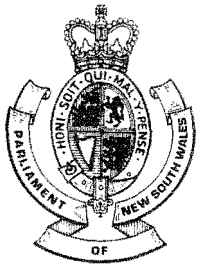

PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

REPORT ON -

REVIEW OF THE ICAC ACT

MAY 1993

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REPORT ON

REVIEW OF THE ICAC ACT

Together with Minutes of Proceedings

May 1993

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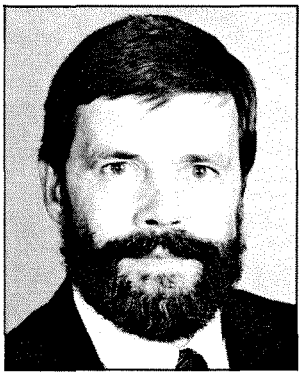

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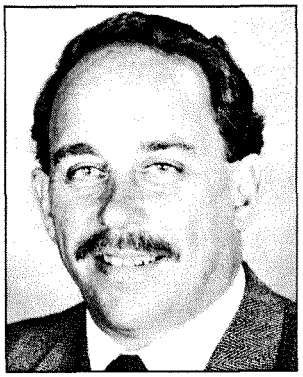

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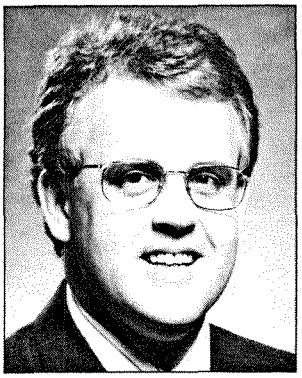

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COMMITTEE FUNCTIONS

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 report represents the culmination of over nine months work by the Parliamentary Joint Committee on the Independent Commission Against Corruption.

Following the Court of Appeal's decision in the **Greiner** case last August, and particularly in view of the criticisms of the ICAC Act which were contained in the judgements, the Committee issued a Discussion Paper which identified ten key issues for review. The Committee has come to a firm position on eight of those key issues and the Committee's conclusions on those issues are contained in this report.

Two key issues remain to be resolved. These are the question of the findings about individuals which the ICAC should be able to make in its reports, and the questions of whether an appeal mechanism should be established for the review of ICAC findings of fact. The Committee has decided to refer a number of technical legal questions on these issues to the Law Reform Commission. The questions which are being referred to the Law Reform Commission for advice are set out in this report, as is a thorough account of the evidence the Committee has received on these issues.

On behalf of the Committee I would like to express our appreciation to all those who made submissions or gave evidence before the Committee. I would also like to thank the ICAC for its co-operation in this inquiry.

Particular thanks are due to the Institute of Criminology, and its Director, Associate Professor Mark Findlay. The Institute organised a series of seminars to coincide with this inquiry. These seminars greatly assisted the Committee by defining some of the specific issues requiring attention during the inquiry.

Finally, I would like to thank the members of the Committee for their dedication and co-operation in the conduct of this inquiry. The Committee has already achieved a bipartisan position on a number of contentious issues. When the advice of the Law Reform Commission is received on the primary facts and appeals issues I am sure the Committee will go about finalising its position on these important issues in the same efficient and co-operative manner.

Malcolm J Kerr MP
Chairman

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1 *DEFINITION OF CORRUPT CONDUCT*

1.7.1 The current definition of corrupt conduct in the ICAC Act is overly complex and fraught with difficulties. The definition is conditional in nature and was found by the NSW Court of Appeal to be "apt to cause injustice".

1.7.2 The Committee endorses the proposed changes to the definition of corrupt conduct put forward in the major submissions received, including that from the ICAC.

1.7.3 The ICAC must be able to investigate all public officials, including Ministers, MPs and Judges. The "great and powerful" must not be outside the reach of the ICAC.

1.7.4 Section 9 should be repealed.

1.7.5 Section 8 should remain largely in its present form to describe the ICAC's jurisdiction to inquire. The conduct described in s.8 could be called "relevant conduct" if it needs to be defined at all.

1.7.6 As set out in this chapter, the Committee has been concerned about the implementation of these recommendations for changes to the definition of corrupt conduct. A number of consequential amendments to other sections of the ICAC Act will be necessary. It is important that these consequential changes do not inadvertently result in any threat to the ICAC's jurisdiction. The Committee therefore recommends that the Parliamentary Counsel be asked to prepare draft amendments to the definition of corrupt conduct as recommended by the Committee together with the necessary consequential amendments to other sections of the ICAC Act, so that they can be reviewed by the Committee to ensure there are no unintended consequences arising from these changes.

1.7.7 Section 8 should be amended to expressly enable the ICAC to investigate possible criminal conduct related to official corruption, including matters where organised crime and official corruption may be linked.

2 *FINDINGS ABOUT INDIVIDUALS*

2.7.1 The 1990 amendments which sought to "clarify" the ICAC's reporting powers have led to a number of difficulties for the ICAC. The Committee would draw attention to the fact that there was little informed debate at the time these amendments were made. Unlike the current process whereby there has been a public inquiry by a bipartisan Parliamentary Committee following the Court of Appeal's decision in

the **Greiner** case there was no such dispassionate inquiry following the High Court's decision in the **Balog** case.

2.7.2 The Committee reaffirms that the ICAC is a fact finding investigative body.

2.7.3 The Committee agrees with the major submissions to this review that the present requirement under the ICAC Act for the ICAC to place "labels" of corrupt conduct on individuals should be removed.

2.7.4 The Committee has received conflicting views on the nature of the findings of fact that the ICAC should be able to include in its reports. Athol Moffitt QC, CMG, and Mr Justice Clarke have submitted that ICAC findings should be limited to primary facts, in respect of adverse findings about identifiable persons. The ICAC has argued that such a limitation would lead to unacceptable consequences. The ICAC has suggested that such a limitation would mean that it could do little more than present a summary of the raw transcript of evidence.

