letter was sent to support Taylor's application for a housing loan. In the letter Wilson advised the Bank that the final two year contract was about to be signed and that it was anticipated that Extran would "earn in the vicinity of $3.5m in the first year increasing each year". Wilson made no inquiries as to whether it was consistent with SRA policy to write the letter (p.106).

. Wilson certified as the "officer in charge" that the services claimed for by Extran were provided and that the rates and amounts were correct (p.65). Wilson admitted that he simply received contractor claims from Extran and certified them without ever asking for supporting documentation from the company... In the end he conceded that he simply decided to trust Taylor and Chapman, to the extent that he certified for trucks that had never arrived at Trackfast (p.66).

. Camp often questioned Wilson as to the correctness of the days and truck tonnages certified and obtained his assurance that he had records to confirm that the amounts claimed were correct (p.67).

A secondary finding which follows from the primary facts in the previous two paragraphs (together with other primary facts) is:

. The conclusion is inevitable that Wilson failed to satisfy himself that the services for which he was certifying had been provided and that payment was due for the amounts claimed. He deliberately misled Camp (p.67).

Primary facts are the basic facts which lay the groundwork or introduction for describing what happened. The primary facts or findings report what the evidence was. The secondary findings puts the evidence together and explain the relationship or significance of primary facts. Secondary findings involve combining pieces of evidence or resolving or reconciling differences between pieces of evidence. The following are secondary findings from the Trackfast Report:

. Tony Wilson, the Fleet Resources Manager of Trackfast, provided covert assistance to Stuart Taylor and Malcolm Chapman, the principals of Extran Pty Ltd. The assistance was provided over the period June 1989 to the end of 1990 and took a variety of forms. In particular, Wilson secretly assisted Extran in drafting expressions of interest for two significant contracts (p.v).

. The various assessments by Wilson reflected a pattern of favouritism towards Extran. For example, the original handwritten recommendation referred to the "vast experience" of the Extran principals, a clearly exaggerated description on the material available to Wilson (p.44).

. Taylor gave evidence that he had told Wilson that Extran intended to employ Lambert. That evidence receives support from the fact that the resumes supplied on behalf of Extran included one from Lambert. In these circumstances I infer that Wilson was aware that the "reference" was prepared by an associate of the two principals, who was to be employed by them or their company (p.50).

. The proper inference from the evidence was that Wilson had neither made appropriate inquiries, nor conducted genuine arms length negotiations (p.64).

. The end result of the process begun in August 1989 was that Extran received the benefit of substantially increased remuneration under its contractual arrangements, back-dated for a period in excess of two months. The process was infected by the assistance improperly provided by Wilson to Extran and by his inability or unwillingness to perform adequately the negotiating and assessment roles expected of him by Camp. Camp himself was misled by Wilson, who never divulged that he was providing assistance to the very party with which he was meant to be negotiating in the interests of Trackfast (p.64).

. Extran did not obtain the initial contract on its own merits in a fair competition; its principals (and Wilson) engaged in deception to promote the cause. The principals lacked competence in skills basic to the efficient conduct of a business (and were assisted by Wilson to hide their deficiencies) (p.65).

If the Commission were limited to reporting primary facts and not permitted to report secondary conclusions derived from those primary facts, the Commission's effectiveness as an investigative, fact finding and fact reporting body would be diminished. To report primary facts only would entail the Commission adding little value to a raw transcript of evidence. If the Commission's role were limited to that then other persons or bodies would be required to examine the evidence and the primary facts in order to draw conclusions as to what had occurred in the situation(s) under investigation. Because that process will usually require an assessment of evidence it is best done by the investigating or inquiring body, that is the Commission, rather than a stranger to the process.

The Commission would also wish to be able to report secondary conclusions of a more advanced or developed nature than the secondary findings reported above, although still distinct from ultimate findings in terms of statutory expressions. The type of finding alluded to here is demonstrated by the following examples.

. I have found that Camp did not deliberately commit wrongdoing in his capacity as General Manager of Trackfast. However I have also formed the view that Camp's actions unwittingly facilitated Wilson's wrongdoing (p.109).

. Wilson's overall actions amounted to a dishonest manipulation of the assessment process to ensure that Extran received the Batemans Bay contract.

As the Act presently stands, the next step after these findings would be for the Commission to consider whether the statutory requirements in particular sections of the ICAC Act had been met or otherwise by the conduct as found in the investigation and express ultimate findings in the terms used in the statute. Examples of ultimate findings are: "X has engaged in corrupt conduct within the meaning of the ICAC Act"; "the conduct of Y was infamous and disgraceful in a professional respect": **Felix v General Dental Council** (1960) AC 704; "the respondent was negligent and the appellant's actions amounted to contributory negligence": **Da Costa v Cockburn Salvage and Trading**. The Commission is of the view that it need not make ultimate findings, expressed in terms derived from the Act, in order to effectively conduct its investigative function.

The Commission strongly urges that in order to be able to make recommendations for changes in systems or procedures to avoid potential or actual corruption, or in order for responsible public authorities or public officials to make informed decisions about whether such changes are necessary, the Commission must be able to report fully its conclusions about matters investigated, and that this requires reporting beyond primary facts, in the nature of the secondary findings outlined above.

THE PARLIAMENTARY COMMITTEE ON THE ICAC

"PRIMARY FACTS" ISSUE

Further Comments by: ATHOL MOFFITT

I have been invited to comment on three questions raised concerning the proposal made by myself and others that findings of the ICAC in its reports should be restricted (in some areas) to findings of primary facts.

The three comments can be summarised as follows:—

(1) The term "primary facts" would give rise to uncertainty and court challenges interfering with ICAC functions.

(2) Findings of "primary facts" may themselves give rise to problems similar to those sought to be avoided.

(3) Such a restriction would deprive the ICAC of its functions to report the results of its investigation and accordingly lessen its effectiveness.

Before dealing separately with each of these matters, a general comment relevant to all should be made.

This comment is that my proposal concerning "primary facts", which I believe can and should be implemented, is quite limited in scope. This appears from my original written submissions, as submission C17 on pp 22-3, to which I suggest reference back should be made. It there appears that the restriction to findings of primary facts should be to where findings otherwise or opinions would be adverse to a named or identifiable person. The consequence of this information would be to leave untouched the power to make general findings or to express general opinions of any description and also any finding or opinion exculpatory of a named person eg. where complaints made are not sustained. I believe it will be important to ICAC functions that any amendments to the Act providing limitations of findings to primary facts is only in the type of case mentioned.

The change proposed is quite limited so the remaining power of ICAC in other cases to make findings and express opinions is very wide. Left untouched is the primary function and concept of ICAC which is future prevention, detection, reform and education which depend principally on exposure by open hearings and general findings and recommendations. The proposed change is solely directed to the involvement of specific named persons in areas where the ordinary processes of the law should be allowed to operate, as some existing provision the Act show is intended.

As to matters (1), (2) and (3) taken individually:

(1) The term "primary fact" is not a legal term of art, but its meaning is well understood by lawyers. A primary fact is any event which in fact occurred, including any statement made or any condition which in fact existed, each at some time in some place. A condition includes a state of mind, such as a belief, knowledge or intention of a person at a specific time. A finding of primary fact includes a finding whether the primary fact existed or did not exist. A primary fact does not include a factual inference which has no independent existence and depends on other (primary) facts. Therefore it does not include an opinion concerning the quality of the conduct of a person. It does not include a legal inference or conclusion.

The concept of what is primary or prime (and hence what is secondary) in various situations is a well recognised concept in the English language applying eg. to facts, numbers and colours. Primary is that which stands on its own and secondary is that which depends on a combination. Thus a prime number is a number "having no integral factor except unity" (Oxford Dictionary) so 1, 2, 3, 5, 7, 11 and 13 are primary numbers while 4, 6, 8, 9, 10, and 12 are secondary numbers. Blue and red are primary colours while purple is a secondary colour.

Illustrations of primary facts are:—

(a) *A* met *B* at the *X* RSL Club on 1 January 1992.

(b) The version of the conversation at the RSL Club given by *B* is correct but that of *A* is false.

(c) *C* paid $100.00 in cash to *D*.

(d) At the time, both *C* and *D* intended that *D* would pay the $100 to *E*.

