PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

INQUIRY INTO COMMISSION PROCEDURES AND THE RIGHTS OF WITNESSES

Second Report

TOGETHER WITH MINUTES OF PROCEEDINGS, AND RELEVANT EXTRACTS FROM SALMON REPORT

FEBRUARY 1991

COMMITTEE ON THE

INDEPENDENT COMMISSION AGAINST CORRUPTION

MEMBERS

Mr M J Kerr, MP (Chairman)
The Hon D J Gay, MLC (Vice - Chairman)
Mr J E Hatton, MP
Ms S C Nori, MP
Mr A A Tink, MP
Mr J H Turner, MP
Mr P F P Whelan, MP
The Hon R D Dyer, MLC
The Hon S B Mutch, MLC

STAFF

Ms R Miller, Clerk to the Committee
Mr D M Blunt, Project Officer
Miss G Penrose, Stenographer

FUNCTIONS OF THE COMMITTEE

INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

"64 1 The functions of the joint Committee are as follows:

(a) to monitor and to review the exercise by the Commission of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

(c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

2 Nothing in this Part authorises the Joint Committee -

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint."

CHAIRMAN'S FOREWORD

This is the second report of the Committee's "Inquiry into Commission Procedures and the Rights of Witnesses". The first report, released in November 1990, addresses the major concerns in relation to Commission hearings. Part One of this report deals with the outstanding issues of concern in relation to ICAC hearings. Part Two focuses on concerns in relation to Commission investigations. Part Three addresses a number of miscellaneous issues raised in evidence before the Committee.

The Committee received a large number of submissions to this inquiry and could have taken evidence well into 1991. However, the Committee felt it was important not to prolong this inquiry indefinitely but rather to report as soon as practicable with constructive recommendations to assist the ICAC in its performance of its functions. Together with the First Report of November 1990, this Second Report addresses the major issues raised with, and of concern to, the Committee in relation to Commission procedures and the rights of witnesses.

Of course the Committee will continue to pursue its monitoring and reviewing role in relation to the ICAC in an on-going way. However, now that the Committee has completed this inquiry it is up to the ICAC to continue with its important job and make procedural changes where these have been identified as necessary.

I would like to express my appreciation to all those who made submissions and to those who gave evidence before the Committee. I would particularly like to acknowledge the co-operation of the ICAC and the invaluable material provided by Mr Kevin Zervos and Ms Gail Furnesse of the Commission.

Lastly, I think credit is due to all members of the Committee who have approached this inquiry in a diligent and bipartisan manner.

M J Kerr MP
Chairman

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2.6.1 The Committee acknowledges that there are a number of factors making it difficult for the ICAC to give full content to the provisions of s.17(2) of the ICAC Act. The ICAC must ensure that all evidence it receives is carefully tested and witnesses at hearings will therefore sometimes be subjected to rigorous cross examination. Furthermore, the issues at stake are such that adversarial positions and tactics are almost inevitable. For these reasons "adversarial treatment" is likely to be something to which witnesses will from time to time be subjected at ICAC hearings.

2.6.2 The Committee notes and commends the steps taken by the Commission in terms of seeking and receiving submissions in writing. Furthermore, the Committee recommends that the ICAC conduct a study of the inquisitorial system of criminal justice practiced in Europe and elsewhere, and whether its application to Commission inquiries is appropriate, with a view to further consideration by the Committee.

Legal Representation

3.8.1 All persons who may be in peril of being prejudicially affected by an ICAC inquiry should have access to legal representation at ICAC hearings. However, the cost of legal representation is prohibitive for most private citizens. The cost of legal representation before the ICAC is an issue which requires further attention.

3.8.2 There are circumstances in which it would be appropriate for political parties and other unincorporated associations to be represented at ICAC hearings. The ICAC should seek a legal opinion as to whether this is possible under the ICAC Act at present. If the advice is that it is not possible, the Act should be amended.

3.8.3 The Committee recognises the difficulties the ICAC faces in making suitable arrangements for legal representatives and their clients who are advised at short notice of matters affecting those involved in Commission inquiries. The Committee notes and commends the steps which the Commission has taken in this regard.

Transcripts

4.4.1 The Committee welcomes the review by the ICAC of its transcript policy and the advice that witnesses will now be provided with a copy of the transcript of their evidence free of charge.

PART TWO - INVESTIGATIONS

Three-Tiered Approach

5.7.1 Mr Helsham's three-tiered approach is a helpful way of conceptualising the ICAC inquiry process. The Committee believes that public hearings, whilst having an essential role in ICAC inquiries, should so far as possible, be the end process of an inquiry. Public hearings would therefore be undertaken only when it becomes necessary for a matter or matters to be explored in that forum. The relevant issues could be more carefully sifted and tightly defined before they reach the public hearing stage. This would reduce the length and cost of hearings which are adversarial in demeanour and costly in terms of legal representation.

5.7.2 In view of the Cashman matter, the Costigan model and the recommendation contained in the Salmon Report, the ICAC should review its investigations policy. Consideration should be given to putting allegations to affected persons before a matter proceeds to the public hearing stage. At the very least, the letter of advice to affected persons should invite them to put their case to the Commission at the earliest opportunity.

Statements

6.6.1 Persons making statements to the ICAC should be provided with copies of their statements. The ICAC's policy in this area should be strengthened so that copies of statements are made available to those making them except in the most exceptional circumstances.

6.6.2 The Committee notes that there are existing sanctions against the perversion of the course of justice. However, if the ICAC considers it necessary, it should seek an amendment to the ICAC Act to provide for a specific offence which would prohibit a person from disclosing the contents of a statement to anyone other than that person's legal representative.

Property

7.4.1 It is important for the ICAC to provide a high level of documentation when property is seized or produced. The Committee notes the advice of Mr Zervos that this is an area in which the ICAC acknowledges there may be room for improvement and where the Commission would be prepared to review its current practice.

7.4.2 The ICAC has a responsibility to return property to its owners promptly when it is no longer required. In circumstances where property is held for long periods of time due to continuing inquiries, either by the ICAC or agencies with which the ICAC is working in co-operation, the Commission needs to provide better advice to persons about the reasons for the delay in the return of their property. The Committee notes the advice of Mr Zervos that this is also an area in which there may be room for improvement and where the Commission would be prepared to review its current practice. It is the view of the Committee that where appropriate the Commission should provide access, by appropriate means, to property which is held.

7.4.3 Where a person is not legally represented the ICAC should have regard to the confidentiality of any material which becomes an exhibit. However, where a person who is legally represented wants to ensure that material which becomes an exhibit at an ICAC hearing is not published, the primary responsibility lies with the legal representative to apply for a suppression order. The Commission should bear in mind the injustice that can be occasioned by the publication of confidential documents.

PART THREE - MISCELLANEOUS ISSUES

Riordan Matter

8.5.1 The ICAC needs to recognise the impact of naming a person in one of its reports. Where a person is named in a report and there is no suggestion of impropriety, consideration should be given to the inclusion of a brief statement to that effect. Consideration should also be given to the inclusion of a standard notice in a prominent place at the front of ICAC reports indicating that no inference of wrongdoing can be drawn against a person merely because they are named in an ICAC report. The Committee sees merit in the following proposed wording.

> "Persons against whom adverse findings are made in this Report under the Independent Commission Against Corruption Act 1988 are named at page *XX* of this Report. The fact that other persons are named in this Report does not constitute an adverse finding against them and no inference of wrongdoing can be drawn merely because a person is named in this report."

8.5.2 The ICAC should give consideration to contacting any person who is to be named in a report. Moreover, where the report is to contain commentary about a person, fairness dictates that the Commission should provide that person with an opportunity to be heard in relation to any evidence which concerns them.

Alleged Political Bias

9.8.1 The Committee has examined and taken evidence with regard to the allegations of political bias made against the ICAC. The Committee has found them to be without foundation.

9.8.2 Mr Roden's response to the allegation of political bias in the North Coast report speaks for itself. To the extent that donations to the National Party and Labor Party are dealt with differently in that report, it should be noted that the ICAC was given access to different levels of information by the two parties. Mr Toomey's response to the allegation of political bias against him also speaks for itself.

Contempt

10.4.1 The contempt issue is one which requires further consideration before any legislative change could be recommended.

10.4.2 The ICAC needs to exercise its contempt powers with restraint. Except in the most exceptional circumstances the Commission should be robust enough to allow criticism to be vented. The Committee notes Mr Temby's advice that "it is not as if we (the ICAC) are strongly inclined to commence litigation or to protect ourselves against any criticism".

CHAPTER ONE

INTRODUCTION

1.1 Background

1.1.1 On 15 August 1990 the Vice-Chairman of the Committee, the Hon Duncan Gay, announced the terms of reference of the Committee's current inquiry to the Legislative Council. These are:

1 To review the exercise by the Commission of its functions relating to witnesses and other interested parties who appear at Commission hearings or who otherwise assist the Commission in its investigations; and

2 to report to both Houses of Parliament on any changes which should be made to Commission procedures or the Independent Commission Against Corruption Act 1988 (with particular reference to, but not restricted to, matters relating to Commission hearings and the rights of witnesses).

1.1.2 On Saturday 18 August advertisements appeared in the major metropolitan newspapers advising of the Committee's inquiry and calling for submissions. A form letter dated 23 August was sent to all witnesses and legal representatives who had appeared at public hearings of the ICAC inviting submissions by 28 September.

1.1.3 By early October the Committee had received more than 60 submissions. Most of these submissions were from witnesses and legal representatives who had appeared at ICAC hearings. However, a small number of submissions (10 in total) dealt with the material contained in a discussion paper prepared for the Committee by the Hon Athol Moffitt QC, CMG, entitled "Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations".

1.1.4 The Committee resolved to tackle this inquiry in two stages, dealing initially with the matters raised in Mr Moffitt's discussion paper. Two public hearings were held in October and, following deliberations by the Committee, a report was released in November 1990 entitled, "Inquiry into Commission Procedures and the Rights of Witnesses: First Report". That report addressed the question of public vs private hearings, the problem of damage to reputations and made a number of recommendations aimed at minimising unnecessary or unfair damage to reputations.

1.2 Selection of Witnesses

1.2.1 Following the preparation of the first report the Committee was in a position to move on to examine the issues raised in the bulk of submissions received from witnesses and legal representatives who had appeared at public hearings of the ICAC. As mentioned

above the Committee had received over 60 submissions. It was obvious that it would not be possible for the Committee to receive evidence from all those who had made submissions.

1.2.2 A sub-committee was formed to examine the submissions and to determine who should appear to give evidence before the Committee. This sub-committee, consisting of Mr Gay, Mr Dyer and Mr Hatton, met together with the Chairman and Project Officer on 16 November. In examining the submissions the sub-committee noted that a number dealt with issues outside the terms of reference of the inquiry or outside the Committee's jurisdiction (see section 64 of the ICAC Act inside the cover of this report). It was also noted that a number of submissions were received from persons about whom findings had been made in ICAC reports recommending consideration of prosecution. In cases where the Director of Public Prosecutions had yet to make a decision on the ICAC's recommendations, the sub-committee decided it would be inappropriate for these persons to give evidence before the Committee. It was also noted that a number of submissions related to inquiries on which the ICAC had not yet reported. The sub-committee decided that it would be inappropriate for the Committee to hear evidence in public related to these inquiries until such time as the ICAC had reported. Finally, the sub-committee was left with a list of twelve persons from whom it recommended that the Committee should receive evidence. These persons were then contacted and in most cases suitable arrangements were made for them to be able to appear before the Committee.

1.2.3 The sub-committee subsequently met with the Commissioner of the ICAC, Mr Ian Temby QC. It was agreed at that meeting that for this inquiry to be effective it would be necessary for the ICAC to provide a response to the issues raised in evidence before the Committee and any other submissions which were to be taken into account. Consequently a number of other persons were approached and their consent was sought for either their submission or a confidential summary of their submission (which did not identify them as the author) to be forwarded to the ICAC for a response.

1.3 Hearings

1.3.1 The Committee conducted three public hearings in December. The witnesses who appeared are set out below.

Tuesday 11 December 1990

The Hon J M Riordan, Deputy President, Australian Industrial Relations Commission

Mr Doug Moppett, Chairman, National Party of Australia - NSW

Mr Stephen O'Halloran, Solicitor, White Barnes and McGuire

Mr J W Bradshaw, Managing Director, The Bradshaw Group; and Mr J J Watt, Manager and Director, Bradshaw Waste Industries

Ms Suzanne Jones, Project Manager, Department of State Development

Mr Barry Toomey QC, Barrister at law.

Wednesday 12 December 1990

Chief Inspector Bob Cashman, Patrol commander, Hurstville Police (evidence taken "in camera")

Mr Stephen Connelly, Director, Planners North

Mr Bob Steel, Managing Director, Travel Scene Pty Ltd

The Hon Michael Helsham QC - Former Supreme Court judge; Commissioner in two Commissions of Inquiry; Assistant Commissioner of ICAC for Walsh Bay inquiry

Monday 17 December 1990

Mr Kevin Zervos, General Counsel, ICAC

1.3.2 When Mr Zervos appeared on Monday 17 December he responded in general terms to the matters raised by witnesses on 11 and 12 December. He was also questioned about the detail of some of these matters by Committee members.

1.4 Other Submissions taken into account

1.4.1 In addition to the evidence taken at the hearings on 11,12 and 17 December the Committee also took into account a number of other submissions and the response received from the ICAC. Details of these submissions which were forwarded to the ICAC for advice are set out below. The ICAC's response, in the form of a further submission to the Committee from Mr Kevin Zervos, was received on 25 January 1991.

Submissions Forwarded:
Mr P Lynch
Mr P Mansford
Mr R Micallef
Mr P Watkins
Mr R Marshall
Mr A Macdonald

Four edited versions of confidential submissions were also forwarded to the ICAC for a response.

1.5 This Report

1.5.1 A draft version of this report was prepared during January 1991. This draft was considered by the Committee at its meeting on 29 January, and subject to a number of amendments, was adopted by the Committee at that meeting.

1.5.2 The Committee's first report on the "Inquiry into Commission Procedures and the Rights of Witnesses" deals with the major issues of concern in relation to Commission hearings. This second report deals with the remaining issues of concern in regard to the Commission hearings and then focuses upon matters relating to Commission investigations. It also deals with a range of miscellaneous issues raised in evidence taken before the Committee at its December hearings.

1.5.3 The report contains extensive quotations from the Minutes of Evidence taken before the Committee at its public hearings in December. There are two reasons for this. Firstly, the high quality of much of this evidence - the Committee felt it was important for this evidence to be placed on the public record. Secondly, the Committee was of the view that it was important for this material to be included so that it would be clear how the Committee reached its conclusions and formulated its findings and recommendations on the matters under review.

1.5.4 During the course of this inquiry the Committee has had considerable regard to the Report of the 1966 Salmon Royal Commission into Tribunals of Inquiry in England. A number of quotations from that report appear in this report. Furthermore, a number of the key sections of that report appear as an appendix to this report.

PART ONE

COMMISSION HEARINGS:

OUTSTANDING ISSUES

CHAPTERS TWO TO FOUR

CHAPTER TWO

ADVERSARIAL TREATMENT

2.1 Background

2.1.1 The alleged adversarial treatment of witnesses and the alleged adversarial demeanour of Commission hearings is an issue which has been of concern to the Committee for some time. This arises from the need for the Commission to give proper content to the provisions of section 17 of the ICAC Act. Section 17 provides that:

> "(1) The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.
>
> (2) The Commission shall exercise its functions with as little formality and technicality as is possible, and, in particular, the Commission shall accept written submissions as far as is possible and hearings shall be conducted with as little emphasis on an adversarial approach as is possible." (emphasis added)

2.1.2 Mr Dyer has raised this matter with the Commissioner of the ICAC, Mr Ian Temby QC, at two public hearings of the Committee on 30 March and 15 October 1990.

2.2 Complaints Received

2.2.1 Complaints about adversarial treatment were raised in a large number of submissions, particularly those from persons who had appeared as witnesses in the North Coast inquiry. In most cases the complaint was directed at Counsel Assisting, Mr Barry Toomey QC. Some submissions also directed complaints at the Assistant Commissioner who conducted the inquiry, Mr Adrian Roden QC.

2.2.2 Some submissions used very emotive language to describe their alleged adversarial treatment and the demeanour of the Commission hearings. They spoke of the "hothouse" atmosphere and "highly pressurised" atmosphere of the Commission. Some referred to "smart innuendo" and "cynical assertion". Some wrote of being "savaged by an unfettered Counsel Assisting" and being "denigrated and ridiculed" by the Commission's senior counsel.

2.2.3 The National Party in its submission asserted that the atmosphere of the North Coast inquiry was excessively adversarial.

> "The hearing rooms are, in fact, set up to promote the appearance of an adversarial court room environment.

> The degree of formality and its adversarial approach is maximised under the current Commission administration, not minimised as required by the Act.
>
> In the National Party's opinion there were occasions in the North Coast investigation when at the public hearings, the Commissioner and Senior Counsel Assisting the Commissioner, were excessively adversarial in their treatment of certain witnesses, notwithstanding s.17(2) of the Act."1

2.2.4 Mr Stephen Connelly, Director of Planners North, appeared before the Committee on 12 December. His submission detailed what he believed to be adversarial treatment by Counsel Assisting the Commission in the North Coast inquiry.

> "I found the demeanour of the hearing most disturbing. I made myself available to the Commission in an endeavour to widen its knowledge concerning developmental matters. I found myself in a situation where I perceived that I was being treated as "the enemy". Further, I was not treated anywhere near the professional respect accorded by jurisdictions with which I was familiar. Upon arrival at the hearing chambers I sought access to my files which had been handed up to the Commission some months before. Such access was not provided to me. Instead, I was lead into what felt like an "entrapment process", Mr Toomey, Counsel assisting the Commission, extracting material from my file, out of context and out of sequence, and seeking of me information in respect to the specifics of that particular extract. Without the ability to refresh my memory concerning the file and being lead material out of context and out of sequence from such files, Counsel seemingly sought to make me appear a rogue or a fool."2

2.2.5 However, it should be noted that when Mr Connelly was asked to clarify certain points of his complaint, a somewhat different picture emerged.

> "**CHAIRMAN:**
>
> Q: In relation to cross-examination by Mr Toomey, you mention that you felt there was an entrapment process whereby Mr Toomey extracted material from your files out of context and sought specific answers with regard to that material?

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1 Minutes of Evidence taken before the Committee on the ICAC, 11 December 1990, pp 48 - 49.

2 Minutes of Evidence, 12 December, p 4.

MR CONNELLY:

A: Yes.

Q: In the process of that cross-examination, do you recall whether you asked for access to those files?

A: Yes, I did.

Q: What was the response?

A: I was given access to them.

Q: You were given access to them?

A: I asked for access, though, before coming into the hearing room. I arrived quite early in the morning, asked if I could have access to my files and waited; and then I was called to give evidence. My files are probably much like yours, in the sense that they are not precisely in chronological order. Pieces of paper get put on the file, and unless you re-familiarise yourself with a file, it is very hard duty.

Q: I understood what you were saying is that Mr Toomey in the course of his cross- examination was putting to you extracts from your files?

A: That is correct.

Q: You then wished to have access to those files in order to answer the question in the context of the file note?

A: Yes.

Q: You say you were given access by Mr Toomey?

A: Yes, I was. What I am saying is that it was difficult to answer his question, notwithstanding having access to the files.

Q: Nevertheless he did not impede you?

A: Not in that regard,no.

Q: But you say that "Counsel seemingly sought to make me appear a rogue or a fool"?

A: Yes.

Q: In relation to the appearance of being a rogue, do you say that Mr Toomey at any time put to you that you were a criminal?

A: No, not in the explicits but in the sense of asking me questions about particular projects and so forth and asking me about documentation in my file and so forth; and I got the feeling that I was not able to fully answer those questions. I certainly got the feeling that they were being put to me in a manner that either I was a rogue or a fool.

Q: Where any questions put to you by Mr Toomey that suggested that you were a dishonest person?

A: No."3

A reading of the transcript of Mr Connelly's evidence before the ICAC indicates that he was granted access to his files during examination by Mr Toomey. However, there were other occasions when he was pressed to a "guess" or "guesstimate" rather than going through his files. There was no suggestion or inference made that Mr Connelly was dishonest or incompetent.4 When Mr Toomey appeared before the Committee he assured the Committee that "there was nothing special or inimical or intimidatory about the manner in which Mr Connelly was dealt with".5

2.3 ICAC Response

2.3.1 When Mr Zervos appeared before the Committee on 17 December he addressed this concern. He pointed out that whilst ICAC hearings are not adversarial in the technical legal meaning of that term, the Commission readily acknowledged that witnesses were subjected to rigorous cross examination.

"MR ZERVOS:

A: Two comments that have been made can be considered together. One is a criticism of the inquisitorial nature of the proceedings; the other that they are allowed to become 'too adversarial'. There may be misunderstanding of the terms. That is of no moment. The fact of the matter is that proceedings are basically inquisitorial, as is clearly intended by the Act. They are not adversarial, in that there are not parties contending against one another.

The real complaint relates to the treatment of witnesses. There is no doubt that some are

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3 ibid, pp 9 - 10.

4 Transcript of proceedings of the ICAC, 28 September 1990, pp 3555, 3556, 3559 and 3564.

5 Minutes of Evidence, 11 December 1990, p 153.

questioned vigorously. It can be appreciated that that is not a pleasant experience. Section 34 of the Act provides that a witness be examined or cross-examined. It appears that people who have given evidence before the Commission have been offended by the fact that their word has been tested by the questioning of the presiding person or counsel assisting.

What has to be considered in this regard, is the Commission's duty, and the way in which it can best be performed. It is the objective of the Commission to seek out the truth and that may require testing a person's word.

An investigation involving the examination of witnesses is not conducted properly or effectively if every statement made by a witness is accepted at face value. An essential part of the process is the testing of a witness."

"MR ZERVOS:

A: ... the Commission has a duty to test the evidence of witnesses, and it is in the performance and execution of that duty that people who come before the Commission have their word tested - it is the proper and dutiful function of the presiding officer and counsel assisting and any other legal representative who may be there and who have sought to obtain leave to examine the witness."6

2.3.2 When Mr Toomey appeared before the Committee, he answered a number of questions from Mr Gay about advesarial treatment of witnesses and outlined what he saw as his role during the North Coast inquiry in cross-examining witnesses.

"MR TOOMEY:

A: Cross examination is the most powerful weapon I know - cross examination by experienced counsel, properly briefed, is the most powerful weapon I know for exposing lies and, indeed, for exposing the truth ... my cross examination in respect of every witness who came before the North Coast inquiry was aimed at establishing the truth. If, for example, there was a statement tendered to the commission by a witness on a relatively non-controversial matter, and that statement was corroborated by a number of other witnesses who had said much the same thing, and if the witness had no interest to lie that was apparent, then it

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6 Minutes of Evidence, 17 December 1990, p 12 and 28.

may be that my questions of that witness would have been very gentle indeed because there would be nothing to suggest to me that the material might be false. But, when witnesses on matters which were the fundamental basis of the inquiry gave evidence of matters where there was contrary evidence, where the witness had an interest to say something which may or may not have been the truth, then I judged it to be my duty, as I would think any Queen's Counsel in my position would have thought, I judged it my duty to test what was being said.

Now, I never put to any witness as the fact anything for which I did not have a basis in other evidence or other material. I am not holding myself forward as being a paragon. That is the duty of the barrister. I never put any question to a witness suggesting misconduct, suggesting lies, suggesting an attempt to mislead unless there was a basis for so doing. May I remind you that that cross-examination resulted in a number of people ... admitting after very lengthy cross-examination that they had lied to the commission. Now, if I had not and the commissioner had not adopted the probing and adversarial, if you like, stance that we did, those admissions would never have been gained...

Mr Gay, could I just answer the second part of your question which was the suggestion that the atmosphere was intensely adversarial. It got fairly heated at times because there were areas which were very combative. I mean, there, were for instance, people who were swearing 180 degrees to the commission and people who were swearing 360 degrees to the commission.

MR GAY:

Q: Could you clarify that?

A: Yes. I mean some were saying white and some were saying black. They were swearing the opposite, and the commissioner of course, as was his duty, was intensely concerned to get the truth, and I can tell you that some of the intensely adversarial cross-examination of which you speak was occasioned by the refusal of witnesses——and educated, knowledgeable witnesses——to acknowledge that black was black or that white was white. Many of the witnesses we heard simply refused to admit the plain truth when it was placed before them and that was one of the reasons for the

adversarial nature of the proceedings."7

2.3.3 As mentioned above, Mr Dyer has raised this matter with Mr Temby at two previous public hearings of the Committee. In outlining the ICAC's response to the criticism that has been levelled at it, it is worthwhile to note Mr Temby's response on both occasions.

"MR DYER:

Q: Finally, could I put a question to you with which you probably will not find yourself in agreement. If the ICAC is intended to operate in a non-adversarial manner, why are many witnesses at public hearings being treated in an adversarial way by counsel assisting the Commission?

MR TEMBY:

A: I do not think that they are so treated. In fairness to counsel assisting, if they are, then presiding officers must take a fair share of the blame for that, so I would not want anyone to think that I am shaking my head and saying you cannot control them.

By and large, counsel assisting are doing the job we want them to do. They might sometimes go a bit far, but by and large they are doing the job we want in carrying out a satisfactory investigation where the facts are not known and in the nature of things are likely to be hidden, with a strong desire for them to remain hidden. It is necessary to have special powers and it is necessary to ask probing questions and it is necessary to give people the opportunity to reply, which means that allegations have to be put to them, because if we did not put allegations they would say "We had no chance to reply; this is outrageous".

I really do think that a proper understanding of the necessity to give justice to individuals and to witnesses would go far to persuading people that we are not being adversarial in nature and we are not being nasty for the sake of it. This is about how the job has to be done. If you ask me whether I would rather appear in the witness box before the ICAC or go to the police station to be questioned about a matter of real significance in a court context, I think I would opt for us. We are investigators: they are investigators. I think I would rather be in our

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7 Minutes of Evidence, 11 December 1990, pp 149 - 150.

hands than police hands when police are conducting a major criminal investigation. They push pretty hard. We do it at least under scrutiny: the police could not. At least people come along and watch, and if we turned into bullies we would be exposed as such."8

"MR DYER:

Q: 6.1 **In view of s.17 of the ICAC Act, what steps are being taken to make Commission hearings more informal and less adversarial?**

MR TEMBY:

A: The difficulty that is encountered was adverted to when last I appeared before the Committee, and I have not a lot to add to it. It is easy to say that proceedings should not be adversarial, and that informality is desirable. We try hard to give those provisions content, but the Act says that witnesses or SDIs are entitled to legal representation. The law says that natural justice must be accorded to people. Accordingly, whether you like it or not, the Commission is at least sometimes very lawyer-ridden. Indeed you could say it is excessively lawyer-ridden when you see the well of the hearing room chockfull of lawyers, some of whom do not perform any useful function as far as I can see; but you cannot prevent that, it is a matter of statutory right.

Once you have a roomful of lawyers you are going to have a fair degree of formality and the thing is going to be run in a manner which is not far distant from the way the courts are typically run. In some respects we can do it better because we are not bound by the best evidence rule, which is very important. But given other provisions of the Act, it is a very difficult matter to give as much content to s.17(2) as I would like to, despite best efforts. But I also say in relation to written submissions, I take that provision seriously. It is cast in mandatory terms. I do frequently call for written submissions; presumably the idea is that this will save time and expense. In relation to two major hearings which have come to a close recently, the driver licence hearing and the Sutherland licensing police hearing, the written submissions from some parties are very badly out

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8 Committee on the ICAC, Collation of Evidence of the Commissioner of the ICAC, Ian Temby QC, on General Aspects of the Commission's Operations, 30 March 1990, pp 10 and 11.

of time. By that I mean we have been waiting for them for weeks beyond the time stipulated. There is not much one can do about it. I can proceed to write a report which ignores submissions that are late, but that would be seen by most to be playing hardball, and I am disinclined to do that. Then what do you do about it?

Q: Because they are lawyers?

A: These people just will not perform, and that is holding up the work the Commission has got to do and it seems to me it is a very unsatisfactory state of affairs. The written submissions are presumably to save time and save expense. Instead in some cases they cause a great deal of time to be wasted and you say 'What's the point, why not just listen to them'.

Q: From the Commission's point of view you are saying that you are endeavouring to give this provision for written submissions full force and effect?

A: I am trying to, but with the absence of greater co-operation from some members of the legal profession it gets more and more difficult. We have to get on with the job.

Q: Are you saying that the legal profession is frustrating you?

A: No. In fairness I have no reason to think that because these submissions are being held up, the profession or any part of it is trying to frustrate us. I am not saying that. They are busy and have other things to do. They know that a substantial report is going to take some time to write and I suppose they make their own judgment about priorities. It is frustrating from my end of the process, that is all.

Q: Flowing from what you are saying, would it be useful to have statutory power to convene a directions hearing and to give directions as to the furnishing of written submissions within a given period of time?

A: No, because I can get them back if I want to and read the Riot Act to them. I say, after consultation, 'All right, now I think we can do this by written submissions; what do you say?' and they all respond. 'How does this timetable sound? Counsel assisting, three weeks from tomorrow, others a week or ten days thereafter. If anybody thinks that it is desperately

essential to speak to the written submission you have to tell me within a given time.' Everybody says 'That's fine', so I say 'I will so order', but they do not perform. I do not know that we could do much more. I could get them back and read the Riot Act, but then they say 'Sorry, we are busy, I am doing a murder trial that went for an extra two weeks.' Some of these people are very busy indeed. Some of it is waffle but most of them have a better excuse than just inactivity. That I think is all I can usefully say about 6.1."9

2.4 Mr Helsham's Comments

2.4.1 The Hon Michael Helsham also addressed this issue when he appeared before the Committee on 12 December 1990. He suggested that because of the nature of the issues being investigated at ICAC hearings, adversarial treatment or adversarial proceedings were inevitable.

"MR HELSHAM:

A: The second main question which you asked in your letter, Mr Chairman, was problems created by the adversarial nature of proceedings. I have dealt with that in my submissions and I summarise it by saying that I doubt if you can get rid of them because under the way in which I conceive certain commissions to be conducted, as it were, you have narrowed everything down in ambit, if you can, and then I think you are stuck with adversarial proceedings because you have allegations or evidence of corrupt conduct on one side, and you have a quasi-prosecutor in the form of counsel presenting the evidence in public hearing. It is alleged that that corrupt conduct was the subject of some person's activities because it has to be corrupt conduct by someone. So you have a person in the position of a quasi-defendant. I do not see how in our society in that situation you are going to avoid adversarial proceedings or an approach when you have narrowed your inquiry down to that stage, but my thought is that you get rid of, as it were, all the dead wood or anything else that might otherwise have been adduced in public hearings and it is restricted, as it were, to those issues or that issue in the public hearing."10

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9 Committee on the ICAC, Collation of Evidence of the Commissioner of the ICAC, Ian Temby QC, on General Aspects of the Commission's Operations, 15 October 1990, p 42.

10 Minutes of Evidence, 12 December 1990, pp 68 - 69.

He also made the point that the very involvement of lawyers trained in the adversary system meant that ICAC hearings would take on an adversarial demeanour.

2.4.2 Mr Helsham's major suggestion for overcoming this situation was for the number of hearings to be carefully defined in their scope and kept to a minimum (see chapter 4). He also recommended that a study be made of the inquisitorial system of criminal justice that is practiced in Europe and elsewhere.