2.7.5 As outlined in this chapter these views have not been able to be reconciled. The Committee believes that this issue is fundamentally important to the future of the ICAC. Although the Committee has received a great deal of evidence on this issue, there are a number of important questions which remain unanswered and the Committee does not believe it is currently in a position to make a properly informed decision on this matter. The Committee therefore recommends that the Law Reform Commission be asked to provide advice on the following questions:

> **Definition of primary facts** — What are primary facts? Is the concept of primary facts well understood by lawyers? Is the definition proposed by Mr Moffitt when he appeared before the Committee on 19 April 1993 appropriate? If not, how should primary facts be defined?
>
> **Effect of proposed limitation upon ICAC's effectiveness** — What would be the effect of the proposed limitation upon the ICAC's effectiveness as a fact finding investigative body? Is the ICAC correct in stating that such a limitation would mean that it could do little more than present a summary of the raw transcript of evidence?
>
> **Likelihood of litigation arising from proposed limitation** — What is the likelihood of the use of prerogative powers arising from the proposed limitation? How could any opportunity for the use of prerogative powers to frustrate the ICAC in the exercise of its functions be addressed?

With the benefit of the advice of the Law Reform Commission on these questions the Committee will be in a position to make an informed decision on this issue.

2.7.7 The Committee believes the requirement for the ICAC to make statements of opinion about consideration of prosecution, disciplinary action or dismissal under s.74A(2) of the Act should remain in place. However, in relation to constitutional office holders ICAC reports should not contain statements about consideration of

dismissal — decisions about the dismissal of constitutional office holders must remain the prerogative of the Parliament.

2.7.8 The Committee agrees with the submission of The Hon Athol Moffitt QC, CMG, that, in relation to Parliamentary references, the Parliament must have the ability to determine the extent of the findings it requires from the ICAC, by varying the limitations/requirements which apply to ICAC findings generally. Section 73 of the ICAC Act should be amended to provide the Parliament with this discretion.

3 *JUDICIAL REVIEW AND APPEAL MECHANISMS*

3a *Judicial Review*

3a.3.1 The Committee accepts that the current extent and nature of judicial review of the ICAC is appropriate. As set out in the ICAC submission, "[t]here can be no doubt that the Commission must be subject to the control of the courts. Because it fulfils both investigatory and quasi-judicial functions judicial review is appropriate".

3a.3.2 There is no need for the common law remedies which are available in the case of the legal or procedural error by the ICAC to be entrenched in legislation.

3b *Appeal Mechanisms - Review of Findings of Fact*

3b.3.1 The question of the establishment of an appeal mechanism for the review of ICAC findings of fact is inseparably linked to the question of the nature of the findings of fact which the ICAC should be able to make.

3b.3.2 Mr Moffitt and Justice Clarke have submitted that, if ICAC findings are not limited to primary facts, fairness requires that a mechanism be established for the review of ICAC findings. Mr Moffitt, Justice Clarke and the ICAC are in agreement that the establishment of a statutory right of appeal would lead to difficulties. As well as arguing against such a right of appeal in principle the ICAC stated that the practical difficulties involved in establishing such a mechanism would be insurmountable.

3b.3.3 The Committee does not believe it is currently in a position to make an informed decision about this issue. The Committee therefore recommends that the Law Reform Commission be requested to provide advice on the following questions:

> **Necessity** — If ICAC findings are not limited to primary facts as proposed, does fairness to individuals require the establishment of a statutory right of appeal against ICAC findings (in fact and law)?
>
> **Practicalities** — If it was decided as a matter of principle that a statutory right of appeal should be provided, could the practical difficulties identified by the ICAC and others be overcome?

Alternatives — If the practical difficulties involved in the establishment of a statutory right of appeal are insurmountable, are there any alternative means by which the concerns expressed about fairness to individuals could be addressed other than the proposed limitation of ICAC findings to primary facts? If there is such an alternative, could its terms be defined with some precision and could a statement be included setting out its benefits and disadvantages?

With the benefit of the advice of the Law Reform Commission the Committee will be in a position to make an informed decision on this issue.

3c ***Industrial Tribunals - De Facto Appeals?***

3c.4.1 It is clear from a number of recent cases that industrial tribunals, in considering appeals against disciplinary or dismissal action arising from ICAC inquiries, are required to re-evaluate the evidence before the ICAC. In effect the ICAC's findings of fact and conclusions may be reviewed and different findings made by the tribunal.

3c.4.2 These recent cases make it clear that authorities have a duty to make an independent assessment of ICAC findings before taking disciplinary or dismissal action and must ensure that such action takes place in a way which ensures that public officials are treated in accordance with the principles of natural justice.

3c.4.3 It appears to be anomalous that different public officials who may be subject to disciplinary or dismissal action as a result of ICAC inquiries have access to different industrial tribunals to have that action reviewed, when different appeal procedures apply to the decisions of those tribunals. In the case of some public officials (such as members of the SES) there is no avenue for disciplinary or dismissal action to be reviewed. The Committee calls for a review of the rights of public officials to have disciplinary or dismissal action arising from an ICAC inquiry reviewed, with a view to ensuring greater equity of access to industrial tribunals.

4 ***STANDARDS TO BE APPLIED BY THE ICAC***

4.5.1 The Court of Appeal decision in the **Greiner** case mandates that the ICAC must apply objective standards, established and recognised at law. This decision was based on the Court's interpretation of s.9(1)(c) of the ICAC Act. The repeal of s.9 to simplify and clarify the definition of corruption (as recommended in chapter one) will effectively remove this mandate.

4.5.2 The Committee notes that the ICAC has no objection to the entrenchment in the ICAC Act of the requirement for the Commission to apply objective standards, established and recognised at law.

4.5.3 The Committee recommends that a new section be inserted in the ICAC Act entrenching the requirement for the ICAC to apply objective standards, established and recognised at law, in any findings which it makes about named or identifiable

individuals in public reports.

4.5.4 The Committee notes that the ICAC's compliance with such a requirement would be a matter of law and therefore subject to possible review in the Courts. However, it should be emphasised that this would not be creating more opportunities for judicial review, merely substituting one for the opportunity which would be removed by the removal of s.9 of the Act.

5 ***PROTECTION OF CIVIL LIBERTIES***

5a ***Search Warrants***

5a.4.1 The Committee endorses the principle that judicial scrutiny should be applied to the exercise of coercive powers by the ICAC. The Committee endorses the policy decision adopted by the current Commissioner that all search warrants should be sought from judges. The Committee would hope that future Commissioners would also adopt this policy.