On the other hand a finding that *A* acted corruptly would be a factual inference or opinion but not of a primary fact. A finding that *D* accepted the $100 as a bribe or that he did so in breach of his duty would be a finding of law and not of fact or primary fact.

I do not think that a legislative restriction which used the term "primary facts" in specific cases would give rise to the problems suggested by Mr Roden. Lawyers understand the term, Reports of ICAC will be framed by lawyers and will be subject to the final approval, confirmation and signature of the Commissioner who is an expert, experienced lawyer. There should be no difficultly confining findings to the type of cases exemplified in (a) to (d) above. If ICAC elects to trespass into forbidden areas or what are now suggested to be doubtful areas (if such exist), the problem will be with ICAC and not the courts or Parliament. If ICAC keeps to the primary facts, such as in (a) to (d) above, a court challenge must fail with costs against the complainant. It will not delay the report which will be already out.

Once the legislative change is made, the ICAC will be bound to follow and will follow it and I do not believe in practice it will have any difficultly in doing so in ways that there can be no court challenges.

If despite the above, concern still exists, an alternative would be to prohibit any finding or opinion being included in a report concerning the quality of the conduct of a named or identifiable person which is adverse to such person. A further alternative would be to use the term "primary facts' but define it in a way to produce the foregoing result.

(2) It is very true that some findings of fact concerning a named person may be just as damaging and unfair to the person and usurp the function of courts as would be a finding or opinion or legal conclusion concerning the conduct of the person.

For example, a finding that *C* gave *D*, a police officer, $100.00 in a brown paper bag is little different to finding *C* bribed *D*. A further example, is a finding that *X* police officer was the one who made the telephone call to *Y* in which the caller said he would kill *Y*. This is little different a finding that *X* was guilty of making a harassing telephone call.

The answer to this valid comment is to be found in another part of the package of reform advocated by me and set out in some detail also in my submission C17, in particular (1)(a), at page 22. Summarised, the package was that the power to report primary facts adverse to a named person "should not extend to reporting of facts that may have to be decided in any criminal or disciplinary proceeding which may reasonably be anticipated" (p 22). The effect of this is that such findings of fact should not be included in a report to be made public, where eg. there is a positive statement under S.74A(2) (or recommendation) concerning such proceedings. This, of course, would not prevent a private communication of such a finding or opinion to the DPP.

The foregoing, of course, would not affect the power of ICAC to make findings of primary facts, from which some readers may draw adverse conclusions about some conduct of a lesser kind than a criminal or disciplinary offence. If criminal or disciplinary offences or proceedings are not involved, this must be accepted as reasonable and as an acceptable consequence of the exercise of ICAC functions. There can be no possible conflict with the due processes of the law.

(3) This concerns misunderstandings of the functions of the ICAC and the purposes for which it was set up.

When set up it was not an intended function, nor should be, for ICAC in effect to try identified public officials and as a public institution inflict punishment by public condemnation made under privilege and to do so, not in accordance with procedural and evidentiary requirements and safeguards which are accorded to every other citizen. ICAC was not set up as a tribunal to conduct such trials of public servants including the most minor, without those safeguards and be able to rely on hearsay and

other inadmissible evidence including compelled self incrimination material and upon such to inflict punishment, which could be more damaging than that inflicted by courts in many criminal cases.

It is important to restate and remind of the true functions of ICAC. They are (cf NCA) to prevent or reduce future official corruption and corrupt practices, long endemic in this State, and to facilitate future detection. This is to be done by reform and education based on ICAC investigations and recommendations. An important device directed to future prevention is exposure. Exposure is by public hearings of what in the past has happened generally and in particular cases. This alerts all to what is occurring and decreases future corruption for fear of exposure at public hearings. The provisions of the Act recognise that when an ICAC inquiry uncovers what appears to or may be misconduct of some public official, that it is then for the courts (and external authorities) to determine what, in accordance with law, is to be done to that person, whether it be a trial for a criminal or disciplinary offence or initially or on appeal to determine questions of dismissal. ICAC is to aid such court interventions by steps which will alert others to the possible need for such intervention (eg.s.74A(2)). It is contemplated that ICAC functions will not trespass on or interfere with the proper and fair trial of cases by courts (eg.S.74B(1)).

The powers of ICAC to make findings or report opinions is given in general terms, (s.74 and s.74A(1)), but, as in the case of any general statutory power, this can only properly be exercised in aid of its functions. To refine now by legislation this general power in order to prevent its use by ICAC to trespass into the court area or to set itself up as a tribunal which was not intended, is not depriving ICAC of its functions, but, keeping it within them.

This now appears necessary because the inclination of some within ICAC seems to be to set ICAC up as a substitute for the courts. This inclination is further manifested by ICAC's submissions that the Act should be amended to free ICAC of its present duty (imposed by s.74A(2)) to make statements on appropriate occasions intended to alert courts to the need for court intervention.

ICAC and the courts were intended to compliment and assist each other and not act in parallel or competition, which they will do if each exercise trial and judgemental powers in respect of the same subject matter. As earlier stated, ICAC was not set up as a alternate trial system to pass its own judgements and inflict its own type of punishment on individuals.

Quite contrary to the claims made of detriment to ICAC, benefits will flow to it from the refinements proposed to its powers which will avoid conflicts of functions likely to lead to conflicts of decisions between ICAC findings and courts decisions, which are already occurring. I believe that once the refinements are in operation, it will be seen that the effectiveness of ICAC has not been diminished. Indeed, they will shield ICAC from real dangers to it from a pursuit by ICAC of the dual system. Already the ICAC intrusion and "judgements" have on significant occasions been shown by the courts to be wrong leading many to see ICAC as having acted unfairly, all greatly to the detriment of the public image of the ICAC. This will continue unless the cause is

the detriment of the public image of the ICAC. This will continue unless the cause is remedied, as it should be by the proposal. ICAC will be left to its intended function and in doing this it is likely it will have strong public support.

The Hon Athol Moffitt

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JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

19 February 1993

The Hon Malcolm Kerr Esq MP,
The Chairman,
Committee on the ICAC,
Room 1129,
121 Macquarie Street,
Sydney, N.S.W. 2000

Dear Mr Kerr,

I furnish herewith answers to the questions which you have submitted to me. As you will observe I have not confined my answers strictly to the questions posed. That is because I think that there are some important issues, for instance, the issue concerning primary facts, which require further discussion in the light of the specific questions submitted. I should say in this regard that my consideration of the problems underlying the definition of the powers of ICAC has been greatly assisted by the submissions from the Hon A R Moffitt QC CMG and ICAC itself. These submissions do, however, highlight some of the difficulties facing the Committee and the need for great care in drafting any legislation necessary to implement changes to the Act which may be thought necessary. In addition I think that it is important that in answering the questions I clearly express my views on what I might describe as the primary fact issue.

The other matter that I should make clear before providing my answers is that I have borne in mind the following fundamental matters:

(1) The importance of ICAC being permitted to continue to perform its important functions. This was expressed in the statement issued on 21 December 1992.

(2) The important distinction between the procedures pursuant to which ICAC operates and those pursuant to which courts of law accord to persons charged with offences a number of fundamental safeguards. Those distinctions include, but are not limited to, the power of ICAC to compel the giving of evidence.

(3) Consequent upon (2) the dangers of irremediable damage being caused to persons including a person who is not, and could not be, successfully prosecuted; and

(4) The need to secure the right balance to ensure that ICAC operates properly while not causing unnecessary harm to particular citizens. (I do not think I need to amplify the problems flowing from the publication of a report with adverse findings because my appreciation is that they are well understood by the Committee and they are in any event well covered in a number of submissions including the submission by Mr Tim Robertson which includes some pertinent observations of Blom-Cooper QC.)

I turn then to the questions -

1 What is a "primary fact"? Is this term one which is used at law? Is the meaning of the term reasonably settled or is it a contested term? (The Hon Jan Burnswoods has stated that she does not believe that it is possible to separate "primary facts" from opinions, that anyone making a finding of "primary fact" will necessarily be exercising judgment and putting forward their own opinion.)

I do not think that lawyers have much difficulty in understanding the phrase "primary fact". One matter upon which Mr Moffitt and ICAC seem to be in agreement is on the general meaning of the phrase. In Bracegirdle's Case (which is referred to by ICAC) Lord Denning said that:

> "Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them."