> "**CHAIRMAN:**
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> Q: At pages 11 and 12——and you have touched on this in your commentary today——about the major problems concerning ICAC hearings relating to the inappropriateness of the adversarial practices, you suggested that more should be found out about the inquisitorial system and that investigations could be largely conducted without recourse to hearing. Can I have your comments on the source of that information and the manner in which it should be obtained?
>
> **MR HELSHAM:**
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> A: I am very interested to know how they do things elsewhere. We have this court system, with adversarial procedures, in the minds of our lawyers. Very few lawyers can think sideways. When we go into a proceeding like this we think along conventional lines. They do it differently elsewhere. The old judge gets involved in the thing right from the start. How much involved and what he does and how much help he has and how he conducts hearings and for what purpose is something about which I know nothing. I beg to say that there are very few people in the commission, and certainly in the ranks of lawyers, who do know anything about it. It is worth sussing this out in my view to see whether we can get something that is apposite to an inquiry. This is not a court case; it is an inquiry. I do not think we know enough about handling inquiries. That is why I have suggested that somebody should do a study, to see what would emerge."11

2.5 Conclusions

2.5.1 The Committee acknowledges that the ICAC has a duty to see that all evidence it receives is properly tested. This means that witnesses at Commission hearings will sometimes be subjected to rigorous cross examination by senior counsel. As in the case of the North Coast inquiry, this may be an unpleasant experience

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11 ibid, pp 70 - 71.

for witnesses, but it is certainly part and parcel of the work of Counsel Assisting and Commissioners presiding at hearings.

2.5.2 Whilst ICAC hearings are not technically adversarial, in the sense that there are not parties contending against one another, it is nevertheless the case that ICAC hearings will often take on an adversarial demeanour. This may be attributed to the nature of the issues being dealt with, in many cases potentially very serious criminal offences. Furthermore, as Mr Helsham pointed out, once the issues have been defined, there are in effect quasi-prosecutors and quasi-defendants in some ICAC hearings. Consequently the stakes are high and adversary positions and tactics may be adopted.

2.5.3 These matters are exacerbated by the presence of legal representatives familiar with adversarial proceedings. The greater the level of legal representation, the more likely the adversarial nature of proceedings. (See chapter 3.)

2.5.4 For each of these reasons the Committee acknowledges that it is difficult for the ICAC to give full content to the provisions of s.17(2) of the ICAC Act. On the other hand, the Committee notes the large number of submissions received which complained about the demeanour of the North Coast inquiry. The Committee notes that whilst rigorous cross examination was quite justified, every care must be taken by Commission personnel to ensure the appropriate demeanour for Commission hearings. Assistant Commissioner Roden made important comments to this effect at the Fourth International Anti-Corruption Commission Conference held in Sydney on 16 November 1989:

> "This imposes an enormous responsibility upon those conducting the investigations and related hearings. There is no room for the personal whim or odd quirk when dealing with lives and reputations of others in a context and atmosphere that are short on checks and balances and generally free from the control of appellate proceedings."

In this regard the Committee notes with concern some of the comments of Mr Justice Wood in a judgement dated 22 March 1990.

> "While these passages do reveal unfortunate and undignified expressions of irritation and, on occasions, sarcasm, which to some extent were understandable at the end of a long and wearing inquiry in which many technical and legalistic points were taken, they also reveal in a telling way that the Commissioner was carefully listening to and trying to follow the submissions which were being put. When they seemed irrelevant or incorrect, they were stopped and tested. It is clear that the learned Commissioner was doing his utmost to keep the inquiry to relevant matters and to understand what was being put. Others may well have behaved with more patience, politeness, and awareness of the possible risks attached to ill

> temper and sarcasm, but when read in their entire context and in the light of the foreshadowed issues, I do not believe that the Commissioner passed over the line between robust control of the inquiry and unfair and uneven-handed treatment."12

2.5.5 Despite the factors outlined above which make it difficult for the ICAC to give full content to the provisions of s.17(2) of the ICAC Act, the Committee notes and commends the steps taken by the Commission in terms of seeking and receiving submissions in writing. Furthermore, in view of Mr Helsham's recommendations, the Committee recommends that the Commission conduct a study of the inquisitorial system of criminal justice practiced in Europe and elsewhere, and its potential application to ICAC inquiries.

2.6 Findings and Recommendations

2.6.1 **The Committee acknowledges that there are a number of factors making it difficult for the ICAC to give full content to the provisions of s.17(2) of the ICAC Act. The ICAC must ensure that all evidence it receives is carefully tested and witnesses at hearings will therefore sometimes be subjected to rigorous cross examination. Furthermore, the issues at stake are such that adversarial positions and tactics are almost inevitable. For these reasons "adversarial treatment" is likely to be something to which witnesses will from time to time be subjected at ICAC hearings.**

2.6.2 **The Committee notes and commends the steps taken by the Commission in terms of seeking and receiving submissions in writing. Furthermore, the Committee recommends that the ICAC conduct a study of the inquisitorial system of criminal justice practiced in Europe and elsewhere, and whether its application to Commission inquiries is appropriate, with a view to further consideration by the Committee.**

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12 Wood J, 22 March 1990, Paul Edward Glynn, Robert William Steel, Ocean Blue Fingal Pty Ltd vs ICAC, Ocean Blue Club Resorts Pty Ltd vs ICAC, pp 55 - 56.

CHAPTER THREE

LEGAL REPRESENTATION

3.1 Need for Legal Representation

3.1.1 The need for legal representation for persons concerned with the substance of an inquisitorial inquiry, such as an ICAC inquiry, has been well established. The report of the Salmon Royal Commission into Tribunals of Inquiry identified the right to be legally represented as one of the six cardinal principles which should be strictly observed in order to improve the safeguards for witnesses and other interested parties involved in such inquiries.

> "We recommend that ... anyone called as a witness would have the right to be legally represented. It is unlikely that any witness will go to this expense unless he considers that he is in real peril of being prejudicially affected by the inquiry - and he may know more about his peril than it would be possible for the tribunal to know before the evidence is taken. We can see no reason why a witness who in the public interest is to be subjected to an inquisitorial form of inquiry and its attendant publicity should not be accorded this elementary right of being represented should he consider himself to be in peril."13

3.1.2 This need is recognised in the ICAC Act. Section 33 (2) provides that:

> "(2) The Commission is required to give a reasonable opportunity for a person giving evidence at the hearing to be legally represented."

3.1.3 A number of legal representatives who appeared before the Committee re-affirmed the need for legal representation for those who may be in peril of being prejudicially affected by ICAC hearings.

> "MR TOOMEY:
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> A: ... If a person is merely a witness with no interest, merely giving evidence of some facts which touch on the inquiry but without having an interest themselves, then it is difficult to see how they could possibly need representation, especially if they were telling the truth. If,

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13 Report of Salmon Royal Commission into Tribunals of Inquiry, Cmnd. 3121, 1966, p 23.

however, a person is in a position where he or she may be affected by the result of the inquiry, as for instance a property developer or a politician, then I do not find any sort of difficulty with facing the fact that a person with an interest who is before an inquiry which may affect their life may need representation. I mean, that simply makes sense to me and I do not see how it could be a ground for criticism. I would see it as a ground for criticism if people who have no interest and who are bare witnesses, if you understand the distinction I am making, if they felt the need for representation, but I really do not see how they could if they were simply telling the truth."14

"MR GAY:

Q: Would you recommend that any of your clients appear, in any capacity, before the ICAC without a barrister?

MR O'HALLORAN:

A: It would have to be determined to some extent by the circumstances of the matter, in that if one had adequate notice of the area of inquiry, then if the client felt that it was simply too expensive to employ counsel and the client was happy to have myself or someone else appear less than a barrister——a solicitor——then I might say to them, "If that is your instruction, I accept that". But certainly if someone were in a position of some degree of peril, I would recommend that they employ counsel. One thing has to be understood by this Committee and that is there are vastly different areas of legal work between counsel and solicitor. The role of barrister is very much a specialist role. Certainly appearing before inquiries or in courts is the part of counsel. In my opinion, if a client were in some peril, I would have no hesitation in recommending that he retain counsel.

Q: What about someone without any legal representation at all appearing in any capacity before the commission?

A: Again that depends on the circumstances. If it were quite obvious that your client had absolutely nothing to fear from the inquiry and that it was just more or less the formality of an

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14 Minutes of Evidence, 11 December 1990, p 150.

appearance, I would say that if the client did not wish to expend legal costs for representation, they could appear. That would not be with my advice; that would be a decision they would make given the advice I gave them. Generally the answer would be, no. You would have to look at individual circumstances."15

3.1.4 Whilst it has been readily acknowledged by the ICAC and others that those in peril of being prejudicially affected by ICAC inquiries require legal representation, the ICAC has taken the view that the role that legal representatives can play is limited. It has therefore been put to the Committee that it would be inappropriate for there to be an "across the board" right to legal representation for all persons coming before the Commission. This is a matter which Mr Whelan has pursued with Mr Temby and Mr Zervos at Committee hearings.

"MR WHELAN:

Q: On these questions we are dealing with now, I have a real concern about people being represented ... before the Independent Commission ...

MR TEMBY:

A: ... the extent to which a lawyer can help a witness is limited. A lawyer can advise the witness as to the right to object, and that can be useful. It is done in this document ("Information for Witnesses"). It may be that a lawyer can underline that. A lawyer can raise objections as to lack of relevance, but that happens very rarely because if some counsel wants to ask a question that is considered to be irrelevant we stop him anyway. It is not easy for me to see the justification for legal representation across the board for witnesses, necessarily I suppose at State expense, when the contribution that lawyers can make is somewhat limited. That is the difficulty I have.

Q: I am talking about legal representation as a matter of right ... I think that the general public who would be summonsed to appear before the Independent Commission Against Corruption live in fear, are somewhat confused, and go there and oftentimes may tend to disadvantage themselves.

A: I understand the proposition that ideally all witnesses would have legal representation, but

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15 ibid, p 101.

you tend to achieve the ideal only in circumstances where the justification is sufficiently strong, unless it is the case that resources are unlimited, and we well know that they are not. I am saying that the extent to which a lawyer can help a witness is limited. There is not much they can do. I have them appear before me, and I observe them typically as not being able to make much of a contribution. I am not critical of the statutory provisions. Let them be there by all means. But it would be difficult to justify the expense involved, given the limited contribution they can make.16

"MR WHELAN:

Q: Could I ask you to look at your submission pages 17 and 18. At the foot of page 17 you talk about the question of legal representation. Do you have a personal view?

MR ZERVOS:

A: I have a few personal views. I think the issue is a difficult one because of the burden on the public purse that is likely to result if you give carte blanche to people who come before the Commission to have legal representation. I think Mr Temby has made this observation when he was previously before you. Legal representation is of a limited benefit. Mr Temby's experience, and he is in a better position than I am because he is seeing it from the role of a presiding person, has been that the role of the lawyer is limited before a commission inquiry. They can raise the matter of sections 37 and 38 objections but that has now been dealt with by information being provided to witnesses in relation to that. In any case, witnesses would invariably be advised about sections 37 and 38, though I do acknowledge that there have been circumstances where it has been felt that it is unnecessary to do so. The other area that a lawyer or legal representation may assist a witness is on the issue of relevance and really that is in the hands of the presiding person anyway in the course of an examination that takes place.

It has been interesting to note that some of the evidence that was given last week, the legal representation that some of the parties had was lacking. Sometimes the wrong lawyers are commissioned to appear before a body like ours.

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16 Collation of Evidence, 15 October 1990, pp 61, 69 -70.

I know I am getting into a sticky area but the point is this, if you are going to have legal representation, you have got to have legal representation that is effective and that understands the jurisdiction and is going to be able to make a contribution to the clients interests and be able to represent and protect their interests. I personally had the situation where lawyers have fronted up and they have not even bothered to peruse the Act and have not had a real appreciation of basic criminal law principles. There have been many that have come forward representing the interests of witnesses that have done their homework and have effectively represented the interests of the witness. You can have the best legal representation in the world, but the fact is that the inquiry is there for the purpose of searching for the truth. If a witness comes forward and answers questions truthfully there should be no need for legal representation ...

Q: Could we come back to legal representation again? If the question of cost was irrelevant, would your personal view be that legal representation should be available?

A: Then it raises another issue of whether it is going to clutter up an inquiry with a whole host of lawyers in circumstances when they may not be necessary. I do not know whether it is appropriate that legal representation be provided for the sake of it. I think there has to be a basis for it and that would be my answer.

Q: So we have a few reasons against them, competency, cost and too many lawyers in the commission?

CHAIRMAN:

Q: Perhaps appropriateness.

MR HATTON:

Q: The fact that they are lawyers too.

MR WHELAN:

Q: That is a fourth fact?

A: I was waiting for Mr Hatton to say something about that. I do not think lawyers are the be all and the end all. As I said before, we are criticised for the commission being too adversarial and then we are also being requested

that there should be greater right of legal representation. The issues are inter-related.

Q: Do you think that if anyone gets a summons or a knock on the door or a phone call that. member of the public understands his legal rights?

A: I think they are coming to the point where they are understanding their legal rights. It is up to us to make sure that we have a human face and that we let people know. We are very active in this area. I do not think that any other organisation like ours has been as active as we have in getting out and talking to the public and showing the human face of the Commission. Letting people know what we do and how we do it and letting them know their rights and obligations. I think that the general public feel comfortable and confident with the commission and I think that is increasing every day ...

Q: Do you believe that the Independent Commission Against Corruption has the same powers as or greater powers than a royal commission?

A: There are variations.

Q: Good. Do you believe that the absence of legal representation could affect the rights of people, if any of the powers——summonsing witnesses, arrest, privilege regarding answers, documents, objections, issue of search warrants, authorities——might disadvantage people by their abuse at any stage in the future operations of the commission? ... Referring specifically to the powers in the Independent Commission Against Corruption Act which you have in front of you, do you think that an individual would be prejudiced by not having legal representation at any stage, because of those wide and sweeping powers?

A: It depends on the circumstances.

Q: Is there anyone to your knowledge who has been disadvantaged?

A: Because they have not had legal representation?

Q: Yes?

A: Yes, I know of situations in which that has happened. I will give you an example. An individual came and gave evidence. In the course of the examination of this person it became apparent that serious matters were emerging that

touched upon possible criminal offences. The Commissioner stood the matter down for that person to consult a legal practitioner. He did so and he chose to come back without him. That man would have benefited had he taken advantage of the opportunity that was given to him to seek legal representation. But he choose not to, and the point that I would make——

Q: He was seriously disadvantaged?

A: I would not say he was seriously disadvantaged. He would have been in a better position in terms of having his interests represented and protected if he had legal representation. "17

3.2 Cost of Legal Representation

3.2.1 The Committee has received evidence indicating the high cost of legal representation for witnesses appearing at ICAC hearings. When Mr Moppett appeared before the Committee he estimated the cost to the National Party for legal representation for its officers during the North Coast inquiry at $150,000. He also pointed out that had the National Party not had "a friend at court" who advised them when relevant material was likely to come up this cost would have been considerably higher.18 Mr Bradshaw indicated that the cost of legal representation for the Bradshaw group of companies during the Silverwater inquiry was $78,000.19

3.2.2 Other submissions received by the Committee raised similar concerns about the cost of legal representation. One private citizen said his legal fees to have a barrister and solicitor present throughout the North Coast inquiry exceeded $110,000. Mr P Mansford, Secretary of the NSW Division of the Australian Transport Officers Federation noted that his union, which had co-operated with the ICAC throughout the driver licence inquiry, faced a legal bill of approximately $100,000.

3.2.3 The most extraordinary evidence received by the Committee in relation to the cost of legal representation was given by Mr Robert Steel, Managing Director of Travelscene and a Director of Ocean Blue Club Resorts and Ocean Blue Fingal Pty Ltd.

"CHAIRMAN:

Q: The other thing you mention is, "My group of companies has spent in excess of $1,400,000". I wonder if you can tell us how that is made up?

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17 Minutes of evidence, 17 December 1990, pp 47 -50.

18 Minutes of Evidence, 11 December 1990, p 68.

19 ibid, p 117.

MR STEEL:

A: Yes I can. It is simply made up of all the fees that our joint venture has expended over the course of the investigation.

Q: Were they directly related to ICAC?

A: It seems a phenomenal amount and I shudder to think, and that is the reason I did raise it because it is a frightening amount of money. This commission became such a large part of our life that minute by minute, day by day we were having to have probably a team of three or four solicitors and barristers working on just defending our position because, as I said before, we were given no time to prepare our case and it was a case prepared on the run, I suppose. We also had problems with our legal representation because the commission identified a conflict of interest with our former Q.C. and we had to, in mid stream, change from one legal representation to another."20

It should be noted that in addition to representation at ICAC hearings, this figure would cover the cost to Mr Steel's group of companies of other legal proceedings which arose from the North Coast inquiry, including proceedings in the NSW Supreme Court that were initiated by Ocean Blue. Nevertheless, this is an extraordinary figure.

3.2.4 In order to put these figures into some sort of context it is useful to note the expenditure by the ICAC. When Mr Temby appeared before the Committee in 30 March 1990 he tabled a document setting out fees paid to counsel up until 29 March 1990.

"FEES PAID TO COUNSEL

TOTAL EXPENDITURE TO DATE ON MATTERS

TWEED	$510,697.80
WAVERLEY	172,125.00
RTA	132,005.00
QUINN (ie Hakim)	30,925.00
SILVERWATER	21,600.00
LAND TITLES	18,075.00
KUMAGAI GUMI	10,222.00
OTHER	14,476.30
TOTAL	$910,126.10

DATE: 29 MARCH 1990"21

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20 Minutes of Evidence, 12 December 1990, p 36.

21 Collation of Evidence, 30 March 1990, p 27.

3.2.5 The question of the capacity of ordinary citizens to meet the cost of appropriate legal representatives was put to one legal representative who appeared before the Committee.

> "MR GAY:
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> Q: Given the amount of time involved in such matters can anyone feasibly——a private citizen——bear the financial cost of retaining a barrister for that period of time?
>
> MR O'HALLORAN:
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> A: ... I should have thought it was almost a matter of public knowledge that for any legal proceeding involving more than a few days the average person simply has no capacity at all to pay for the cost——even for a few days the cost for counsel is quite substantial."22

3.3 Provision of Assistance by the Government

3.3.1 Section 52 of the ICAC Act provides for applications to be made to the Attorney General by witnesses before ICAC hearings for assistance to be legally represented.

> "(1) A witness who is appearing or is about to appear before the Commission may make an application to the Attorney General for the provision of assistance under this section in respect of the witness's appearance.
>
> (2) If an application is made by a person under this section, the Attorney General may, if satisfied that -
>
> (a) it would involve substantial hardship to the person to refuse the application; or
>
> (b) the circumstances of the case are of such a special nature that the application should be granted,
>
> authorise, out of money provided by Parliament, the provision to that person, either unconditionally or subject to such conditions as the Attorney General determines, of such legal or financial assistance in respect of the appearance of that person before the Commission as the Attorney General determines."

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22 Minutes of Evidence, 11 December 1990, pp 100 - 101.

3.3.2 In addition to assistance provided under s.52 of the ICAC Act, there have also been some ex gratia payments from the Premier's Department. Firstly, in accordance with a ruling of the previous Government, legal representation has been provided for Ministers of the Crown and public servants who have appeared at ICAC hearings. Secondly, funds were made available by an ex gratias grant for submissions to be prepared for the driver licence inquiry.

3.3.3 The provision of ex gratia payments by the Premier's Department was criticised in a number of submissions as having the potential to put private citizens at a disadvantage vis a vis public servants. These payments were also criticised by a public servant who received such a payment. When Suzanne Jones, Project Manager with the Department of State Development, appeared before the Committee she called for a review of the policy under which these payments were made. She pointed out that in the Walsh Bay inquiry the Premier's Department paid the legal fees of both present and former public servants. She said that former public servants had a choice of legal representation but that current officials were directed that they would have certain representation.23

3.4 Options Put Forward

3.4.1 During the Committee's hearings in December a number of options were discussed for redressing the problem of the cost of legal representation before the ICAC. One option was suggested by Mr Whelan. This was for the provision of counsel assisting parties before the Commission, or a duty lawyer.

> "**MR WHELAN:**
>
> Q: Do you think there is a place for counsel to be assisting parties to be called, as opposed to counsel assisting the commission? Do you think there should be a barrister or a trained legal person there in the commission representing the interests of all parties?
>
> **MR MOPPETT:**
>
> A: That may be a way out. I am not sure whether the legal profession would accept that someone who was so appointed would really substitute for another representative who would be specifically looking after the interests of his individual client. But, in general, I think there was an impression among well-informed and high-minded people that the whole atmosphere up there became very aggressive towards witnesses. They felt the

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23 Minutes of Evidence, 11 December 1990, pp 137, 142.

need of legal representation."24

In his further submission to the Committee, Mr Zervos stated that, "it may be that a witness is better served by seeking legal advice prior to giving evidence rather than being legally represented when giving evidence".25 Taking up this point, it may be worth exploring the option of a duty solicitor and a duty counsel to advise witnesses of their legal rights before they appear at ICAC hearings.

3.4.2 The second option that was put before the Committee was for the provision, by the Government, of a base fee for legal representation. This option was put forward in the National Party submission and developed by Mr Moppett when he appeared before the Committee.

> "**CHAIRMAN:**
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> Q: I wish to put something to you that appears on page 4 of the submission. It reads:
> 'There is a strong case for a base fee for legal representation to be offered to any witness. This will then permit the witness to select the representation of his choice.'
>
> I wonder whether you would like to elaborate on that suggestion?
>
> A: I think it basically suggests that your Committee may find it unimaginable that whatever costs a witness incurred would be met. So perhaps the practical solutions would be to say that there would be in effect a base level available and, if you chose not to use that, all the costs were on your head for what you might regard as superior."26
>
> "**MR HATTON:**
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> Q: Would you comment on the second matter linked with this; that is, the issue of costs. It is accepted by both sides that the costs of Ministers with regard to government action are covered automatically where a court or ICAC action arises out of their ministerial duties. However, the costs of a member of Parliament are not covered if they do not happen to be in a ministerial position, despite the fact that their

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24 Minutes of Evidence, 11 December 1990, p 69.

25 K Zervos, Further Submission to the Committee, 25 January 1991, p 53.

26 Minutes of Evidence, 11 December 1990, pp 69 - 70.

actions might well arise out of the exercise of their duties. If we have political parties entitled to representation, it appears to me that the balance seems to be tipped towards the powerful and away from the less powerful, starting at members of Parliament and going down from there. Should we have a base cost for all who appear before ICAC?

A: I do not think I could have any argument with that. I think that is really what we are suggesting, that there should be a base cost for any person. I would imagine that this would really be basically in terms of public inquiries. I had not considered the implication in terms of private inquiries. I assume there is no place for legal representation there. It is when the matter becomes a public inquiry and the risk of damage to one's reputation and so forth becomes evident that that base level of legal representation should be available to everyone."27

3.4.3 This option was further developed with another witness, Ms Jones, whose comments about the present arrangements for ex gratia payments for public servants are found in paragraph 3.3.4 above.

"**CHAIRMAN:**

Q: What was put to the Committee this morning as a suggestion was that all witnesses be entitled to legal representation at a base fee but if they wanted to go higher——and I do not know if you had any reaction to that suggestion.

MR GAY:

Q: That was to cover people outside the public service.

CHAIRMAN:

Q: I think the suggestion was that the Government would pay, say, $200 a day for legal representation and you would therefore be entitled to engage legal representation up to $200 a day?

MS JONES:

A: It is a very difficult question given the costs of legal fees.

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27 ibid, pp 73 - 74.

Q: I plucked that figure out of the air and it is a difficult problem in terms of justice and cost containment?

A: In no way commenting on the representation we received, I think there needs to be some equity in the system that is not there now.

Q: That suggestion had the advantage of offering people the choice, but it is an important question that you have raised?

A: It is one I would like to see the Committee address."28

3.4.4 This option was also discussed with Mr Zervos when he appeared before the Committee.

"MR TURNER:

Q: ... (Do) you think we should look at some form of fund or base fee representation for people who appear before the Commission?

MR ZERVOS:

A: I think it has got to be looked at, and this is only a new matter that has been raised and one that I can say that I personally have not turned my mind to, because it has been a matter which has really been in the domain of another Government department. We do not make decisions as to who is entitled to legal representation. We have really kept out of that completely, but I agree with you. I think it is a matter that needs to be looked at and considered to a far greater extent than what we have discussed today. I am just raising some initial thoughts only for the purpose of the discussion that is taking place, but there may be other issues and factors that should be taken into account. It is an issue that is worthy of consideration."29

3.4.5 The other option which has come to the Committee's attention, but which was not raised in the hearings before the Committee in December, is that contained in the report of the Salmon Royal Commission. The Salmon Commission recommended that witnesses legal expenses generally be met out of public funds but at the discretion of the Tribunal of Inquiry rather than the Government. It also recommended that the Tribunal should have

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28 ibid, p 142.

29 Minutes of Evidence, 17 December 1990, p 53.

the power to grant legal aid.

"60 It is a great hardship that a witness should be left to bear the very heavy expenses often incurred in being legally represented before the Tribunal. After all, the inquiry is in the public interest, the witness is the Tribunal's witness, it is usually just that the witness should be represented, and his solicitor or counsel are assisting the Tribunal in arriving at the truth. It is manifestly unfair that such a witness should be left to face what in a long inquiry is sometimes a crippling bill of costs. It was for this reason that in the last inquiry to be held under the Act of 1921 the Tribunal recommended that some of the witnesses should be paid all or part of their costs out of public funds. As a result the Treasury wrote to these witnesses advising them that it was proposed to make an ex gratia contribution towards their costs, and they were asked to submit their bills of costs. This, of course, was all that could be done under the Act in its present form and was an advance upon the previous practice of leaving all witnesses to pay their own costs. We do not consider however that it is satisfactory that the amount to be paid to a witness in respect of his costs should be offered ex gratia. It may put the witness in an embarrassing position. He may feel that he is accepting alms at the public expense. There should be power in the Tribunal to order in its discretion that any witness should be paid all or any proportion of his costs out of public funds on a Common Fund basis. Common Fund basis means that the amount of the costs must be reasonable. If their reasonableness is not agreed by the Treasury Solicitor, the costs should be taxed by a Taxing Master in accordance with the Rules of the Supreme Court. Once the Tribunal makes an Order for costs in favour of a witness, he should receive them as of right and not ex gratia.

61 It may be helpful if we state how, in our view, the Tribunal's discretion in respect of costs should be exercised. Normally the witness should be allowed his costs. It is only in exceptional circumstances that the Tribunal's discretion should be exercised to disallow costs. We have recommended in paragraph 54 that any witness should be entitled to be legally represented. If the Tribunal came to the conclusion in respect of any witness that there had never been any real ground for supposing that he might be prejudicially affected by the inquiry and that it was therefore unreasonable for him to have gone

to the expense of legal representation, the Tribunal should leave him to bear those expenses himself. In any case in which the Tribunal considered it reasonable for the witness to be legally represented, the practice should be to order that he should recover his costs out of public funds on a Common Fund basis, unless the Tribunal considered that there were good grounds for depriving him of all or part of his costs. It is impossible to catalogue what these grounds might be; cases vary infinitely in their facts and the matter must be left entirely to the discretion of the Tribunal. It may be helpful, however, to give a few examples of the type of case in which a Tribunal might deprive a witness of part or all of his costs. If the witness during the course of the inquiry sought to obstruct the Tribunal in arriving at the truth or unreasonably delayed the inquiry. This does not mean that every departure in evidence from strict accuracy even if deliberate should be regarded as necessarily disqualifying a witness from recovering his costs. It would be a question of fact and degree in each case. The mere fact that a witness had committed a criminal offence - even a serious one - or was a disreputable person should not, of itself, be a ground for depriving him of his costs. We have no doubt that Tribunals can safely be left to exercise their discretion over costs wisely and justly.

62 In dealing with costs, we have hitherto dealt with the case in which the witness would not qualify for assistance under the Legal Aid Scheme. But what of these latter cases? No one should be disabled by comparative poverty from being legally represented if reason and justice require that he should be represented. We therefore recommend that any necessary amendments to the relevant statute or regulations should be made to give the Tribunal the same power to grant legal aid as the Criminal Courts exercise, ie. the Tribunal would have to be satisfied that prima facie the witness's financial position qualified him for legal aid and that it was reasonable in all the circumstances that he should be represented."30

3.5 Representation for Political Parties and Similar Bodies

3.5.1 The submission from the National Party raised concerns about the fact that the National Party was not able to be represented at

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30 Report of Salmon Royal Commission, pp 25 - 26.

the North Coast inquiry. This contrasts with the Fitzgerald inquiry where the Australian Broadcasting Corporation, the Australian Labor Party and other organisations were able to be represented. When Mr Moppett appeared before the Committee he made the point that the ethics of the National Party were questioned and the Party organisation was extensively examined at the North Coast inquiry.

3.5.2 It is apparent that the application by the National Party for leave to be represented was withdrawn and the issue was not finally determined. However, it is clear that there was some confusion as to whether the ICAC Act enabled political parties to be represented.

> "MR MOPPETT:
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> A: ... I understand at the time Commissioner Roden expressed some sympathy for the dilemma of the legal representative seeking the opportunity to represent the party in making his case. He expressed his sympathy but said that the Act simply did not envisage that an organisation such as the National Party could be recognised by the Commission and therefore its legal representative admitted."31

3.5.3 When Mr Zervos was questioned about this issue on 17 December, he suggested that it was indeed possible under the ICAC Act for such bodies to be represented.

> "MR GAY:
>
> Q: Mr Zervos, could I go back to Mr Moppett's evidence. Why was the National Party not granted leave to be represented during the North Coast inquiry?
>
> MR ZERVOS:
>
> A: Mr Gay, all I can say in relation to that is that it appears on reading the transcript that Mr Forsyth made an application, discussion took place and he withdrew the application. The discussion was centred on this notion as to whether or not a political party was a legal person as identified under the legislation. However, the application was withdrawn and so it did not become an issue.
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> Q: Is it possible for such bodies to be represented?
>
> A: Are you asking my opinion?

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31 Minutes of Evidence, 11 December 1990, p 66.

Q: Yes?

A: I think it is. I think and I am subject to the views of others and correction—for the purposes of the legislation that a political party would be a person that is capable of being represented and to seek leave.

Q: We had a similar situation in evidence from Ocean Blue. If it is not in fact the case under the Act, do you think the Act should be amended to clarify this position?

A: Yes. You are now treading in the waters of an unincorporated association and this issue of a "legal person". There is a lot of case authority on this, in particular in relation to political parties, but if there is a need for an amendment, I can understand it. I do not personally believe that there is a need. I should add this, that while the National Party had its application withdrawn, it still had its interests represented, albeit through official office bearers. Other individuals sought leave and they were granted leave in their official capacities as treasurer, president and secretary of the National Party of Australia. I am not definite about that, but I think that was the case."32

3.6 Notice for Legal Representatives

3.6.1 The major point made by Mr Stephen O'Halloran in his submission and evidence before the Committee was the difficulties that legal representatives face in responding to notice to appear before the ICAC. Mr O'Halloran referred to the difficulties in securing appropriate counsel to represent ones clients on short notice. He was specifically dealing with the case where the client is at the periphery of an inquiry - if the client is a central witness there will be continuous representation and these problems won't exist.

"MR O'HALLORAN:

A: ... by the nature of the proceedings very often the notice was simply totally inadequate. It was simply not possible to discharge my obligations as a solicitor to my clients in, what I regarded as being, an acceptable way ... A problem so far as the profession is concerned in dealing with a matter like this arises unless you are acting on behalf of a person who is virtually attending at the inquiry every day. When you are only acting for witnesses who have a peripheral involvement

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32 Minutes of Evidence, 17 December 1990, p 38.

in a matter the fact that the invitation to attend often comes very late, the fact that it is on very short notice and the fact that one ends up, as it were, coming and going either to give evidence or to listen to evidence that has been given about a witness, makes it very difficult to secure adequate representation. Most counsel who are competent and respected practitioners generally have their commitments well and truly booked up for many weeks ahead. If one wishes to retain the services of competent counsel, which in many instances is in the best interests of the client to do so, it is simply not possible to obtain adequate representation given the very short notice that sometimes is given.

In my personal involvement I was able to obtain the benefit of counsel on most occasions we were asked to attend. That was largely because of the coincidental availability of counsel or arrangements being made to take evidence at particular times. As I have said, the commission did attempt, in my view, to accommodate the problems of shortage of notice but very often, whilst attempting to accommodate us, it was not possible on every occasion ... In a proceeding such as the North Coast land development matter, which proceeded over a period of many months, it becomes almost impossible to try to accommodate the wishes of the inquiry to receive evidence from my client or to hear evidence about my client, simply because of the fact that a telephone call will be made one afternoon wanting to know whether we could be there the following morning, or even a telephone call in the morning wanting to know if we could be there in the afternoon. It was simply not possible to satisfy those requests. As I have indicated, I think the commission has, with all the best intentions in the world, tried to accommodate the problem of adequate representation by inviting witnesses to respond to allegations that are made against them; but in practice it was done in such a way that it was very difficult to comply with the requests.