5a.4.2 However, the Commissioner has made out a case that in extraordinary circumstances the power for the Commissioner to issue his own search warrants could be an important investigative tool. Therefore, the Committee does not recommend any changes to the search warrants provisions in the Act.

5b ***Contempt***

5b.6.1 The Committee endorses the principle that nothing should be done which suppresses or discourages constructive criticism of the ICAC. However, it is essential that the ICAC have available to it all the means necessary to maintain proper control over investigations and hearings. The ability to take action against contempt in the face of the Commission is an essential tool to this end.

5b.6.2 The Committee does not recommend any legislative changes to the contempt provisions in the ICAC Act.

5b.6.3 The Committee recommends that the Attorney General establish an inquiry into the contempt provisions which operate in the Courts and other tribunals, including the ICAC, with a view to ensuring consistency across the range of bodies which have contempt powers.

6 ***FOLLOW UP ACTION ON ICAC REPORTS***

6.6.1 If the ICAC is to have a long term effect upon corruption in NSW it is essential that its recommendations be acted upon and followed up.

6.6.2 The Parliament must retain the right to consider, debate, and sometimes ultimately reject ICAC recommendations for legislative change. Similarly, the Government must retain the right to consider and sometimes ultimately reject ICAC recommendations for changes to administrative procedures and practices.

However, when this happens there should be a public explanation of the reasons for the decision to reject the ICAC's recommendation.

6.6.3 Where recommendations are contained in reports to Parliament (that is, in public investigative reports and annual reports) the Parliament should be informed of the response to these recommendations. This includes the response to recommendations for changes to legislation and administrative changes, and recommendations that consideration be given to prosecution, disciplinary or dismissal action against individuals. Where the ICAC reports directly to an agency (that is, in corruption prevention reports) the agency should inform the ICAC of its response direct.

6.6.4 The Committee recommends that the ICAC Act should be amended to provide that the relevant Minister should inform the Parliament of his/her response to any ICAC report concerning his/her administration within six calendar months of the tabling of the ICAC report.

6.6.5 The Committee has an important role to play in regard to ICAC reports under s.64(1)(c) of the ICAC Act.

6.6.6 The Committee has carefully noted Mr Knoblanche's comments about the risk of injustice to individuals from delays in the completion of prosecutions, disciplinary or dismissal action arising from an ICAC report. The Committee does not support Mr Knoblanche's proposal for a statutory time limit for such action to take place or be forever stayed. Instead, the Committee recommends that the ICAC develop a protocol with the Director of Public Prosecutions which would recommend an appropriate time frame in which prosecutions arising from ICAC reports should be completed. Similarly, in each case in which the ICAC states that consideration should be given to disciplinary or dismissal action, the ICAC should recommend an appropriate time frame in which such action should be completed.

7 *PROFILE OF CORRUPTION*

7.6.1 The preparation by the ICAC of a profile of corruption in the NSW public sector on a timely basis could be a valuable exercise. It could enable an historical picture of corrupt conduct and the ICAC's work to build up over time. It could provide a benchmark against which the effectiveness of the ICAC and its target selection could be measured. It could also be an important tool in corruption prevention.

7.6.2 The Committee recognises that the preparation of such an overview is not an easy task. However, the fact that the NCA is preparing an overview of organised crime, and the CJC intends to prepare an overview of corrupt conduct means that it is not an impossible task. Furthermore, the fact that the NCA intends to publish a report on its overview of organised crime, and the report it has already produced on money laundering suggest that any concerns about the dangers of publishing such an overview can be addressed.

7.6.3 However, the Committee recognises the ICAC's current heavy workload. The resources of the Commission's Strategic Intelligence Research Group are fully committed to Operation Milloo, the investigation into alleged Police corruption. The Committee therefore recognises that it is unlikely that the Commission will be in a position to produce such a profile of corruption within the next twelve months. It would therefore be inappropriate for a requirement for the ICAC to prepare such a profile to be included in the ICAC Act at this time.

8 ***FALSE COMPLAINTS AND PUBLIC STATEMENTS***

8.6.1 Complaints from members of the public are an important source of information for the ICAC and the ICAC has an important role to play in dealing with complaints. Any amendments to the ICAC Act to deal with the problems of false complaints and public statements about complaints must not discourage or inhibit genuine complainants from coming forward and providing information to the ICAC.

8.6.2 False complaints can cause unnecessary trauma and hardship to the subjects of such complaints. The conduct of investigations or even preliminary inquiries into such complaints can also divert the ICAC's limited resources.

8.6.3 Section 81 of the ICAC Act provides a sanction against false complaints. The Committee recommends that section 81 be reviewed with a view to determining whether it can be improved to ensure that action may be taken in all appropriate cases. Consideration should be given to providing the Operations Review Committee with an additional responsibility of advising the ICAC whenever it feels that action under s.81 would be appropriate in relation to a complaint with which it has dealt.

8.6.4 The Committee notes that the ICAC is cognisant of the varying levels of credibility of anonymous complaints. The Committee encourages the ICAC to treat anonymous complaints with appropriate circumspection.

8.6.5 Public statements about complaints have the potential to cause great harm and to lead to the ICAC being used for personal or political gain by complainants. The Committee commends the ICAC on the steps that it has taken to discourage public statements about complaints and encourages the ICAC to continue to take such steps in the future.

8.6.6 The Committee notes that defamation action is presently available in respect of false complaints which are published by a complainant.

8.6.7 The Committee notes the concerns expressed by Mr Johnson about the security of the ICAC's communications in making preliminary inquiries into complaints. The Committee recommends that the ICAC take steps to ensure the security of such communications.

9 *SECTION 11*

9.6.1 Section 11 is an essential part of the Independent Commission Against Corruption Act 1988. A number of the ICAC's most important inquiries have resulted from reports under s.11. The ICAC has emphasised, and the Committee agrees, that the reporting requirement under s.11 should not be weakened.

9.6.2 On the other hand the ICAC has acknowledged that s.11 can be improved. There is scope for the section to be amended so as to provide "a more workable regime from the point of view of public authorities".