That was no doubt an accurate expression in the context in which it was made but for my part I find Mr Moffitt's discussion of primary fact more helpful because it illustrates that findings of primary fact do involve the exercise of judgment by the Tribunal. For instance, the question may be whether A met B at the Wyong RSL Club on 1 January 1992 and A and B may give conflicting evidence on this issue. The finding that A did meet B at the club on that day involves the acceptance of the evidence of one witness in preference to that of the other and this is a classic illustration of the exercise of judgment. To restrict ICAC to findings on primary fact would, therefore, not mean that in making its finding it would not be exercising judgment. What it does mean, however, is that ICAC would not be able to make any secondary findings of fact or what ICAC describes as "ultimate findings", whether expressed in ordinary language or in accordance

with the terms of the statute. The point I am seeking to make is that while I agree wholeheartedly with the Hon Jan Burnswoods' observation that anyone making a finding of primary fact may well be exercising judgment (and this will occur on every occasion on which there is a factual dispute) that is not a reason for concluding that it is inappropriate that a particular body should be limited to findings of primary fact. There is no inconsistency in deciding that a body should have the power to find primary facts (and in doing so exercise its judgment) but not have the power to go beyond the determination of those facts.

Your question has, however, occasioned me to reconsider the statement I made in evidence that ICAC should be confined to findings on primary fact. I have done so in the light of Mr Moffitt's opinion that the limitation on ICAC's power to make findings to those relating to primary facts should operate only within a limited sphere and ICAC's own submission which strongly argues against the limitation. While I recognise that there is much force in Mr Moffitt's opinion I am concerned that the scheme which he advocates would introduce undesirable complexity into the operation of the Act. In my view, and I think past history supports this view, it is important to seek simplicity in the drafting of any amendments to the Act. It may also be that a finding exculpatory of a named person may, inferentially, inculpate another named person. Notwithstanding the Moffitt scheme would, I think, be workable and would meet most of ICAC's objections.

ICAC, however, argues for the power to make, in every case in which it concludes the power should be exercised, ultimate findings couched in ordinary language. It submits that unless it has this power its effectiveness would be diminished. This view is articulated in the following paragraph of the submission: "If the Commission were limited to reporting primary facts and not permitted to report secondary conclusions derived from those primary facts, the Commission's effectiveness as an investigative, fact finding and fact reporting body would be diminished. To report primary facts only would entail the Commission adding little value to a raw transcript of evidence. If the Commission's role were limited to that then other persons or bodies would be required to examine the evidence and the primary facts in order to draw conclusions as to what had occurred in the situation under investigation. Because that process will usually require an assessment of evidence it is best done by an investigating or enquiring body, that is the Commission, rather than a stranger to the process."

The theme is more fully developed in the ultimate paragraph of the submission, which reads: "The Commission strongly urges that in order to be able to make recommendations for changes in systems or procedures to avoid potential or actual corruption, or in order for responsible public authorities or public officials to make informed

decisions about whether such changes are necessary, the Commission must be able to report fully its conclusions about matters investigated, and that this requires reporting beyond the primary facts, in the nature of the secondary findings outlined above."

It will be seen that the reasons advanced in support of ICAC's basic proposition are as follows:

(1) To find primary facts adds little to the raw transcript of evidence;

(2) The party determining the primary facts is best placed to assess the meaning of that evidence - that is to evaluate the effect of the evidence and express the conclusions resulting from that evaluation;

(3) That recommendations for a change in practices are meaningful only if the need for change is fully explained in the context of the facts of the particular case;

(4) That public authorities will only be able to evaluate any recommendation properly if furnished with full reasons for the suggested changes.

While no mention is made of the role of ICAC in exposing corruption I have assumed, in the light of previous evidence and later questions submitted to me, that it is the contention of ICAC that its exposure function could be effectively exercised only if it has the power to make ultimate findings.

Before dealing with these arguments I would like to refer to specific provisions in the Independent Commission against Corruption Act 1988 ("the Act") as it was in 1988. The first is the definition of its principal functions (s13). They include the power to investigate circumstances, allegations (subs 1(a)) and conduct (subs 1(b)) and to communicate the results of its investigations to appropriate authorities (subs 1(c)). There are also a number of educational functions and subs(2) expresses obligations to carry out specific stated functions in respect of references from Parliament.

Then there are the additional functions set out in s14 and it is important to observe that pursuant to subs3 ICAC may furnish information pursuant to s14 on a confidential basis.

Nowhere in the expressions of ICAC's functions is there reference to a power to make public reports. That aspect of ICAC's powers is to be found in s74 which in subs 1 empowers it to make reports, and in subs 2 and 3 requires it to make reports in specific circumstances.

Subs 4 sets out to whom the report should be furnished and omitting, for the sake of conciseness, the following subsections which are important, subs (8) empowers ICAC to defer making a report except in respect of references from Parliament (this last power is directly relevant to another question which I have been asked to answer).

Now it is important to note that one of its principal functions is to communicate the results of its investigations to appropriate authorities. That is, in my view, an obligation quite separate from the one expressed in s74 to furnish a report to Parliament. It may be that ICAC may comply with this obligation by sending a copy of the report it has furnished to Parliament to appropriate authorities but it is not bound to do this, For my part I can see no reason why it could not send a separate, and different report, to the appropriate authorities.

Indeed it is clear that it can. One way it can do so is pursuant to its powers under Part 5 of the Act. Although it is obliged to consult and consider the views of any relevant appropriate authority (s53(5)) there is no other restriction on its power to furnish information to a body together with its recommendation as to what action should be taken. Pursuant to s53(5) it can furnish information confidentially.

In any event if the Act is to be amended then there would appear to me to be a case for the inclusion of a provision requiring ICAC to send a report to the appropriate authority with its recommendations, and sufficient reasons fully to support those recommendations, and separately to make a public report finding the primary facts, provided that the first report is furnished on a confidential basis and there is a provision similar to s14(3) in respect of it.

If that is done then the harm caused by the public denunciation of an individual is substantially avoided. For this reason I am unimpressed by the suggestion that ICAC could only carry out its educational function properly if it retained the power to make ultimate findings publicly. It is true that authorities, which are not appropriate authorities, would not be privy to information contained in a private communication but I do not believe there is a good reason why they should be. General education can, and often is, carried out with the use of hypothetical examples and I find it difficult to support the view that public denunciation is necessary for this purpose.

I would add that I am not sure, in the light of the last paragraph under Item I of the ICAC submission, that it has fully appreciated its obligation under s 13(1)(c) and the facility that power may provide in carrying out its educational role.

What I understand ICAC to be saying is that in order to make recommendations, and in order for responsible public authorities to make informed decisions about possible changes, the Commission must be able fully to report its conclusions about the matters it has investigated in a public report. I appreciate that the submission does not contain the last four words but I think that is what is meant and I draw some support for that view from the paragraph to which I have just referred. To say that section 14 apparently contemplates private communications, as that paragraph does, is not strictly accurate. The section clearly invests ICAC with power to furnish information or a report on that information to a public authority or the Minister for that authority and to submit it on a confidential basis. (Subs 2-3)

It is also argued that no useful function is served by finding, and publishing the findings of, the primary facts. I disagree. Such findings require, or may require, the exercise of judgment, and the statement of findings of fact would expose in clear, or even stark, fashion what has occurred in the matter under investigation. The transcript of evidence, on the other hand, would almost certainly contain a great deal of evidence, much of which may be disputed, and would tell the reader no more than what the various actors had to say.

On this aspect it should not be overlooked that ICAC is not a court of law and its role in relation to the prosecution of alleged offenders, or disciplinary action against employees, is limited to those functions appearing in the Act, ie ss 13, 14 and 53. Furthermore, and this can be easily overlooked, when it assembles evidence, and prepares observations and recommendations for submission to the DPP (s 14(1)), it is only evidence admissible in a court of law with which it is concerned.

It seems to me to be of importance to recognise, as the submission does, that ICAC is primarily an investigative body. Of this there can be no doubt (see Balog's case). The role of such a body is to ascertain the facts, ie the primary facts. Once they have been determined then it is for the prosecuting authorities to determine whether criminal proceedings should be taken against a named individual or for an employer to determine whether disciplinary proceedings should be taken against an employee. The fact that ICAC (that is, the Commissioner) expresses an opinion, which has no legal force, on the quality of the conduct revealed by the primary facts, which expression of opinion may well both be extremely damaging to an individual and based on evidence not admissible in a court of law does not seem to me to advance the investigation and yet could be most harmful to named persons.