With a long running inquiry such as the North Coast inquiry, how one actually satisfies the mutually exclusive objective of the procedure running the way the commission has and meeting the convenience of the legal profession, I do not know. When I say "the convenience of the legal profession" I am not suggesting it is a matter of personal convenience. It is more a question of accommodating the fact that the legal profession does not, by and large, sit around waiting for

> the telephone to ring. We have obligations to other clients, and it is simply not possible to drop everything at a moment's notice to be running off to hear what will be said about your client or to appear on behalf of your client on very short notice."33

Mr O'Halloran also made the point that the proposal (recommended in the Committee's First Report) for persons about whom allegations are made to be given an opportunity to respond on the same day would exacerbate this problem of inadequate notice.

3.6.2 When Mr Zervos was questioned in relation to this matter he pointed out that he had made efforts to accommodate Mr O'Halloran during the course of the North Coast inquiry. He also highlighted the dilemma the Commission faces in giving notice to parties involved in inquiries.

> "CHAIRMAN:
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> Q: In relation to the evidence of Mr Stephen O'Halloran, what can be done to address his concerns about the lack of notice provided to legal representatives and the problems this causes in terms of properly representing their clients' interests, if anything?
>
> MR ZERVOS:
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> A: Mr O'Halloran highlights a classic problem that one has when one is a busy legal practitioner. I personally dealt with Mr O'Halloran in the course of the North Coast inquiry. He was representing two witnesses before the commission. I informed him of matters that were likely to emerge in the course of the inquiry and on one occasion I contacted him in the belief that matters would more than likely emerge that afternoon concerning his clients. Mr O'Halloran is a busy practitioner and he was difficult to get hold of on some occasions. However, I made arrangements with him to provide him with the transcript of the evidence that was given. I also made arrangements with him that if he so desired to have witnesses who touched on his clients recalled or for them to give evidence. In fact, one of his clients, after final submissions gave evidence in relation to some matters that were raised during this time. I should add that I went to extraordinary lengths to ensure that he had all the relevant passages of transcript where his clients were mentioned and I provided that to him without charge.

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33 Minutes of Evidence, 11 December 1990, pp 98 - 99.

> ... I agree that as a general rule we would not place that sort of imposition on parties. We would try to give them reasonable notice in advance. But sometimes, quite unexpectedly, issues or matters may emerge in the course of inquiry, even a short definitive one, that warrant somebody being notified at short notice. It is a little bit of a catch 22 situation. We get criticised for giving short notice and we get criticised for not making the proper arrangements to give notice well beforehand. As I said, we try to meet the convenience of the parties. In a better way, I may add, than the courts do."34

3.6.3 One proposal that was put forward as a means for overcoming this problem was an "overnight rule" by which no witness would be required to appear until at least the following day. Mr O'Halloran suggested that whilst any additional notice would be helpful, the overnight period would be of little real assistance in obtaining counsel, as they will generally be booked up for the following day.

3.7 Conclusions

3.7.1 The need for legal representation for persons in peril of being prejudicially affected by an inquisitorial inquiry such as an ICAC inquiry is well established. However, the costs of legal representation are totally prohibitive for most private citizens. In the words of the Salmon Report, it is a "great burden" and unreasonable for private citizens to be expected to bear the full cost of such representation. It also appears that the provision of some ex gratia payments by the Premier's Department has created confusion and led to a situation where private citizens are at something of a disadvantage in comparison with public servants.

3.7.2 On the other hand there are no doubt many witnesses who appear before the Commission who do not require legal representation by reason of the nature of their involvement. Furthermore, it would be unrealistic to expect public funds to be made available to meet the cost of any (perhaps extravagant) legal representation engaged by a witness at ICAC hearings.

3.7.3 Some useful suggestions have been put to the Committee as to how this matter may be resolved. However, the Committee is of the view that this issue has not yet been dealt with in enough depth for any firm recommendations to be made. There may be other alternative approaches which have not yet been explored. Furthermore, the considered views of the major interest groups representing the legal profession, the relevant Government departments and the ICAC itself, have not yet been sought. Regard would also need to be had to the inquiry into the "Cost of Justice' being undertaken by the Senate Standing Committee on

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34 Minutes of Evidence, 17 December 1990, pp 31 - 32, 43.

Legal and Constitutional Affairs. The Committee believes this matter requires further consideration.

3.7.4 Some confusion exists in relation to the question of whether political parties and similar bodies can be legally represented at ICAC hearings. The National Party may have been disadvantaged by not being represented at the North Coast inquiry. The legal situation under the ICAC Act needs to be clarified and, if necessary, the Act should be amended to provide for such bodies to be represented.

3.7.5 The question of notice is a difficult one. Circumstances inevitably arise in inquiries such as those of the ICAC in which matters arise at short notice which could affect parties. Whether or not it is possible for the parties or their legal representatives to attend (to hear evidence or respond), it is certainly in their interest to be notified. The Committee notes and commends the efforts made by the ICAC to accommodate legal representatives and to notify parties of matters which may effect them.

3.8 Findings and Recommendations

3.8.1 **All persons who may be in peril of being prejudicially affected by an ICAC inquiry should have access to legal representation at ICAC hearings. However, the cost of legal representation is prohibitive for most private citizens. The cost of legal representation before the ICAC is an issue which requires further attention.**

3.8.2 **There are circumstances in which it would be appropriate for political parties and other unincorporated associations to be represented at ICAC hearings. The ICAC should seek a legal opinion as to whether this is possible under the ICAC Act at present. If the advice is that it is not possible, the Act should be amended.**

3.8.3 **The Committee recognises the difficulties the ICAC faces in making suitable arrangements for legal representatives and their clients who are advised at short notice of matters affecting those involved in Commission inquiries. The Committee notes and commends the steps which the Commission has taken in this regard.**

CHAPTER FOUR

TRANSCRIPTS

4.1 Complaint Received

4.1.1 The complaint in relation to transcripts of ICAC proceedings related to the access provided to media representatives vis a vis witnesses and legal representatives. Mr John Bradshaw, Managing Director of the Bradshaw Group, and Mr John Watt, Manager and Director of Bradshaw Waste Industries were extremely critical of ICAC policy in this regard.

> "MR GAY:
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> Q: You mentioned the media and you intimated that the media has more rights than witnesses in the building at Redfern?
>
> MR BRADSHAW:
>
> A: Right, I will tell you this: our first day there we went to get transcript and they said transcript is $50 a go. The media, it was handed to them, so I thought myself——I think that's pretty open myself. That's good enough evidence for me but they did get open go. We could not even get a telephone the day we were there. We could not even get into the office to get a telephone."35
>
> "MR HATTON:
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> Q: Is it your belief that transcripts should be made available free of charge to all people who appear before an ICAC inquiry, at least as regards the section of that inquiry that pertains to their questioning or their appearance at that inquiry?
>
> MR WATT:
>
> A: My belief is that if it is free to one it should be free to all. The thing that struck me about it was that on the occasions when we were waiting for the transcript, without exception we were the last to get the transcript of an afternoon. As the pages became available they were being

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35 Minutes of Evidence, 11 December 1990, p 121.

brought out and handed to the media people in the room a page at a time.

MR TINK:

Q: I wish to ask Mr Watt another question about the situation where the media were getting the transcript. They were getting the transcript as it was coming off the press, so to speak; is that what you were saying?

A: Yes. I saw the clerical staff of ICAC walk into the courtroom and hand out a page at a time. I said to our blokes, "What about our transcript? We have to pay $50 and we have to wait for it to be ready".

Q: I just wish to get this straight. It was coming straight from wherever the shorthand transcription was going on?

MR BRADSHAW:

A: They had a tape recorder.

Q: They had a tape recorder that we assume was being typed up somewhere and then being brought back in as it was ready?

MR WATT:

A: Yes, that did happen.

Q: And it was handed to the press?

A: Yes. They did run the joint, so it didn't matter. They just walked around anywhere they liked. We could not get the use of a phone or a room; the media just walked in and out of any door or anything.

Q: Let us assume you were prepared to do everything you possibly could to get a copy of the transcript for yourself. I assume that was the case. You had legal people there and you were keen to get a copy of the transcript yourself as soon as you could. Is that right?

MR BRADSHAW:

A: We got it the next day. We could not get it the day of the hearing but we could get it the next morning at $50 a go.

Q: Can you briefly outline to me the procedure as you understand it that you had to go through to

get a copy of the transcript?

MR WATT:

A: Our solicitor told us that it was $50 a copy and that it would be made available to us at the end of the day. As I say, the media were getting it piecemeal. We did not always get it at the end of the day. The idea was that the solicitor wanted it to work on it that night before he saw us the next morning.

Q: Do you know whether or not he had to go down to some office somewhere, put in an application for it, tender the money and that sort of thing?

A: No, I do not know that. I do not know what the arrangements were. But he had plenty of people there running around with messages for him. It is possible, but I honestly do not know.

Q: Do you know if he got it on the same day?

A: Not always on the same day to my knowledge——definitely not always. I could not tell you the number of occasions but I know specifically one occasion when we could not get any at all until the following day.

Q: I find that extraordinary?

A: You want to go to ICAC."36

4.2 ICAC Response

4.2.1 Mr Zervos was questioned about this issue when he appeared before the Committee. He indicated that, as a result of the evidence received by the Committee on this subject the Commission was prepared to review its policy.

"**CHAIRMAN:**

Q: A more general question that arose in relation to a number of witnesses related to the availability of transcripts to the media free of charge but at $50 to witnesses and their legal representatives?

A: I am glad you asked me that question, Mr Chairman. Transcript is not available to the media free of charge. They are given access to a transcript which is the transcript that is made available to the public, including the press, who

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36 ibid, pp 129 - 130.

I understand are still members of the public. A charge is generally imposed on people who make requests for transcript of daily proceedings. We get numerous requests from parties for transcript of the entire proceedings. On most occasions it is in relation to witnesses that they are not acting for. The media, in their dealings with the commission, are given access only to the public transcript.

MR GAY:

Q: And not charged?

A: They are not given the transcript, Mr Gay.

Q: They are not charged?

A: They are not charged but they are not given the transcript. They are given access to it.

Q: What is the rationale for the $50 per person? Is it user pays?

A: I think that is the basis of it. We do have a policy in relation to transcript and I can provide that to you.

Q: Are you considering reviewing it?

A: In light of matters that have emerged here I think we are."37

4.2.2 In his further submission to the Committee, Mr Zervos provided further advice in relation to the ICAC's Transcript Policy. He indicated that witnesses would be provided with a copy of the transcript of their evidence free of charge.

"Transcripts of hearings are produced daily. A witness who has given evidence will be provided with a free copy of the relevant transcript of their evidence. Otherwise, transcript is provided at a cost to the legal representatives of effected parties/witnesses, and any other person who may request a copy of the transcript of a public hearing. Parties requiring transcript complete an order form held by the Commission, and are invoiced. The charge for the transcript is $1.00 per page, with a maximum of $50 per day.

A free copy of the transcript is provided for the public to examine in the Commission's premises. This transcript is also available to the media and if media

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37 Minutes of Evidence, 17 December 1990, pp 32 - 33.

organisations require a copy of transcript they must pay for it.

The Commission may make available free transcript in appropriate circumstances, which may include to law enforcement agencies, and legally aided or otherwise impecunious parties or people.

Where a person is the subject of adverse comment by a witness, and the person is not present or not represented at the time of the comment, has not been cross-examined on the subject, and the comment is material and may affect or be the subject of a finding in a report, it may be appropriate to provide the transcript of that evidence to the person the subject of the comment, in order to permit the person to respond to the comment. This may be more conveniently done by way of a statement or written submissions than having the witness recalled."38

4.3 Conclusion

4.3.1 The Committee understands that the ICAC must receive a large number of requests for copies of transcript of daily proceedings. The Committee also understands that to meet all these requests by providing copies to all persons requesting it free of charge could lead to a large amount of work and significant cost to the ICAC. The Committee notes the advice of Mr Zervos that the media are not given copies of transcript but are rather given access to the transcript, which is made available to the public. However, when witnesses and their legal representatives were charged $50 per day for transcript while the media was provided with access free of charge, the impression that was created was not good. It served to reinforce the perception that witnesses and their legal representatives were at a disadvantage vis a vis the media in their dealings with the ICAC.

4.3.2 The Committee welcomes the advice received from Mr Zervos in his further submission that the ICAC has reviewed its transcript policy and will now provide witnesses with a copy of the transcript of their evidence free of charge.

4.4 Findings and Recommendations

4.4.1 **The Committee welcomes the review by the ICAC of its transcript policy and the advice that witnesses will now be provided with a copy of the transcript of their evidence free of charge.**

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38 K Zervos, Further Submission, pp 50 - 51.

PART TWO

INVESTIGATIONS

CHAPTERS FIVE TO SEVEN

CHAPTER FIVE

THREE-TIERED APPROACH

5.1 Mr Helsham's Proposal

5.1.1 The Hon Michael Helsham made a submission to the Committee dated 24 October 1990, followed by an addendum dated 05 December. He then appeared before the Committee on 12 December. Mr Helsham recently served as an Assistant Commissioner of the ICAC and conducted the Walsh Bay inquiry. Mr Helsham has also participated in two previous Commissions of Inquiry - an inquiry into the conduct of certain Queensland judges and a Royal Commission into the future of the Lemonthyne forest in Tasmania. Between 1976 and 1986 Mr Helsham was the Chief Judge in Equity in the Supreme Court of NSW.

5.1.2 In his submission to the Committee Mr Helsham noted that there was no requirement for ICAC inquiries to be conducted by means of hearings. "It is permissible to hold hearings for the purposes of an investigation, but not obligatory".39 An investigation could conceivably be conducted in large part through the use of the ICAC's extensive powers, contained in Part IV Division 2 of ICAC Act, providing for the compulsory production of documents, statements etc.

5.1.3 In his addendum to his submissions Mr Helsham developed this idea further, suggesting that after substantial investigatory work matters required to be dealt with in open hearings could be dealt with in a more expeditious and better way. He identified a number of advantages with such an inquiry process.

> "In search of a solution to the problem, I note that investigations by the Commission are not required to be done in public. A hearing may be an adjunct to an inquiry. Nor does a general scope and purpose document (section 30(3)) have to relate to an inquiry. It may relate only to the scope and purpose of that particular hearing. This enables separate topics, events or what have you to be hived off from the inquiry and explored in separate hearings, if it is appropriate to proceed in this way.
>
> This leads me to a suggestion that investigations be conducted by a Commissioner using the powers and procedures conferred and envisaged by Part 4 Division 2 of the Act, having recourse to hearings only when, for example, a particular matter cannot be taken any

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39 Minutes of Evidence, 12 December 1990, p 64.

further without one, or for some other sufficient reason. In particular I see this process used to enable the mass of material or information collected or volunteered be refined down to what appear to be the real matters of corruption, or issues if you like, and to be restricted to the persons who appear to be in the hot seat. These can then be brought into open hearings.

The idea is that this enables the ambit of the open hearing to be confined, to allow tests of relevance of evidence to be applied, to avoid surprise in the evidence and other disadvantages associated with the extraction of material by means of open hearings. It will probably reduce the number of hearings involved and hence shorten and simplify proceedings; the adversarial approach would be reduced to a minimum. It would enable the whole hearing to be held in public without any section 112 direction.

One possible disadvantage flowing from this type of approach to inquiries may be the lack of possible relevant information coming to the Commission as the result of publicity. This must be offset against the certain disadvantage of lawyers, the adversarial attitude and delays, as well as problems arising from closed hearing applications, and, worse still, challenges to decisions about them."40

5.1.4 This concept was then further developed when Mr Helsham appeared before the Committee on 12 December. It was then that he described the ICAC inquiries as a three-tiered process.

"MR HELSHAM:

A: I would like to consider the inquiry as being, in effect, a three-tier activity. The first tier is the assessment of a problem that is submitted to it. That, of course, is done by the commission officers with a report to the commissioner as to whether the matter is one which is within jurisdiction and whether it looks as though, on the material presently before it, it should go further. So that is the assessment stage.

I like to think of the next stage being the investigation stage. As you will recall, under the Act considerable power is given to the commission to investigate allegations or corruption before it ever gets to a public hearing and it is my view that that is really where the hard work of inquiries should lie. As a result of that I am hoping that there would

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40 ibid, pp 51 - 52.

emerge those aspects which are appropriate or necessary for a public hearing and that by the time you get to that, you have refined down the material to proportions where it can and should be dealt with in a public hearing and you do not have to worry about hearings in private, about section 112 orders or about anything else. If there are reputations involved in that aspect of the inquiry, well, so be it. You have done an assessment of them and you have realised that that has to be brought out in public. My approach to things is a three tiered approach which, as I say, I have not tried and I do not know how successful it would be."41

5.1.5 Whilst Mr Helsham was quick to point out that his proposal was not put forward as universally applicable and was untested he gave some indication as to how it would work in practice in answer to a question about his conduct of the Walsh Bay inquiry.

"**CHAIRMAN:**

Q: Can I take you to your submission, page three relating to problems with the procedures adopted with the Walsh Bay inquiry. You say, "I accept the responsibility for not conducting that hearing in a better way and more expeditiously". ... With the benefit of hindsight is there a better or more expeditious way than the way you did it?

MR HELSHAM:

A: I do not know about being more expeditious or better but I would have done it differently. That is, instead of coming in and sitting on all this material like an old judge and letting it all be presented, as a commissioner I would have gone in there at the investigation stage and tried to get all this material organised and, as it were, assessed so that what eventually came out after months of hearing and really became the issues at the end of the whole proceeding would have come out without all the introductory evidence, so that that would have been conducted by investigation and not in open hearing, so that a great deal of the material that we presented and which was subjected to cross-examination and argument and goodness knows what, and went on and on and on, would have been avoided. In other words, I think had I done it again, I would have tried to come down to the 12 points which eventually emerged as issues, and then bring

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41 ibid, pp 67 - 68.

those into the public hearing. I do not know whether that would have been cheaper or more expeditious."42

5.2 ICAC Response

5.2.1 When Mr Zervos appeared before the Committee he indicated that he felt the ICAC already pursued matters in accordance with Mr Helsham's proposed three-tiered process.

"Mr Helsham has suggested that Commission investigations should be conducted on a three tiered basis:

1 assessment of the problem;

2 investigation of the matter and refining down the material; and

3 conduct of hearing.

Matters under investigation by the Commission are generally dealt with in this way. This approach varies depending on the subject matter under investigation. It is sometimes necessary for the matter to be investigated largely through the hearing process and sometimes the hearing is to some extent incidental to the investigation."43

"MR ZERVOS:

A: The commission follows certain procedures when it looks at a particular matter that has been brought before it. We carry out extensive and detailed preliminary inquiries in relation to a matter. It goes through a fairly vigorous process of assessment. It is then the subject of a detailed report which will ultimately go to the commissioner. It is the commissioner who decides, on the information that is provided, whether or not a formal investigation should be approved. Further extensive inquiries take place after investigation has been approved. Of course, in some instances, that will depend on the nature of the subject-matter, and the extent to which we do carry out those inquiries varies from case to case. Depending on the circumstances under investigation statements are taken by officers of the commission. In some instances people do refuse to make statements to the commission, and there are occasions when it

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42 ibid, p 69.

43 Minutes of Evidence, 17 December 1990, p 10.

is thought that the matter should proceed to a hearing without a statement from somebody who is principally involved in the matter. This is done to prevent prior knowledge of the areas under investigation being obtained by potential witnesses and used against the interests of getting to the truth. In many instances private examination of people has taken place before a matter goes to a public hearing ...

It is the commission's view that a hearing is part of the investigation process. Clearly the Act provides that and states it in clear terms. It is therefore important to recognise that the hearing, in being part of the investigative phase, is there for that purpose. It is there to seek evidence, to collect that evidence, and to conduct a genuine search for truth. There will be many instances, depending on the matter in question, in which prior investigation, using traditional and conventional methods, has taken place before a public hearing. I should add that there have been various occasions when private hearings have been utilised in the initial stages of an investigation and prior to going into public hearing. The fact that they have been in private is a reason why people do not know about them. We have also utilisated suppression orders during the course of an inquiry. Because there have been suppression orders, people again do not know about them. But they have been utilised in the course of inquiries for the benefit of suppressing information that, for whatever reasons that may have applied at the time, should not be in the public domain. Having said that, I say further that the commission does carry out a considerable amount of field work in certain circumstances to ensure that the ground work has been laid for matters to be raised in hearings. Mr Helsham submitted to you a three-tier basis on which the commission should conduct investigations. The fact is that the commission does operate on that basis. As I have stated, this approach varies depending on the subject-matter under investigation."44

5.2.2 Mr Zervos was subsequently pressed on this matter by Committee members.

"MR DYER:

Q: Mr Zervos, in your preliminary oral observations before the Committee this afternoon you referred

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44 ibid, pp 25 - 27.

to Mr Helsham's three-tiered basis of operations. You indicated more or less that the commission seeks to do that at the moment. Could I put it to you that perhaps insufficient emphasis is placed by the commission at the moment on the investigatory stage, with the consequence that in some matters undue damage is caused in public hearings ... do you believe that it is a point well taken by Mr Helsham that more emphasis might well be given to preliminary investigation to cut down the potential damage that could be occasioned to parties appearing at public hearings?

MR ZERVOS:

A: That is assuming that that is a causal result of that lack of extensive inquiry prior to a public hearing. I accept that that may be a possibility. But it should be noted that we do carry out extensive examination both at the preliminary inquiry stage and also at the pre-hearing stage, which is the formal investigation stage. It depends on the matter. It depends on the issues before the commission. I shall give you an example. In the Walsh Bay inquiry serious issues were raised in Parliament involving a senior member of Government and senior Government officials. The commission saw it as its duty and obligation to the community to look into the matter and to look into it quickly. It needed quick resolution. We probably would have preferred to have investigated the matter more than we did. I think some six weeks of investigation was conducted before we went to public hearing. I can assure you that the team on the matter worked seven days a week right through the Easter break in preparation for that public hearing. That was a case where it was in the public interest that the matter go to public hearing."[45]

5.2.3 It should be noted that Mr Helsham subsequently provided the Committee with further advice on this matter. After reading the transcript of the evidence of Mr Zervos before the Committee on 17 December, Mr Helsham wrote to the Committee's Project Officer. The relevant sections of that letter are set out below.

"I hope I made it clear that in my proposals the Commissioner (or Assistant Commissioner) would come into and take over an inquiry at the second stage, ie. once a preliminary decision had been made to proceed

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45 ibid, pp 41 - 43.

with it. He would become immersed in it from that point onwards, enabling him to make a decision in due course as to what evidence it was necessary or desirable to adduce in public hearings and what ground should be covered there.

This did not happen in the Walsh Bay Inquiry. The second stage that Mr Zervos refers to was the investigation that was made by officers of the Commission, which involved taking statements, preparing witnesses and assembling documents for the purpose of putting before the Assistant Commissioner evidence at public hearings - which is exactly what happened. I had no part in that aspect at all, and except for some private conversations with counsel assisting during the course of the hearings, no idea of what was going to be adduced in evidence or where the Commission was going.

I am not being critical, except of myself. The Commission officers did an enormous amount of work and a most thorough and workmanlike job in collecting and preparing the material for presentation in open hearing. But that was largely a finding out, sifting and assembling activity to enable anything possibly deemed by the officers to be relevant to be presented in public. Mr Zervos has missed the thrust of my suggestions. I should have been involved in that activity, directing it, not for the purpose of getting the material assembled and ready for presentation, but for the purpose of finding out what happened in and to the Walsh Bay project, and extracting those aspects which might involve corrupt conduct that ought to be aired in public. Mea culpa."

5.2.4 In his further submission to the Committee Mr Zervos endorsed Mr Helsham's suggestion that Presiding Officers could play an active role in the investigative phase of ICAC inquiries.

> "Mr Helsham in his letter to the Committee suggests that the presiding person should play a more active role in the investigative phase in the three-tier approach. Generally speaking, Commission investigations have been conducted on that basis and the presiding person has been involved in the investigative phase. Accordingly, the approach that Mr Helsham suggests is endorsed and followed by the Commission. Of necessity this is to some extent left up to the particular presiding person."46

5.3 Cashman Matter

5.3.1 A number of submissions received by the Committee complained

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46 K Zervos, Further Submission, p 49.

about the alleged inadequacies in ICAC field work and investigations prior to a matter reaching the public hearing stage. In most cases it was not possible to test these complaints as little evidence was put forward in support of the complaint. In relation to those which relate to the North Coast inquiry the comments of Mr Toomey when he appeared before the Committee are of interest.

"MR TOOMEY:

A: May I just say this: it is not self-serving but it may explain some of the things that happen. The North Coast inquiry was the first major inquiry that was undertaken by ICAC . We felt that public perceptions demanded that the Independent Commission Against Corruption not be another black hole into which something disappeared and was not heard from for three years or so, when all the public interest had disappeared and when nothing could be done to correct the wrongs that were being investigated. Accordingly, we drove ourselves in the six months that the commission sat on that inquiry. There were over 7,500 pages of transcript——in fact, I think over 8,000 pages of transcript. We literally worked day and night, including weekends.
Frequently, you will appreciate, matters arose out of evidence that one witness had given which were investigated by the commission's investigating staff being sent out to find out what the answer was about that. They were not sent out, so far as I was aware, with any bias one way or the other. They were sent out to find out. I agree with you that the procedure which we use ought to be refined but I think criticism of the procedure that actually was used has to be considered in the light of the position we were in. We were trailblazers and frequently we were surprised by things that happened from day to day we did not really anticipate."47

5.3.2 Of considerable concern to the Committee was the evidence of Chief Inspector Bob Cashman, Patrol Commander, Hurstville Police. It should be noted that Mr Cashman's evidence was taken "in camera", mainly because of concern that discussion or publication of certain aspects of his submission would be sub-judice and possibly prejudicial to certain legal proceedings. For this reason, the bulk of Mr Cashman's evidence will remain confidential until such time as the relevant proceedings are completed, and his evidence will be discussed in this report in fairly general terms.

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47 Minutes of Evidence, 11 December 1990, pp 146 - 147.

5.3.3 Mr Cashman gave evidence that in March 1990, upon returning from annual leave,he received a letter indicating that the ICAC was conducting an investigation, and had decided to hold public hearings, into a matter which has become known as the Sutherland Police Licensing matter and that it was expected that at the hearing there would be evidence from which it could be concluded that he had been involved in corrupt conduct. The first public hearing was held on 29 March in which the nature of this evidence was announced. The substance of the allegation against Mr Cashman was that he was present at a luncheon when corrupt payments were asked for. This allegation received considerable media coverage. Mr Cashman described the next 18 days as the most traumatic time in his life and said the effect on the morale of the Police under his command was marked. After 18 days, as further evidence emerged at the ICAC hearing, Mr Temby announced that Mr Cashman was no longer regarded as a person substantially and directly interested in the ICAC inquiry.

5.3.4 Mr Cashman's major complaint was that fundamental investigative steps had been overlooked in the ICAC investigation into this matter and that had these steps been followed he would never have been subjected to the public hearing process and attendant media publicity. Mr Cashman submitted that the ICAC should have:

- determined the date of the luncheon he was alleged to have attended;
- examined his Police diary to see where he was on that date; and
- sought a full statement from him in relation to the matter,

before proceeding to the public hearing stage.

5.3.5 In the event, the date of the luncheon was not determined until the second week of the public hearing, on the insistence of the legal representatives appearing for interested parties at the hearing. Mr Cashman was not asked for a statement in relation to the matter until August 1990, some four months after the first public hearing, and three months after Mr Temby had, in effect, said he was no longer a "suspect". The words used by the Commissioner when indicating for the first time that there was no case against Mr Cashman which appear on page 817 of the Commission transcript of 11 April 1990 were as follows:

> "**COMMISSIONER:**
>
> Q: ... Such case as there was against Mr Cashman does not now subsist because Mr Reid says that he wasn't at the lunch during the course of the key discussion which is all there really was against him. Right?
>
> "**MR EDWARDS:**

A: (representing Mr Cashman) Yes, Mr Commissioner ...."

This being the basis upon which Mr Cashman was removed from suspicion, the Committee feels strongly that had the matter been more fully investigated prior to the public hearing getting underway and had Mr Cashman's comments on the matter and his documents been sought he would have been cleared at the investigative stage and would not have had to suffer his name being extensively and adversely referred to in the context of the public hearings down to 11 April 1990.

5.3.6 When Mr Cashman gave evidence before the Committee he was asked to describe police procedures with regard to the taking of statements from suspects.

"MR TINK:

Q: In a police investigation, correct me if I am wrong, my understanding is that where somebody is charged or under suspicion in relation to a serious matter, or any matter, police, as an absolutely fundamental step in any such investigation, seek to interview that person, do they not?

MR CASHMAN:

A: Yes.

Q: And it may be that that person declines to say anything, but they make the effort, as one of the most fundamental aspects of any criminal investigation, to go and speak, as it were, to all the principal targets or principal possible offenders?

A: That is so, yes.

Q: And that is something that seems to be, in your case anyway, plainly lacking in this instance?

A: Yes.

Q: You say further at the top of page three that there were some pretty elementary matters that could have been put to you which would have, to any investigator, cleared you without any further——?

A: That is so, yes.

Q: In any event, as it was, the matter became apparently so plain that Mr Temby was in a position to clear you without having to speak to you, as events turned out?

A: I think under the circumstances Mr Temby made that statement at the earliest opportunity.

Q: Then it seems to me the question boils down to this: somebody has to make out a case as to why the matter could proceed in this way into the public domain with the effect on you that it had, without, on the face of it, taking the elementary investigative steps of putting these matters to you, as a principal. That seems to me what it boils down to?

A: I am sorry?

Q: The real question at issue here is what basis was there for the allegations against you entering the public domain like this, without the elementary investigative step being taken in the first place of putting the matters to you for your response?

A: Yes I would agree with that.

Q: And that being an elementary step that is taken in virtually every police investigation?

A: Well it should be in every police investigation."48

5.3.7 Mr Cashman was also asked about the liability of Police for damages where people were charged without reasonable grounds.

"MR TINK:

Q: The Chairman mentioned a little earlier the sort of problems that have emerged in the Blackburn inquiry and the severe view that is taken, quite rightly, of investigations that go off at a tangent. Just suppose for a minute this was a police matter——well, relevant perhaps in this sense that you are talking that the commission should be held accountable for any damage caused. I am just wondering whether, to your knowledge, if this happened in a police matter and offence was taken to it, and it got into the public domain in some fashion, are there things laid out in the Police Rules for the handling of investigations like this? For example, every police investigation which took these matters to the target before the matter goes to court——?

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48 Minutes of Evidence taken "in camera", 12 December 1990, p 19.

MR CASHMAN:

A: Yes.

Q: Is there anything in the Police Rules that requires that to be done? How does that become a police procedure?

A: Before police can charge anybody they must have reasonable grounds to suspect that that person has committed that offence. If reasonable grounds are not established before the court, then that individual officer can be subject to litigation, personal litigation, for damages ... The Commissioner has issued a very widely published document to all police officers following the Blackburn matter. It has been a long-established police policy that police do not disclose any information concerning an offender before the matter goes before the court, before the open court. Once it does go before the open court, then it is a matter of public knowledge, but even then police are discouraged from giving certain details. That discouragement is now more firmly established by Mr Avery since the Blackburn matter."49

5.3.8 As mentioned above, the evidence of Mr Cashman was of considerable concern to the Committee and when Mr Zervos appeared before the Committee he was questioned at some length in relation to this matter.

"**CHAIRMAN:**

Q: I have addressed a number of concerns to you in relation to the witness Cashman. Would you like to respond to those concerns?