9.6.3 The Committee supports the reform proposal contained in Deborah Sweeney's letter of 17 November 1992. Section 11 should be amended to provide for a clear distinction to be drawn between serious matters which require immediate reporting and minor matters which can be reported by schedule. Section 11 should also be amended to include a provision as to the timeliness of reports of serious matters.

9.6.4 It is important that s.11 reporting not stand in the way of principal officers conducting due inquiry into matters of suspected corruption within their agencies, and taking necessary action resulting from those inquiries. If necessary, s.11 should be amended to ensure that there is full and adequate consultation between the ICAC and principal officers as to action to be taken on s.11 reports.

10 *ENTRENCHMENT OF COMMITTEE RECOMMENDATIONS*

10.5.1 The Committee endorses the principle that it is the responsibility of the Parliament to prescribe by way of legislation and guidelines appropriate limits upon the exercise by the ICAC of its extraordinary powers.

10.5.2 The Committee acknowledges that it is essential that the ICAC's independence is maintained. However, it is the Commission's independence from executive government that is important. After all the ICAC is a creation of and accountable to the Parliament.

10.5.3 The Committee recommends that the regulation power in s.117 of the ICAC Act should be expanded to enable regulations to be made on procedural or policy matters on the initiative of the Parliamentary Joint Committee. It should be expressly stated in the legislation that such regulations could not deal with operational matters or in any way seek to direct the ICAC in the conduct of any particular investigation. The procedure by which such regulations are to be made should also be spelt out in the legislation, including the requirement that they be published in the Government Gazette, tabled in Parliament and subject to possible disallowance. In formulating any such regulations the Committee must consult with the ICAC, but the ICAC should not be able to veto the regulations.

11 *PUBLIC SECTOR MANAGEMENT ACT*

11.4.1 While at the time of its establishment there were reasons why it was considered that the ICAC need not be staffed under the Public Sector Management Act, there are strong public policy reasons for all public sector employment to comply, at the very least, with the merit selection principles contained in the Act.

11.4.2 The Committee therefore recommends that the ICAC Act should be amended to require the ICAC to comply with the merit selection principles in the Public Sector Management Act.

11.4.3 The Committee notes the concerns raised by the ICAC about the possible application of the Public Sector Management Act generally to the ICAC. The Committee therefore does not recommend that the Public Sector Management Act generally should be applied to the ICAC at this time.

11.4.4 The Committee has had an interest in the question of the appeal mechanisms available to ICAC staff for some time. The Committee commends the ICAC on the establishment of a process of internal grievance mediation. The Committee will continue to take an interest in this issue as part of its monitoring and review function.

QUESTIONS TO BE REFERRED TO LAW REFORM COMMISSION

Preamble:

The Committee has received conflicting evidence on two separate but related issues.

Athol Moffitt QC, CMG, and Mr Justice Clarke have submitted that ICAC findings should be limited to primary facts, in respect of adverse findings about identifiable persons. The ICAC has argued that such a limitation would lead to unacceptable consequences. The ICAC has suggested that such a limitation would mean that it could do little more than present a summary of the raw transcript of evidence.

Mr Moffitt and Justice Clarke have submitted that, if ICAC findings are not limited to primary facts, fairness requires that a mechanism be established for the review of ICAC findings. Mr Moffitt, Justice Clarke and the ICAC are in agreement that the establishment of a statutory right of appeal would lead to difficulties. As well as arguing against such a right of appeal in principle the ICAC stated that the practical difficulties involved in establishing such a mechanism would be insurmountable.

[There has been no suggestion that a statutory right of appeal against ICAC findings would be required if ICAC findings were limited to primary facts as has been proposed.]

The Committee draws attention to the submissions, Minutes of Evidence and correspondence which it has received on these issues and requests the advice of the Law Reform Commission on the following questions.

1 *PRIMARY FACTS*

1.1 **Definition of primary facts** — What are primary facts? Is the concept of primary facts well understood by lawyers? Is the definition proposed by Mr Moffitt when he appeared before the Committee on 19 April 1993 appropriate? If not, how should primary facts be defined?

1.2 **Effect of proposed limitation upon ICAC's effectiveness** — What would be the effect of the proposed limitation upon the ICAC's effectiveness as a fact finding investigative body? Is the ICAC correct in stating that such a limitation would mean that it could do little more than present a summary of the raw transcript of evidence?

1.3 **Likelihood of litigation arising from proposed limitation** — What is the likelihood of the use of prerogative powers arising from the proposed limitation? How could any opportunity for the use of prerogative powers to frustrate the ICAC in the exercise of its functions be addressed?

2 *APPEALS*

2.1 **Necessity** — If ICAC findings are not limited to primary facts as proposed, does fairness to individuals require the establishment of a statutory right of appeal against ICAC findings (in fact and law)?

2.2 **Practicalities** — If it was decided as a matter of principle that a statutory right of appeal should be provided, could the practical difficulties identified by the ICAC and others be overcome?

2.3 **Alternatives** — If the practical difficulties involved in the establishment of a statutory right of appeal are insurmountable, are there any alternative means by which the concerns expressed about fairness to individuals could be addressed other than the proposed limitation of ICAC findings to primary facts? If there is such an alternative, could its terms be defined with some precision and could a statement be included setting out its benefits and disadvantages?

-i- *INTRODUCTION*

i.1 ***Background to the Inquiry***

i.1.1 The Parliamentary Joint Committee on the Independent Commission Against Corruption is a standing Committee of the NSW Parliament. The inaugural Committee had its first meeting on 04 May 1989. That Committee met on 32 occasions and conducted a number of formal inquiries including an "Inquiry into Commission Procedures and the Rights of Witnesses". Following the general election in May 1991 the Committee was re-established. Since July 1991 the Committee has met on 39 occasions and has conducted a number of inquiries, including a formal inquiry into allegations that the ICAC had bungled an investigation into police corruption. This background is provided to make it clear that the Parliamentary Joint Committee was in existence and active well before the Metherell affair arose or the Court of Appeal brought down its decision in ***Greiner vs Independent Commission Against Corruption*** (1).

i.1.2 The idea of a comprehensive Review of the ICAC Act was first raised during the debate in Parliament on the Metherell report. A number of Members from all parties called for the ICAC Act to be reviewed.