It is my view that if the contents of the public report were limited to findings on primary fact (although confidential reports were

not so limited) most of ICAC's objections would be met and much of the harm which would result from the unrestricted publication of a report making adverse comments about the quality of a person's conduct would be avoided

I turn then to the argument that ICAC's exposure function would be inhibited. I readily appreciate the view that it is important that corrupt conduct be exposed. This object can be achieved adequately, as it seems to me, by finding what conduct has taken place and this is effected by findings of primary fact.

Whether ICAC could more effectively expose corruption by making secondary findings is a moot point although I have reservations whether the making of ultimate findings, of the nature discussed on page 11 of the ICAC submission, would achieve the same object.

The difficulty with permitting ultimate findings of that nature being made publicly is the obvious one, that is, they have the potential to cause great damage. Again although it may be accepted that the making of secondary findings of a limited nature may not cause greater harm to individuals than primary findings, there is an obvious difficulty in defining those secondary findings which are to be permitted and those which are not.

A different approach which could be considered is a prohibition on ICAC reflecting, either expressly or impliedly, on the quality of the conduct of a person in a report which is to be made public. If this limitation were imposed upon ICAC's powers it would be able publicly to make secondary findings provided that they did not breach the prohibition and it would be able to report fully to appropriate authorities.

Having considered the alternatives, including the one advocated by ICAC, I have come to the conclusion that, having regard to the functions of ICAC expressed in sections 13 and 14 of the Act, supplemented by Parts 5 and 8, and its fundamental role as an investigative and educative body, its power should be limited to reporting publicly its primary findings of fact. Upon that approach the position is, as it seems to me, more clear cut than it would be if there was a prohibition against ICAC expressly or impliedly reflecting upon the quality of conduct of a person in a public report. I say this because the author of a report may quite genuinely fail to realise that the report does impliedly criticise a person's conduct.

If it is not already clear my reason for this view is that the harm likely to be caused by public reports including adverse observations on the quality of a person's conduct is very great indeed and the purposes

for which ICAC was set up will not, in my view, be diminished, or at least not significantly diminished, if its powers are more limited.

2. Mr Roden stated that if ICAC findings were limited to "primary facts" the way would be opened for legal argument as to the meaning of "primary facts". He said that any finding of fact by the ICAC could then be the subject of "pointless litigation". Could not this open the floodgates to innumerable challenges to ICAC reports?

I have already expressed the opinion that the phrase "primary facts" is well understood by the legal profession and I think that a reading of the competing submissions to which I have referred would support that conclusion. For this reason I do not see any basis for the conclusion that such a limitation would lead to pointless litigation or open the floodgates to innumerable challenges. It is difficult to see what challenges could be made if ICAC faithfully reported the primary facts.

3. Mr Roden suggested that limiting ICAC findings to "primary facts" would inhibit the ICAC's exposure function. Is not the ability to express judgmental opinions about conduct an essential part of the ICAC's exposure function and a necessary foundation upon which recommendations for reform are made?

I have already dealt in part with this question but I should say that I have some difficulty with the expression "exposure function". I apprehend that what is meant is that ICAC was constituted to investigate whether conduct, which was corrupt either in the statutory or normal sense, had occurred and to educate authorities and the public on means to avoid corrupt conduct occurring in the future in order to stamp out or reduce corruption in the community, and that the public expression of its findings that particular conduct had occurred served an important function in stamping out corrupt conduct. Upon that basis I cannot accept that the function would be inhibited by limiting the findings in a public report to primary facts. The conduct investigated would be fully exposed and I remain to be convinced that the expression of an opinion on the quality of that conduct takes the matter any further. The debate in the newspapers following the publication of the report on Mr Greiner and the published criticisms of the Commissioner's conclusions (in contradistinction to his findings of primary fact) would, I think, support that view.

4. Would not limiting ICAC findings to "primary facts" mean that allegations could not be conclusively finalised in ICAC reports? If

so, what steps can be taken to ensure that allegations can be finalised expeditiously?

I do not agree that the limitation suggested would inhibit ICAC in giving a "final" report. If allegations are made the facts can be found and the matter finalised. Upon that occurring ICAC's function is concluded except to the extent it may wish to communicate with a public authority. I emphasise that it should not be overlooked that ICAC cannot make legally binding determinations in respect of conduct. Such determinations have to be made in courts of law and in accordance with the safeguards provided by our system of law.

5. At the Institute of Criminology seminar on 8 October 1992 Murray Tobias made the point that findings of primary fact could be just as devastating as findings which included judgmental opinions. He raised for consideration the coronial model whereby, once evidence is brought forward of a criminal offence, the papers are sent to the DPP and no public report issued until after the matter has been determined by the Courts. Could not limiting ICAC findings to "primary facts" prove to be of limited effect, as devastating findings will continue to be made in public reports?

I agree that findings of primary fact can be devastating. But I do not think the coronial model is one to be followed. As ICAC points out it is important that it conclude its investigations and there are obvious difficulties in stopping an investigation and re-starting it perhaps months or years later after a trial has been concluded or the DPP has made a decision, which he or she may later reverse, not to prosecute. Quite apart from that consideration the difficulty with adapting the coronial model is that nice questions are involved in determining in an enquiry, where evidence inadmissible at law may be compelled and given, whether and when a prima facie case has been established.

There is, I think, a simpler solution. There is power in ICAC to defer making a report if, in its view, that is desirable in the public interest (s74(8)). Where, therefore, it concludes that the findings it might make in a case, in which it is satisfied there is prima facie evidence that an offence had occurred, might prejudice a subsequent trial it is empowered to defer making a public report. That sub-section could be amended to overcome the difficulty underlying the question so that it provides that in the event ICAC determines that there is prima facie evidence that an indictable offence has occurred it should defer making a public report until either a decision has been made by the DPP not to prosecute the persons involved or the prosecution has been concluded.

If, however, ICAC concludes that the admissible evidence did not establish a prima facie case of an offence then there would be no reason for deferring the making of the report and I must accept that findings of primary fact included in it could be damaging to named persons. The first point I would seek to make, however, is that if the evidence did establish a prima facie case that an offence had occurred then deferral would limit the damage to the named person. If he had been tried and acquitted he would have a ready answer to the findings. If he was convicted there would be a question whether any further damage flowed from the publication of primary findings of fact. If the DPP decided not to prosecute then, although there may well be damage to the named person, he or she would be able to limit that damage by responding to the effect that ICAC's findings were wrong as evidenced by the decision of the DPP.

The second point is that the damage from primary findings is almost certain to be much less than that which flows from a combination of those findings and adverse conclusions. Where, for instance, the primary findings are that A acquired information in the course of his official functions, that he used the information and did so for no discernible proper reason then a case of corrupt conduct would be established (s8(1((d)). No doubt the publication of those findings would damage A's reputation but not, I suggest, to the same extent as would occur if there was added to the findings a statement that A had been grossly dishonest. And there is little that could be done to redress that damage even if a tribunal considering disciplinary action concluded that there was no evidence to support a finding of dishonesty.

While, therefore, the problem remains one of achieving the correct balance I hold to the view that the disadvantages flowing from the public statement of adverse ultimate findings (in the sense used by ICAC) outweigh the advantages and that the public interest is better served by the restriction (or one of the restrictions) I have suggested.

Yours sincerely,

[redacted]

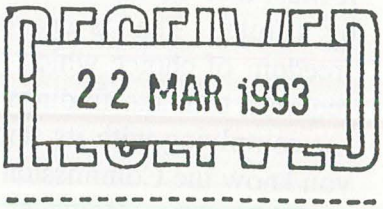
Justice M J R Clarke.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Malcolm Kerr MP
Chairman
Parliamentary Committee on the ICAC
Room 1129
121 Macquarie Street
SYDNEY NSW 2000

19 March, 1993



Dear Mr Kerr,

Yesterday the Commission received a copy of two further submissions to the Committee, one by Mr Justice Clarke written on 19 February. I note it was received by you four weeks ago today. I also understand that the matter generally is to receive further, and it is hoped final, consideration by the Committee on 26 March.