MR ZERVOS:

A: Yes. It should be appreciated that this is something that I have made detailed inquiries about and have spoken to the various case officers. As I understand the evidence of Mr Cashman and also in relation to our own dealings with him, sometime in February and March he was away on annual leave. We sent a letter to him on 9th March setting out the fact that we were conducting an investigation into this matter and that it would likely touch on his involvement in the matter. The matter was opened in public hearing on 29th March of this year. From the time that the letter was received——although in

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49 ibid, pp 20 - 21.

fairness to Mr Cashman he did not return, I think, until 24th March——to the time the opening was given by the commission, nobody contacted the commission. As you are all well aware, we identified a contact person on the document. The contact person advises me that she was not contacted by anybody in relation to the letter that she sent on 9th March.

Q: I might interpose there that I think that was in accordance with Mr Cashman's evidence?

A: Yes. Regrettably, nothing further was said to the contact person as to Mr Cashman's position in relation to the suggestion that he was present at a particular luncheon. It became apparent in the course of examination by Mr Cashman's solicitor of one of the witnesses very early in the piece that it was being suggested through the questioning, that Mr Cashman was not present at this luncheon. It was then and for the first time that it was appreciated that that was Mr Cashman's position. I should add that prior to this matter being undertaken in public hearing it had been investigated, or aspects of it that were the prime consideration of the inquiry, by the Police Department and also the Ombudsman's office. So a degree of material had already been given to us in relation to the matter. This is something that I can personally vouch for because I was counsel assisting that conducted the private hearings. There were some five private hearings of witnesses before the matter went public. The five witnesses concerned were significant and important witnesses in the matter."50

"MR ZERVOS:

A: ... As I said at the outset, there had been a police investigation in relation to the allegations but not as they specifically related to Mr Cashman, which also involved the Ombudsman's office. As I pointed out, there was quite extensive examination of the matter. I do not think it would have changed anything at all in that it needed to go through that public hearing process for the commissioner to then come to the view, as he did——and as he quickly did I might add——that Mr Cashman on the basis of the evidence was more than likely not present at this luncheon and, therefore, was not the subject any more of this inquiry. I do not think that would

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50 Minutes of Evidence, 17 December 1990, pp 33 - 34.

have been achieved by even obtaining a statement from him. Although, as I pointed out, there was some difficulty in speaking to him in that he did not approach us even though the invitation was there, and we did not know what particular stance he would take. Let me add this: it is suggested that he had a diary which indicated he was elsewhere on the day in question. That diary was inconclusive. There were two witnesses who were giving evidence against Mr Cashman. It had to go through that process for the commissioner to make the determination that he did. I should add, and I hope this is not tampering with the current status of the matter as it has still yet to have a report handed down in relation to it, that one of the witnesses was examined extensively in private hearing in relation to the allegations. I did it myself, so I can assure you he was subject to quite a vigorous examination. Matters that he was putting to the commission were substantially corroborated."51

"MR HATTON:

Q: Are you satisfied that the investigators could not have got to the credit card or the diary earlier in the case of Mr Cashman and, therefore, excluded him as a suspect?

MR ZERVOS:

A: It did not necessarily. It assisted the commissioner, from what I understand, although I gather that the basis on which the decision was made was the evidence that was elicited from a witness during the course of the public hearings. The determination of the date of the luncheon was done by contacting American Express and, as we understood, at some stage he paid for the lunch through his American Express card, and that was then sought. We did not serve a section 22 notice to obtain that information. We made a written request to American Express. Answering your question, my assessment of the matter is that it still would have gone through the process of public examination. The diary was not conclusive at all, and that is apparent from reading the transcript."52

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51 ibid, p 42.

52 ibid, p 57.

"MR TINK:

Q: Did I understand you to say that so far as you are concerned Mr Cashman does not have any ground for complaint?

A: No, I am not saying that.

Q: In that case, what sort of area of complaint do you think he has?

A: I think there are a number of factors that operated here. I do not think it is necessarily the case that the commission could have done it better because had we done it better I do not think it would have changed circumstances. It was unfortunate that the position was taken not to communicate with the commission in relation to the matter. Had they done so, I still feel that it would not have changed circumstances because the matter would still have gone to public hearing and would have gone through the process that it did. If you are suggesting, and I think you are, that if he had been approached much earlier and a statement obtained or the allegations put to him, circumstances may have been different and he may not have been a party to the public hearing proceedings. I again, having looked at the matter, do not think that that would have been the case.

Q: But a statement was never taken from him?

A: In the end there was a statement but that was obtained through his solicitor. He gave evidence but that was well after he had been considered as not a party to these proceedings, when it emerged in the public examination of the evidence, and that was through the evidence in particular of one of the witnesses that he may not have been present at this luncheon.

Q: Did that emerge through the evidence of one of the witnesses who gave a statement prior to---?

A: Yes, and who was subjected to a private hearing, although I cannot recall the extent that he was examined in relation to Mr Cashman's presence at this luncheon. But I do recall that he named him.

Q: Do you think with the benefit of hindsight there might have been a greater area for testing that evidence before the matter went public?

A: Well it was, in private hearing, vigorously.

Q: By that person who subsequently ---?

A: There were two witnesses. There was a further witness who also gave evidence in relation to Mr Cashman. It just emerged that these were matters that seemed to be best tested in the public examination. I should add this, and this is unrelated really to the Cashman matter, my experience has been that public hearings tend to be a fairly powerful truth serum. There are occasions when people give evidence in private or give a statement to the commission and you find that the evidence is fuller and franker in public examination. I have noticed that even with the evidence given by some of the people who have come before this Committee.

Q: Mr Cashman's recorded reaction to receiving Mr Catt's letter was, particularly the bottom of the first page where it is said that it is expected at the hearing there will be evidence from which it can be concluded that he was involved in corrupt conduct, "What a frightening statement", and as it turned out, blatantly false. That is what he put in his submission to us. I raise that in this context, as I understood what you said earlier, really there was an invitation at the end of that letter to contact Deborah Sweeney, the principle lawyer, that if he wanted to put anything forward he could have availed himself of that opportunity. May I put it to you that anyone in Mr Cashman's position reading a letter like that would have probably been the last thing they would have done. What I understood from his evidence, he was faced with a situation where you had, as it were, reached a prima facie position on his situation?

A: I do not agree with that, not if he had truth on his side. He had no concern he had an explanation, bearing in mind this is not a court of law, it is an inquiry.

Q: Could I put this to you strongly, if in fact the sort of letter here that Mr Catt has written is designed to have people in Mr Cashman's position come forward before a public hearing to make a statement, that something be put in to that effect. In other words, rather than have the final paragraph as it reads now, to have something in there indicating quite affirmatively that if prior to the commission getting underway in public session he wishes to put something, that that offer be specifically made?

A: That is implicit in the letter. I would have thought we would be criticised if we did not put the type of paragraph that you are referring to, to put this person on notice.

Q: Sorry?

A: I would have thought that we would be criticised for not doing so, for putting such a paragraph. You are saying because of the way it was pitched---.

Q: I guess that is implicitly what I am doing; I am criticising it for not being in here. What I am saying is to make it crystal clear that form of letter would be advanced a thousandfold if the final paragraph was expanded slightly to put it to Mr Cashman in unequivocal terms, "Look if you want to put something to us before the public hearing, if you want to say anything to us at all, then please get in touch with us for that purpose". I think Mr Cashman's point was that there was not in the text of the rest of the letter an invitation that one would readily imply?

A: I will have a look at the letter and see how it can be improved."53

5.4 Costigan Model

5.4.1 The Committee sees considerable overlap between what Mr Helsham has termed the three-tiered inquiry and the procedures outlined by Mr Frank Costigan QC when he appeared before the Committee in October. Mr Costigan stressed the importance of preliminary sifting of evidence and described the investigatory work carried out during his Royal Commission before a matter reached the public hearing stage. Although this material has already been published in the Committee's first report, it is also of relevance in the context of Mr Helsham's proposal.

"MR COSTIGAN:

A: You get all sorts of information coming into a body like the ICAC I am sure which indicates that perhaps there might be something wrong in a particular area. That is all you have in the beginning. The first thing you ought to do is to start investigation to see whether there is in fact any basis for that suggestion that there might be something wrong. The extent to which you take those investigations depends on the

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53 ibid, pp 64 - 65.

nature of the allegations...

One result of making those inquiries is that you may be satisfied beyond reasonable doubt that the allegation is not true. There was no basis for it. That happened a number of times in my commission, that we would investigate a matter and we would go a certain way down the track and would realise because of the investigations we had done in confidential sessions that there was not any basis for it, and that was the end of it. There had been no public allegations made and there had been no damage done to the reputation, although there had been some inconvenience to the person one was looking at because one was making some inquiry into his private affairs.

If as a result of that preliminary investigation - the calling of evidence in confidence, the looking at bank accounts, looking at travel movements, and so on - you formed the view that there really was a significant basis of evidence to justify a further investigation, then you had reached the next stage where you embark on a full investigation, and as it becomes apparent to you that there is a good deal of evidence which needs to be explained, that is the point at which you seriously contemplate going public. Again it is a matter for the commission, I would think, to determine whether you would go immediately public on that or whether you would give the person against whom the allegations are being made an opportunity to answer them in a confidential session.

On a number of occasions what we did was, having reached the stage where we were very suspicious about a certain course of behaviour, we would call in the person and say 'We have been looking at your affairs, would you mind telling us what has been going on?' That would give him an opportunity, with counsel there, to explain what was going on. Normally we would not then accept that, but we would adjourn it and go away and investigate what he said and check it over. If it checked out, we would bring him back and say 'We have checked this out and what you told us was right. Perhaps you have been a bit naughty in some areas but not the matters we were concerned in following. Thank you very much.'

If it did not check out, and this often happened, we found that there were serial lies. We then would go public. We would ask the man to come along and we would put to him all the facts we had pulled together in our private inquiries.

That is the way we worked, and I think that is the kind of way really; you try to achieve that balance between the very genuine public interest in seeing what is going on in our society, and the very real damage that can be done to a private person's reputation merely by being mentioned in the context of a body like the ICAC, and the very real difficulty of curing that damage down the track."54

5.5 Salmon Report

5.5.1 The Salmon Report contained a number of specific recommendations and considerable debate on the relationship between the investigative and public hearing stages of inquiries and the appropriate balance. One proposal that was discussed was the option of a preliminary hearing of evidence in private.

"80 The suggestion has been made that a private preliminary inquiry should be held by a Parliamentary Commissioner or other person to decide whether or not there was sufficient material for investigation by a Tribunal of Inquiry under the Act of 1921 or that there should be some other form of preliminary inquiry by a member of the Government before the Government sets up such a Tribunal. No doubt the Government of the day usually causes some informal inquiry to be made by the Lord Chancellor before it moves any resolution to set up a tribunal under the Act. We do not think that it would be right to seek to fetter the Government's power to move such a resolution in any case in which it appeared to the Government that there was a nation-wide crisis of public confidence.

81 A further suggestion has been made by some witnesses, although many have disagreed with it, that the Tribunal should hold a preliminary investigation in private. At this investigation evidence should be called and submissions made to enable the Tribunal to decide whether or not there was a prima facie case to support any allegation against any of the persons concerned. The advantage of this course, so it is said, is that the Tribunal could thus protect innocent persons from having groundless allegations or rumours against them pursued in the fierce light of publicity. Whilst we fully recognise the importance of protecting innocent persons against any possible injury to their reputations which may be involved in a public hearing, we do not

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54 Minutes of Evidence, 12 October 1990, pp 31 - 32.

consider that a preliminary hearing in private is the best means of affording them this protection. Assuming that there are wide-spread rumours and allegations about the conduct of some innocent individual, it seems to us that if the evidence is heard in private at a preliminary hearing and the Tribunal thereafter announces that the rumours and allegations are groundless, there is a real risk that the public will not be convinced and may consider that something is being hushed up. Indeed a number of witnesses involved in recent Tribunals of Inquiry and those appearing on their behalf have stressed in evidence before us the importance they attach to being able to destroy the rumours and allegations by evidence given in public.

82 If on the other hand the Tribunal comes to the conclusion that there is enough in the rumours and allegations to warrant a public investigation, the impression that this would make upon the public might well be unfortunate from the point of view of the individual concerned. Moreover there is something unreal about evidence being taken in private and then being re-hashed before the same Tribunal in public. Besides the untruthful witness who has done badly under cross-examination at the first attempt would be forewarned. This procedure would also entail considerable unnecessary delay for the publication of the Report would be postponed by the time taken by the preliminary hearing without any corresponding advantage being secured.

83 It is for these reasons that we prefer the recommendation made in paragraph 49 under the hearing of 'More Time'. It seems to us that if more time is given to collating the material evidence before the public hearing begins, the Tribunal should have an ample opportunity of defining the allegations, pinpointing the relevant matters to be investigated, and discarding any prejudicial testimony that is clearly immaterial. This will also make it possible for the Tribunal to comply with our recommendations for making known to witnesses the allegations and rumours they have to meet and the substance of the evidence upon which they are based. If a witness after he has been supplied with this material wishes to make a submission to the Tribunal in private, either personally or through solicitor or counsel, he should be allowed to do so. It is thus, rather than by a two tier investigation with a preliminary hearing of evidence in private, that we think that the

interests of witnesses can best be protected."55

5.5.2 The preference of the Salmon Report was for the Tribunal to take more time preparing its case and to supply all witnesses with a document setting out the case against them, before they were to give evidence.

> "49 The question arises, how is it possible to ensure that any allegation against witnesses and the substance of any evidence against them will be made known to them so as to give them an adequate opportunity of preparing their case (Cardinal principles 1, 2 and 3(a)). We believe that the answer to this question lies mainly in less haste. We are under the impression that the tempo of some of the post-war Tribunals, particularly in the early stage of an inquiry, was somewhat too hurried. We appreciate that there should be no dilatoriness in starting the inquiry and pushing it to a conclusion. It is urgent that the truth should be revealed to the public as speedily as possible. Nevertheless, a few weeks more in preparing the material for arriving at the truth is a small price to pay in order to avoid injustice.
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> 50 Any potential witness from whom a statement is taken by the Treasury Solicitor should be told that, if he so wishes, his own solicitor may be present when the statement is taken. In many cases a witness will not require legal assistance. If, however, he does wish his solicitor to be present he should be given a reasonable opportunity to secure his solicitor's attendance even if this entails a day or two's delay. As soon as possible after he has given his statement, and certainly well in advance, usually not less than seven days before he gives evidence, he should be supplied with a document setting out the allegations against him and the substance of the evidence in support of those allegations.
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> 51 There may be cases in which the Tribunal will consider that there is a real danger of witnesses being intimidated or influenced or of a witness making improper use of the information supplied to him. Accordingly, the form of the document disclosing to a witness the substance of the evidence against him must be left, in each case, to the discretion of the Tribunal. We realise that however thoroughly a case is prepared fresh evidence may emerge during the course of an

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55 Report of Salmon Royal Commission, pp 31 - 32.

inquiry which may give rise to further material allegations. In such circumstances, the witness concerned should be given a reasonable opportunity of meeting those allegations even if this means adjourning the inquiry for a few days. The time allowed to anyone at any stage for preparing his case against the allegations he has to meet must be left to the discretion of the Tribunal.

52 Further time in preparing for the public hearing would also give the Tribunal a better opportunity of discarding irrelevant evidence. It is of the greatest importance that irrelevant evidence should not be made public, particularly if it contains what are clearly groundless charges against anyone.'56

5.6 Conclusions

5.6.1 The Committee expresses the view that the various methods discussed in this chapter point up a proper objective in a corruption inquiry, namely to try and ensure that public hearings are, so far as possible, the end process of an investigation, to be undertaken only when it becomes necessary or desirable that some matter or matters should be explored in such a forum. This could have the advantages of saving time and expense (particularly lawyer's fees), and of avoiding surprise. It would also prevent unnecessary damage to reputations because of the sifting and refining process that had preceded the decision to hold any public hearing.

The Committee does not suggest that a three tier process would be suitable for each inquiry. However, it believes that the objective is correct, and that such a process points to one way of achieving it. It also believes that public hearings consequent upon such an approach would help to eliminate problems that have caused a deal of criticism to be voiced before the Committee.

5.6.2 The Committee has noted all that Mr Zervos said in relation to the Cashman matter on 17 December. The Committee recognises that public hearings are an essential tool in the ICAC inquiry process. It is only during hearings that witnesses can be compelled to answer questions which may be incriminating. The pursuit of matters in the public forum has other benefits as well, as identified in the Committee's First Report. The Committee also notes that private hearings took place in relation to the Sutherland Licensing Police matter before it reached the public hearing stage.

The Committee also recognises that the ICAC is not the Police Force and that there is a clear distinction in terms of the

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56 ibid, pp 22 - 23.

degree to which a Police "case" needs be prepared and "sealed" before it reaches the courts and an ICAC inquiry going to the public hearing stage.

5.6.3 However, the Committee does not believe the ICAC has been able to provide a full answer to the concerns raised by Mr Cashman's evidence. As Mr Cashman pointed out, when a serious allegation of this nature focuses on a specific event, in this case a luncheon, it is surely the most fundamental investigative step to determine the time and place of that event. Yet this was not done until after the matter reached the public domain with all the damaging media coverage and other consequences that entailed.

5.6.4 Furthermore, stemming from this case and Mr Cashman's evidence it would appear that the ICAC should at the very least review its investigations policy in terms of putting allegations to persons. Mr Cashman made the point that before a person is charged and a matter goes to court, it is Police procedure for the suspect to be brought in and given an opportunity to respond to the allegations against them. This was the procedure followed in the Costigan Royal Commission. This was also the recommendation of the Salmon Royal Commisison - that persons should be advised of the allegations against them at the earliest opportunity. The Committee believes it would certainly be worthwhile for the Commission to reassess its investigations policy and the applicability of this Police procedure and the Costigan model. At the very least the letter of advice to persons affected by ICAC inquiries could be more specific in terms of inviting them to put their case to the Commission at the earliest opportunity.

5.7 Findings and Recommendations

5.7.1 **Mr Helsham's three-tiered approach is a helpful way of conceptualising the ICAC inquiry process. The Committee believes that public hearings, whilst having an essential role in ICAC inquiries, should so far as possible, be the end process of an inquiry. Public hearings would therefore be undertaken only when it becomes necessary for a matter or matters to be explored in that forum. The relevant issues could be more carefully sifted and tightly defined before they reach the public hearing stage. This would reduce the length and cost of hearings which are adversarial in demeanour and costly in terms of legal representation.**

5.7.2 **In view of the Cashman matter, the Costigan model and the recommendations contained in the Salmon Report, the ICAC should review its investigations policy. Consideration should be given to putting allegations to affected persons before a matter proceeds to the public hearing stage. At the very least, the letter of advice to affected persons should invite them to put their case to the Commission at the earliest opportunity.**

CHAPTER SIX

STATEMENTS

6.1 Complaints

6.1.1 The Committee is most concerned with a number of complaints which have been received suggesting that some persons who have made statements to the ICAC have been denied access to copies of their statements. The National Party submission outlined the position of Mr Don Page MP, Mr C G Lomax and Mr Doug Moppett.

> "Written statements, sometimes extracted from witnesses in confusing circumstances, were then used in public hearings as part of systematic cross-examination inimical to the tenet of informal non-adversarial proceedings.
>
> For example, Mr D L Page, when he went into the witness box at the North Coast hearing he had not been given a copy of his written statement to the Commission.
>
> Indeed, his requests for a copy of the statement had been expressly refused by the Commission.
>
> At the time that Mr C G Lomax went into the witness box at the North Coast hearing he had not been given a copy of his written statement to the Commission. Indeed Mr Lomax's requests for a copy of the written statement had been expressly refused by the Commission.
>
> At the time Mr Moppett was called to the witness box at the North Coast inquiry, Mr Moppett's written statement to the Commission had not even been finalised.
>
> At the time each of Miss Gardiner and Mr Forsyth gave statements to the Commission a photocopy of their signed statements was made available to each of them immediately.
>
> Whilst the National Party would have thought that basic fairness would require that as soon as a statement is signed by a witness a photocopy is given to the witness, the National Party is of the opinion, in the light of the events set out above, that the Act ought to be amended to provide that at the time a statement is signed by a witness the Commission gives

the witness a photocopy of that signed statement."57

Mr Moppett elaborated on his own experience when he appeared before the Committee.

"MR MOPPETT:

A: Perhaps if I may say this, Mr Chairman: I think the atmosphere was struck very much in the first place. My experience is a good example in that one was invited to come up and have a talk with officers to see whether you might be useful as a potential witness. A record of that was taken. In most cases I think the person was either, you know, grasping around amongst his memory to try to say things that were helpful to what appeared to be an investigative officer. But then having said, "Yes, that is right. That is a record of the discussion we have had", you were suddenly in the witness box and tested as to the veracity, and you were subjected to what appeared to be a legalistic testing. That may be desirable but in my own case a difficulty immediately arose in that the statement had not been completed and this caused some flurry of embarrassment in that I had to provide the unsigned copy as the official copy had not been completed. I think that those initial statements were certainly offered as helpful evidence and later on appeared to be something that many of the witnesses felt they should not have made except in the presence of their legal advisers. I think that is a very regrettable state of affairs.58

6.1.2 When Mr Bradshaw and Mr Watt from the Bradshaw Group appeared before the Committee they outlined the circumstances of one of their employees, a Mr Budden, who also had difficulty in obtaining access to a copy of his statement.

"MR DYER:

Q: I am concerned to note that you mention in your submission to the Committee in regard to the statement given by Mr Budden that he was unable to obtain a copy of the statement?

MR BRADSHAW:

A: Yes, she refused to give him a copy. I cannot remember the officer's name. It was a female. She came to the office, her and Bob Campbell come

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57 Minutes of Evidence, 11 december 1990, pp 50 - 51.

58 ibid, p 75.

back to the office to interview John Watt and she asked to speak to Budden who was not in the office at the time. They asked for him to go to the Independent Commission Against Corruption office to be interviewed. We just could not let him off the office so she come up and did it by tape recorder.

Q: So is this the position, Mr Budden made a request over the telephone?

A: Yes.

Q: To this female officer?

A: Yes.

Q: For a copy of the statement?

A: Yes.

Q: And that request was not acceded to at that time?

A: That is right.

Q: And it was subsequently furnished on the first day of the public hearing?

A: Yes.

Q: In response to a request by the company's solicitor?

A: It was the company solicitor to the Independent Commission Against Corruption solicitor, Mr Brown."59

6.1.3 Mr Stephen Connelly also gave evidence before the Committee concerning the difficulty which he experienced in obtaining access to a copy of his statement.

> "I was interviewed a number of times by ICAC investigation officers. On two occasions I provided statements to those officers. On the first of such occasions I was denied access to a copy of my statement. This action was, in my view, both unreasonable and unnecessary given the statutory bars which are placed upon a person who makes a statement to ICAC officers."60

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59 ibid, p 123.

60 Minutes of Evidence, 12 December 1990, p 3.

"MR GAY:

Q: Mr Connelly, I wish to go back over some of the ground in respect of the statements. Was a reason given for refusing to give you a copy of your statement when you asked for it?

A: Yes, the field officer did not want me to circulate the statement, and it was for the protection of the investigative process that I could not have one.

Q: Were you aware that under the Act you were entitled to a copy?

A: I was made aware of that by the next field agent who took a statement from me. He was not aware that I had given a statement before. I explained that I had, and he was kind enough to have my first statement faxed to me while he was in my presence.

Q: Do you know who the field officer was who refused you your statement?

A: Yes, I do. It was an investigator by the name of S. A. Osborne.

Q: Did the second field officer let you know as a matter of course that you were entitled to a copy of your statement?

A: Not as a matter of course. He expressed curiosity at the fact that I had not been given a copy of my statement and, like I said, on the spot he rang his office and a facsimile was transmitted to us. That was helpful in him preparing the second statement, of course ...

MR DYER:

Q: Mr Connelly, I must say I am concerned about your statement regarding access to the two initial statements you gave to the commission. I assume that on the second occasion you were given access to the statement you made?

A: Yes, I was.

Q: But on the first occasion you were not?

A: That is correct.

Q: Am I correct in believing that the reason for the difference is that perhaps the material contained in the first statement was more sensitive than

that contained in the second and the commission had an apprehension that you might circulate the first statement and cause some damage?

A: I suspect that was their view, yes.

Q: Did you offer, or did they seek, an undertaking from you that you would keep the statement confidential to yourself and your legal advisers and not circulate it?

A: Firstly, I was advised that I was not permitted even to tell people that I had had a statement taken from me. I was certainly in no doubt as to the level of confidentiality associated with the statement process.

Q: At what stage did you and your legal advisers have access to a copy of that first statement?

A: Being perhaps a little naive in these things, I did not see the need for a legal adviser until a little later down the track. I gave the statement dated 7th July, and I obtained a copy of the statement by facsimile transmission date 21st September.

Q: So you eventually obtained access to it?

A: Yes.

Q: After substantial delay?

A: Yes."61

6.2 ICAC Response

6.2.1 When Mr Zervos appeared before the Committee he responded to these complaints both in general terms, outlining the Commission's policy in this area, and also in relation to specific questions, about each complaint.

> "Depending on the circumstances of the matter under investigation, statements are taken by officers of the Commission. In some instances people refuse to make a statement to the Commission. There are occasions when it is thought that the matter should proceed to a hearing without a statement from somebody who is principally involved in the matter. This is done to prevent prior knowledge of the areas under investigation being obtained by potential witnesses and used against the interests of getting to the truth ...

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61 ibid, pp 10 - 12.

When conducting interviews, these may be tape recorded or recorded on a typewriter or portable computer, or notes are made of the conversation. The method of recording interviews is generally at the discretion of the investigator concerned and to a large extent is contingent upon the attitude of the person being interviewed.

It is the policy of the Commission that witnesses are to be provided with a copy of their statement or record of interview on request, unless any officer has reason to believe that so doing may adversely affect any investigation. If an officer does hold a belief that disclosure may or will adversely affect an investigation, approval to withhold a copy of the statement or record of interview is sought.

In some cases it may be that a compromise can be reached by giving a witness access to, but not a copy of, his or her statement or record of interview. Another compromise is to provide a copy under cover of letter asking or directing the witness not to make disclosure except to legal advisers.

When the Commissioner was before the Committee on 15 October 1990, he was asked whether it was the right of a person to be provided with a copy of their statement. The Commissioner said the following:

> 'There is no such right, but we will ordinarily make one available on request. I say 'ordinarily', because there can be exceptional circumstances in which to provide the statement will in our judgement lead almost immediately and almost inevitably to undesirable consequences, which is to say that the thing starts being waved around and everybody is tipped off prematurely. The police do the same thing. As a general rule the police will provide copies of statements, but it is not an invariable rule by any means.'"62

6.2.2 In relation to the complaint from the Bradshaw Group about Mr Budden, Mr Zervos responded as follows.

> "CHAIRMAN:
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> Q: Turning to the evidence of Mr John Bradshaw and Mr John Watt——I indicate that these questions are predicated on the acceptance of their evidence——firstly, why was Mr Ross Budden denied

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62 Minutes of Evidence, 17 December 1990, pp 6 - 8.

access to a copy of his statement to the commission until the first day of the public hearing on the Silverwater inquiry?

MR ZERVOS:

A: I cannot speak with first hand knowledge but I understand that Mr Budden was interviewed by officers of the commission a short time prior to the public hearing. The interview was done by way of tape recording. As a consequence, no transcript of the tape recorded interview was done until some time later and it was provided to counsel representing the Bradshaw interests on the morning of the first public hearing. It was not a signed statement. It was a tape recording of a conversation between an officer and Mr Budden."63

6.2.3 Mr Zervos responded to the complaint from Mr Connelly in the following terms.

"CHAIRMAN:

Q: Turning to the evidence of Mr Stephen Connelly, why was Mr Connelly denied access to his first statement to the Commission?

MR ZERVOS:

A: I am unable to say positively. It is the practice of the commission to provide a copy of a witnesses statement. As I mentioned in my brief overview, there are circumstances in which we do not provide it. I think this may have been one of those situations in which the officer involved may have felt that to provide Mr Connelly with his statement at that time may have prejudiced or jeopardised the matter under consideration. I should add that Mr Connelly subsequently did obtain a copy of his statement, and before he gave his evidence."64

6.2.4 Finally, Mr Zervos was pressed in relation to the complaint contained in the National Party submission, concerning Mr Page and Mr Lomax. He was also pressed in relation to the ICAC's policy in this area.

"MR GAY:

Q: Returning to witnesses' statements, specifically to

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63 ibid, p 32.

64 ibid, p 34.

Page and Lomax who in correspondence with us said that they were not offered a statement, more than that they were directly refused a statement and also Connelly said a similar thing, as a general rule should not witnesses be provided with a statement because it is a statement of what they had said themselves?

MR ZERVOS:

A: Yes, I agree with you. I think as a general rule that should be the case. It has been the policy of the commission. I do not know why in this case Mr Page and Mr Lomax were not given a copy of the statement. I have made inquiries. I am not certain how it emerged. I do recall speaking to Mr Page in arranging his attendance at the hearing and I remember when speaking to Mr Page he did not raise the matter with me. With Mr Lomax similarly, and with Mr Lomax in particular, I again went to great pains to provide him with material and information and I recall on one occasion where I faxed volumes of transcript to his counsel as he had counsel briefed from the local area. They did not raise it with me and, as a general principle, I agree with you, although there is a provision that there may be circumstances when we do not provide it and I am not able to say whether those circumstances applied on this occasion, but I will look into it further if you want me to.

Q: I find it hard to see where there is any circumstance——and perhaps you should look at amending the Act to make it a duty of the commission to give people a copy of their statement, because you mention that perhaps in testing evidence or something like that there may be some grounds for people not receiving a copy of their statement, but I find it hard to see someone just receiving a copy of a statement that they have made to your investigator, how that is going to jeopardise any investigations or inquiries?

A: If I could deal with the two aspects to your question. There have been occasions when investigations could have been seriously prejudiced or jeopardised by the circulation of statements and the collusion that has taken place amongst some witnesses. In addition to that, the statement of a person is a statement in preparation of or for the statement that is going to be made in hearing. That is the statement that ultimately matters, although it is of great assistance to have that statement. I cannot recall a situation where a person did not have a

statement or, sorry, was refused a statement up to the date of their appearing. There may have been occasions when a person was refused their statement at the time they made it.

Q: But if you get refused once, let us be practical, they are not going to ask again, probably?

A: Well it depends on how you refuse. Look, I take what you say and I think as a general principle we have to accept the fact that people are entitled to their statement. The other difficulty is that we, on a lot of occasions, do not take a formal statement in that it is signed and it is written. We sometimes speak to people and the discussion is tape recorded and I think that is where the problem seems to have arisen. We are not providing people with a transcript of a tape recorded discussion because there are occasions when there is no need to transcribe the evidence. It is not often, but it does arise and even then when you do transcribe, you find you need to condense it in a statement form, and it is generally insisted upon by the person, anyway. Then again sometimes we have transcribed tape recorded interviews and we have provided them, but the general principle I acknowledge."65

6.2.5 It should also be noted that when Mr Toomey appeared before the Committee, his comments were sought in relation to this issue. He expressed strong views.

"MR GAY:

Q: ... what is your comment on the situation where (a) people have not been offered a copy of their statement and (b) have been refused a copy of their statement?

MR TOOMEY:

A: Well, Mr Gay, the first thing I say is this, that I acted for the commission purely as a barrister. I took no part in the investigation, in the decision as to who would be investigated or the manner in which those investigations would take place. But I would say, and I would be astonished if Mr Roden or anyone else associated with the commission said differently, that a person is clearly entitled to a copy of a statement they made and it would be quite wrong to refuse them a copy. I agree entirely, yes, it is their statement and they are certainly

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65 ibid, pp 65 - 67.

entitled to have a record of what they said.

Q: We have it on oath that people have not received them and one has in fact been refused.

CHAIRMAN:

Q: I think Mr Toomey could only express an opinion?

A: I was quite unaware of that and am utterly opposed to it."66

6.3 Police Procedure

6.3.1 When Mr Cashman appeared before the Committee he was asked to outline the procedures adopted by Police in relation to the taking of statements. He said that it was police procedure for anybody making a statement to be provided with a copy of that statement.