The Hon Elizabeth Kirkby MLC (Democrats)

> *"As honourable members will remember, there was lenghty debate on the Independent Commission Against Corruption Bill. My colleague the Hon R S L Jones, who will be speaking later in this debate, was most concerned about some provisions of that legislation. It caused him a great deal of heart searching before he could bring himself to agree with some of the provisions of the bill. At the time it was introduced the bill was debated in detail. Subsequently it has been amended. It is possible that it will be necessary to amend it again."* [1]

The Hon I M MacDonald MLC (ALP)

> *"[referring to the High Court's decision in* ***Balog and Stait vs ICAC*** *28 June 1990] That was the finding of the High Court in relation to the Independent Commission Against Corruption Act, that many of its*

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1 Parliamentary Debates (Hansard), Legislative Council, 30 June 1992, p 4674.

powers may be exercised in disregard of basic protections otherwise afforded by common law. By that statement the High Court was making a telling point about the failure of the Act constituting the Independent Commission Against Corruption to embody common law provisions.... On 8th June 1988, I said that the proposed Act suffered from a number of major difficulties arising out of the indecent haste in its drafting phase, that is, the phase between the election of the Government in March and its introduction to the lower House in May of that year — all of two months....

If anything comes out of this report, I hope it is that members of Parliament will have the courage to seek to amend those sections to bring them into line with what the High Court spoke about and into line with the comments made by senior judges and other eminent organisations such as the International Commission of Jurists." [2]

The Hon Dr B P V Pezzutti MLC (Liberal)

"We may need to look seriously at the Independent Commission Against Corruption Act in order to protect a large number of people in NSW. It is under constant review and a parliamentary committee is looking at it. Let us hope that committee makes some recommendations so that individuals — little people as well as big people in NSW — can be sure that, when they are investigated, it is done with fairness." [3]

The Hon R T M Bull MLC (National)

"I take exception to the wording of the Act, because it is ambiguous. You are either corrupt or you are not.... The wording of the Act — which Mr Temby had to work within — is ambiguous. The parliamentary committee responsible for the Independent Commission Against Corruption must look at that wording and remove the grey areas." [4]

Reverend the Hon F J Nile MLC (Call to Australia)

"In principle I agree with the definition of corrupt conduct, but the definition is so broad that the actions of many members of Parliament

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2 Parliamentary Debates (Hansard), Legislative Council, 30 June 1992, pp 4702-3.

3 Parliamentary Debates (Hansard), Legislative Council, 30 June 1992, pp 4709-10.

4 Parliamentary Debates (Hansard), Legislative Council, 30 June 1992, p 4716.

> *could be regarded as corrupt.... The purpose of the definition was to try to prevent people evading the law. The definition was made all-embracing to catch the guilty, but it appears that it could also seriously damage the reputation of an innocent person. Members undertaking legitimate action in the course of their parliamentary duties also could be caught by that definition....*
>
> *I accept that Mr Temby is sincere and is carrying out his duties under the Independent Commission Against Corruption Act in a correct manner. If there is criticism, it should be directed not at him but at the Act itself. This House and the other place may need to further refine the Act."* [5]

i.1.3 In addition to the concerns raised during the Parliamentary debate on the Metherell Report there was a certain amount of public debate on the future of the ICAC at that time. On 30 June 1992 **The Australian** published an article by the Hon Athol Moffitt QC CMG entitled, "Why ICAC must reform or perish". In that article Mr Moffitt discussed a number of issues of concern in relation to the ICAC Act and called for a dispassionate review of the Act.

> *"Now that the dust of the political debate over the Metherell Report has subsided a little, some calm over the future of the Independent Commission Against Corruption and a review of attitudes to it is called for. As one with some close knowledge of the work of the ICAC and its Act, I have long publicly supported it as an institution most necessary for this state and still do so — but it is in urgent need of reform.*
>
> *The Metherell Report has revealed that on Commissioner Ian Temby's construction, some parts of the Act required him to make what appeared to be tortuous gymnastics, devoid of reality and incomprehensible to the layman, leading to labels being put on people which are not in accord with the ordinary meaning of words. An Act which can so operate clearly needs some amendments....*
>
> *The unsatisfactory operation of the Act in one respect is a matter for remedy not abolition of the ICAC. Criticism of it in one respect is not condemning it as a whole....*
>
> *The last line is that in the public interest the ICAC survive, but that in order to survive and have public support the Act must be critically*

5 Parliamentary Debates (Hansard), Legislative Council, 01 July 1992, pp 4869-70.

reviewed and substantially amended." [6]

i.1.4 In August 1992 the ICAC published its "Report on Unauthorised Release of Government Information", which had been prepared by the Hon Adrian Roden QC. In that report Mr Roden expressed concern about two statutory requirements concerning ICAC reports. He expressed concern about the requirement imposed by ss.13(5) and 74B of the Act for findings to be made whether an individual's conduct falls within the definition of corrupt conduct contained in the Act.

> *"In any findings made by the Commission, it is the facts that are important, rather than a decision that the conduct disclosed falls on one side or the other of an artificial line drawn by the law."* [7]
>
> *"The principal purpose of Commission investigations is to ascertain facts. It has special powers to enable it to do so. The principal purpose of its reports should be to report the facts it has found, and to make any relevant recommendations.*
>
> *Requirements that the Commission determine or consider whether facts fit or may fit within any particular legal category, should, it is submitted, be avoided so far as possible. Such questions are generally more appropriate for the courts."* [8]

Mr Roden also expressed concern about the terms of s.74A of the ICAC Act which require the ICAC to express an opinion whether or not prosecution of individuals should be considered. He called for this requirement to be removed from the Act or for the ICAC to be left with a discretion as to whether or not such opinions would be expressed.

i.1.5 On 21 August 1992 the NSW Court of Appeal brought down its decision in ***Greiner vs Independent Commission Against Corruption*** (hereafter referred to as ***Greiner***). In its decision the Court made a number of comments critical of the Act, particularly the definition of corruption.