Mr Blunt advised Ms Sweeney that because the submissions had been received so late by the Committee, the Committee did not require a response from the Commission unless the Commission wanted to make one. The Commission is of the view that it must address Mr Justice Clarke's submission, if only shortly, because it takes quite a different approach from that of the Commission, and the Commission would not want silence to be interpreted as acquiescence. Had the Commission been sent the submission when the Committee received it a month ago, we would have had time to respond more fully.

The Commission remains of the view that it should not be restricted to the finding of mere primary facts. It should be in a position to find secondary facts, that is to say conclusions as a matter of inference from the primary facts concerning the conduct of individuals and institutions. At both levels there are judgments to be made. The intellectual approach which must be taken is well understood by any competent lawyer, and of course the ICAC Act requires that the Commissioner for the time being have the same qualifications as are required for judicial appointment.

The Commission does not wish to make ultimate findings, as for example guilt or otherwise. That is the proper province of the courts. But this Commission should not be less empowered than Royal and other Commissions of Inquiry have been over the decades.

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It is suggested that the Commission is "primarily an investigative body", and Balog's case is cited for the purpose. Since that decision the Act has been amended. In any event it may be doubted whether simple categorisation of this sort helps much. One must look at the statute. The fact is that the Commission has various functions, including corruption prevention and education. Hearings and reports go far beyond investigation in the police sense. Reports inform the Parliament, as the elected representatives of the people, as to just what has happened in a given area of concern. The hearings and reports inform and thereby educate the people. And most of the Commission's reports serve an important corruption prevention purpose. Very few of them concentrate upon individuals rather than systems and their shortcomings.

It must also be borne in mind that the Commission writes the reports that are required of it by statute. That is unavoidable for any creature of statute, as the Commission is. The freedom of choice which the Commission has is limited. For example, it has always been required to make findings in relation to individuals. The Commission cannot be criticised for complying with its statute if the making of such findings is considered unfortunate. As you know the Commission wishes to be deprived of that responsibility, which serves no very useful purpose. However, we still wish to write reports which clearly state the position, for the information of the public, and without narrow legal constraints being placed upon us.

Yours sincerely,

[redacted]

Ian Temby QC
Commissioner

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Malcolm Kerr MP
Chairman
Parliamentary Committee on the ICAC
Room 1129
121 Macquarie Street
SYDNEY NSW 2000

April 7, 1993

Dear Mr Kerr,

The Commission appreciates the opportunity to respond further to Mr. Justice Clarke's submission and the advice of the Crown Solicitor. I have relied heavily on the assistance of Assistant Commissioner McClellan in preparing this response.

Submission of Mr. Justice Clarke

The fundamental concern of Mr. Justice Clarke is that the Commission should not be able to publish conclusions, other than findings of primary fact, because they may be damaging to those affected. He believes that the Commission is primarily an investigative body, not a court of law. He further says that because findings of primary fact may be damaging, the Commission should not make such findings public if prosecution or other proceedings are under consideration or, if so, only after any proceedings have been finalised.

The role of the ICAC

On reflection the Commission believes Mr. Justice Clarke's submission is based upon a misconception of the role of the Commission as defined by the legislation and redefined by the amendments to the Act following Balog's case. It may be many people have this misconception.

The Committee is aware that the Commission was set up to deal with corruption by various means. An important element of its investigative functions are its powers to require people to answer questions and produce documents, even if that involves admitting the elements of a criminal offence. Because this is an extraordinary power a special protection is given. Sections 37 and 38 provide that when given under objection, answers may not be used in "other proceedings" against the person.

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There have been many instances where people have admitted wrongdoing, the admission being subject to objection. Without the Commission's coercive powers the admission would not have been forthcoming. Because of these admissions problems have been addressed, systems improved and government and public sector managers enabled to respond to difficult and unsatisfactory situations.

In these situations, if the Commission was limited to findings of primary fact, the outcome would be most unsatisfactory. No prosecution or other proceedings would be possible and to most ordinary people the outcome would be pointless or worse. For those required to respond to problems such an outcome would be unhelpful. Many matters could not be brought to finality. If a person confesses to taking money for a corrupt purpose but cannot be prosecuted for it, surely the Commission should be able to publicly report its conclusions in appropriate language. The general public would soon lose faith in its anti-corruption body if this was not the case.

The Commission has been given special powers to find the truth and in many cases only the Commission will be able to bring it to public notice. This is the justification for Royal Commissions - as it is for the ICAC Act.

Many investigations take place because of concerns expressed by one or a number of people about the conduct of others. The concerns are public. There must be a capacity to allay or confirm those public concerns. If there is not, the work of the Commission will come under suspicion.

Mr. Justice Clarke is correct to point out that the Commission is not a court. It is accepted that its findings, although not binding, may do considerable damage. For this reason, as with any inquiry or Royal Commission, great effort is invested in ensuring that findings are appropriate.

Findings of primary fact and conclusions

The Commission does not believe that it is always easy to define primary facts. The theory is simple. The practice can be quite difficult. Perhaps more importantly, as Mr. Justice Clarke appears to acknowledge, finding a primary fact will often involve a conclusion which could only be described as secondary - eg. B (who tells a different story from A) is telling lies. That secondary determination may depend upon many other determinations of both primary and secondary facts. In order to justify the finding that A is telling the truth it will be necessary to reject B's evidence. Any report must explain and justify such findings - the Courts would not allow otherwise (see Greiner's case).

Those who contend the Commission should be limited to making findings of primary fact express a concern that individuals should not be publicly criticised for their conduct - it is said this is for the courts. As previously indicated this misunderstands the reasons for the existence of the ICAC.

To be useful a report must describe particular conduct in a manner which ordinary people can understand. It must do far more than merely find the primary facts. To state the primary facts without any attempt at evaluation will significantly inhibit the Commission's capacity to encourage change in the public sector. A set of primary facts alone may be open to competing interpretations, innocent or illicit. To leave those competing conclusions at large would be unfair and it would be impossible for the public, or responsible authorities, to decide the appropriate conclusions. That can only be done by someone in a position to assess the evidence and draw inferences. The Commission, having conducted the investigation, is in that position.

The Commission does not wish to traverse the Greiner matter but would respectfully suggest that if only the primary facts had been reported the damage and controversy may have been greater. The Commission in an exercise going well beyond the primary facts rejected the suggestion that Mr. Greiner had offered a bribe to Dr. Metherell. If the Commission had merely reported the primary facts the inference of bribery would have remained. Only the Commission or a court could put it to rest. Surely it should not have gone to Court. Consider many of the rumours and allegations which abound in public life. Unless the Commission can deal with them in a conclusive manner, great damage can be caused. Public reports limited to primary facts will merely create mischief - not eradicate it.

The following two examples from Commission reports indicate the utility and desirability of the Commission being able to report other than primary facts.

RTA Driving Licensing: Vernon Forsyth

Forsyth had been a driving examiner and after that was a driving instructor working for the DMT/RTA.

The witnesses who gave evidence about and against Forsyth were Lennon, John Smith, Ivan Dodic, Lina Frezza and Wayne Berghoffer. The Commission accepted the evidence of Lennon and Smith, found that the evidence of Frezza and Dodic was significant against themselves but a strong reliance should not be placed upon it as against others, and that Berghoffer was a credible witness but his evidence should not be relied upon on the matter of importance as to whether Forsyth had received money from Cataldo, to draw a conclusion adverse to Forsyth.

Lennon's evidence was that Forsyth had taken money from a large number of driving instructors, some of whom he named, and that Forsyth had a "leadership role" within the ranks of the examiners at Rosebery who were prepared to accept money. Lennon said that Forsyth participated in a "pool" at Rosebery and that he could recall Forsyth producing matchboxes in the meal room on various occasions, opening them and taking money out. Lennon said that Forsyth was one of several people who received information about pending raids by internal audit officers.

John Smith said that he and Forsyth pooled money when they were both working at Chullora and that each took between $350-$400 per week on average.

Forsyth denied ever having taken money as an examiner either for the administration of a knowledge test or a practical driving test. He maintained those denials in the face of video and audio evidence of conversations which he had with Lennon, which conversations indicated that he had been involved in taking money. The Commissioner described the conversations as "compelling, not just in negating Forsyth's denials, but as tantamount to admissions of his own involvement in the taking of moneys".