"**CHAIRMAN:**

Q: Could you give the Committee some information in relation to police procedures of taking statements from people under investigation?

CASHMAN:

A: Yes. Normally, a statement is made by a complainant first, and that is the way some police matters are investigated. Then there are various witnesses. That statement is normally tested. Before a police investigation starts, police are required, first of all, to find out whether an offence has been committed. So, that statement is always tested first. Then various witnesses' statements are obtained, and if there appears to be sufficient——

Q: When you say that various witnesses' statements are obtained, what is the procedure? Do you ask a witness to make a statement?

A: Yes, whether they are willing to make a statement.

Q: Do they have to sign that statement?

A: They are asked to sign. It is not compulsory.

Q: Are they given a copy of it?

A: Yes.

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66 Minutes of Evidence, 11 December 1990, p 151.

Q: Invariably, or do the police have rules that require them to do that?

A: It is police procedure to give anybody who makes a statement a copy of the statement, whether it be a statement or a record of interview.

Q: At the time they make the statement?

A: At the time they make the statement. It is not always possible at the time. Sometimes out in the field if a police officer has not got facilities, he or she may take a statement in their notebook and then at a later stage have a copy typed out and produced to the witness.

Q: When they take a statement in a notebook do they ask the person to sign that?

A: Yes.

Q: And they transcribe it later and forward a copy to that person?

A: Yes. The statements of the witnesses are also tested and various questions asked of the witness following the statement are always typed in question and answer form afterwards to clear up any matters. Following that, the person is asked to sign it again, and it is witnessed by the police officer taking the statement. After that, when all the information is obtained in statement form, the alleged offender is interviewed and asked to make a statement or record of interview. The person making the statement is also asked to sign each page, witnessed by the police officer. Then that person is also given a copy of that statement or record of interview. Further, that statement or record of interview is then sighted and various questions are asked of the alleged offender by the acting officer in charge of the station at the time——usually somebody senior to the arresting officer. Various questions, such as, "Are you satisfied with police performance in this matter and the way you have been dealt with by the police officers?" are asked. The answers to those questions are also put in. Then that is endorsed by the officer asking the questions."67

6.4 Salmon Report

6.4.1 It should also be noted that the provision of copies of statements to persons making them was addressed in the Salmon Report. The report recommended that all witnesses be provided

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67 Minutes of Evidence, 12 December 1990, pp 10 - 11.

with not only copies of their statements but also with details of any allegations against them.

50 Any potential witness from whom a statement is taken by the Treasury Solicitor should be told that, if he so wishes, his own solicitor may be present when the statement is taken. In many cases a witness will not require legal assistance. If, however, he does wish his solicitor to be present he should be given a reasonable opportunity to secure his solicitor's attendance even if this entails a day or two's delay. As soon as possible after he has given his statement, and certainly well in advance, usually not less than seven days before he gives evidence, he should be supplied with a document setting out the allegations against him and the substance of the evidence in support of those allegations.

51 There may be cases in which the Tribunal will consider that there is a real danger of witnesses being intimidated or influenced or of a witness making improper use of the information supplied to him. Accordingly, the form of the document disclosing to a witness the substance of the evidence against him must be left, in each case, to the discretion of the Tribunal. We realise that however thoroughly a case is prepared fresh evidence may emerge during the course of an inquiry which may give rise to further material allegations. In such circumstances, the witness concerned should be given a reasonable opportunity of meeting those allegations even if this means adjourning the inquiry for a few days. The time allowed to anyone at any stage for preparing his case against the allegations he has to meet must be left to the discretion of the Tribunal.

107 During the period between the preliminary meeting and the hearing of the evidence, if it has not been done already, the Treasury Solicitor should provide all witnesses with copies of their statements and all the witnesses and persons interested with a precis or a list of the allegations which they will be required to answer. The Tribunal should direct the Treasury Solicitor to provide witnesses and interested persons with a document containing the substance of any evidence which affects them. The form of any such document should in each case be at the discretion of the Tribunal for the reasons we

have stated in paragraph 51."68

6.5 Conclusions

6.5.1 It is clear that persons making statements to the ICAC should be provided with copies of those statements. It is also clear that a witness could be severely disadvantaged if forced to appear at an ICAC hearing and answer detailed questions about the contents of a statement, without having access to a copy of that statement.

6.5.2 The Committee notes the advice of Mr Temby and Mr Zervos that it is ICAC policy to generally provide copies of statements to those who have made them. The Committee believes this policy needs to be strengthened so that copies of statements are made available except in the most exceptional circumstances.

6.5.3 The Committee recognises that there may be circumstances where if a person divulged the contents of a copy of a statement to other persons, an ICAC investigation could be jeopardised. However, the Committee is not convinced that this provides sufficient justification for denying persons access to their statements, except perhaps in exceptional circumstances. The Committee feels the ICAC should review the offences contained in the ICAC Act and, if necessary, seek an amendment to provide for a specific offence which would prohibit a person from disclosing the contents of a statement to anyone other than that person's legal representative.

6.6 Findings and Recommendations

6.6.1 Persons making statements to the ICAC should be provided with copies of their statements. The ICAC's policy in this area should be strengthened so that copies of statements are made available to those making them except in the most exceptional circumstances.

6.6.2 The Committee notes that there are existing sanctions against the perversion of the course of justice. However, if the ICAC considers it necessary, it should seek an amendment to the ICAC Act to provide for a specific offence which would prohibit a person from disclosing the contents of a statement to anyone other than that person's legal representative.

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68 Report of Salmon Royal Commission, pp 23, 37.

CHAPTER SEVEN

PROPERTY

7.1 Complaints Received

7.1.1 The Committee has received three general complaints in relation to the way in which property has been dealt with by the ICAC. The first of these concerns the level or nature of documentation provided to persons when documents are seized. This complaint was put most strongly in one of the confidential submissions forwarded to the ICAC for comment and response.

> "During their search of my premises for documents, ICAC officers were courteous to the point of appearing somewhat embarrassed by their required procedures. However, it needs to be pointed out that what appeared to be correct procedures at the time, later (during Commission hearings) proved to have very critical shortcomings in providing myself as a witness the basic and one would think rightful information of knowing precisely what documents were seized.
>
> Critical questions were asked of me on these documents during critical stages of the Commission hearings, questions on which reputations would turn and the direction of the hearings alter, of which I would have to answer without precise identification of the documents in my mind and with no time to try to recall events six and eight years past.
>
> A signed and dated running sheet of boxes of documents taken by the officers was provided. However, unlike, say, Federal Police procedures - where there is a requirement that EACH item or document (right down to, say, an individual business card) be logged and a copy provided to the witness - the Committee will note that only each larger quantity such as box or bundle was logged by ICAC officers."69

Another confidential submission complained that no record was provided of the files and other material which had been seized.

7.1.2 The second area of complaint in relation to property concerns delays in the return of property which has been seized. This concern was put most strongly by Mr Connelly.

> "At the outset of the North Coast Inquiry into land development a number of files belonging to the

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69 Confidential Submission number two.

practice of Planners North: financial statements, cheque butts, personal diaries, and the like were sought by the Commission. Such material was dutifully supplied to the Commission. However, since that date I have experienced extreme difficulty in gaining access to those files and diaries. To this date the bulk of such material remains in the custody of the Independent Commission Against Corruption. For a person whose livelihood is information based, the retention of such files and documentation for an extended period is a crippling burden."70

"CHAIRMAN:

Q: On pages 2 and 3 of your submission you indicate that you have experienced extreme difficulty in getting access to files and diaries supplied to the ICAC in mid-1989?

MR CONNELLY:

A: I have.

Q: What is the present situation?

A: My diaries have been returned but my files still remain with the Commission. That is a particular problem to me in the sense that the nature of my work is that it is information based. My files hold information which is useful not only to one project but to many projects. I also have other difficulties of a more corporate nature, in the sense that some of those files relate to matters in relation to which my company is prosecuting people for the non-payment of debts. It is difficult to stitch together a case in that regard without having my files to go through ...

MR GAY:

Q: As to your files, how often have you contacted the commission to get your files back?

A: I have phoned the commission a number of times. I have written one or two letters and my lawyer, as I understand it, has been speaking to the Commission also about extracting my files.

Q: On each of those could you detail, firstly, to the phone calls; secondly, to the letters, and, thirdly, to your lawyer's approach, what the response has been from the commission. Has it acknowledged receipt of your letter?

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70 Minutes of Evidence, 12 December 1990, pp 3 & 4.

A: Yes.

Q: What reason has it given for not returning your files?

A: On a number of occasions, or on one occasion at least, I have been told that they would be returned.

Q: How long ago was that?

A: I have a letter in my file here dated 20th October, 1990. It is a letter addressed to the commissioner, where I say:

> 'This letter is to confirm the telephone conversation of today between Mr Stephen Connelly of this practice and one of your officers who stated that files and documents presented by this office to you on 6th July, 1989, will be returned immediately.'

That was my confirming of a phone call.

Q: Were you involved in the North Coast land development investigation?

A: Yes.

Q: The report came out in July 1990?

A: That is correct.

Q: I should imagine you would have expected your files to be returned shortly afterwards?

A: Shortly thereafter, yes.

Q: It is six months now since the conclusion of the inquiry?

A: That is correct.

Q: And you still have not received your files?

A: No."[71]

7.1.3 The third area of complaint relates to the publication of documents made an exhibit during the course of an ICAC inquiry. The specific complaint concerns the publication of the National Party's financial records in an ABC program.

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71 ibid, pp 9 - 11.

"MR GAY:

Q: On page 15 you state that the Commission failed to give fair warning that all documents handed up in evidence were available to the public on request, unless suppressed by order of the commission, and that this resulted in the unnecessary publication of irrelevant and confidential records of the National Party. Could you elaborate on this and whether there were any unwarranted ramifications from the publication of internal National Party documents?

MR MOPPETT:

A: Yes, the party was deeply distressed. I cannot give you an exact date but confidential records of the party were published in an Australian Broadcasting Corporation feature which, as I say, I could not give the date of or precise terms of, but it was quite obvious that they had obtained that information simply by looking through the items that had been admitted as evidence to the commission and amongst that was our complete financial records. In approaching a fairly new body——and one that we were not too sure to what extent it resembled a court or to what extent it resembled just an inquiry——I guess we offered those documents on the understanding that only those parts that were relevant to the inquiry would be available to the public to scrutinise, and in fact that was not the case. We specifically made application for suppression of publication of matter that was not relevant to the inquiry but by that time it was too late. I believe in this circumstance the commission could have taken upon itself that in taking delivery of these very sensitive documents, for not only ourselves but for others, we should have made it implicitly clear we wished to ensure they were confidential documents, excepting any matter that was to be brought forward in evidence——and I think that would have certainly caused great dismay and anguish to our party in its relationships with members of the public as well who I think also would have been deeply aggrieved that the matter was so capriciously taken up by the ABC, to publish material that really had no relevance to the public interest at all."72

7.2 ICAC Response

7.2.1 When Mr Zervos appeared before the Committee he provided advice

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72 Minutes of Evidence, 11 December 1990, p 76.

in response to each of the areas of concern raised with the Committee. On the question of the documentation provided when property is seized he indicated as follows.

> "Once property has been obtained by the Commission, it is appropriately processed and recorded. Property seized under Search Warrant is itemised at the time of seizure and subsequently a receipt is given to the persons from whom the property was seized. Material produced to the Commission is treated in a similar fashion."73

When pressed on this issue by Mr Hatton, Mr Zervos indicated there was room for improvement.

> "MR HATTON:
>
> Q: ... To what extent are the procedures covering the execution of search warrants by Independent Commission Against Corruption investigators different from those of the police, and are they better than those of the police in your experience?... My follow-up question from that is: Do you see the need for improvement?
>
> MR ZERVOS:
>
> A: In relation to what we do?
>
> Q: In the way that your officers behave in terms of acting on search warrants?
>
> A: I think overall we have done a very good job in relation to our behaviour when executing search warrants. There is always going to be room for improvement. A particular area where we may be able to do a better job would be in the listing of property and in the provision of that list to people from whom we have seized property. I take the point that Mr Gay made previously: greater communication with that person, letting them know the state at which matters are and when property is likely to be returned. That has to be done within reason, but the point is taken. We still have to follow the procedures of the Search Warrants Act 1985. We do not have any sort of special power other than that we are able to obtain search warrants in relation to an investigation being conducted by the Commission. I think our procedures are good. I cannot recall, I apologise, there is one incident where I think a complaint was made in relation to a search warrant where a photograph was seized.

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73 Minutes of Evidence, 17 December 1990, p 8.

> That matter was looked into. But, overall, we have not had a problem either with the issuing magistrates or with people we have generally executed search warrants on."74

It should be noted that, in his further submission to the Committee, Mr Zervos responded to the complaint contained in one of the confidential submissions and quoted at paragraph 7.1.1 above.

> "It should be appreciated that during the North Coast investigation hundreds of thousands of documents were seized and obtained. It is often an impossible task to individually list every document. The running sheets identify the contents of boxes of documents that have been taken and provide an adequate description of the documents generally and would enable the person from whom the documents have been seized to have a good appreciation of the material taken. The procedures followed by the Commission in the execution of search warrants have been drawn up after careful consideration and I am confident that they are fair and workable.
>
> It is available to the complainant to examine their documents and thus to know precisely what documents have been seized. Arrangements are regularly made for people to examine their documents.
>
> In relation to some of the witnesses before the North Coast investigation hearings it was necessary that they exhaust their memory before documents were used to assist them. This is a common forensic practice. In some instances, documents were put to witnesses to show that they were not telling the truth to the Commission. There were several witnesses who had finally admitted that they had lied to the Commission after documents were put to them."75

7.2.2 With regard to the return of property Mr Zervos was first asked about Mr Connelly's files.

> "**CHAIRMAN:**
>
> Q: Why have all Mr Connelly's files not yet been returned?
>
> **MR ZERVOS:**
>
> A: If it is in order, the reason for it is that a lot of the matters in which he has given evidence and the material that he has supplied relate to

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74 ibid, pp 56 - 57.

75 K Zervos, Further Submission, pp 27 - 28.

matters that are still under consideration by the Director of Public Prosecutions in relation to recommendations made in the North Coast land development report.

Q: Are you aware whether Mr Connelly has been advised of that?

A: I have spoken to Mr Connelly on occasions and I have advised that we would endeavour to return his property as quickly as we could, although I have mentioned that it was subject to the requirements of the commission and whether or not some of that material may be required by other agencies. I should add that in the meantime and this is well before Mr Connelly gave his evidence, we had made arrangements to return some of the items of property that were not necessary for consideration by the Office of the Director of Public Prosecutions and we returned them accordingly.

I should also make the point which was not mentioned, that Mr Connelly sought access to his documents, and I recall on one occasion he requested access without any notice whatsoever and arrangements were then made to have all his material, which was considerable, available for him for inspection and he did not turn up."76

It should also be noted that Mr Connelly acknowledged that when he received his notice to produce documents to the ICAC he had a few days to meet the requirements of the notice. He also acknowledged that he had an opportunity to make copies of the documents which he provided to the Commission, and did indeed make copies of a number of documents.

7.2.3 Mr Zervos was then further questioned on this matter in general terms. He again acknowledged that there may be room for improvement in terms of better informing persons of the reasons for delays in returning their property.

"**MR GAY:**

Q: It is a question in general. Are there many people who have not got their files back?

MR ZERVOS:

A: Let me answer it generally and then I will get to the specifics. We do have a large storage of material in relation to the myriad of investigations that we have conducted, which are

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76 ibid, pp 34 - 35.

at different stages of completion. That is the reason why we hold a large storage of property. We try as best we can to return the property after the completion of the matter. However, where matters do emerge and flow from the inquiry that relate to possible future action or other action by another department, whether it be another law enforcement agency, or referral of matters for consideration by the Director of Public Prosecutions, that could cause a hold up in the return of property.

In relation to the North Coast matter, most of the property in question relates to a time set in the mid-1980s. In all likelihood, the reliance on that material by the parties in question would be low. However, there is of course material that they may need and they want. As I said in my opening, we do provide access. That is made known to the parties and we are there to meet any request that is reasonable. We have endeavoured to do that. However, it would be foolish of us to release property that we subsequently find out was of relevance to future prosecution actions or could have been used in other inquiries that other bodies are undertaking. That is the situation in relation to the North Coast matter. There are other parties interested in some of the subject-matters, and they are accordingly looking into those things. Therefore, material is retained.

Q: The other two questions were these: Have you let people know that that is the reason why you are still holding it? Technically, having seconded that material for your inquiry, are you in a position then to pass that material on to someone else without the person's permission?

A: Dealing with your last question first, the Act actually provides that we co-operate with other agencies. In fact, specific mention is made of property obtained under search warrants. Once we no longer require such property it is either to be returned or referred to the office of the Director of Public Prosecutions. I also rely on our incidental power under section 19 in relation to meeting our objective of co-operating and working with other law enforcement agencies. It is important in the overall fight against corruption and organised crime that we do not stand alone selfishly guarding information that could be of significance and great use in relation to other matters that other law enforcement agencies are looking into.

Q: The second part of the question was this: What about material not obtained under search warrants, as much of that material was freely given and not obtained under search warrants?

A: You are talking about volunteered material?

Q: Yes, volunteered material. Have you sent letters to people explaining the situation?

A: Generally we have not sent letters to people saying to them, "We have still got your property and we hope to return it in the near future, and these are the reasons we are still retaining your property". We do deal with inquiries. People occasionally ring up and say, "I would like to know when I am going to get my property back", and we try to deal with those inquiries as best we can. Maybe it is a matter that we should take on board and, to avoid any confusion or apprehension, we should send such a letter. I take on board what you say, and I will look into it when we get back to the Commission.

Q: Without going too much further into this matter, what about the voluntary material?

A: The voluntary material is on the same basis. The Act is actually silent in relation to our responsibility for the return of property that is volunteered to us and that is produced to us under section 22. Interestingly, it is mentioned under the provisions in relation to search warrants but not in relation to section 22 notices or material that is volunteered. I suppose if something is volunteered, and this has generally been the case in the general arena of law enforcement, there does not seem to be the same sort of strict duty and obligation that would normally be imposed upon a law enforcement officer who obtained material under some statutory notice.

Q: So really the situation does arise where you should also be sending a letter requesting permission to forward that material on?

A: Sorry, no, not in relation to that. If a person volunteers material and we have it, we are entitled to use that material in meeting our objectives. Whether we get that material by way of it being volunteered or by search warrant or by a section 22 notice, we are entitled to use that information in furtherance of our statutory

objectives."77

7.2.4 Mr Zervos was also asked about the complaint with regard to the publication of the financial records of the National Party. On the general principle arising from this incident he suggested that where a person appearing before an ICAC hearing wanted an exhibit kept confidential it was up to the person, or more particularly their legal representative, to make an application for a suppression order to prevent the exhibit being published.

"MR GAY:

Q: On page 76 of the transcript of Mr Moppett's evidence, I asked him a question about his documents. I also asked whether there were any unwarranted ramifications from the publication of internal National Party documents. He went on in his answer to mention that confidential material that they had provided to the Independent Commission Against Corruption had ended up in an ABC documentary. Can you comment on that?

MR ZERVOS:

A: Yes, I had some personal involvement in that matter. I spoke to Mr Forsyth the very next morning when the show went to air. That involved a document that was made an exhibit in the course of the North Coast inquiry. It was the accounts book that lists the donations that were received by the National Party. Certain pages of that book were relevant to the inquiry, in particular the reference relating to the donations that were made by Ocean Blue Club Resorts and others. The entire book was made an exhibit. It was made an exhibit at a time when no objection was raised to it being put into evidence. So, like all exhibits, that then formed part of the public record and was available to be examined by any member of the public, including the media.

When this matter was then brought to my attention the next day, I made arrangements with Mr Forsyth for a time to be convened, because we were holding some public hearings in relation to the North Coast inquiry, for him to come to the commission and on that day to make an application for a suppression order in relation to the parts that were not relevant. I know what you are going to say to me next, that the damage had been done. It was regretted, but there is an obligation on those who represent the interests of parties before the Commission to make the

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77 ibid, pp 39 - 40.

appropriate applications.

Q: The National Party was not allowed to be represented at that stage?

A: As I said to you before, while it was not represented in its name, there were parties represented before the commission that held an office bearer position within the party. I understand having examined the transcript that that legal representation was present when this document was tendered. The point is that an objection could have been raised or an application could have been made. It is always easy in hindsight. I am not being critical of the legal representatives - they are not to know, nor did we. As soon as it was brought to our attention, we made the appropriate arrangements.

Q: My question was going to be: Have you taken steps to avoid this happening to anyone else in the future?

A: That is a difficult thing to do. We try when we can to assist people before the Commission. There have been many instances that I can remember when, for example, the commissioner has had a witness stood down because that witness was unrepresented and needed to seek legal advice. But I think when you have got legal representation there is just so much you can do. In these sorts of circumstances I think the obligation falls on their shoulders. But the incident is one that we have not forgotten quickly and one that we will remember for the future."78

7.3 Conclusions

7.3.1 It is important for the ICAC to provide an appropriate level of documentation in relation to property which is seized. This is particularly important when the time provided for a person to comply with a notice to supply documents etc is short, or when property is seized following the execution of a search warrant. When the time provided for a person to comply with a notice to produce documents etc is more lengthy, the person has an opportunity to make copies of the documents produced. The Committee notes the advice of Mr Zervos that this is an area in which the Commission acknowledges that there is room for improvement.

7.3.2 The Committee believes the ICAC has a responsibility to return property to its owners promptly when it is no longer required.

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78 ibid, pp 40 - 41.

The Committee accepts that while a matter is still under consideration, either by the ICAC or an agency with which the Commission is working in co-operation, it would be inappropriate for the Commission to return relevant material to its owners. However, in these circumstance there is a need for the ICAC to provide better advice to persons about the reasons for the delay in the return of their property. The Committee notes the advice of Mr Zervos that the Commission is prepared to review its current practice in this area.

7.3.3 The Committee understands the embarrassment which could be experienced where confidential material which becomes an exhibit at an ICAC hearing is published in the media. Where a person is not legally represented the ICAC should have regard to the confidentiality of any material which becomes an exhibit. However, where a person who is legally represented wants to ensure that such material is not published, the primary responsibility lies with the legal representative to apply for a suppression order. It should be noted that one of the recommendations in the Committee's first report was for the Commission document "Procedure at Public Hearings" to be amended to note the general circumstances in which suppression orders will be made. This should assist persons appearing as witnesses and their legal representatives considering making an application for a suppression order.

7.4 Findings and Recommendations

7.4.1 It is important for the ICAC to provide a high level of documentation when property is seized or produced. The Committee notes the advice of Mr Zervos that this is an area in which the ICAC acknowledges there may be room for improvement and where the Commission would be prepared to review its current practice.

7.4.2 The ICAC has a responsibility to return property to its owners promptly when it is no longer required. In circumstances where property is held for long periods of time due to continuing inquiries, either by the ICAC or agencies with which the ICAC is working in co-operation, the Commission needs to provide better advice to persons about the reasons for the delay in the return of their property. The Committee notes the advice of Mr Zervos that this is also an area in which there may be room for improvement and where the Commission would be prepared to review its current practice. It is the view of the Committee that where appropriate the Commission should provide access, by appropriate means, to property which is held.

7.4.3 Where a person is not legally represented the ICAC should have regard to the confidentiality of any material which becomes an exhibit. However, where a person who is legally represented wants to ensure that material which becomes an exhibit at an ICAC hearing is not published, the primary responsibility lies with the legal representative to apply for a suppression order. The Commission should bear in mind the injustice that can be occasioned by the publication of confidential documents.

PART THREE

MISCELLANEOUS ISSUES

CHAPTERS EIGHT TO TEN

CHAPTER EIGHT

RIORDAN MATTER

8.1 Complaint Received from Mr Riordan

8.1.1 In October 1990 the Chairman of the Committee received a letter from the Hon Joe Riordan, Deputy President of the Australian Industrial Relations Commission. Mr Riordan wrote that in August he had been shocked to learn that he had been mentioned in the ICAC's report on its North Coast inquiry. Mr Riordan's letter complained about the manner in which he was referred to in the report. Mr Riordan enclosed copies of correspondence with Mr Temby in which he had sought to have Mr Temby publish a statement concerning his mention in the report. Mr Riordan indicated that he saw Mr Temby's response, in which he declined to publish such a statement, as unsatisfactory.

8.1.2 When Mr Riordan appeared before the Committee on 11 December he tabled a submission which elaborated on the concerns contained in his letter to the Commission. He indicated that he had no idea, prior to reading the North Coast report, that anything with which he had been concerned had been the subject of any inquiry by the ICAC. He then detailed the grounds for his objection to being named in the report.

8.1.3 Mr Riordan was featured in the context of a description of the lobbying techniques of a consultant, Mr Barry Cassell, and specifically his use of Members of Parliament, in this case Mr Peter Watkins, at that time a member of the Legislative Council. At the time in question Mr Riordan was Secretary of the Department of Industrial Relations and, by virtue of that position, Corporation Sole of the Long Service Payments Corporation. The report detailed the work carried out by Mr Cassell's company relating to the construction of a police station at Castle Hill and a police station and courthouse at Sutherland. The relevant section of the report concerning the Castle Hill project appears on the following pages.

"He certainly purported to be very well connected in Government and business circles ...". His evidence went on:-

> *"I am interested in Mr Cassell, as you put it, identifying the opportunity?---The opportunity, yes.*
>
> *That would mean that if somebody in a Minister's office, or in some other position in Government knew of a Government intention and told Mr Cassell - - -?---Yes.*
>
> *Any developer or architect who had an arrangement with Mr Cassell would get a head start on anyone else?---Yes.*
>
> *Is that what you were paying Mr Cassell for?---Well, we were specifically not in so - in the words that I didn't pay him for that reason, he believed that he could successfully generate projects and so we put him on a trial basis."*

This prospective project relating to Sutherland Police Station, was also of interest to Mr. Watkins. He introduced his evidence on the point by saying:-

> *"There were areas, I think that I gave him - or we did some work on Sutherland Police Station, too."*

He went on:-

> *"I think that was mainly me, not Mr Cassell, because I was - at that stage I was interested in Sutherland Police Station as I come from Sutherland and I was very friendly with the police there and they were good enough to take me over to show me their conditions and I spoke to Barry about what way we could approach it."*

He said that Mr. Cassell was *"trying to push it along"*, as he had *"some fairly good contacts, probably better contacts than I had"*. He also said. *"I was more interested in it than Mr. Cassell"*. It must be doubtful whether Mr. Watkins would have been of that view, if he had known that it carried the prospect of fees in excess of one million dollars for Mr. Cassell's company.

Castle Hill

Mr. Cassell sought to obtain Mr. Watkins' help, and to use his influence, with regard to the Castle Hill Police Station.

One of the file notes relating to that project is dated 19 February 1985, includes *"PW"* in the distribution list, and contains the following:-

> *"This file note will be forwarded to our colleague, Mr. PW, with a request to recontact his colleague on the matter."*

An indication of the identity of "PW" and of "his colleague", may be gleaned from the following, which appears in the next file note on the subject:-

> *"Hon. P.W. also will be asked today to speak directly with Mr. Joe Riordan with a view to asking him to speak directly with Police Department Secretary."*

Mr. Watkins confirmed those matters in the course of his evidence. Asked if he had anything to do with Castle Hill Police Station, he said:-

> *"My only involvement in this one was that Barry rang me, I think rang me or came to see me and asked me, could I make a contact for him and I don't know who else, to see a Mr Joe Riordan because Joe Riordan and I were very close friends and I think Joe Riordan had something to do with this Long Service Payments Corporation at the time. They asked me or Barry asked me, could I arrange an appointment for them to see Mr Joe Riordan."*

At this point, it is useful to quote from the file note of 19 February 1985 in which there is the reference to Mr. PW recontacting his colleague:-

> *"Long Service Payments Corporation investment officer, Mr. Jerry Bush, advised that a final decision on the Castle Hill development and the corporation's investment in the project has been delayed, along with all other investment proposals, pending establishment of new guidelines. These investment guidelines will be confirmed at the corporation's Investment Committee Meeting on the second Tuesday in March."*

It is likely that Mr. Watkins did more than simply make an appointment for Mr. Cassell and others to see Mr. Riordan. He acknowledged that he may have seen Mr. Riordan on three occasions with regard to the matter, and that he may have conveyed some details of it from Mr. Cassell to Mr. Riordan. No doubt Mr. Cassell hoped that the intervention of Mr. Watkins would improve the chances of a favourable decision when the corporation met on that second Tuesday in March.

Mr. Watkins was at the time a Member of Legislative Council. He had been duty MLC for the north coast area until 1984, and when the Castle Hill Post Office was under consideration in 1985 he had responsibility for the electorates of Gloucester and Miranda. Castle Hill was at no time within his area of responsibility. There would appear to be nothing other than his relationship with Mr. Cassell, and his friendship with Mr. Riordan, which would make him an appropriate person to be making representations, or to be dealing in any way, with regard to this matter.

With regard to both the Sutherland and Castle Hill projects, the investigation reveals that Mr. Cassell was seeking to use his contacts with public officials to further his commercial interests, both by influence and by privileged information. That that had long been his method of operation. appears clearly from his earlier dealings with Mr. Ross. That he continued to operate in the same fashion, is to be seen from his later dealings with Mr. Ross, which are referred to in Chapter 12.

8.1.4 Mr Riordan was particularly concerned that he was named in a context where there was a suggestion of improper conduct by others.

> "My name is mentioned in a setting which paints a picture of improper attempts to bring influence to bear. It is what the author has failed to do that gives offence: my name is to be found in the same description of events as that of Mr Cassell and Mr Watkins, without any attempt to differentiate their roles from my distant interest. Because of this failure, the inference that emerges is that all the persons mentioned in these pages were in some way connected in unacceptable behaviour. Such an inference cannot be supported by fact. In this regard the report is unfair and the inference represents an improper conclusion."79

8.1.5 Mr Riordan expressed concern about the fact that he had not been contacted by the ICAC prior to his mention in the North Coast report. He suggested that the section of the report, which relied upon the file notes of Mr Cassell's company, contained errors of fact which would have been rectified had the Commission contacted Mr Riordan and provided him with an opportunity to put his views before the report was prepared.

8.1.6 On 25 September Mr Riordan wrote to Mr Temby seeking a statement from the ICAC concerning this matter.

> "It is expected, however, that you will forthwith publish to me, a clear and unambiguous statement to be used as the occasion arises, that your report is not to be taken as a suggestion of impropriety on my part, that no such allegation has been made and that there is no material in your possession which would support such an allegation. Further I expect you to indicate in the clearest possible terms that any inference that there was any such impropriety was not intended by you."80

Mr Temby's response included the following.

> "The Report has been published, is in the public domain and cannot be changed. I do not propose to add to or subtract from its content.
>
> Any fair minded reader of that part of the Report which concerns you would agree with the observation in paragraph 3 of your letter that "... no suggestion has been made of any impropriety on my part, and no

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79 Minutes of Evidence, 11 December 1990. p 2.

80 ibid, p 3.

explanation is therefore required...".

As to the other observation in that paragraph of your letter that "... the record should be clear for the future", the Commission has noted all that you have said. It, however, cannot accede to the request in the last paragraph of your letter. It is an untenable proposition that the Commission should issue, on request or demand, an individualised gloss on a published report of an investigation."81

8.1.7 When Mr Riordan was questioned by members of the Committee a number of important matters of general application arose. The first of these is the significance of being named in an ICAC report.

"MR DYER:

Q: Do you take the view that there is any suggestion in the passages mentioning you at page 145 that there was any improper activity on your part?

MR RIORDAN:

A: No, and I made that clear to Mr Temby. There was no suggestion of impropriety and none was called for, but the way in which it is referred to can create the situation where inference and innuendo might be used. Mr Dyer, the position is this. An innocent person with no knowledge of any of the alleged impropriety that is contained in that report does not want to be mentioned in it. It is as simple as that, and I should not have been mentioned. There was no cause for it, there was no call for it, and if Mr Temby, or whoever is the author of that report, had taken the trouble to make one simple phone call, I am sure the matter would not have arisen."82

8.1.8 The second general issue arising from Mr Riordan's evidence is the distinction between an account of an event, or a story, and commentary on evidence contained in an ICAC report.