> *"Insofar as the Act required the Commission to apply to the conduct of the plaintiffs the description "corrupt conduct", that description is*

---

6 "Why ICAC Must Reform or Perish", The Australian, 30 June 1992.

7 ICAC, Report on Unauthorised Release of Government Information, August 1992, p 89.

8 ibid, p 221.

misleading and apt to cause injustice" [9]

"*The ICAC Act contains a definition of corrupt conduct which is both wide and, in a number of respects, unclear. One of the most striking aspects of the legislative scheme is that a conclusion that a person has engaged in corrupt conduct, which is unconditional in form, is necessarily based upon a premise which is conditional in substance.*" [10]

"*Insofar as there is injustice from the Commission's Report it is because the Report states that the conduct of Mr Greiner and Mr Moore was "corrupt conduct" within the Act and "corrupt" is not a term which, in its ordinary sense, is appropriate to describe what they did.... Such injustice results from the operation of the Independent Commission Against Corruption Act. The Commission did what, under the Act, the circumstances required it to do. The injustice arises because the Act applies "corrupt conduct" to conduct which, in the ordinary meaning of the term, is not corrupt. For its own purposes or because of a failure to appreciate the damage which could be done, the Act requires the Commission to apply a misleading description to some of the conduct with which it deals.*" [11]

During the proceedings in the Court of Appeal, the Chief Justice commented at one stage that, "there really ought to be a better way of testing or reviewing the findings of the Commission than just having the Commissioner in here as a defendant". [12]

i.1.6 Following the handing down of the ***Greiner*** decision comments were reported from a wide range of public figures, ranging from the Commissioner of the ICAC to the Premier, Leader of the Opposition and Independent Members of Parliament, for a review of the ICAC Act by the Parliamentary Joint Committee. (See for example "ICAC in the hot seat", **The Sydney Morning Herald**, 22 August 1992.) The Chairman of the Committee immediately had a Discussion Paper prepared identifying key issues for consideration in a review of the Act. A draft Discussion Paper was circulated to Committee Members for consideration at a meeting on 02 September 1992. In the meantime, the ICAC provided a Second Report on the Metherell Affair to Parliament which sought to correct the record in view of the

9 *Greiner vs. ICAC*, Court of Appeal, unreported, 21 August 1992, decision.

10 ibid, Gleeson CJ, pp 3-4.

11 ibid, Mahoney J, (dissenting), p 65.

12 *Greiner vs. ICAC*, Court of Appeal, transcript of proceedings, 02 July 1992, p 173.

Court of Appeal's decision and identify the ICAC's preliminary views on any issues which may be considered in a review of the ICAC Act.

i.2 ***Conduct of Inquiry***

i.2.1 As outlined in paragraph i.1.6, following the handing down of the ***Greiner*** decision by the Court of Appeal the Chairman had a draft Discussion Paper prepared which identified issues to be considered in a review of the ICAC Act. This Discussion Paper was considered at the Committee's meeting on 2 September 1992 and a number of amendments were made. The Discussion Paper was then tabled in Parliament on 03 September. The Discussion Paper was circulated widely and advertisements were placed in the major metropolitan newspapers calling for submissions in relation to the Discussion Paper by Friday 02 October 1992. As at 02 October 16 submissions had been received. Over the next few months 16 further submissions were received. A list of submissions is included as appendix six.

i.2.2 Early in September 1992 the Committee received a letter from the Institute of Criminology offering its assistance with the Review of the ICAC Act. The Committee gratefully accepted this offer and discussions were held to identify the most appropriate means by which this assistance could be provided. As a result of these discussions the Institute of Criminology organised two seminars on key issues identified in the Committee's Discussion Paper. The first of these seminars, dealing with definitions of corrupt conduct, was held on Thursday 08 October. The key note speaker was Murray Tobias QC, who had appeared for the ICAC in the ***Greiner*** case before the Court of Appeal, who gave an overview of the issues arising from the Court of Appeal decision. Four panellists also spoke briefly and answered questions. They were Daniel Brezniak, John Dowd QC, Beverly Schurr, and Deborah Sweeney, Solicitor to the ICAC. About 40 people attended this seminar which was held at Parliament House and there was some interesting discussion from the floor on the definition of corruption. A second seminar was held, also at Parliament house, on Thursday 15 October 1992, dealing with the scope and review of ICAC findings. The key note speaker was the Hon Adrian Roden QC. The panellists for this seminar were Quentin Dempster, Brian Toohey, Simon Stretton, ICAC General Counsel, and Mark Findlay. The discussion from the floor was particularly useful at this seminar and had the result that the key issues before the Committee were enunciated clearly at the earliest opportunity.

i.2.3 The Committee scheduled three hearings to take evidence in relation to the Review of the ICAC Act. A number of those who made submissions were requested to give evidence at these hearings. Those who gave evidence are set out below.

12 October 1992

◊ Patrick Fair, representing Law Society of NSW

◊ Michael Bersten

◊ Kevin Fennell, Deputy Auditor General

◊ Keith Johnson, Ballina Shire President

◊ Warren Hart, Director of Human Resources, Water Board

◊ Mark Findlay, Director of Institute of Criminology

26 October 1992

◊ The Hon Ernie Knoblanche QC

◊ The Hon Athol Moffitt QC, CMG

◊ The Hon Adrian Roden QC

09 November 1992

◊ The Hon Adrian Roden QC

◊ Ian Temby QC

Following the hearing on 09 November 1992 the Chairman felt that there was at least one issue, judicial review and appeal mechanisms, on which it was important for the Committee to receive further evidence. A further hearing was therefore scheduled for 08 December 1992 at which the Hon Mr Justice Clarke, of the NSW Court of Appeal, gave evidence.

1.2.4 The Committee was first able to deliberate on the Review of the ICAC Act at a meeting on 18 December 1992. The Committee was mindful of the self imposed deadline included in the Discussion Paper of September 1992 for the Committee to report on the review by the end of the year. The Committee was able to come to a firm position fairly readily on most of the key issues identified in the Discussion Paper. After the meeting the Chairman was therefore able to issue a media release which outlined the areas of agreement. A copy of this media release is included as appendix one to this report. As outlined in the media release, there were two key issues which the Committee identified as requiring further work.