Forsyth explained the conversations as a joke he played on Lennon.

The Commission did not recommend consideration of Forsyth's prosecution for bribery offences, because charges could not be particularised with sufficient precision and because in order to obtain a criminal conviction there would be a need for support for Lennon's evidence, which could only come from Smith who was also involved in the taking of bribes. However the Commission found that Forsyth was deeply involved in corrupt conduct in the course of his duties as a driving examiner and found there was sufficient evidence to warrant the Chief Executive of the RTA considering dismissing Forsyth.

However, if the Commission's report had simply recorded the evidence given by Lennon, Smith, Dodic, Frezza, Berghoffer and Forsyth's denials, with no assessment of the reliability of the evidence and which evidence should and should not be accepted, then it would have been left to the RTA to decide whether it should accept Forsyth's denials or the evidence of others - a difficult if not impossible task. At the least it would have required the RTA to repeat the inquiry - a process for which it is not equipped. If there is a body expert in assessing these matters surely it ought provide conclusions.

The Blackmore Report

The allegation investigated was that Peter Blackmore, whilst an alderman and Mayor of Maitland City Council, abused his office by giving partial treatment to a development application by Alan Buckingham, and as a reward, Alan Buckingham gave him a boat.

In Chapter 2 of the Report the Commission deals with conflicting accounts given by Alan Buckingham, Peter Blackmore and George Blackmore as to the amount paid for the boat, the manner of payment, who paid, and who attended at Buckingham's house to collect the boat. A report which set out the accounts given by each of these people when first interviewed (for example George Blackmore said that the boat was paid for by a $6,000 cheque drawn on his building society account) and then recorded that ultimately each gave evidence that the boat and accessories were purchased by George Blackmore from Buckingham for $5,000 paid in cash would, the Commission suggests, not have been a useful report. That course of events could be open to differing interpretations, one being that when first interviewed the witnesses had been mistaken and had later given correct, more considered and honest answers. Another interpretation could have been that consistent accounts given some time after initial inconsistent accounts indicated some degree of collusion or invention among the witnesses. It is clear that the detailed analysis of the evidence, and the demeanour of witnesses, which permitted the Commission to make findings as to the true facts of what had occurred, as set out on pages 19 and following, was more valuable in dispelling the allegation.

Another example is that the Commission took account of evidence from Mr. Huett, an expert marine dealer, to draw an inference that the purchase price for the boat could not be regarded as an unreasonably low purchase price (p. 17).

In addition on page 17 the Commission's report sets out a series of mostly primary facts of Mr. Blackmore's actions in respect of the boat, from which behaviour the Commission was able to conclude that the boat was not a reward by Mr. Buckingham to Mr. Blackmore. The Commission submits that a report which had set out purely the primary facts on page 17, without the analysis (on page 17 above the series of primary facts and on page 18) would be a less useful report. In fact the publication of the primary facts without conclusions in this case would have been extremely damaging to Mr. Blackmore - it would be rightly described by many as intolerable.

Mr. Justice Clarke suggests that if the Commission was limited to findings of primary fact there would not be litigation. This must be seriously doubted. The history of litigation to date would suggest that an artificial limitation of the Commission's reporting functions would lead to disputation. Given the importance to participants this is only to be expected.

A public and a private report

Recognising that if findings are limited to primary facts reform will be inhibited, Mr. Justice Clarke accepts that confidential reports should not be so limited.

But private reports - if they are to be acted upon - must become "public". At least in the Department or section where the problem exists it is impossible to speak only by hypothetical example. However much care is taken, some will come to know of the contents of the report - others will know some of it and others will say they do but may merely be peddling rumour and damaging innuendo. All will be suspect although many may be innocent. Unless the report is made public harm - far greater than presently - must occur to many people.

Consider a public report which finds primary facts. X, who was important to the events of the report but innocent of wrong-doing, is nevertheless under suspicion and indeed the primary facts may heighten it. The public report cannot allay the suspicion. X is then moved for reasons totally unrelated to the allegations which were investigated to another position. Many will reasonably suspect the private report is the cause and a great injustice will have been done.

One further matter requires comment. Mr. Justice Clarke suggested that ICAC reports which might damage persons who may be charged should not be published until a decision has been made not to prosecute or the prosecution has been concluded. This would have the effect of delaying all reports for months and many for years - the position would soon become intolerable for all concerned including those under suspicion. Many would know the report was delayed - would not know why - but would reasonably suspect it was because the participants in events may at some stage be charged. This may be true but only for some or very few. The others must inevitably suffer. Again that is intolerable.

The advice of the Crown Solicitor

The Commission has not seen the draft report and is accordingly inhibited in its capacity to comment. The Commission's role is, and should remain, an anti-corruption body.

The Commission's jurisdiction to perform all its functions can either be in respect of conduct spelled out in the Act or in respect of an undefined term such as "corruption", in which case there will be uncertainty about the scope of the Commission's jurisdiction, but it cannot be a mixture of both.

It would not be workable to have the Commission having a function to investigate "relevant conduct" as defined and its other functions being in respect of another kind of conduct, not defined, and perhaps narrower than the defined relevant conduct.

If the public understand corruption to mean something less than what is presently the Commission's jurisdiction, then the Commission suggests that the better course is that the public be educated as to the Commission's jurisdiction rather than the Commission be limited to the "lowest common denominator" understanding of what is meant by corruption. If the Commission is not to make findings in terms such as "corrupt conduct" then there is no harm being caused by the Commission having jurisdiction in terms of defined and specified conduct rather than narrower terms of what the public understand to be corruption, which may be limited to bribery and extortion. Clearly, as the Commission's experience shows, corruption can extend beyond such conduct.

An example of a consequence of the proposed use of two terms within the ICAC Act for different functions is that if an investigation examined conduct which was within the definition of "relevant conduct" but thought to be outside the concept of corruption in its "ordinary meaning" then the Commission would be precluded from making recommendations for systems fixing and corruption prevention, because that would be outside the Commission's corruption prevention functions as expressed in the Act. Any such recommendations made would be beyond power and could be ignored.

In the Commission's view the same term must be used throughout the legislation in respect of all the functions and powers.

The Commission has in its submission commented upon s.9. It cannot operate to limit complaints. It has no practical effect and should be repealed.

Yours sincerely,

[redacted]

Ian Temby QC
Commissioner

JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

16 April 1993

The Hon Malcolm Kerr Esq MP,
The Chairman,
Committee on the ICAC,
Room 1129,
121 Macquarie Street,
Sydney, N.S.W. 2000

Dear Mr Kerr,

I C A C

In his most recent comments Mr Moffitt has tendered a constructive suggestion which, subject to what appears below, may be thought worthy of consideration.

The first comment I would make is that under the proposal ICAC would be carrying out a function which in the past has been performed by a Royal Commission with special powers under Part 2 Division 2 of the Royal Commission Act. It may be that it is sensible that ICAC carry out a particular rare inquiry of the type envisaged rather than a Supreme Court Judge but I am not sure that everyone would hold that view. But whatever view one holds on that question there is an obvious need to ensure that any changes of the type proposed do not lead to inconsistencies between the ICAC Act and the Royal Commissions Act.

My second comment concerns the use to which reports of ICAC have been put by authorities in the past and the apparent contemplation that its reports will continue to be used for that purpose, i.e. the basis for dismissal, in the future. (This is a matter which Mr Temby also mentions.) ICAC, of course, can compel evidence and any report it publishes will be based, obviously enough, on all the evidence, voluntarily given and compelled, which it receives. However, when it makes a recommendation under s 74A(2)(a) of the Act it must have in mind that portion of the evidence which is admissible in a court of law,

... 2

otherwise the recommendation would be of limited weight. Bearing in mind the reference to 'the taking of action' in s 74A(2)(b) and (c) it would no doubt approach a recommendation under those subsections in the same way. Yet that does not seem to have been appreciated by all Government authorities and in some cases authorities have dismissed a person, as opposed to taking proceedings to dismiss him or her, solely on the strength of an ICAC report which contains a relevant recommendation and findings. Those findings may have been based partly on evidence which had been compelled and that evidence would not necessarily have been available to the authority in disciplinary proceedings (s37(3)).