"MR TINK:

Q: Mr Riordan, I am inclined to agree with Mr Dyer, that the material in this report seems to fall into two parts. There is a part that forms extracts of evidence that the commission does not necessarily adopt. Those extracts are part of a story. They are no more palatable as far as you

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81 ibid, p 9.

82 ibid, p 21.

are concerned, but there is that category. The other category is one of opinion or conclusion, where the commission has decided to pull certain strands together and to draw conclusions. That seems to me to be the commentary part of the report at the bottom of page 145 and at the top of page 146. I should have thought in relation to that that there is some justifiable concern on your part so far as inferences might be drawn by people reading the report...

MR RIORDAN:

A: ... I accept that there is a difference between a report of what is on the file of Mr Cassell and the commentary by the ICAC. I accept that there is that difference. I accept that there may be a circumstance where the commission might feel it pertinent and relevant to include in its report notes that appear on the file even though that will be damaging to an innocent party such as myself. I accept that that is possible. There is no excuse for the bland statements made on pages 145 and 146, without an appropriate disclaimer or qualification."83

8.1.9 Arising from this was a suggestion that where the ICAC seeks to draw conclusions and provide some commentary on any evidence, the Commission should provide the person concerned with an opportunity to be heard.

"**MR TINK:**

Q: What must happen here is that if diary notes become relevant, regardless of whether in relation to you they are true, there must be a rider included to explain the position of the person mentioned, in respect of whom no adverse inference is sought to be drawn. It seems to me that if the commission decides not to draw an adverse inference without hearing from the person referred to, that is fine, and the commission should state that clearly and unequivocally. However, if the commission seeks to go further and refer to the person mentioned, in this case you, in any detail in the way it seems to have done in this instance, you should be able to seek a brief opportunity to be heard, to put your case?

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83 ibid, pp 24 - 25.

MR RIORDAN:

A: Yes."84

"MR HATTON:

Q: I think the principle that worries us is the sensitivity versus objectivity. Should all people mentioned in evidence be contacted where there is impropriety implied or where it could be implied? That is the question we have to face and to what extent would that bog down the commission. What would your comment be on that, based on your experience?

A: I can appreciate that it might cause some additional workload for the commission but the rights of individuals are entitled to be protected, and in particular the rights of the innocent are entitled to be protected. It should not bog the commission down. It could be done in many instances by way of correspondence or by way of a short phone call, so long as a proper record is kept. This matter could have been dealt with very expeditiously and probably would have saved the commission a good deal of time. It would not have had to consider any of this report on pages 144, 145 and 146, because there was nothing to consider.

Q: Had there been a phone call or some other consultation, a one-line statement could then have appeared in the report saying that Mr Riordan has indicated that no such meeting took place, no such conversation took place, or whatever?

A: Yes."85

8.1.10 The other matter raised by Mr Riordan's evidence was the need for the ICAC to make very clear statements, where there is no evidence of any impropriety against a person named in an ICAC report.

"MR DYER:

Q: In summary, I understand what you are putting to the Committee is that although on a fair reading of the material involving that particular person there is no suggestion or implication of improper

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84 ibid, p 26.

85 ibid, p 24.

conduct, in the event that there is no improper conduct, there should be the further precaution of a clear statement to that effect?

MR RIORDAN:

A: If I may say so with great respect, one of the great faults that many of us have is that we expect everyone in the population to have a trained mind, and that everyone will read a document like a lawyer reads it. That is just not so. The person who is not trained may read it and come to a completely unreasonable conclusion. That is what the reporter has to do; to ensure that the man in the street, if I can use that term——how does the man in the street see that report? How will he see it, not how the trained mind or the lawyer will read it?

MR WHELAN:

Q: That is the point I was trying to make. The only words the public understand are "I am innocent". They do not understand exoneration or exculpation, anything in relation to hearsay. They just like the words "I am innocent"?

A: I agree with that. I think that is one of the things that bodies of this kind, such as ICAC must be required to observe. One would expect them to anyway, but obviously they do not or have not."86

8.2 ICAC Response

8.2.1 Mr Zervos was questioned by Committee members about Mr Riordan's evidence. He was first asked why Mr Riordan was not contacted for a statement.

"CHAIRMAN:

Q: The Hon J Riordan, could I ask why was he not contacted for a statement in relation to the matter in regard to which he was mentioned in the North Coast report?

MR ZERVOS:

A: I think you have to go to what Mr Riordan himself had to say to this committee in public examination. It was readily acknowledged by him that nothing was said in the report that reflected on him adversely or indicated any

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86 ibid, pp 27 - 28.

impropriety on his part. It seems that his concern was the fact that he was mentioned, together with others, where unfavourable comments had been made about them. When you read the particular section and you read the entire section you can appreciate that what was being put there in the report is the fact that a particular consultant was using a member of Parliament for the purposes of promoting interests that he had a commercial involvement in. Reading that section of the report it is clear that it was being illustrated the extent to which representations were made on behalf of this consultant and that they had been made to Mr Riordan. Nothing more, nothing less than that. It may be worthwhile me quoting a section of the report at page 178 where I think Mr Roden himself has anticipated this problem would arise and has made comment about such situations. At page 178 of his report he said:

> 'In any corruption inquiry, and in particular in one as wide ranging as this, names are likely to be dropped. Sometimes it is inaccurately reported that there have been allegations against the people named. This investigation has been no exception. I regard it as no part of the Commission's function or of my function in this report to exonerate people whose conduct has not been investigated. Where there is nothing, there is nothing. It is to be hoped that those who read this report and those who report or comment on it publicly will have the good sense to recognise those facts.'

Those comments apply to Mr Riordan's situation. No one was suggesting nor did the report suggest that Mr Riordan had done anything improper. The report refers to documents that were in evidence add that Mr Riordan confirms in essence the factual account of this approach. I think that hopefully answers the question."87

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87 Minutes of Evidence, 17 December 1990, pp 30 - 31.

8.2.2 Mr Zervos was then asked why Mr Riordan's request for a statement from the Commission was not acceded to.

"MR GAY:

Q: If we go back to Joe Riordan, why was his request for a statement from the commission not acceded to?

MR ZERVOS:

A: Well, I think that once a report is out, the report then stands on its own. The letter that was provided to Mr Riordan to some degree actually deals with the matter. If you recall, the letter that was sent by the commission did state, I think it was in the second paragraph, that a fair-minded reader would appreciate that no impropriety was being suggested on the part of Mr Riordan. It could create a very unworkable situation where everybody who is mentioned firstly should be contacted and secondly should have some form of exoneration. Could I just expand it a little bit further? A lot of people have suggested that when a commission report states that there is insufficient evidence to warrant the consideration of somebody, that person has been cleared or exonerated. I do not agree with that statement. All that does is it makes a statement pursuant to section 74. It is no more, it is no less. One has to go to the report to appreciate the conduct of the person involved and it is for the reader then to assess on the basis of the report as to whether or not somebody has engaged in conduct that they should not have."88

8.2.3 Mr Zervos was then asked about mechanisms for preventing this sort of case recurring. He was pressed on the value of persons being contacted before being named in a report and the significance of being named in an ICAC report.

"MR GAY:

Q: Have you in mind mechanisms that can be put in place to stop this happening to anyone like Mr Riordan in the future?

MR ZERVOS:

A: Mr Gay, I do not think that in this case, and maybe in like cases, there has been a situation arising that has unfairly treated Mr Riordan. I

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88 ibid, p 36.

think if you read the relevant passage, if you read the full context, it is clear that there is no suggestion being made against Mr Riordan. He seems to be offended by the fact that he was mentioned, together with two others. It is probably worth while noting the comments made by Mr Costigan before this Committee. The evidence was confirmed by Mr Riordan that he was approached by these two persons and he had met with another. He confirmed the fact that there were three approaches. He confirmed that a representation was made to him. That was the point of it being mentioned in the report, to use that as an illustration, and there was reliance on exhibits, certain documents, that had been put before the commission in which Mr Riordan was named. I feel that the situation did not necessarily in these circumstances warrant Mr Riordan being contacted because if he had been contacted and he gave the evidence in accordance with what he submitted to you, the facts would not have changed.

Q: The facts did not change, but may I put it to you that there may have been a situation where the facts could have changed, and there lies the dilemma. I think in a situation like this you should consider at least contacting people who are going to be mentioned, particularly in his situation——a high-standing person with what he considers a very good public reputation who is now concerned that his name is in every library in the State?

A: I can only repeat my comments and say it would be a difficult undertaking in a lengthy and complex inquiry to contact everybody that is mentioned, and especially those that on the face of it there is no suggestion whatsoever of them acting in any manner improperly or adversely to themselves.

Q: But a person's reputation, how valuable is that? I think if you were to contact each of the persons, it would put a greater responsibility on the author of the report as to who was mentioned in the report?

A: Well, my experience in these types of inquiries, and I am talking about inquiries that have not been necessarily conducted by the commission, is that invariably people in these sorts of circumstances get mentioned in reports. I think there is a distinction to be drawn between somebody mentioned in a manner which could adversely reflect on their character and reputation and somebody who is not. That cannot

be said here because nothing adverse was said.

MR TURNER:

Q: The person he is alleged to have met with, one of them at least, was a person who was subsequently named as being substantially and directly interested. Would that not have occurred to the presiding officer, that that should have been looked at, an SDI person meeting with another person? Should Mr Riordan not have been contacted at that stage, or do you not attach that importance to an SDI?

A: No, I think there is considerable importance attached to an SDI, but it is the SDI that the focus is on in relation to this particular matter. If you are using the Riordan example, it could have been the Queen that they spoke to and it would have mentioned that. Do you contact the Queen and say, "We are going to mention the fact that you were approached by this person?"

Q: Why not? I cannot see any problem at all with that, Mr Zervos. Do you realise the stigma that is attached to being mentioned in these reports?

A: No, I do not.

Q: I suggest to you if you step outside the Commission, you soon will?

A: It depends on what basis you have been mentioned. I mean my name is mentioned in a lot of reports. It depends on what basis and the context in which your name has been mentioned as to whether or not there is a stigma."[89]

8.3 Potential for Abuse of ICAC Reports

8.3.1 Another issue of concern to the Committee that was drawn out by Mr Riordan's evidence was the potential for the fact that a person had been named in an ICAC report to be abused by persons motivated by mala fides.

"**MR DYER:**

Q: I understand that you have taken offence at being mentioned, but any ordinary reading of the material would lead a reasonable reader to conclude that there was no wrong-doing on your part?

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89 ibid, pp 36 - 38.

MR RIORDAN:

A: I agree with that. There is not doubt about that. However, there is always the person who is moved by mala fides, and the opening is there for that improper innuendo or inference to be raised: "Well, at least he was mentioned. He was there. What was he doing with that fellow anyway?" Those sorts of questions can arise. That is why this commission should at the very least have been expected to contact me to tell me that this was being said, and, second, it should have published a disclaimer in the report that no impropriety was suggested, and nor was any found to exist. That should be the least one would expect."90

8.3.2 Other witnesses who appeared before the Committee gave evidence that they had already been subjected to such innuendo and attacks from persons so motivated. Mr Steel said that competitors in the travel industry had been making mischievous use of media reports of the ICAC's North Coast hearings and report to attack his reputation.91 The Bradshaw Group indicated that in addition to facing "dirt" and "innuendo", there had been a significant financial cost from their involvement in the ICAC's Silverwater inquiry.

"MR TURNER:

Q: Mr Bradshaw, do you believe that your company has suffered a financial loss or detriment having regard to the totality of the hearings?

MR BRADSHAW:

A: A financial loss is hard to say. That is hard to judge in our industry. Put it this way: it would have been better if we were not there.

Q: Perhaps I shall take the financial side out of it. Do you believe you have experienced a downturn in business?

MR WATT:

A: May I answer you there——but not on the downturn of business side. I manage this company and this was a land fill project. Right? I have been doing land fill for a lot of years and I am the most experienced person probably in Australia on

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90 Minutes of Evidence, 11 December 1990,p 27.

91 Minutes of Evidence, 12 December 1990, p 31.

them. We are talking about multi-multi-million dollar deals. I have two on my plate now that are worth $60 million. All I am doing is getting dirt thrown back at me by idiots over what is happening at ICAC. You know, the damage is incalculable. It could be $100 million in reality.

MR BRADSHAW:

A: On a couple of occasions we were refused tenders from government departments because they did not want to touch us. They thought we were too hot.

MR DYER:

Q: Since this report?

A: Not since the report, but after the hearing. The report has not come out and people do not know the results. We are the ones telling them the results. I mean, the thing is, we have had to do a lot of work to get our name because our name was tarnished and it should not have been tarnished ...

We have got a good name in the business, we have been going for 70-odd years, and that is the thing that I do not like. Because it did hurt. I mean, government departments hung off us because of the tendering. We were close to getting the job and we did not get the job. I do not know if that still sticks around. I think there is probably still a bit there. You are still getting a few little innuendos which I do not think is right."92

8.4 Conclusions

8.4.1 The Committee recognises the difficult position in which the ICAC found itself in relation to Mr Riordan's request for a statement to be published to him concerning his mention in the North Coast report. However, the Committee believes that the tone struck in the last paragraph of Mr Temby's letter of 18 September (see 8.1.6 above) was unnecessarily hostile. Perhaps if that paragraph had not been included in the letter, this matter may not have developed in the way that it has.

8.4.2 In any case, Mr Riordan's complaint has served to highlight a number of important issues of more general application. The first of these is the significance of being named in an ICAC report. As Mr Riordan stated to the Committee, an innocent person does not want to be mentioned in an ICAC report.

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92 Minutes of Evidence, 11 December 1990, p 131- 132.

Mr Turner asked Mr Zervos whether he was aware of the "stigma" associated with being named in an ICAC report. The ICAC has a high public profile. The Commission needs to realise the significance of naming a person in one of its reports, even where there is no suggestion of impropriety. The decision to name someone should not be taken lightly. Furthermore, where there is no evidence of impropriety against someone named in a report, as in the case of Mr Riordan, the ICAC should consider including a brief statement to that effect.

8.4.3 This issue of the significance of being named in an ICAC report was given further emphasis by the evidence of the Bradshaw representatives and Mr Steel in relation to the use made of ICAC reports by competitors and the "innuendo" and "dirt" which can result from any association with the ICAC.

8.4.4 There is a clear distinction between the use by the ICAC in a report of file notes or other evidence which may incidentally include someone's name and commentary on that evidence and the person named. The ICAC should make every endeavour to contact any person to be named in a report. Moreover, fairness would dictate that every person about whom there is going to be some commentary must be contacted and given an opportunity to respond to any evidence which concerns them. As suggested by the Riordan case, such contact could also assist in ensuring the accuracy of any account of events contained in the report.

8.4.5 The Committee has received a further suggestion as to how this problem may be addressed. In a letter to the Chairman dated 14 January 1991 Mr Michael Bersten suggested that a standard notice could be placed at the front of ICAC reports. This notice would state that:

> "Persons against whom adverse findings are made in this Report under the Independent Commission Against Corruption Act 1988 are named at page *XX* of this Report. The fact that other persons are named in this Report does not constitute an adverse finding against them and no inference of wrongdoing can be drawn merely because a person is named in this report."

8.5 Findings and Recommendations

8.5.1 **The ICAC needs to recognise the impact of naming a person in one of its reports. Where a person is named in a report and there is no suggestion of impropriety, consideration should be given to the inclusion of a brief statement to that effect. Consideration should also be given to the inclusion of a standard notice in a prominent place at the front of ICAC reports indicating that no inference of wrongdoing can be drawn against a person merely because they are named in an ICAC report. The Committee sees merit in the following proposed wording.**

> **"Persons against whom adverse findings are made in this Report under the Independent Commission Against**

> Corruption Act 1988 are named at page *XX* of this Report. The fact that other persons are named in this Report does not constitute an adverse finding against them and no inference of wrongdoing can be drawn merely because a person is named in this report."

8.5.2 The ICAC should give consideration to contacting any person who is to be named in a report. Moreover, where the report is to contain commentary about a person, fairness dictates that the Commission should provide that person with an opportunity to be heard in relation to any evidence which concerns them.

CHAPTER NINE

ALLEGED POLITICAL BIAS

9.1 Alleged Bias in North Coast Report

9.1.1 The National Party submission contained a serious allegation of political bias in the way the ICAC conducted and reported on its North Coast inquiry. There were two parts to this allegation. The first concerned the way the report dealt with the issue of political donations. The second, concerning Mr Barry Toomey QC is dealt with later in this chapter at paragraphs 9.4 and 9.5. The basic proposition put in relation to political donations was that,

> "It appears that the ICAC, in an endeavour to expose deficiencies in the Election Funding Act and whilst acknowledging the belief that other political parties followed the same procedures, these were not pursued leading to a totally one-sided and biased treatment by the ICAC and the media of the National Party."93

9.1.2 When Mr Moppett appeared before the Committee he was pressed as to the exact nature of the political bias that the National Party was alleging. He made it clear that there was no suggestion of any predetermined malicious bias against the Commissioner, Assistant Commissioner or the Commission as a whole. Instead, the allegation focused upon alleged inadequacies in the North Coast report and investigation.

> "**MR WHELAN:**
>
> Q: Could I just go now to what I find very interesting, and that is page 15 where you talk about political bias. Can you tell me when you use the words "political bias" do you mean political bias against the National Party, in favour of the Labor Party, in favour of the Liberal Party, in favour of Independents? What is your definition of political bias—that the judge was biased?
>
> **MR MOPPETT:**
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> A: I think my definition in this respect is that the nature of the report, taken on face value, represented a bias in examining the facts which

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93 Minutes of Evidence, 11 December 1990, p 51.

assertions there—but he has said that by showing one example, then the public will be aware of the possible widespread use of those procedures in other parties, and from that standpoint advocates the changes in the law.

Q: But you are not saying this bias affects the whole Commission?

A: No, not at all.

Q: You are saying it only relates to this one matter?

A: Yes.

MR WHELAN:

Q: If that is the answer, can I ask you to look at page 21 of your National Party submission and tell me the meaning of the words in the middle, starting with the words:

> 'That the Commission has not carried out these enquiries and that it has not chosen to explain why it did not carry out those enquiries, leaves, at the very least, the perception that the Commission has demonstrated political bias.'

A: In respect of that report.

Q: So in respect of the North Coast report, there was a demonstrated political bias against the National Party?

CHAIRMAN:

Q: I think the word "perception" is used.

MR WHELAN:

Q: At the very least, the perception, at the very least.

CHAIRMAN:

Q: I am just saying that is how the question should be framed?

A: I would be astounded if there are not a great number of people numbered amongst them, people well beyond the membership of our party, that do not view the report of the North Coast inquiry, when it moves on to the area of political

it purported to do so. I think there are two aspects to this. One is the fact that the Commissioner——Assistant Commissioner in deciding that his main duty was to explore and, by example, show the nature of political party donations and how they were treated, acknowledged that all three major parties at least handled them in the same way but simply chose to make an example of the National Party in detail ... That was one kind of bias.

The second one was that there was a conclusion drawn that there was a breach of the Electoral Funding Act which pertained to transactions within the National Party, but almost identical evidence was led that the same sort of transaction was handled in the same way by an officer of another party and no recommendations were made in respect of that transaction ...

Q: To come back to my original question, you say there is a bias against the National Party exercised by the Commission?

A: I think somewhere along the line a subjective decision was made. I find it hard to understand how we arrived where we did unless a subjective decision was made; to simply say we would follow the strand of political donations in the National Party and from that draw conclusions as to the nature of public funding and the Electoral Funding Act generally from that without making any, at the same time, examination of parallel circumstances in the Liberal Party and Labor Party and the Democrats.

MR DYER:

Q: This allegation of bias, am I correct in understanding, is not against the Commission as such. It is against a Commissioner in regard to a particular inquiry, or is it more general than that?

A: No, no, no, it is entirely directed——and I am not saying that there was a predetermined malicious bias. I think if you follow Commissioner Roden's arguments in this matter, he believes that in fulfilling the functions of exposing what he terms corruption——and I want to make it quite clear that I do not agree, and that is again detailed in our submission, with the assumptions he makes about the intentions of people when they make donations, nor about the effectiveness of a political machine in shielding the donor from the parliamentary wing, I do not accept his

> donations, as inadequate to say the least because it deals——basically the evidence deals with one party alone and inferences are drawn that the others do and they are aware of the fact that there are such things as the Labor victory fund and so on, that there is an insinuation or an inference that exactly the same——but I think the public out there were——what was made available to the public by way of evidence was basically only that related to the National Party."94

9.2 ICAC Response

9.2.1 The main response by the ICAC to the allegation of political bias in relation to the North Coast report, was a letter from the Assistant Commissioner, Mr Adrian Roden QC. This letter is reproduced in full on the following pages.

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94 ibid, pp 83 - 85.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

17 December 1990

The Chairman
Parliamentary Joint Committee
Parliament House
121 Macquarie Street
SYDNEY NSW 2000

Dear Sir

Since publication of the North Coast Land Development Report, I have deliberately refrained from comment on the public discussion it has engendered. It is highly desirable that there be such discussion, and I have welcomed it.

I am moved to write now, because of the submission made to your Committee by Mr D F Moppett in the name of the National Party of Australia. On page 15 of the submission, the following appears:

> "One of the most serious criticisms of the North Coast inquiry by the National Party is the one of political bias."

Two paragraphs later, the following appears:

> "Also, the National Party draws to the Committee's attention a number of examples of what it believes is political bias in the treatment of witnesses from political parties, bias which is inherent in the Report by Assistant Commissioner Adrian Roden, QC."

The suggestion of political bias is false, and unworthy of the political party in whose name it is made. If I retained any respect for those responsible for the allegation,

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I would demand a retraction and would expect an apology. As well as being false, the allegation seems a little odd, coming from one who purports to be concerned about unwarranted damage to people's reputations.

What will no doubt be of concern to your Committee, is the potential impact of Mr Moppett's assertion on the standing and repute of the Commission. I trust that the matter will be dealt with appropriately and firmly in any Report produced by your Committee in consequence of the present hearings.

As you are of course aware, Mr Kevin Zervos of the Commission will be appearing before your Committee today to respond on the Commission's behalf to a number of criticisms and suggestions that have been made. I felt, however, that the allegation of bias directed against me personally is a matter to which only I can respond. It goes to my motivation, to which only I can attest; it touches my integrity, which only others can judge.

I reiterate that I was not motivated by political bias in any aspect of my handling of the North Coast Land Development Investigation, or in writing the Report. I have no party political allegiance or bias. My only relevant prejudice is against corrupt practices.

It is healthy that there be informed public debate about the exercise of the Commission's powers, and about its procedures. It is imperative, however, if that debate is to be of value, that it be based upon what has in fact occurred, rather than inaccurate representations of what has occurred. Not all criticisms that have been made, meet that requirement.

Mr. Zervos will be dealing with a number of those matters when he appears this afternoon. If there is any matter on which you require further assistance or clarification from me, please let me know. I am, of course, ready to contribute to

your Committee's work in any way I can.

May I be permitted one final observation. The public discussion to which I have referred, sometimes gives the impression that there is more interest in the Commission than in the corruption with which it is seeking to deal. I trust that when initial reactions to the North Coast Land Development Report have run their course, there will be valuable public debate on the substantial questions it seeks to raise about levels of integrity in public life.

Yours sincerely,

Adrian Roden.

9.2.2 It should also be noted when Mr Toomey appeared before the Committee he was asked for his response to the allegation of political bias concerning political donations. Mr Toomey said that the allegation had no substance.

"**MR WHELAN:**

Q: Have you had a chance to have a look at this document, the National Party submission?

MR TOOMEY:

A: I have not read all of it, Mr Whelan, but I have read some of it.

Q: The part on page 22 which affects you?

A: Yes. I read also, because that was linked back to the statement on page 15 that the National Party drew to the Committee's attention a number of examples of what it believes is political bias. I read that and what followed for the purpose of seeing what accusation was being made against me.

Q: Yours in fact is cited as a third example of political bias?

A: Yes.

Q: Have you had a chance to read page 21, in the middle, which is the end of the first example?

A: Yes——am I correct in thinking that was where——

Q: The words stating:

> 'That the Commission has not carried out these enquiries and that it has not chosen to explain why it did not carry out those enquiries, leaves, at the very least, the perception that the Commission has demonstrated political bias.'

A: Yes I did read those and if I may say so, they are entirely wrong. The Committee investigated the allegation of the donation to the Labor Party immediately before the 1988 election, just as it investigated the donation to the National Party after the election and during the pendency of the applications for the Fingal land."95

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95 ibid, p 146.

9.3 Evidence made available to the ICAC

9.3.1 There may be a reasonably simple explanation for the differences in the way the North Coast report dealt with the political donations made to the Australian Labor Party and the National Party. This concerns the different levels of information which the ICAC had made available to it by the two parties. Mr Moppett acknowledged that the National Party made its full financial records available to the Commission. This included information on the accounts of an associated company in Canberra. This meant the ICAC was able to fully pursue any investigations concerning political donations made to the National Party.

9.3.2 In relation to the Australian Labor Party, however, the ICAC did not have access to the same degree of information. This point was acknowledged in the North Coast report.

> "The Commission's powers do not extend beyond State borders, however, and the assistance received from Canberra was limited. The national secretary of the Australian Labor Party, Robert Duncan Hogg, consented to be interviewed by a Commission officer on 25 July 1989. When he was questioned about the Labor Victory Fund, he at one stage said, '... I am not intending to go any further' and 'I mean it is outside the jurisdiction and I'm not prepared to talk about public funding.'"96

This matter was also discussed by Mr Whelan and Mr Moppett when Mr Moppett appeared before the Committee.

> "MR MOPPETT:
>
> A: ... I think it would have been far better, had they decided to go down that track, if they had made sure that there was evidence available to support those conclusions equally drawn from all parties, not just from the National Party.
>
> MR WHELAN:
>
> Q: We have been down that track before and you keep ignoring the fact that the Labor Party's donations ended up in Canberra. Do you not realise that the Independent Commission Against Corruption has no jurisdiction in the Australian Capital Territory?
>
> A: Do you recognise also that in an attempt to assist the commission we made available records

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96 ICAC, Report on Investigation into North Coast Land Development, July 1990, p 496.

of donations which also were admitted to an associated company in Canberra in relation to the National Party because it was our intention and our belief that the matters being pursued are——

CHAIRMAN:

Q: Could I interpose here, because we are subject to section 64(2). I appreciate that general questions about political bias can be asked, but we are tending to get into the operational side of the findings of the Commission."97

9.4 Allegation Concerning Mr Barry Toomey QC

9.4.1 The National Party submission contained a further serious allegation of political bias in relation to Counsel Assisting the ICAC for the North Coast inquiry, Mr Barry Toomey QC.

"Senior Counsel assisting the Commission, Mr B M J Toomey, had represented Stephen Loosley when the latter was prosecuted for breach of the law relating to disclosure of campaign donations arising out of the ALP's receipt of a donation from Harris Daishowa.

This is the reason, the National Party understands, that when Mr Loosely gave evidence at the hearing in the North Coast Inquiry he was not interrogated by Mr Toomey (who was in the hearing room at the time); rather, Mr Loosley was interrogated by Junior Counsel assisting the Commission, namely Mr Buchanan.

In the National Party's view, as soon as the Commission became aware that Parliamentary and other members of the National Party were to be called to give evidence at the North Coast Inquiry, Mr Toomey should have returned his brief and ceased to assist the Commission in this Inquiry.

Failing Mr Toomey voluntarily returning his brief, the Commission itself should have withdrawn its instructions to Mr Toomey.

There have even been suggestions that Mr Toomey is, or was at one time, a member of the Society of Labor Lawyers. If this is so, then clearly Mr Toomey should have either voluntarily returned his brief or had his instructions terminated by the Commission.

If there was a good reason either for Mr Toomey not voluntarily returning his brief or the Commission not withdrawing his instructions, that reason should have been disclosed publicly by the Commissioner together

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97 Minutes of Evidence, 11 December 1990, pp 93 - 94.

with a similar public disclosure of Mr Toomey having represented Mr Loosley and, if it was or is a fact, the membership of Mr Toomey of the Society of Labor Lawyers.

Others substantially and directly interested in the North Coast Inquiry could then have made their views known on these issues."98

9.4.2 When Mr Moppett appeared before the Committee he was questioned about this allegation by Mr Whelan and others.

"MR WHELAN:

Q: Could I now go to page 22. This is another of your examples of bias and this is a very serious allegation you make; that Mr Toomey, senior Counsel Assisting the Commission—— ... You were at pains to say that people's reputations have been tarnished by ICAC. Do not you think that this cheap political shot has besmirched Mr Toomey's reputation?

MR MOPPETT:

A: I do not agree it is a cheap political shot.

Q: How else would you described it?

A: I think it is a very serious submission to this Committee as to the conduct that should be adopted by those who professionally assist the commission in the conduct of their duty, particularly in sensitive areas.

Q: If Mr Gyles who represented Mr Murray had attended a National Party or Labor Party function, would he have to disentitle himself?

A: I do not think there is any parallel in the instance that you are quoting. The difficulty with Mr Toomey is that he was directly involved in a similar case. I mean it is not a matter of socialising with people. If we had got into that, I think we would have been making a cheap political shot.

Q: In the second last paragraph you say there have been suggestions that Mr Toomey is or was at one time a member of the Society of Labor Lawyers. Are you talking about 1950, 1960, when are you talking about? Was he a member? Do you have any proof, or is this hearsay?

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98 Minutes of Evidence, 11 December 1990, pp 58 - 59.

A: I do not personally have proof here with me.

Q: So you are happy to have that in the document though?

A: Yes, I am because I think——

Q: The second last paragraph on page 22?

A: Yes. I think it needs to be read in context.

Q: Context with what?

A: Of the whole of that third example.

Q: The example of political bias?

A: Yes.

Q: So you would withdraw it if Mr Toomey was not or is not a member of the Society of Labor Lawyers?

A: The principle being raised there is his professional association with Mr Loosley in a particular instance and that in my view is just simply illustrating that the commission needs not only to act impartially but to be seen to be acting impartially. I think that is the purpose of including that reference there.

MR TURNER:

Q: Are you aware that Commissioner Roden on many occasions asked Counsel to withdraw from representing people because of perceived conflicts within the commission during the North Coast hearing?

A: Yes.

MR WHELAN:

Q: Did any counsel of National Party members of Parliament ask for Mr Toomey's withdrawal?

A: No, but I think, Mr Whelan, you would have to be practical and say once the inquiry got under way, for us to have asked for the removal of any particular officer of the commission at that stage would have been self-defeating in any purpose to achieve a fair hearing. I think if we had to appeal for that once the inquiry got under way and we were the subject of such widespread speculation and sensational reporting in the

paper, it would have only inflamed the circumstance."99

9.4.3 Mr Moppett was further pressed on the reasons why the National Party made no submissions during the course of the North Coast inquiry to have Mr Toomey stood down.

"MR MOPPETT:

A: My only suggestion for thought, because I have not been able to reflect on it for very long, would be that it might be possible for a motion from one of the interested parties——a witness——to suggest to the commission in the broadest sense that it should consider that person's qualifications.

MR HATTON:

Q: Precisely. I would have thought that the National Party, despite my concerns about what the public perception might have been at that time, should have, if it felt as strongly as this submission would suggest about Mr Toomey, made a very strong submission through their counsel to ask Mr Toomey to stand down on this matter, because there is no other way to do it. I do not think there is much point in criticising Mr Toomey after the event, when the opportunity was not taken, because of some public perception and disadvantage at that time to the National Party's image, to, to put it crudely, take on Mr Toomey at the time. I cannot see any other way ...