These were the question of whether ICAC findings should be limited to "primary facts" and the issue of appeal mechanisms. A further hearing was organised for 05 February 1993 at which two witnesses gave evidence. They were Tim Robertson, Secretary of the Labor Lawyers Association, and Mark Le Grand, Director of the Official Misconduct Division at the Criminal Justice Commission.

i.2.5 Following the hearing on 05 February 1993 a draft report was prepared. That draft report was considered by the Committee at a deliberative meeting on 09 March 1993. The Committee agreed to make a number of changes to the draft report. As a result of concerns raised by Committee members it was decided to seek the Crown Solicitor's advice on aspects of the draft recommendations concerning the definition of corrupt conduct. The Crown Solicitor's advice is reproduced as appendix two.

i.2.6 The Committee held a further deliberative meeting to consider the draft report after a public hearing with Mr Temby on 26 March 1993. Discussions at this meeting focussed on the primary facts issue. The Committee resolved to provide the ICAC with an opportunity to respond to further correspondence which had been received on the primary facts issue, as well as to the Crown Solicitor's advice on the definition of corrupt conduct. The correspondence received by the Committee on the primary facts issue is reproduced as appendix three.

i.2.7 In April 1993 the Committee received a late submission from the Hon Athol Moffitt QC, CMG, concerning Parliamentary references and findings about individuals. This matter is discussed in chapter two. Consequently, a further hearing was held on 19 April to enable the Committee to explore this submission with Mr Moffitt. Tim Robertson also gave evidence before the Committee briefly at that hearing.

i.2.8 The Committee then held a deliberative meeting on 11 May 1993. At this meeting the Committee discussed a strategy for finalising this inquiry, including referring a number of specific questions to the Law Reform Commission for advice. A draft of these questions was circulated to Committee members a few days later. The Committee then met on 18 May 1993 and finalised this report.

i.3 *Structure of Report*

i.3.1 The format of this report follows that of the Committee's Discussion Paper of September 1992. There are eleven chapters, the first ten each dealing with one of the key issues identified in the Discussion Paper. Chapter One deals with Key Issue 1, Definition of Corrupt Conduct, Chapter Two deals with Key Issue 2 and so on. There is also a chapter eleven which deals with another issue which arose during the course of the review but which was not addressed in the Discussion Paper.

-1- DEFINITION OF CORRUPT CONDUCT

1.1 *Current Definition*

1.1.1 The current definition of corrupt conduct in the ICAC Act is set out below. The definition covers three sections of the Act. Section 8(1) sets out the general nature of corrupt conduct. Section 8(2) then specifies a number of particular offences which may be regarded as corrupt conduct. Section 9 provides that conduct falling within section 8 does not amount to corrupt conduct unless it could constitute or involve a criminal or disciplinary offence or reasonable grounds for dismissal.

> "7 (1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.
>
> (2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).
>
> (3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.
>
> 8 (1) Corrupt conduct is:
>
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public

official, any group or body of public officials or any public authority; or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);

(b) bribery;

(c) blackmail;

(d) obtaining or offering secret commissions;

(e) fraud;

(f) theft;

(g) perverting the course of justice;

(h) embezzlement;

(i) election bribery;

(j) election funding offences;

(k) election fraud;

(l) treating;

(m) tax evasion;

(n) revenue evasion;

(o) currency violations;

(p) illegal drug dealings;

(q) illegal gambling;

(r) obtaining financial benefit by vice engaged in by others;

(s) bankruptcy and company violations;

(t) harbouring criminals;

(u) forgery;

(v) treason or other offences against the Sovereign;

(w) homicide or violence;

(x) matters of the same or a similar nature to any listed above;

(y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

(a) matters arising in the State or matters arising under the law of the State; or

(b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve;

(a) a criminal offence; or

(b) a disciplinary offence; or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purposes of this section:

"**criminal offence**" means a criminal offence under the law of the State or under any other law relevant to the conduct in question;

"**disciplinary offence**" includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law."

1.2 ***Purpose of the Definition***

1.2.1 The definition of corrupt conduct contained in sections 7-9 of the ICAC Act "does not create in law a new class of crime or proscribed conduct".[13] The definition is only used for the purposes of the ICAC Act. The term corrupt conduct appears in a number of sections of the Act. The most important of these uses are in sections 13 and 74B. Section 13 sets out the ICAC principal functions. Section 13(1) provides that one of the ICAC's principal functions is to investigate corrupt conduct. The use of the term corrupt conduct in this section therefore prescribes the ICAC's jurisdiction to inquire. Section 13(2) requires the ICAC to conduct its investigations with a view to determining whether any corrupt conduct has occurred, is occurring or is about to occur. That is, the ICAC is required to conduct its investigations with a view to determining whether any conduct as described in section 7-9 has occurred. Sections 74A and 74B deal with the contents of ICAC reports to Parliament on investigations. The use of the term corrupt conduct in section 74B provides that the ICAC can make a finding that a person's conduct falls within the definition of corrupt conduct contained in sections 7-9.

1.2.2 Michael Bersten succinctly described the role of the definition of corrupt conduct in sections 7-9 in his submission. Mr Bertsen suggested that in addition to defining the ICAC's jurisdiction to investigate matters and providing a definition which could be applied to the conduct of individuals, the definition served another function. He said the definition was intended to ensure that corrupt conduct was seen in objective legal terms.

> *"The definition of 'corrupt conduct' is fundamental to achieving three main objectives in the scheme of the ICAC Act:*
>
> ◊ *it is the main statutory device to define the investigative jurisdiction of the ICAC;*
>
> ◊ *it is the main statutory device to define that which ICAC may report on; and*
>
> ◊ *it precludes ICAC from lawfully applying moral, rather than legal, standards as to what constitutes 'corrupt conduct'.*
>
> *Although these objectives are of self-evident importance, I think it useful to focus on their primary importance. That importance may be summed up in the notion of the rule of law. By carefully defining ICAC's powers and jurisdiction in terms of objective legal standards, the Parliament is*

13 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, p 8.