Such an action may be grossly unfair if regard is paid to compelled evidence and, in any event, if the dismissal is challenged then the evidence will not be available for use in the court case, or inquiry. The proposition that a person can be dismissed on the basis of evidence which would not be admissible in disciplinary proceedings is one which is not only contrary to the spirit of the Act but is, in my opinion, indefensible. If then, as Mr Moffitt suggests, Parliament wished to have facts found which would enable it to consider whether action should be taken against, for instance, a Minister or a judge, there is a case for requiring those facts to be found on evidence which is admissible in a court of law or, at least, is not given under compulsion.

Otherwise, the protection afforded to witnesses by s37(3) of the Act will be circumvented by the use of the ICAC report (which on the stated hypothesis is partly based on compelled evidence) as the evidence on which to decide what action (which will, arguably, be disciplinary in nature) should be taken.

I turn now to the ICAC letter of 7 April 1993 which is expressed to be, in part, a further response to my submission (that word is ICAC's not mine for I was not making a submission but responding to a series of questions). I should say at once that I had sought only to proffer views and, while it was completely proper of ICAC to respond I do not believe that I should allow myself to be drawn into a debate. For this reason I will not offer criticisms of all the comments with which I disagree. Obviously, I do not accept the proposition that I have misconceived ICAC's role but my letter speaks for itself and, no doubt, the committee will reach its conclusions according to its perception of the role that ICAC should fulfil.

What, however, I am concerned with is the treatment of primary facts in Mr Temby's letter.

The concept of primary facts was explained in detail in clear terms by Mr Moffitt in his submission. In my letter I expressed the view, to which I adhere, that it was a concept well understood by lawyers, that it had been accurately explained by Mr Moffitt and that the finding of primary facts would involve an exercise in judgment in many instances.

I was also at pains to point out that findings of primary fact in an inquiry would, or should, demonstrate ICAC's findings as to what had occurred in the situation in a clear fashion.

Similar, but more detailed, observations on primary facts had been made by Mr Moffitt who, by reference to examples, demonstrated beyond argument that a finding of primary fact will, if the existence of the fact is in dispute, involve a determination as to which of the competing evidence is to be accepted. It follows that there is, as I sought to point out, a world of difference between findings of primary fact and a summary of the raw transcript of evidence.

Notwithstanding these statements, Mr Temby has submitted a response to my letter which, particularly in its discussion of the examples, indicates that he maintains a view of 'primary' facts which is completely inconsistent with what both Mr Moffitt and I have said. No doubt he is entitled to maintain an opinion and to construct an argument which is based on that opinion but I should make it plain that I regard that opinion as completely and demonstrably misconceived. On page 4 of his letter he says:

> "However, if the Commission's report had simply recorded the evidence given by Lennon, Smith, Dodic, Frezza, Berghoffer and Forsyth's denials, with no assessment of the reliability of the evidence and which evidence should and should not be accepted, then it would have been left to the RTA to decide whether it should accept Forsyth's denials or the evidence of others - a difficult if not impossible task."

This statement suggests that the course I suggested involved no more than recording the evidence which had been given. I did not suggest that ICAC be limited in that way in my letter nor do I now. What I did say is that ICAC should be confined to finding the primary facts.

Although I believe that expression should be well understood by now I think it is imperative, in the light of Mr Temby's letter, to amplify my earlier observations. In my letter I said that, because ICAC had quoted Lord Denning's statement in Bracegirdle's case, it appeared

as though ICAC agreed with Mr Moffitt's explanation of the phrase. It would seem that, notwithstanding the quoted passage of Lord Denning, I was wrong.

It will be recalled that in Bracegirdle Lord Denning said:

> "Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them."

That is a useful description which is well illustrated by the following example:

> A collision occurs between a motor vehicle driven by A south in Macquarie Street, Sydney, and a vehicle driven by B north. Each driver claims in evidence that the collision occurred on his correct side of the road and claims damages on the basis that the other driver was negligent. There is evidence from eye-witnesses and there are marks on the road. The judge evaluates all the evidence and concludes that the collision occurred while the vehicles were on A's side of the road.

That is a finding of primary fact. The consequential question is whether an inference should be drawn from that fact that B was negligent. A conclusion that the inference should be drawn is not a finding of primary fact but could be categorised either as a finding of a secondary or ultimate fact.

What is readily apparent is that the finding of primary fact involves an evaluation of the evidence and an assessment of the reliability of the witnesses. Further, the fact that a judge gives reasons for preferring the evidence of witness A does not involve finding secondary facts but is simply part of the process involved in finding the primary facts.

To go back to Lord Denning, this time in Smithwick v The National Coal Board ([1950] 2 KB 335 at 352):

> "One often gets cases where the facts proved in evidence - the primary facts - are such that the tribunal of fact can legitimately draw from them an inference ..."

Obviously a tribunal of fact is bound to determine what are the primary facts before it can decide whether the relevant inference should be drawn.

I take this to be trite law and I would indicate that a consideration of primary facts arises in a number of contexts in cases which are regularly before the courts. For instance, where a judge directs a jury in a case in which a plaintiff claims that an inference of negligence should be drawn he or she will direct the jury first to determine the primary facts and then to decide whether the inference should be drawn. Again where an appeal is brought from a factual finding of negligence the appellate court is constrained by well established principles to defer, except in very special cases, to the trial judge's findings on primary fact which are based, expressly or impliedly, on a view as to the reliability of a witness. To go back to my example, if an appeal was brought by B he would almost certainly be unable to challenge the finding on the primary facts and would have to argue that the judge was wrong to infer negligence. (This is discussed in the well known case of Warren v Coombs (1979) 53 ALJR 293 at 300-1.)

The point is that the courts are regularly required to consider whether the primary facts support a particular inference and well understand the concept.

I have not presently available the RTA report but if the issue was whether Forsyth had taken money from a large number of driving instructors then an acceptance of Lennon's evidence that Forsyth had taken money would lead to a finding of primary fact that Forsyth had done as Lennon said. And, of course, reasons can and should be given for the acceptance of that evidence. What would not be permitted, if ICAC was restricted to findings on primary facts, is a finding that an inference or a number of inferences should be drawn from the accepted evidence of the witnesses.

Why I hold the views I have expressed is that ICAC in drawing an inference is exercising a subjective judgment which is of no legal force and yet can be extremely damaging and may be wrong. If the primary facts are established then whether a damaging inference should be drawn is, or should be, for the courts of law or relevant disciplinary tribunals to determine.

What I am seeking to demonstrate is that the basic premise on which Mr Temby constructs his argument in opposition to the primary facts proposition is wrong. If that is so then the argument has little, if any, force. In truth the limitation I suggest will not hinder ICAC's ability to find the facts. All that it will do is prevent the commissioner subjectively from drawing secondary inferences from those facts or expressing conclusions on the quality of the conduct demonstrated by those facts.

An allied question arises whether the task of finding primary facts is as difficult as Mr Temby suggests. The fact that he has so obviously misconceived the task suggests, probably unwittingly, that it is all too difficult. I simply cannot accept this and I re-iterate the observation that the courts deal with primary facts every day. Obviously the application of the principle is not always completely straightforward otherwise you would not need trained lawyers as judges or as commissioners in inquiries. But what is clear is that the concept of primary facts is well understood and I find it hard to accept that the limitation I suggest will create significant difficulties.

Clearly I did not suggest, as the letter says, that there would not be litigation. There is always a possibility of litigation no matter now clear a point is. What I did say was that I could not see an increase in pointless litigation or an opened floodgate. What may occur, and this is not unusual with new legislation, is one or two challenges in which the principles are expressed and then everything settles down.

Two further points. Confidential reports will become public only if the act is breached for there is no justifiable reason why facts supporting a suggested reform should be communicated beyond those officers whose duty it will be to implement reform and they are bound to secrecy.

Finally, my suggestion about deferring publication is criticised. Unfortunately, the criticism does not mention the context of my suggestion and, worse still, is not faithful to it. What I said was:

> "Where, therefore, it concludes that the findings it might make in a case, in which it is satisfied there is prima facie evidence that an offence had occurred, might prejudice a subsequent trial it is empowered to defer making a public report. That sub-section could be amended to overcome the difficulty underlying the question so that it provides that in the event ICAC determines that there is prima facie evidence that an indictable offence has occurred it should defer making a public report until either a decision has been made by the DPP not to prosecute the persons involved or the prosecution has been concluded."