A: ... The most strident objections that we expressed were at the closing stages when Mr Toomey was summing up. It was a bit late then to object to him taking part in it all. In a court case, which is the sort of thing you seem to be talking about, you know in advance you are accused of something and you say, "I object to Mr Whelan acting as a prosecutor". No such circumstance existed there. We approached Mr Toomey assuming that our confidence in our good practices and our ethical attitudes would carry us through. We were not really interested in having legal representation. It was only as the procedures unfolded that we realised that a potentially damaging report would be made, or that suppositions and hypotheses would be put that were damaging. I still continue to assert that there were times when the conduct of that inquiry went beyond the finding of facts but

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99 ibid, pp 86 - 87.

clearly followed a line in which an hypothesis was established and that that particular line was pursued by aggressive cross-questioning and cross-examination.

MR WHELAN:

Q: Did anyone ever complain to Mr Temby about this political bias?

A: We did not do so formally; we always intended to place this submission before you. But I am not sure whether your Committee has been made aware——

Q: This submission here?

A: Yes

Q: You held up complaining about the alleged political bias in the North Coast inquiry because of this Committee?

A: One thing you have to appreciate is that immediately the report became available, and even before that, we have been in a straightjacket because there are individuals who may be facing legal proceedings.

Q: Mr Hatton's point is why you did not raise objections at the time the hearing was being conducted?

A: I think I can only reiterate what I said a moment ago. Perhaps you may like to look at the transcript."100

9.5 Mr Toomey's Response

9.5.1 In view of the recommendation contained in the Committee's first report that persons be given an opportunity to respond to an allegation on the same day that it is made, Mr Toomey was contacted immediately after Mr Moppett had given evidence and was invited to appear before the Committee and respond to the allegation contained in the National Party submission. Mr Toomey was able to accept this invitation and appeared before the Committee on the afternoon of 11 December. Mr Toomey's detailed response to the allegation is set out below.

"**CHAIRMAN:**

Q: Are you aware of evidence given earlier today by Mr Moppett on behalf of the National Party?

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100 ibid, pp 91 - 92.

MR TOOMEY:

A: I am not aware of the evidence he gave, but I have been provided with a copy of the statement he tendered to the Committee.

Q: Would you like to make any statement in relation to the material you have been provided with?

A: Yes. Mr Moppett's evidence, in so far as it relates to me, is a combination of falsehoods and ignorance. May I elaborate? He referred to the fact that I represented Stephen Loosley when Mr Loosley was prosecuted for breach of the law relating to the disclosure of campaign donations arising out of the Australian Labor Party's receipt of a donation from Harris Daishowa. He is perfectly correct: so I did. That was a charge under the Commonwealth Electoral Act. It had nothing to do with any matter which was or could have been the subject of an inquiry by the Independent Commission Against Corruption, as the commission's jurisdiction is purely a State jurisdiction. Further, the charge against Mr Loosley was that he had signed a document that failed to include a donation made, the allegation not being that Mr Loosley had acted deliberately. In fact, it was accepted by the prosecution that he had been ignorant that the donation had been made, and the question at issue in those proceedings was whether he, as the person who signed to document, was liable despite his ignorance.

At the time that the Independent Commission Against Corruption inquiry into the North Coast began I had no idea that Mr Loosley would be involved in any way. When I did become aware, the inquiry had been going for I think a couple of months, or thereabouts. It started in June and I believe that Mr Loosley was called to give evidence some time in August. The State had already paid me many thousands of dollars in fees, and for me to withdraw from the inquiry would have been an impossible imposition on the public purse. Furthermore, the rules of the Bar——which I have here if the Committee would like access to them——are very stringent as to the requirement of a person appearing or not appearing as the case may be: appearing if required to do so in a field in which he practices, which was my case, and not appearing if there is a reason why it would appear that he has or might have a personal interest in the subject matter. Those rules were met by my

refusing to have anything to do with the interrogation of Mr Loosley. That which Mr Moppett attempts to have appear as a brand of guilt was in fact the simple fact of my obedience to the Bar rules, that because I had acted for Mr Loosley and knew what his attitude was to certain matters, I deemed it improper for me to take any part in the interrogation of him. That is why I did not.

The mis-statements of fact in Mr Moppett's statement are these: I absented myself from the hearing room when Mr Loosley was examined. I absented myself from the hearing room when John Della Bosca was examined. Mr Moppett said, without ever naming his sources——I thought one of the very criticisms he made of the Independent Commission Against Corruption——"There have even been suggestions that Mr Toomey is or was at one time a member of the Society of Labor Lawyers". I have never been a member of the Society of Labor Lawyers. I have expressed often and openly my view that a person who wishes to make his primary concern the practice of the law should not in any way trammel it by tying it to the views of a political party. Mr Moppett, of course, having made the misstatement without quoting his sources, went on to say that I should have, of course, withdrawn. In respect of Mr Loosley, Mr Moppett said, "If there was a good reason either for Mr Toomey not voluntarily returning his brief"——I hope I might be forgiven for indulging myself by saying that was an absurd suggestion.

MR GAY:

Q: He said, "If this is so"?

A: He said, "If there was a good reason either for Mr Toomey not voluntarily returning his brief, or the commission not withdrawing his instructions". I take that, Mr Gay, to refer to the earlier suggestion in paragraph 3 that I should have returned my brief and ceased to assist the commission, which is unconditional. He then said, "If there was a good reason either for Mr Toomey not voluntarily returning his brief, or the commission not withdrawing his instructions, that reason should have been disclosed publicly by the commissioner together with a similar public disclosure of Mr Toomey having represented Mr Loosley". I did publicly disclose before the commission that I had represented Mr Loosley and for that reason I would not take any part in the examination of him. Furthermore, had Mr Moppett

taken the care to read the transcript, he would have found that recorded in the transcript. I think I referred to the cab rank rule by which a barrister is bound to accept a brief in the field in which he practices. This brief was offered to me, and I accepted it, not as an officer of ICAC but as an independent barrister.

May I say this: I really do not understand what Mr Moppett was suggesting. I am not a member of the Labor Party. I am not a member of any political party. Nor have I ever been. I am not a member of the Society of Labor Lawyers. I have appeared for the Liberal Party in a challenge in the Court of Disputed Returns in 1969 in respect of, I think, the seat of Wollongong. I have appeared for senior members of the National Party when briefed to do so——once, when briefed by Mr Spencer Ferrier's firm about two years ago. That took me to Inverell to appear for a senior member of the National Party on a fraud charge. I do not allow my political views——which I choose, and which I am sure you will respect my right to do so,——to in any way affect my professional conduct. Thank you, Mr Chairman.

CHAIRMAN:

Q: In relation to your public utterances about the Society of Labor Lawyers: I take it that was in relation to forming a professional association, rather than members of the legal profession being members of a political party?

A: Absolutely."[101]

9.5.2 In response to questions from Mr Tink, Mr Toomey clarified that, at the time he accepted his brief as Counsel Assisting the ICAC, there was no reference in any material before the Commission to Mr Loosely. Furthermore, as soon as Mr Loosley's name was mentioned Mr Toomey took no part in that part of the proceedings.

"MR TINK:

Q: Am I right in assuming this, that this inquiry got under way and was considering a number of matters and that during the course of the inquiry Mr Loosley's name came up? Is that the sequence of events?

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101 ibid, pp 143 - 145.

MR TOOMEY:

A: That is so. Can I tell you this, when I was briefed, when I was first asked whether I could accept the brief and I said I would and I conferred with Mr Roden and Mr Zervos, the material we had contained no reference to Mr Loosley at all ...

Q: Perhaps I could put it this way: were there any matters that could have led to criminal charges against Mr Loosley under investigation during the course of the hearing?

A: I find that difficult to answer, because as soon as Mr Loosley's name was mentioned——and that arose in the context of the inquiry into payments to governments, whether Labor or Liberal-National——I said to Mr Roden, "He is a client of mine. I cannot have anything to do with that", and I did not have anything to do with it."102

9.6 Appearance of Impartiality

9.6.1 It should be noted that further discussion took place concerning Mr Toomey at the Committee's public hearing on 17 December. Mr Tink expressed concern about the role Mr Toomey played in making closing submission relating to Mr Loosely. He drew attention to the third simple rule enunciated by Mr Roden in the North Coast report,

> "3 The appearance of impartiality should be respected and maintained, as well as impartiality in fact ..."103

and expressed concern about the appearance of impartiality in regard to Mr Toomey's role in making closing submissions concerning Mr Loosely. It should be emphasised, however, that Mr Tink made it clear that he did not think that there was any conflict or problem with impartiality for Mr Toomey in fact. Mr Tink's concern was about the appearance of impartiality.

"MR TINK:

Q: In connection with making submissions to the Assistant Commissioner, concerning Mr Loosley, Mr Toomey took it upon himself to make submissions on matters that affected Mr Loosley?

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102 ibid, pp 153 - 154.

103 ICAC, Report on Investigation into North Coast Land Development, July 1990, p 656.

MR ZERVOS:

A: That dealt with the evidence as it related to Mr Loosley, yes.

Q: I suppose it is in relation to that that I have some difficulty. It seems to me that for more abundant caution Mr Toomey should really have not involved himself whatever with anything in relation to Mr Loosley, whether by way of evidence, which he clearly did not, or by way of making submissions based on the evidence. Can I put it to you on this basis, that really it gets down to Mr Roden's third general rule, that the appearance of impartiality is as important as impartiality in fact and in the context of Mr Toomey involving himself in making submissions in connection with Mr Loosley when he was then acting for him in another matter. I accept without hesitation that there is no concern with Mr Toomey's impartiality in fact, but the appearance of impartiality is also critical. In the circumstances in which Mr Toomey found himself on submissions, that is a matter for cause for some concern. Can I have your comments on that?

A: ... Mr Toomey, when making the final submissions in relation to this aspect was relying on the work that was done by myself, another lawyer and junior counsel, Mr Buchanan. He, in effect, was the mouthpiece who was putting together the overall arguments and dealing with the evidence that was now in. I do not see that there was any problem with perceived impartiality. I think the exact opposite, in fact. I feel that what took place was done out of caution and maintaining the high standards that I talked about earlier. The points that you make and the illustrations that you have extracted seem to indicate to me but I would have to go back to look at the material, that Mr Toomey, in referring to Mr Loosley in some of the examples you have given, is putting the hypothetical situation in that he (Mr Loosley) is being used as an example, not that he is being used in any other capacity. It is there to make general points in relation to something else by using Mr Loosley as an example in the particular circumstances that might apply to him. I would have thought that overall that is quite in order, and I would have thought that because of the different functions that are being performed by counsel assisting when engaging in final addresses perceived impartiality was maintained.

Q: ... He said, in relation to something put to him by the commissioner, "I am in difficulty in respect of this question because of my personal position", and he goes on a bit further. He was having some doubts about it along the way. That is my first point. I agree that there is a clear distinction between adducing evidence from a witness and making submissions on that evidence. Your proposition that when making submissions one is a mouthpiece, is really only half the story. If it were merely a matter of one's standing up at a lectern and reading something that had been prepared by Mr Buchanan, without more, then Mr Toomey would be a mouthpiece. However, the difficulty I have is that, as will inevitably occur, the situation will be arrived at when the commissioner will want to question him about some of the propositions contained in the written submission. At that point, inevitably, and through no fault of his own, he is dragged into an assessment of the pros and cons.

I state again that I do not think in fact he had any conflict; I do not think that there was any actual problem. What I am concerned about is the perception. It seems to me that in this case there was an easy alternative, and that was for Mr Buchanan to do not only the hard work of cross-examining the witness but also to take the next and, it seems to me, relatively easy step, of making submissions on that evidence. Just as there was a separate approach taken to Mr Loosely as a witness, had there been a separate approach taken to submissions, or at least the great bulk of them, there would be no problem. It is no more than perception, and I do not suggest for one moment that it is any more than that. However, I still have some problem with regard to it?

A: I accept what you say in relation to the fact that there is no conflict on the part of Mr Toomey and that there was no problem. If you look at page 6087 you will see at the end that Mr Toomey says, " Perhaps after I have finished my submissions Mr Buchanan could say something on that". It does indicate that he then had junior counsel speak in relation to additional matters. I agree that there is no conflict and there is no problem."104

3.6.2 Notwithstanding Mr Zervos' answer Mr Tink, on behalf of the Committee, has subsequently written to him to pursue certain

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104 Minutes of Evidence, 17 December 1990, pp 59, 61 - 62.

matters arising from his answers on this matter which require further clarification.

9.7 Conclusions

9.7.1 In considering the National Party allegation of political bias with respect to the North Coast report the Committee has had to be mindful of s.64(2)(c) of the ICAC Act which precludes the Committee from reconsidering "the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint". However, as it is such a serious allegation it is important that some brief conclusions be drawn.

9.7.2 Mr Roden's response to the allegation speaks for itself. The Committee accepts without reservation Mr Roden's comment in his letter to the Chairman dated 17 December 1990 that,

> "I reiterate I was not motivated by political bias in any aspect of my handling of the North Coast Land Development Investigation, or in writing the Report. I have no party political allegiance or bias. My only relevant prejudice is against corrupt practices."

9.7.3 To the extent that donations to the National Party and Labor Party are dealt with differently in the North Coast report, there may be a simple explanation, which emerged from Mr Moppett's evidence before the Committee. Mr Moppett made it clear that the ICAC was given full access to the complete financial records of the National Party, including the records of an associated company in Canberra. The Labor Party, on the other hand, did not provide the Commission with information concerning accounts or companies in Canberra, and the ICAC had no means of obtaining access to this information as Canberra is outside the ICAC's jurisdiction.

9.7.4 Similarly, Mr Toomey's response to the allegation of political bias against him, speaks for itself. Mr Toomey made no effort to hide the fact that he was representing Mr Loosley in another matter and took steps to exclude himself from any examination of Mr Loosely when he appeared before the Commission.

9.7.5 The Committee accepts without reservation Mr Toomey's statement that he has never been a member of the Society of Labor Lawyers. The Committee also notes that Mr Toomey has appeared during the course of his career for members of both the Labor Party and National Party and for the Liberal Party. There is no suggestion that Mr Toomey has at any time allowed his political views to in any way affect his professional conduct.

9.8 Findings and Recommendations

9.8.1 **The Committee has examined and taken evidence with regard to the allegations of political bias made against the ICAC. The Committee has found them to be without foundation.**

9.8.2 Mr Roden's response to the allegation of political bias in the North Coast report speaks for itself. To the extent that donations to the National Party and Labor Party are dealt with differently in that report, it should be noted that the ICAC was given access to different levels of information by the two parties. Mr Toomey's response to the allegation of political bias against him also speaks for itself.

CHAPTER TEN

CONTEMPT

10.1 Mr Moppett's Submission and Evidence

10.1.1 In addition to the National Party submission, with the preparation of which he was involved, Mr Moppett also made a personal submission to the Committee on the contempt issue. This submission drew upon his experience in being summonsed to show cause before the Commissioner why he should not be cited for contempt in October 1989 and his subsequent citing to the Supreme Court. Mr Moppett's submission fell into two broad areas.

> "My submission falls into two broad areas. Firstly to advocate that the legislation should be changed so that the contempt powers are curtailed and clearly defined. I would respectfully urge the Committee to avail themselves of the Law Reform Commission Report No 35 and to consider and adopt its recommendations on this subject.
>
> And secondly, that if the Committee is persuaded to retain the existing provisions, they should be regarded by the Commission as reserve powers to be used only against sustained, malicious and outrageous criticism. I would argue that in specific instances the powers have been misused and applied with excessive zeal and that those actions would be judged as repressive by normal community standards."105

10.1.2 The National Party submission also contained a section on contempt. The submission recommended that the contempt provisions in the Act be amended. It also drew attention to a number of cases in which high profile public figures had criticised the Commission but, unlike Mr Moppett, had not been cited for contempt. The submission also recommended that in relation to activities outside Commission hearing (eg. publication in the media) and not constituting a breach of a specific order of the Commission, the Act should require defendants to show cause to the Criminal Division of the Supreme Court, rather than to the Commission itself, why they should not be cited for contempt.106

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105 Minutes of Evidence, 11 December 1990, p 31.

106 ibid, p 47.

10.1.3 When Mr Moppett appeared before the Committee he was asked a number of questions about his submission and the contempt issue generally by Mr Dyer. In answering those questions Mr Moppett mentioned the subjective nature of any determination of an offence of contempt, the lack of defences available and the differences between the ICAC and the Courts.

"MR DYER:

Q: Mr Moppett, as I indicated somewhat earlier, I want to focus for a moment on the question of the commission's contempt powers. In your submission to the committee you said, "I would respectfully urge the committee to avail themselves of the Law Reform Commission Report No 35 and to consider and adopt its recommendations on this subject". You also stated, "I would argue that in specific instances the powers have been misused and applied with excessive zeal and that those actions would be judged as repressive by normal community standards". Would you say what you mean by that second sentence and why you feel reform is necessary in the area of the Commission's contempt powers?

MR MOPPETT:

A: Perhaps I could best address that by saying that I think the recommendations which your committee has already formulated——and indeed some of the matters acknowledged in the annual report, but certainly not those relating to contempt but matters of conduct of inquiries which were acknowledged in the annual report——if effect had been taken before the start of the North Coast inquiry, I believe (a) the inquiry would have been totally different and (b) I would not have felt compelled to speak out as I did at the time. I guess that in retrospect I feel that some of the remarks——although perhaps the language was ill-chosen at the time, nevertheless the difficulties of trying to make a point in the public area remain, and perhaps I can address that at a later stage. I believe that if those amendments had taken place there would not have been the occasion for me to comment about the conduct of the inquiry. To that extent I believe the reaction of the commissioner to my comments was over zealous. I do not think there is any indication that my comments were malicious, but were intended in fact to stimulate debate about the conduct of that inquiry and to that extent I believe that greater restraint might have been exercised by the commissioner, and I believe that is reinforced looking back retrospectively from where we do now ...

Q: ... Given, according to my recollection, that you were accusing the commission of being McCarthyist, do you believe that the commission was being over zealous?

A: You will have noted in the party submission the comparisons made between the language used by Mr Chris Murphy, representing his client, and the response that Commissioner Temby made to that. They had quite a verbal exchange which I would have thought impugned the propriety of the commission far more robustly than my comments. You will know that in fact no real determination was finally made by the courts as to whether the use of the word "McCarthyist" really was the subject of contempt. I guess what I am saying is that the whole law of contempt, as has been simply applied to the commission, is inappropriate. I think my argument is that I agree with the Law Reform Commission which says that a lot of the concepts that are embodied are inappropriate in general, that is, that they apply to courts as well but they are specifically inappropriate to an organisation which is demonstrably not a court. I think I made that argument and, given that, and given the experience of other royal commissions and, for instance, the Fitzgerald inquiry in Queensland where, against constant comment, Fitzgerald declined to take any action against people who were speaking out and trying to get their views across, and I believe has publicly advocated that such provision should not be given to standing commissions and commissions of inquiry, I certainly agree with that view, based on my own experiences ...

The essential thing in terms of scandalising the court is that the court is not in a position to reply. It is regarded as undignified for a judge to hop in and defend himself. But it is quite obvious that Mr Temby does not feel under that constraint. In the case of Mr Murphy, he felt the best remedy was to answer him in the press, very roundly. He did so also with the extraordinary Mr Fast Bucks on the North Coast who wrote a scathing article, and he simply dealt with that by writing a scathing article back. The matter is quite different. I would also draw your attention to the other example which I think illustrates what I regard as excessive zeal, that is, the warning issued to Mr Murray. I am paraphrasing his remarks but I think he said, "I had a very fair hearing. I am very satisfied with my appearance before the ICAC and I believe

I will be exonerated". For that he was given a severe warning that if he persisted in that line he would be charged with contempt of the commission's powers because he was prejudicing the commission's likely findings.

I guess I am saying in my submission that if the commission is solely about establishing facts, I do not see how the acceptance of those facts can be affected by someone such as me giving vent to sincerely held beliefs, even given that the language might be regarded by some as a little colourful, and I guess you may appreciate the problem when you get down to the fine point of law so far as contempt is concerned that really the defences available are very limited indeed. One's case really falls on arguing whether the activities up to date were long drawn out or McCarthyist or anything else. They hang on the very point of law contained in the overall contempt, which means that if someone could have misinterpreted what I said, that is almost an impossible contention to defend. So one is really driven underground by these contempt provisions and I think I have instanced in my submission or in the party's submission that I believe it is most undesirable that there be a dread factor, that people should feel they are excessively constrained in making any public comment because they might be the subject of action which would get out of hand for them. It seems to me that an awful lot of people have come to me from both sides of politics and expressed views which apparently they are unwilling to say publicly, which seems a great shame ...

Q: My interpretation of what you have been saying in response to my questions about the contempt powers of the commission is not so much that those powers need to be curtailed but, rather, that the commission ought to be much more circumspect and careful and cautious before it invokes those powers. Am I correct in interpreting your words to that effect?

A: I think I place that as my first priority, but I certainly believe very strongly that even when those powers——I think I used the terms persistent and malicious criticism that was levelled——and if action were taken, the difficulties that I have highlighted, which again are very much brought out by the Law Reform Commission, ought to be addressed so that the defence of such an action is more compatible with modern community standards. I honestly believe that contempt as it stands today is something that has been

rolling along from concepts that are now largely outdated."107

10.1.4 Mr Moppett was then asked for his reaction to the Commission's decision not to cite Mr Murray for contempt for his comments about the ICAC in August 1990.

Mr Moppett indicated in no uncertain terms that he found the arguments put forward by the ICAC to distinguish his remarks from those of Mr Murray's unconvincing.

"MR DYER:

Q: I remind you that in July Mr Murray characterised the commission's proceedings as more appropriate to the Spanish Inquisition than to Australia 1990. Do you feel a sense of grievance that though you were cited for contempt before the Supreme Court in regard to your characterisation of the commission as McCarthyist, Mr Murray was not proceeded against following his comparison of the commission with the Spanish Inquisition, which does not exactly have an excellent historical reputation? Is there some inconsistency there?

MR MOPPETT:

A: I studied the explanation that Mr Temby offered the public. Basically he said he thought the essential distinction was that the remarks I made were during the progress of an inquiry, and that Mr Murray's remarks were at the conclusion of an inquiry and therefore could not influence the acceptance of it by the public. I thought the arguments were thin and vacuous, to say the least. You asked me if I felt indignant about it. I would say that I do not approach this committee trying to air indignation. It is a very constructive comment to say that if a situation like that occurred again, I believe either greater tolerance should have been displayed by the commissioner of people who wish to come to grips with the damage that was being done either to people themselves or to their organisations or whatever; or otherwise the law should be changed to make the charges far more specific so that they are clearly understood and can be appropriately defended. That is very much better expressed than I would ever be able to do, in the extensive review that the Law Reform Commission conducted of the whole subject, and its recommendations are worthy of study by

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107 ibid, pp 77 - 79, 80.

anyone.

Q: To put another quote to you by Mr Murray, he is reported as having said of the North Coast land development inquiry, "The rule book was thrown out the window and sarcasm, innuendo, inference and downright baseless allegations were allowed to denigrate the character of those unfortunate enough to be subject of the inquiry". Do you think that was fair comment or it bordered perhaps on contempt of the Commission?

A: Well, as I say, I believe that the Commission should be robust enough to allow criticisms like that to be vented, particularly as they have a very extensive media unit and take every opportunity that is available to speak from public forums about their perspective and the justification for what they are doing. In my view it was a robust comment by Mr Murray, that perhaps might not accord with what counsel would suggest he should say. However, it is in the public interest that people can say those sorts of things about an institution like the commission, given its extraordinary powers and the potential damage that it can do to people's reputations. Perhaps this in many ways depends upon your definition of the term. Perhaps members of the committee might pause to reflect on their own definition of the word McCarthyism. Mine certainly was not such as to justify the description Mr Temby made of it, that it was the most insulting term I could possibly use. You have made a comparison with subsequent terminology used. In retrospect, his actions against me were excessively zealous and unjustified, particularly in retrospect as we have seen that many of the objections I tried to contain to half a dozen words, which one has to do to get them into the press, have been, I would argue, vindicated."108

10.2 ICAC Response

10.2.1 When Mr Temby appeared before the Committee in October, Mr Hatton put to him that the contempt action taken against Mr Moppett had been heavy handed. Mr Temby defended the action taken by the Commission but indicated that the Commission does not take or propose to take such action frequently.

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108 ibid, pp 79 - 80.

"MR HATTON:

Q: I might preface this by saying that I am not having a shot at anybody because I am a non-lawyer, and this may be regarded as a radical view, but I tend to this view, that the courts are too protective, and I thought that the action against Mr Moppett was going over the top. I understand that there are two points here - first of all whether in fact it is designed to bring the court into contempt. We are not necessarily talking about Mr Moppett's case but any case. Second does it have a prejudicial effect on a hearing or an inquiry or a matter before a court or a commission. I did not see Mr Moppett's comments in the general sense in the same way as the commission saw them, that it did have those two effects or either of those two effects. I thought it might have been wiser - and therefore I am asking for comment on this - as a Parliamentarian and as a community representative to rebut the comments perhaps, and leave it at that, rather than take contempt proceedings. I would like some comment on that?

MR TEMBY:

A: I do not want to embark upon a replay of a matter which has been before the court, so I will confine myself to a couple of general comments. The key reason why we thought those proceedings were called for was that the statements were in our judgment - and as I recollect it avowedly - designed to reduce the standing and authority that the forthcoming report would have. That is to say, in the context of a particular investigation, they were calculated to do harm to the report which had not yet been brought down.

That is a very different thing from discussion, perhaps even vigorous discussion, with respect to a report when it has been brought down, which is a proper thing. It is a very different thing from discussion, even vigorous discussion, with respect to the Commission and what it is doing. We accept that vigorous discussion and we do not even expect that it will always be soundly factually based. But it is very like that species of contempt which is designed to affect current litigation. There was a hearing under way, and it was in the context of that hearing that the statements were made, as opposed to contempt of courts in a general sense or criticism of judgments after they have been made. We thought that the timing and purpose of what was said added a particularly troubling

characteristic.

Q: I did not share that view. I wondered why?

A: That is the rationale fairly briefly expressed, and it is worth mentioning and it is obvious from the report that it is not as if we are strongly inclined to commence litigation or to protect ourselves against any criticism. We have brought only two sets of contempt proceedings. Others have been proposed from time to time but I think the proceeding has to be taken with a specially compelling case. We thought that was. You are entitled to the contrary view; I do not doubt that."[109]

10.2.2 When Mr Zervos appeared before the Committee, Mr Dyer pressed him on the distinction that was drawn by the Commission between the criticism by Mr Moppett and that by Mr Murray.

"**MR DYER:**

Q: ... if I could focus for a moment on the question on the contempt powers of the commission, do you think that someone in Mr Moppett's position would be somewhat bemused by the fact that he was at one stage cited for contempt for describing the commission as McCarthyist whereas Mr Murray, at a later stage, was not proceeded against in any respect at all when he used the term "Spanish Inquisition" in relation to the Commission?

MR ZERVOS:

A: The Commissioner has made comment in relation to this and has publicly stated in relation to Mr Murray's comments they were made after the report had been tabled and that the report was there to speak for itself, whereas Mr Moppet's comments were made at a time when the hearing was in progress and, it was alleged, designed to undermine the standing of the commission in the eyes of the public.

Q: I realise that the Commissioner gave that explanation. Could I put it to you that that difference involves a degree of casuistry?

A: Legal gymnastics.

Q: Yes, perhaps legal gymnastics and that in essence it ought to matter little whether the commission

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109 Committee on the ICAC, Collation of Evidence, 15 October 1990, pp 59 - 60.

is defamed and viciously attacked either during its proceedings or following the conclusion of any particular proceedings?

A: All I can say is the matter was considered. The Commissioner made his statement on the matter. I think it answers the situation and I really have nothing further that I can add. I see the consistency with the commission's approach and as stated, it was explained to the public at large.

Q: I appreciate you are perhaps in a particularly uncomfortable position in this regard but if I could postulate a situation where prominent politicians of varying parties were unfairly publicly attacking the commission, not on the basis of some analyses of what it was doing but just throwing a problem of one sort or another in its direction?

A: I think that is correct. At that particular time it was most unfortunate and there were others involved as you have said. Let us hope it does not happen again."[110]

10.3 Conclusions

10.3.1 As with the problems associated with the cost of legal representation before the ICAC (see chapter 3), it would be difficult for the Committee to come to any firm conclusions on this matter without taking further evidence. Before recommending any legislative change, the Committee would need to study the Australian Law Reform Commission's report on Contempt.[111] The Committee would also need to seek the considered views of the interest groups representing the legal profession and the media, and interested individuals and academics. It may be that this could be an issue to which the Committee could appropriately turn its attention in the future. The conclusions set out below are therefore only initial views.

10.3.2 The contempt powers contained in the ICAC Act are extensive. It follows that these powers need to be exercised judiciously. The Committee believes that, except in the most exceptional circumstances the Commission should be robust enough to allow criticism to be vented. In this regard the following quote, contained in a submission received from Mr Stephen Rares, is very relevant.

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110 Minutes of Evidence, 17 December 1990, pp 45 - 46.

111 Parliament of the Commonwealth of Australia, The Law Reform Commission, Report No 35, Contempt, June 1989, Australia Government Printing Office.

> "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."112

In this regard, the Committee notes that unlike the Courts, the ICAC is in a position to deal with criticism by a swift response - including statements from the bench and response through the media. The Committee notes Mr Temby's advice that the ICAC is not "strongly inclined to commence litigation or to protect ourselves against any criticism".

10.4 Findings and Recommendations

10.4.1 **The contempt issue is one which requires further consideration before any legislative change could be recommended.**

10.4.2 **The ICAC needs to exercise its contempt powers with restraint. Except in the most exceptional circumstances the Commission should be robust enough to allow criticism to be vented. The Committee notes Mr Temby's advice that "it is not as if we (the ICAC) are strongly inclined to commence litigation or to protect ourselves against any criticism".**

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112 Ambard vs Attorney-General for Trinidad and Tobago [1936] AC 322 at p 335 (Privy Council per Lord Atkin), quoted in submission from Mr Steven Rares, p 2.

APPENDIX ONE

RELEVANT EXTRACTS FROM SALMON REPORT

ROYAL COMMISSION ON TRIBUNALS OF INQUIRY

1966

Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon

Presented to Parliament by Command of Her Majesty
November 1966

LONDON
HER MAJESTY'S STATIONERY OFFICE
FIVE SHILLINGS NET
Cmnd. 3121

(ii) **The six cardinal principles**

32. The difficulty and injustice with which persons involved in an inquiry may be faced can however be largely removed if the following cardinal principles which we discuss in Chapter IV are strictly observed:—

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.

2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.

3. (*a*) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.

(*b*) His legal expenses should normally be met out of public funds.

4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.

5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.

6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

CHAPTER IV

HOW TO IMPROVE THE SAFEGUARDS FOR WITNESSES AND INTERESTED PARTIES

(i) Strict observance of the six cardinal principles

48. We consider it to be of the highest importance that the six cardinal principles which we have stated in paragraph 32 of this Report should always be strictly observed.

(ii) More time

49. The question arises, how is it possible to ensure that any allegations against witnesses and the substance of any evidence against them will be made known to them so as to give them an adequate opportunity of preparing their case (Cardinal principles 1, 2 and 3(a)). We believe that the answer to this question lies mainly in less haste. We are under the impression that the tempo of some of the post-war Tribunals, particularly in the early stages of an inquiry, was somewhat too hurried. We appreciate that there should be no dilatoriness in starting the inquiry and pushing it to a conclusion. It is urgent that the truth should be revealed to the public as speedily as possible. Nevertheless, a few weeks more in preparing the material for arriving at the truth is a small price to pay in order to avoid injustice.

50. Any potential witness from whom a statement is taken by the Treasury Solicitor should be told that, if he so wishes, his own solicitor may be present when the statement is taken. In many cases a witness will not require legal assistance. If, however, he does wish his solicitor to be present he should be given a reasonable opportunity to secure his solicitor's attendance even if this entails a day or two's delay. As soon as possible after he has given his statement, and certainly well in advance, usually not less than seven days before he gives evidence, he should be supplied with a document setting out the allegations against him and the substance of the evidence in support of those allegations.