That appears in Mr Temby's letter as:

> "Mr Justice Clarke suggested that ICAC reports which might damage persons who may be charged should not be published until a decision has been made not to prosecute or the prosecution has been concluded. This would have the effect of delaying all reports for months and many for years - the position would soon

become intolerable for all concerned including those under suspicion."

I limited the occasions on which deferral might occur to those where ICAC made a prima facie determination indicating thereby that it was only in those cases in which ICAC informed the DPP of its opinion that there be a deferral. This could hardly delay all, or even a significant number of reports - as far as I can see ICAC did not express a view under s74A(2)(a) in the South Sydney, Blackmore or R.T.A. reports.

In any event my suggestion was that the course I proposed was preferable to following the course laid down in s19 of the Coroners Act. I doubt that Mr Temby would disagree with that proposition.

Yours sincerely,

[redacted]

Justice M J R Clarke.

JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

23 April 1993

The Hon Malcolm Kerr Esq MP,
The Chairman,
Committee on the ICAC,
Room 1129,
121 Macquarie Street,
Sydney, N.S.W. 2000

Dear Mr Kerr,

RE: I C A C

I have read the draft transcript of evidence given by Mr Moffitt QC and Mr Robertson and, while I initially did not think I would refer to that evidence, on reflection I have decided to make the following short observation.

If "primary facts" were defined along the lines of the definition suggested by Mr Moffitt then I think that nearly all of Mr Temby's objections would disappear. So far as I can see the only one which would remain would be the one that appears on the second page of his letter of 7 April in which he argues that the Commission should be able publicly to report its conclusions in appropriate language.

By this I take him to be saying that even if he could find the primary facts (as defined by Mr Moffitt) he needs the power to describe the relevant conduct in qualitative terms particularly if a witness before the Commission could not be prosecuted. I hope that by now I have made by opposition to this view clear.

The finding of primary facts would provide the necessary exposure and, as it seems to me, nothing constructive would be served by permitting a Commissioner to make qualitative subjective statements the effect of which would be to increase the damaging effect of a report upon individuals.

Yours sincerely,

[redacted]

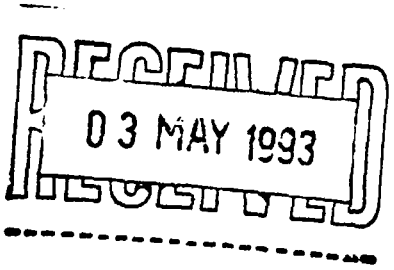
Justice M J R Clarke.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr David Blunt
Parliamentary Committee on the ICAC
121 Macquarie Street
SYDNEY NSW 2000

30 April 1993



Dear Mr Blunt,

Attached is the Commission's response to the most recent submission made, and evidence given, by Mr Moffitt QC, on 19 April 1993, as requested.

The Commission has also received a copy of comments made by Mr Justice Clarke about the Commission's last submission on primary facts. In the Commission's view the Committee's deliberations are not likely to be assisted by further responses and counter-responses on the same issue. The Commission does not resile from its previous submissions.

Yours sincerely,

[redacted]

Deborah Sweeney
Solicitor to the Commission

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SUPPLEMENTARY SUBMISSION BY THE ICAC

This submission on findings of primary facts is made in response to the submissions and evidence of Mr Athol Moffitt QC of 19 April 1993. It should be read in conjunction with the Commission's previous submissions.

Mr Moffitt QC's evidence supplemented his earlier submission that the ICAC should report only primary facts, and be prohibited from making "judgemental" statements about the conduct of named persons.

The Commission offers these views about that suggestion.

(a) Every other judicial and administrative tribunal in Australia with the power to find facts is entitled to comment on those facts where to do so is in the public interest. No judge, magistrate, royal commissioner, coroner or tribunal member faces a prohibition such as that suggested by Mr Moffitt. Where a court or tribunal has considered a matter, the behaviour of the parties or the public officials concerned or the practices undertaken are often "judgmentally" commented on. This is often of great help in the general process of reforming procedures and practices.

Mr Moffitt advances no real reason why the ICAC should be the only tribunal in Australia that is not allowed to comment on the facts it discovers.

(b) The ICAC has considerable experience in corruption prevention, ethics, accountability and public sector practices and is thus well able to comment on public sector behaviour in a considered and responsible way.

(c) It has long been recognised that the most effective way to communicate the urgency and importance of a problem and the need for change, is by example. The simple formula of showing:

(i) Matter X has occurred;

(ii) It is wrong, for A, B and C reasons;

(iii) It can be fixed by doing Y and Z;

has always been most effective.

To use a simple example, a bus crash on the evening news will make people seriously think about the road toll in a way that theoretical pronouncements by the NRMA concerning road safety will not.

The facts show the public that the problem is immediate and real, and give meaning to recommendations for reform that accompany them.

(d) The constraint suggested would necessarily lead to litigation. Parties would seek declarations that the statements in any report went beyond primary fact. Lack of merit is not a bar to commencement or continuation of litigation. Defining primary fact will also be difficult. Will it depend on the mathematical approach suggested by Mr Moffitt on page 2 of his submission that a primary fact is one that "stands alone"? Mr Moffitt said in his evidence (pp11 and 12) that primary facts can be inferred from other evidence but says in his submission (p2) that primary facts do not include factual inferences. This illustrates the difficulty. There can (and would) be significant disagreement and litigation concerning whether a fact stood alone in any complex situation. If the definition simply prohibited "judgemental" statements, as elsewhere recommended by Mr Moffitt, there would be significant disagreement and litigation about what was judgemental.

The only real reason advanced by Mr Moffitt seems to be an argument that the ICAC is somehow less democratically valid and inferentially less capable of reaching an accurate conclusion than a court.

(a) There is nothing less "democratic" about investigatory tribunals making decisions rather than Courts. Fair and effective inquisitorial systems of justice exist in many democratic European countries. Some argue that they work much better than the conflict based "adversarial" method upon which our court system is based.

(b) The ICAC is closer to and more accountable to the democratic process. It has been recently created by Parliament, the ultimate democratic institution, has bi-partisan support in both Houses and exercises the functions and powers given it by the Parliament.

(c) Further, the ICAC is permanently accountable to the bi-partisan Committee on the ICAC, which directly represents the New South Wales electorate, whereas Courts generally assert "Judicial Independence" from government and thereby the electorate.

(d) Apart from this direct "democratic" accountability, the Commission is also subject to judicial review if it exceeds its powers or makes any legal error, is operationally subject to the independent Operations Review Committee, and is subject to intense ongoing media and public scrutiny.

Mr Moffitt also supports his argument by reference to the Salmon Royal Commission on Tribunals of Inquiry. The Commission respectfully suggests that the relevance of the conclusions of the Salmon Report, published in 1966, must be tempered in the context which exists now, and did not then, that corruption is perceived to be such a serious problem, creating the crises of public confidence to which Salmon referred, that Parliament created a special body with special powers to deal with it.

Mr Moffitt also suggests that there be no publication of even primary facts where the Commission envisages a prosecution by the DPP. This would also give rise to serious difficulty. Firstly, it would require the Commission to second-guess the DPP. The DPP has a number of matters to independently consider when it makes the decision to prosecute which include the social benefit of prosecuting, the cost, and a number of other matters which it would be difficult for the Commission to predict. Further, the DPP may obtain more evidence, or have less evidence where witnesses become unavailable or memories fade. These things are impossible for the Commission to predict.

Many other practical difficulties would arise. For example, where the ICAC uncovered serious public corruption through evidence given under objection the matter would still be referred to the DPP who would require the Commission to obtain admissible evidence. If, after time, that could not be done and the DPP decided not to prosecute, Mr Moffitt (draft evidence p.29) would prohibit the ICAC reporting the facts. Accordingly, the serious corruption uncovered would never come to light. By analogy if the person were tried and acquitted Mr Moffitt would also object to the ICAC findings being published. Accordingly his proposals would effectively mean that any corruption serious enough to be an offence would never be reported unless and until a criminal conviction. This would render the fact finding function of the Commission almost useless. The courts are not set up to investigate corruption, as the Commission is; the courts deal with matters presented to them. ICAC findings are not provisional until confirmed by a court, and they should not be so regarded.