51. There may be cases in which the Tribunal will consider that there is a real danger of witnesses being intimidated or influenced or of a witness making improper use of the information supplied to him. Accordingly, the form of the document disclosing to a witness the substance of the evidence against him must be left, in each case, to the discretion of the Tribunal. We realise that however thoroughly a case is prepared fresh evidence may emerge during the course of an inquiry which may give rise to further material allegations. In such circumstances, the witness concerned should be given a reasonable opportunity of meeting those allegations even if this means adjourning the inquiry for a few days. The time allowed to anyone at any stage for preparing his case against the allegations he has to meet must be left to the discretion of the Tribunal.

52. Further time in preparing for the public hearing would also give the Tribunal a better opportunity of discarding irrelevant evidence. It is of the greatest importance that irrelevant evidence should not be made public, particularly if it contains what are clearly groundless charges against anyone.

53. From this it will be seen that in our view it is essential for the Tribunal to consider the evidence which is collated by the Treasury Solicitor. It is understood that in Scotland the practice has been for the Tribunal not to see the statements or precognitions of the witnesses. We recommend that, for the reasons given earlier in this chapter in relation to practice in England, a similar procedure should be adopted in Scotland.

(iii) Right to be legally represented

54. Under the Act of 1921 as it now stands no one has the right to be legally represented before the Tribunal. The Tribunal, however, has a discretion as to whether or not to allow a person to be represented. In the past this discretion has always been exercised in favour of allowing any person to be represented if it appeared to the Tribunal that he might be prejudicially affected by the evidence or by any finding or comment in the Report. This means that a witness cannot be represented until he has satisfied the Tribunal that he may be in peril. We recommend that the Act should be amended so that anyone called as a witness would have the right to be legally represented. It is unlikely that any witness will go to this expense unless he considers that he is in real peril of being prejudicially affected by the inquiry—and he may know more about this peril than it would be possible for the Tribunal to know before the evidence is taken. We can see no reason why a witness who in the public interest has to be subjected to an inquisitorial form of inquiry and its attendant publicity should not be accorded this elementary right of being represented should he consider himself to be in peril. We do not think that to give him this right would add significantly to the duration or costs of the inquiry. The control of the inquiry is in the hands of the Tribunal, and the Tribunal would no doubt rule out any irrelevant questions by whomsoever such questions might be asked. Moreover, costs should be in the discretion of the Tribunal as recommended in paragraph 60.

55. We consider that the Tribunal should have a discretion to allow anyone to be legally represented who is not a witness but who claims to be a person interested in the inquiry in that there is a real risk that he might be prejudicially affected by it. In order to succeed in his application to be legally represented such a person would have to satisfy the Tribunal about the existence of such a risk.

56. Such cases would be rare indeed for it is difficult to imagine circumstances in which a person likely to be prejudicially affected by an inquiry would not be called as a witness. It is impossible however to foresee all circumstances which may arise in the future and the discretion should exist to deal with such a case should it occur.

(iv) Examination by own solicitor or counsel

57. We would here refer to the fourth cardinal principle stated in paragraph 32. We consider that when a witness is legally represented, he should be examined by his own solicitor or counsel on the written statement given to the Treasury Solicitor. The witness is no doubt a witness of the Tribunal, but it must be remembered that he is a witness who is probably at risk so far as his own reputation is concerned. We consider it right that in the first instance he should be allowed to tell his own story confident that the solicitor or counsel questioning him is doing so with the object of bringing out the evidence which he wishes to be placed before the Tribunal. There have been instances in the past in which witnesses have felt aggrieved that although their own counsel was present, they were both examined and cross-examined by counsel for the Tribunal before their own counsel had a chance of being heard. Some of them felt that this procedure was unfair, particularly as they were left with the impression, however wrongly, that their examination in chief—in sharp distinction to their cross-examination—had been perfunctorily carried out. If, when being examined by his own solicitor or counsel, a witness should seemingly depart from what he has said in his written statement to the Treasury Solicitor, his cross-examination by counsel for the Tribunal will be much more effective than if the witness had been examined in the first place by some other counsel for the Tribunal. When a witness is unrepresented, he should be examined by one of the team of counsel appearing for the Tribunal. If, as will no doubt usually be the case, there are no allegations against such a witness, there will be no necessity for him to be cross-examined on behalf of the Tribunal. If, however, such a necessity arises, the witness should be cross-examined by another member of the team representing the Tribunal. No witness should ever be examined and cross-examined by the same counsel. This presents an air of unreality. The purpose of examination in chief is to establish the evidence being given by the witness. The purpose of cross-examination is to test and if necessary to destroy it. If both these tasks are undertaken by the same counsel, however brilliant the tour de force, the witness may be perplexed and left with the feeling that he has not been fairly treated.

(v) Right to have further evidence called

58. This is the fifth cardinal principle stated in paragraph 32. If a witness wishes further evidence called, then a statement of the further evidence should be taken by the Treasury Solicitor. If the Tribunal in its discretion after seeing this statement considers that the evidence it contains may be material and that it is reasonably practicable to obtain it, that evidence should be called by counsel for the Tribunal. This matter must be left to the discretion of the Tribunal in each case, since it is not impossible that a plea for further evidence might be put forward merely for the purposes of delay or some other purpose irrelevant to the inquiry.

(vi) Right to costs

59. The Act of 1921 contains no provision giving the Tribunal power to order that a witness shall be paid his costs out of public funds (Cardinal principle 3(b)). We consider that it should be amended to do so.

60. It is a great hardship that a witness should be left to bear the very heavy expenses often incurred in being legally represented before the Tribunal. After all, the inquiry is in the public interest, the witness is the Tribunal's witness, it is usually just that the witness should be represented, and his solicitor or counsel are assisting the Tribunal in arriving at the truth. It is manifestly unfair that such a witness should be left to face what in a long inquiry is sometimes a crippling bill of costs. It was for this reason that in the last inquiry to be held under the Act of 1921 the Tribunal recommended that some of the witnesses should be paid all or part of their costs out of public funds. As a result the Treasury wrote to these witnesses advising them that it was proposed to make an *ex gratia* contribution towards their costs, and they were asked to submit their bills of costs. This, of course, was all that could be done under the Act in its present form and was an advance upon the previous practice of leaving all witnesses to pay their own costs. We do not consider however that it is satisfactory that the amount to be paid to a witness in respect of his costs should be offered *ex gratia*. It may put the witness in an embarrassing position. He may feel that he is accepting alms at the public expense. There should be power in the Tribunal to order in its discretion that any witness should be paid all or any proportion of his costs out of public funds on a Common Fund basis. Common Fund basis means that the amount of the costs must be reasonable. If their reasonableness is not agreed by the Treasury Solicitor, the costs should be taxed by a Taxing Master in accordance with the Rules of the Supreme Court. Once the Tribunal makes an Order for costs in favour of a witness, he should receive them as of right and not *ex gratia*.

61. It may be helpful if we state how, in our view, the Tribunal's discretion in respect of costs should be exercised. Normally the witness should be allowed his costs. It is only in exceptional circumstances that the Tribunal's discretion should be exercised to disallow costs. We have recommended in paragraph 54 that any witness should be entitled to be legally represented. If the Tribunal came to the conclusion in respect of any witness that there had never been any real ground for supposing that he might be prejudicially affected by the inquiry and that it was therefore unreasonable for him to have gone to the expense of legal representation, the Tribunal should leave him to bear those expenses himself. In any case in which the Tribunal considered it reasonable for the witness to be legally represented, the practice should be to order that he should recover his costs out of public funds on a Common Fund basis, unless the Tribunal considered that there were good grounds for depriving him of all or part of his costs. It is impossible to catalogue what these grounds might be ; cases vary infinitely in their facts and the matter must be left entirely to the discretion of the Tribunal. It may be helpful, however, to give a few examples of the type of case in which a Tribunal might deprive a witness of part or all of his costs. If the witness during the course of the inquiry sought to obstruct the Tribunal in arriving at the truth or unreasonably delayed the inquiry. This does not mean that every departure in evidence from strict accuracy even if deliberate should be regarded as necessarily disqualifying a witness from recovering his costs. It would be a question of fact and degree in each case. The mere fact that a witness had committed a criminal offence—even a serious one—or was a disreputable person should not, of itself, be a ground for depriving him of his costs. We have no doubt that Tribunals can safely be left to exercise their discretion over costs wisely and justly.

62. In dealing with costs, we have hitherto dealt with the case in which the witness would not qualify for assistance under the Legal Aid Scheme. But what of these latter cases? No one should be disabled by comparative poverty from being legally represented if reason and justice require that he should be represented. We therefore recommend that any necessary amendments to the relevant statute or regulations should be made to give the Tribunal the same power to grant legal aid as the Criminal Courts exercise, i.e. the Tribunal would have to be satisfied that *prima facie* the witness's financial position qualified him for legal aid and that it was reasonable in all the circumstances that he should be represented.

(vii) Further Immunity

63. Section 1 (3) of the Act of 1921 provides that a witness before any Tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court or the Court of Session. This means that he cannot be sued for anything he says in evidence, e.g. if he says " A is a liar. His evidence is untrue ", A cannot sue him for defamation. It does not mean however that his answers as a witness cannot be used in evidence against him in any subsequent civil or criminal proceedings. We consider that the witness's immunity should be extended so that neither his evidence before the Tribunal, nor his statement to the Treasury Solicitor, nor any documents he is required to produce to the Tribunal, shall be used against him in any subsequent civil or criminal proceedings except in criminal proceedings in which he is charged with having given false evidence before the Tribunal or conspired with or procured others to do so. This extension of the witness's immunity would bring the law in this country into line in this respect with similar provisions in the legislation of Canada, Australia and India and indeed with Section 9 of the Special Commission Act, 1888. It would also, in our view, be of considerable assistance in obtaining relevant evidence, for persons may be chary of coming forward for fear of exposing themselves to the risk of prosecution or an action in the civil courts. Moreover, the suggested extension of the immunity would make it difficult for a witness to refuse to answer a question on the ground that his answer might tend to incriminate him. Thus not only would the witness be afforded a further measure of protection but the Tribunal would also be helped in arriving at the truth.

64. No doubt this entails a risk that a guilty man may escape prosecution. This would be unfortunate, but it is much more important that everything reasonably possible is done to enable a Tribunal to establish and proclaim the truth about a matter which is causing a nation-wide crisis of confidence. Moreover the risk would be minimised by the fact that Tribunals have in the past and no doubt will in the future wherever practicable forbear from investigating any side issues when it is known that a prosecution is in contemplation or may be brought in respect of them. In any event, it has long been recognised that from a practical point of view it would be almost impossible to prosecute a witness in respect of anything which emerged against him in the course of a hearing before a Tribunal of Inquiry. The Rule against hearsay evidence, rightly in our view, is not applied by the Tribunal although the practice is for the Tribunal to ignore hearsay evidence for the purpose of arriving at any adverse finding against anyone appearing before it. The publicity however which such hearings usually attract is so wide and so overwhelming that it would be virtually impossible for any person against whom an adverse finding was made to obtain a fair trial afterwards. So far no such person has ever been prosecuted. This again may be justified in the public interest because Parliament having decided to set up an inquiry under the Act has clearly considered whether or not civil or criminal proceedings would resolve the matter and has decided that they would not.

(viii) Opportunity to make an early statement

65. We consider that it should be left to the Tribunal in every case to decide whether or not an opening statement should be made by counsel appearing for it. We can conceive of cases in which it would be most desirable that such a statement should be made and others in which it should not. This matter is dealt with further in paragraph 109. In the past the opening statement of counsel for the Tribunal has sometimes contained strong criticisms of persons to be called as witnesses before the Tribunal.

These criticisms have been given the widest publicity yet it has not been possible to call the persons concerned until a much later stage in the inquiry. Accordingly they have been deprived, sometimes for weeks, of giving their side of the story and answering the criticisms that have been publicly made against them. This unfortunately is sometimes unavoidable. It is not however a feature peculiar to Tribunals of Inquiry but occurs equally in the ordinary civil and criminal courts. We consider that solicitor or counsel for any witness before the Tribunal should be given the opportunity of making a short speech of not more than about five minutes duration immediately after the conclusion of the opening speech by counsel for the Tribunal. In most cases we think it unlikely that anyone will wish to avail himself of this opportunity. There may however be cases in which the opportunity to make a particular point or refer to a document at an early stage will immediately put the case in an entirely different light and go far to mitigate the effect upon the public of the criticism made in opening. It is for this reason that we recommend that it should be the practice of Tribunals to accord solicitor or counsel appearing for witnesses the opportunity of making a very short statement immediately after the opening. Whilst this is an advantage not enjoyed in the ordinary civil or criminal courts, it must be recognised that witnesses before an inquisitorial tribunal are sometimes in an exceptionally difficult position and should be accorded every possible safeguard.

(ix) Criminal Records

66. It is perhaps appropriate that at this stage we should deal with the subject of criminal records. Any information as to crimes committed by any of the witnesses must together with any other information obtained by the Treasury Solicitor be placed before the Tribunal in advance of the hearing. It is of the greatest importance that the credibility of any witness should be thoroughly tested, particularly if his evidence supports any of the allegations which are the subject matter of the inquiry. Sometimes a witness's criminal record may be of considerable assistance in this respect. On the other hand there are cases in which the crime was committed so long ago or was of such a nature that it could not materially affect the witness's credibility. In such circumstances it would be manifestly unfair that a witness who has come forward to help in a public inquiry should have his past dragged up and publicised. In each case it must be left to the Tribunal to use its discretion as to whether or not a man with a record should have it used again him.

67. We consider that with the adoption of the safeguards recommended in this Chapter—some of which would require legislation—most of the criticisms which have been made about the workings of the Act of 1921 would be met and all persons appearing before Tribunals would be adequately protected.

CHAPTER XI

PROCEEDINGS OF THE TRIBUNAL

(i) Preliminary meeting of the Tribunal in public

98. In previous inquiries the Tribunal has held a preliminary meeting in public before hearing the evidence. This is a useful practice but we think that the preliminary meeting should not be held until the Treasury Solicitor has collated the evidence and the Tribunal has had an opportunity to consider it. We are convinced that time spent at this stage will lead to the inquiry being more effective and will be a greater protection to those who are involved.

99. We have had a proposal that there should be an informal method of procedure before the Tribunal in public and one witness considered that discussion round the table rather than the usual method of examination and cross-examination might more likely lead to the truth.

100. There is however a real danger in departing from well tried and proved methods of arriving at the truth. Whilst therefore in our view examination and cross-examination should be retained, every effort should be made by the Tribunal and counsel appearing on its behalf to put witnesses at their ease. We have no doubt that this can be done.

101. At the preliminary meeting the Tribunal should read its terms of reference in public and give its interpretation of these terms of reference and the extent of the intended lines of inquiry.

102. The Tribunal should then proceed to give directions on matters of administration and procedure.

103. The Tribunal should explain the duties of the Treasury Solicitor and counsel instructed on behalf of the Tribunal, the duties of counsel appearing for witnesses and interested persons and the order of speeches by the counsel appearing at the inquiry.

104. The Tribunal should indicate so far as it is possible to do so, the allegations which will be investigated. The Tribunal will also indicate what, if any, parts of the proceedings they then intend to hold in private session and give directions as to the venue and times of hearing of the evidence.

105. It may be necessary for the Tribunal to entertain applications for representation earlier than the preliminary meeting in public and this can be done by writing to the Tribunal applying for the representation under the Act.

106. It is essential that sufficient time is given between the preliminary meeting and the hearing of evidence to enable the Treasury Solicitor to make any necessary further investigations and to give the persons involved adequate time to prepare their cases.

107. During the period between the preliminary meeting and the hearing of the evidence, if it has not been done already, the Treasury Solicitor should provide all witnesses with copies of their statements and all the witnesses and persons interested with a precis or a list of the allegations which they will be required to answer. The Tribunal should direct the Treasury Solicitor to provide witnesses and interested persons with a document containing the substance of any evidence which affects them. The form of any such document should in each case be at the discretion of the Tribunal for the reasons we have stated in paragraph 51.

(ii) Hearing of evidence by the Tribunal

108. The hearing of the evidence in public by the Tribunal should be held in premises which are easy of access to the public and provide sufficient accommodation to enable the greatest number of the public to attend.

109. In its discretion the Tribunal will direct whether or not counsel instructed on its behalf should make an opening statement indicating the progress which has been made in the investigation before the evidence is heard.

110. It has been suggested that it would be preferable to have no opening statement by counsel for the Tribunal otherwise allegations are made in the full glare of publicity when the Press and the public are most interested. By the time the allegations have been dealt with in the evidence and the report has been published the interest in the inquiry has waned.

111. Provided a sufficient time has been given to the preparation for the inquiry, an opening statement by counsel for the Tribunal is usually helpful as it is otherwise difficult for the persons who have been granted representation and the members of the public to understand the line of inquiry which is being followed. An opening statement will also assist the Press in reporting the proceedings. The statement should be an impartial summary of the investigation and avoid any comments likely to make sensational headlines. It should be emphasised that until the evidence has been heard it would be wrong to draw any conclusions.

112. After submissions have been made by counsel, the witnesses should be called in the order directed by the Tribunal.

113. At the close of the examination in chief, the witness should, if necessary, be cross-examined by a member of the team of counsel instructed on behalf of the Tribunal. The Tribunal should then give leave in its discretion to other counsel representing interested persons to cross-examine the witness before the witness is finally re-examined by his own counsel. Members of the Tribunal will question the witness at any stage of his examination should they wish to do so.

114. There should be one counsel in the team of counsel acting on behalf of the Tribunal who is appointed to examine and re-examine any witness who is not legally represented.

CHAPTER XII

PUBLICITY

115. As we have already indicated it is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.

116. When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.

117. It has been said that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. This may well be so. We consider, however, as we have said in paragraph 40, that although secret hearings may increase the quantity of the evidence they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would, in our view, be a small price to pay for the great advantages of a public hearing. Moreover, experience shows that the Tribunals of Inquiry which have sat in public have not been hampered in their task by lack of any essential evidence.

118. We appreciate that publicity may be hurtful to some witnesses who are called before the Tribunal and indeed to some persons who are mentioned and perhaps not called to give evidence. But this is a risk which, on the rare occasions when such inquiries are necessary, must be accepted in the national interest. We have already dealt with the measures which we recommend to safeguard the interests of persons called to give evidence. Careful preparation and sifting of the statements of witnesses before the witnesses are called will do much to eliminate the risks of groundless charges being thrown up for the first time by the evidence. It may be decided to discard some witnesses altogether as being immaterial. In other cases, where there is some material evidence which the witness can give, care must be taken whilst examining him in chief not to bring out in his evidence irrelevant and groundless allegations against anyone. Nevertheless the risk remains that such allegations might be made by the witness whilst under cross-examination. This is unavoidable, but it is not a risk peculiar to hearings before a Tribunal of Inquiry. It may equally well occur in any ordinary civil or criminal proceedings.

119. It has been suggested to us that the Press should be prohibited from reporting the proceedings day by day and that the evidence should be made public only after the publication of the Tribunal's report. This would no doubt eliminate the pain sometimes caused to innocent persons by the glare of publicity. On the other hand we are satisfied by the evidence that on balance it is in the interest of innocent persons against whom allegations have been made or rumours circulated to have the opportunity of giving their evidence and destroying the evidence against them in the full light of publicity. If, as we believe, it is essential for the inquiry to be held in public, it seems to us that those members of the public who are not able to attend the hearing in person are entitled to be kept informed through the national Press of what is taking place. Moreover, if the evidence is not published daily and the public has to wait for weeks or months for authentic information about what is occurring before the Tribunal, rumours will grow and multiply and the crisis of public confidence will be heightened.

120. When the evidence is published in bulk after the report, there is perhaps only a small percentage of the reading public which embarks upon the formidable task of reading and digesting it, certainly far fewer than read the newspaper reports of the Tribunal's proceedings.

121. We have also considered the suggestion that the Press tends to highlight sensational aspects of the evidence without providing the other side of the picture. No doubt when this occurs it is largely due to the difficulties which the newspaper has in giving an accurate account of the proceedings because of the roving nature of the investigations and the consequent problem for all concerned of distinguishing between what is important and what is not. We wish to emphasise the extreme care which the Press should exercise in reporting these matters. It should be made clear, particularly in the opening stages of an inquiry, that only one side is then being published. This is especially important in an inquisitorial inquiry when new facts may emerge suddenly during the proceedings. Care should also be taken to give the same prominence to the evidence of persons denying allegations or rumours made against them as was given to the allegations and rumours themselves. We are confident that the Press in general can safely be relied upon to be fair to all persons involved in an inquiry.

122. Although it is of the greatest importance that the hearing should be in public, it has been generally conceded in evidence that there may be most exceptional circumstances in which justice demands that the Tribunal should have a discretion to hear some of the evidence in private. Under Section 2 of the Act of 1921 the Tribunal has no power to exclude the public unless it is of the opinion that "it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given". These words have so far only been construed as applying to cases in which hearing the evidence in public would constitute a security risk. This is because no question has yet arisen as to whether they may confer a wider discretion. We consider that the Tribunal should have a wider discretion, certainly as wide as the discretion of a Judge sitting in the High Court of Justice. This discretion enables the public to be excluded in circumstances in which a public hearing would defeat the ends of justice, e.g. where particulars of secret processes have to be disclosed and in infancy cases. We do not think however the discretion should necessarily be confined to infancy cases or to trade secrets. It is impossible to foresee the multifarious contingencies which may arise before a Tribunal of Inquiry. We can imagine cases in which for instance a name might be required of a witness and it would be just that he should be allowed to write it down rather than state is publicly. The Tribunal might consider it desirable to exclude the public from the inquiry for the purpose of making an explanation to a witness or admonishing him. The Tribunal might consider that the interests of justice and humanity required certain parts of evidence to be given in private. This would be only in the most exceptional circumstances which indeed may never occur. The discretion should however be wide enough to meet such cases in the unlikely event of their occurring. Clearly that discretion should be exercised with the greatest reluctance and care and then only most rarely. The words in Section 2 of the Act are very wide and should in our view be construed so as to confer such a discretion on the Tribunal.

APPENDIX TWO

MINUTES OF THE PROCEEDINGS OF THE COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 20 NOVEMBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 6.00 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Ms Nori
	Mr Tink
	Mr Turner
	Mr Whelan

The Minutes of the meeting held on 23 October 1990, as circulated, were confirmed.

The Committee noted the letters from David Catt, dated 07 November and 12 November 1990.

The Committee deliberated on the letter from B R Thorley, dated 31 October 1990.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

That the letter be included in the Collation of Mr Temby's evidence before the Committee on 15 October concerning general aspects of the Commission's operations, to be tabled in Parliament.

The Committee noted the late submissions received to the Committee's current inquiry.

Meeting of the Committee on the ICAC
20 November 1990

The Committee then proceeded to consider the draft report on stage one of the current inquiry.

Resolved on the motion of Mr Tink, seconded by Mr Dyer:

That the draft report be the report of the Committee and that the report be tabled in Parliament at the earliest possible opportunity.

The Committee noted the arrangements for the hearings for stage two of the current inquiry.

The Committee then considered the draft Collation of Mr Temby's evidence before the Committee on 15 October concerning general aspects of the Commission's operations.

Resolved on the motion of Mr Turner, seconded by Mr Hatton:

That the draft Collation be adopted by the Committee and tabled in Parliament.

The Committee adjourned at 6.40 pm until 10.00 am on Tuesday 11 December 1990.

.....
Chairman

.....
Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 11 DECEMBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 9.50 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
	Mr Tink
	Mr Turner
	Mr Whelan

Apologies were received from Ms Nori and Mr Mutch.

The Chairman introduced Ms Ronda Miller, Clerk to the Committee, to Members of the Committee.

The Committee deliberated.

The media and public were admitted.

The Clerk read the terms of reference of the Committee and Legislative Assembly Standing Order No.362 relating to the examination of witnesses.

The Hon Joseph Mark Riordan, Deputy President, Australian Industrial Relations Commission, was sworn and examined.
Evidence concluded and the witness withdrew.

Douglas Frederick Moppett, Chairman, National Party of Australia - NSW, was sworn and examined.
Evidence concluded and the witness withdrew.

Meeting of the Committee on the ICAC
11 December 1990

Stephen Joseph O'Halloran, Solicitor, was sworn and examined.
Evidence concluded and the witness withdrew.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

That Mr Toomey QC be advised forthwith of evidence relating to him presented this morning, and that he be given an opportunity to respond to that evidence.

John Warwick Bradshaw, Company Director, was sworn and examined.

John Joseph Watt, Manager and Director, was sworn and examined.
Evidence concluded and the witnesses withdrew.

Suzanne Alice Jones, Project Manager, Department of State Development, was sworn and examined.
Evidence concluded and the witness withdrew.

Barry Michael Joseph Toomey QC, Barrister at law, was sworn and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 4.56 pm until Wednesday 12 December 1990 at 9.30 am.

.....
Chairman

.....
Clerk

NO 25

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

WEDNESDAY 12 DECEMBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 9.30 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Tink

Apologies were received from Ms Nori, Mr Turner and Mr Whelan.

The Committee deliberated.

The Clerk read the terms of reference of the Committee and Legislative Assembly Standing Order No.362 relating to the examination of witnesses.

Robert John Cashman, Chief Inspector of Police, was sworn and examined.
Evidence concluded and the witness withdrew.

The media and the public were admitted.

Stephen John Connelly, Consultant Town Planner, was sworn and examined.
Evidence concluded and the witness withdrew.

Meeting of the Committee on the ICAC
11 December 1990

Robert William Steel, Managing Director, was sworn and examined. Evidence concluded and the witness withdrew.

The Hon Michael Manifold Helsham, retired judge, was sworn and examined.

The media and the public were asked to leave and the Committee continued its examination of Mr Helsham in camera. Evidence concluded and the witness withdrew.

The Committee adjourned at 3.32 pm sine die.

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Chairman

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Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

MONDAY 17 DECEMBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 2.00 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Tink
	Mr Turner
	Mr Whelan

An apology was received from Ms Nori.

The Committee deliberated.

The media and the public were admitted.

The Clerk read the terms of reference of the Committee and Legislative Assembly Standing Order No.362 relating to the examination of witnesses.

Kevin Paul Zervos, General Counsel, Independent Commission Against Corruption, was sworn and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 5.20 pm sine die.

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Chairman

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Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 29 JANUARY 1991

AT PARLIAMENT HOUSE, SYDNEY AT 2.00 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
	Mr Tink
	Mr Turner

Apologies were received from Mr Mutch, Ms Nori and Mr Whelan.

The Committee deliberated.

The Minutes of the meetings held on 20 November, 11 December, 12 December and 17 December 1990, as circulated, were confirmed.

Resolved on the motion of Mr Dyer, seconded by Mr Hatton:

1 That the Committee note the correspondence from Mr Michael Bersten, dated 22 November 1990; Dr J Trau, dated 04 December 1990; Mr Ian Temby QC, dated 07 December 1990; Mr Andrew Tink MP, dated 04 January 1991; Mr Andrew Tink MP, dated 14 January 1991; Mr Ian Temby QC, dated 21 January 1991 (in reply to Mr Tink); and the material from the Parliamentary Joint Committee on the NCA.

2 That the Committee forward the correspondence from Mr Ron Micalleff, dated 20 December 1990; and Mr T Fegan, dated 18 December 1990 for a response from the ICAC on the matters raised.

Resolved on the motion of Mr Gay, seconded by Mr Dyer:

That the Committee note the correspondence from Mr Kevin Zervos, dated 03 January 1991, The Hon Michael Helsham, dated 15 January 1991; Mr Michael Bersten, dated 15 January 1991; Mr Michael Bersten, dated 21 January 1991; and The Hon Michael Helsham, dated 25 January 1991.

The Committee deliberated over the additional material and further submission forwarded by Mr Zervos on 25 January 1991.

Resolved on the motion of Mr Dyer, seconded by Mr Hatton:

That Mr Temby be advised that the Committee is grateful for the co-operation of Mr Zervos and the material he has prepared for the Committee.

The Committee then deliberated over the draft report and proposed amendments.

Paragraphs 1.1.1 to 1.3.2 read and agreed to.
Paragraph 1.4.1 read and amended.
Paragraph 1.4.1 as amended, agreed to.
Paragraphs 1.5.1 and 1.5.2 read and agreed to.
Proposed paragraphs 1.5.3 and 1.5.4 read and agreed to.
Paragraphs 1.5.3 and 1.5.4 as read, inserted.

Paragraphs 2.1.1 to 2.6.1 read and agreed to.
Paragraph 2.6.2 read and amended.
Paragraph 2.6.2 as amended, agreed to.

Paragraph 3.1.1 to 3.3.3 read and agreed to.
Paragraph 3.4.1 read and amended.
Paragraph 3.4.1 as amended, agreed to.
Paragraphs 3.4.2 to 3.7.2 read and agreed to.
Paragraph 3.7.3 read and amended.
Paragraph 3.7.3 as amended, agreed to.
Paragraph 3.7.4 read and amended.
Paragraph 3.7.4 as amended, agreed to.
Paragraphs 3.7.5 and 3.8.1 read and agreed to.
Paragraph 3.8.2 read and amended.
Paragraph 3.8.2 as amended, agreed to.
Paragraph 3.8.3 read and amended.
Paragraph 3.8.3 as amended, agreed to.

Paragraph 4.1.1 to 4.2.1 read and agreed to.
Proposed paragraph 4.2.2 read and agreed to.
Paragraph 4.2.2 as read, inserted.
Paragraph 4.3.1 read and amended.
Paragraph 4.3.1 as amended, agreed to.

Proposed paragraph 4.3.2 read and agreed to.
Paragraph 4.3.2 as read, inserted.
Paragraph 4.4.1 read and amended.
Paragraph 4.4.1 as amended, agreed to.

Paragraphs 5.1.1 to 5.2.2 read and agreed to.
Proposed paragraph 5.2.3 and 5.2.4 read and agreed to.
Paragraphs 5.2.3 and 5.2.4 as read, inserted.
Paragraphs 5.3.1 to 5.5.2 read and agreed to.
Paragraph 5.6.1 read and amended.
Paragraph 5.6.1 as amended, agreed to.
Paragraphs 5.6.2 to 5.6.4 read and agreed to.
Paragraph 5.7.1 read and amended.
Paragraph 5.7.1 as amended, agreed to.
Paragraph 5.7.2 read and agreed to.

Paragraphs 6.1.1 to 6.6.1 read and agreed to.
Paragraph 6.6.2 read and amended.
Paragraph 6.6.2 as amended, agreed to.

Paragraphs 7.1.1 to 7.2.3 read and agreed to.
Paragraph 7.2.1 read and amended.
Paragraph 7.2.1 as amended, agreed to.
Paragraph 7.2.2 to 7.3.2 read and agreed to.
Paragraphs 7.3.3 and 7.4.1 read and amended.
Paragraphs 7.3.3 and 7.4.1 as amended, agreed to.
Paragraph 7.4.2 read and agreed to.
Paragraph 7.4.3 read and amended.
Paragraph 7.4.3 as amended, agreed to.

Paragraphs 8.1.1. to 8.4.4 read and agreed to.
Proposed paragraph 8.4.5 read and agreed to.
Paragraph 8.4.5 as agreed to, inserted.
Paragraph 8.5.1 read and amended.
Paragraph 8.5.1 as amended, agreed to.
Paragraph 8.5.2 read and agreed to.

Paragraph 9.1.1 to 9.8.1 read and agreed to.
Paragraph 9.8.2 read and amended.
Paragraph 9.8.2 as amended, agreed to.

Paragraphs 10.1.1 to 10.4.1 read and agreed to.
Paragraph 10.4.2 read and amended.
Paragraph 10.4.2 as amended, agreed to.

Resolved on the motion of Mr Hatton, seconded by Mr Turner:

That the draft report, as amended, be the report of the Committee.

It was agreed that the Project Officer would forward the amendments to Committee members on Wednesday 30 January so that Committee members would have until Friday 1 February to advise of any final amendments.

It was agreed that the report would then be printed and tabled in Parliament on Thursday 28 February.

The Committee deliberated over the proposed meeting dates for the remainder of the year.

The Committee agreed to the foreshadowed Committee meeting dates with the exception of 10 December 1991.

The Committee adjourned at 4.05 pm until 6.00 pm Tuesday 12 March.

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Chairman Clerk