> *endeavouring to protect the public sector (including the three wings of government) and the citizens of NSW from the abuse that could result from conferring ICAC with a subjectively defined jurisdiction."* [14]

1.2.3 The Hon Athol Moffitt QC, CMG, made the point in his submission that there was no reason for the term corrupt conduct to be used at all in the ICAC Act. He referred to the NCA Act which does not seek to define "organised crime". Rather the NCA Act uses the term "relevant criminal activity" and "relevant offence" to define the NCA's jurisdiction and powers. He said that it would be just as appropriate for the definition contained in sections 7-9 of the ICAC Act to be entitled "relevant conduct" instead of "corrupt conduct". [15]

1.3 ***Problems with the current definition***

1.3.1 The Court of Appeal in the **Greiner** decision identified a number of problems with the current definition of corrupt conduct. The judges described the definition of corrupt conduct as misleading and apt to cause injustice.

> *"insofar as the Act required the Commission to apply to the conduct of the plaintiffs the description 'corrupt conduct', that description is misleading and apt to cause injustice"* [16]

> *"The ICAC Act contains a definition of corrupt conduct which is both wide and, in a number of respects, unclear. One of the most striking aspects of the legislative scheme is that a conclusion that a person has engaged in corrupt conduct, which is unconditional in form, is necessarily based upon a premise which is conditional in substance."* [17]

> *"Insofar as there is injustice from the Commission's Report it is because the Report states that the conduct of Mr Greiner and Mr Moore was 'corrupt conduct' within the Act and 'corrupt' is not a term which, in its ordinary sense, is appropriate to describe what they did... Such injustice results from the operation of the Independent Commission Against Corruption Act. The Commission did what, under the Act, the circumstances required it to do. The injustice arises because the Act applies 'corrupt conduct' to conduct which, in the ordinary meaning of*

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14 Michael Bersten, Submission, 02 October 1992, p 1.

15 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, pp 8-9.

16 *Greiner vs. ICAC*, Court of Appeal, unreported, 21 August 1992, decision.

17 ibid, Gleeson CJ, pp 3-4.

> *the term, is not corrupt. For its own purposes or because of a failure to appreciate the damage which could be done, the Act requires the Commission to apply a misleading description to some of the conduct with which it deals."* [18]

1.3.2 The ICAC discussed problems with the definition of corrupt conduct in its "Second Report on Investigation into the Metherell Resignation and Appointment". That report was prepared so as to correct the record following the Court of Appeal decision in the **Greiner** case. The report drew attention to the conditional nature of findings that conduct falls within sections 8 and 9. The report also drew attention to what the ICAC saw as the practical effect of the Court of Appeal's decision, that different standards must be applied to different categories of public officials. The ICAC suggested that the decision meant that the "great and powerful" were beyond its reach.

> *"The existing definition does have its strengths. Its key concepts are honesty, impartiality and upholding the public trust which is a necessary incident of working in the public sector. The real difficulty arises under s9(1), in particular its conditional nature - "**could** constitute or involve" dismissal and so on. The Commission has from time to time made clear its difficulties with the definition, which arose in stark form in the Metherell matter....*
>
> *The earlier Metherell Report dealt with a Premier and a Minister, and the recent Court of Appeal decision states the law concerning dismissal of such public officers. In the view of the majority Judges, which of course prevails, there must be a serious departure from standards of conduct recognised and enforced by the law if any such office holder is to be dismissed. Accordingly findings of corrupt conduct cannot be made against Ministers under the present definition of corrupt conduct unless that requirement is satisfied, or there has been criminal misconduct.*
>
> *Following the Court of Appeal decision, there are now several classes of public officials for the purposes of the ICAC Act, some more privileged than others. The only common characteristic is that the criminal law applies to all, and does so equally.*
>
> *The most strictly controlled are public sector employees to whom specific disciplinary offences apply....*

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18 ibid, Mahoney J, dissenting, p 65.

All employees owe a duty of fidelity to their employer, and breach can warrant dismissal...

The next class comprises employees with respect to whom no disciplinary offences have been created...

The next class comprises those who are not employees, but rather hold an office. That includes, but is not limited to, Members of Parliament and Judges, as well as Ministers. All of them can be removed from office by Parliamentary action, and generally no other means of removal is available. As to such people, there are no disciplinary offences. Accordingly in terms of s.9 of the ICAC Act, the practical reality of the Court of Appeal decision is that if their conduct is not such as could constitute or involve a criminal offence, they are not at risk of a finding of corrupt conduct. This interpretation means behaviour such as bias, favouritism, nepotism and jobs for the boys may be 'corrupt' if done by a public servant but not if done by the holder of a high office.

It seems axiomatic that the ICAC Act should apply the same standards equally to all in the public sector. The Parliament has enacted legislation which confers special powers in relation to public servants and other public sector employees. Most of these ordinary citizens accept the Commission and its powers, although some complain when those powers are used against them as individuals. Nobody can expect general acceptance of the Commission to continue if the 'great and powerful' are beyond its reach." [19]

1.3.3 The Hon Athol Moffitt QC, CMG, discussed the problems with the current definition of corrupt conduct in his submission. He said that s.9(1) was the major problem and that it made the definition one that was subjective and conditional. He referred to the use of the word "could" and the necessary determination of whether others external to the ICAC "could" take certain action on conduct. Mr Moffitt also made the point that the different disciplinary and dismissal powers applying to various offices meant that persons engaging in the same conduct outlined in s.8 could be subject of very different determinations in respect of s.9.

"By reason of the part played by s.9(1) an unreal or at least unusual method is used to define a subject. The presence of s.9(1) makes it confusing and productive of strange anomalies and consequences,

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[19] ICAC, Second Report on Investigation into the Metherell Investigation and Appointment, September 1992, pp 12, 16-18.

particularly when applied to a s.74A(1) and s.74B(2). S.7 accepts that conduct to be corrupt must fall within both s.8 and s.9. It accepts, as must be so, that merely to fall within s.8 does not make conduct corrupt. S.8 objectively refers to conduct. This is not so with s.9 (1) (a), (b) or (c). It depends on what others external to ICAC ' could' do, but may not do. Thus, whether conduct is corrupt depends on s.9 (1), which does not itself objectively describe the nature of the conduct or quantify its seriousness. As Gleeson CJ pointed out, it introduces a conditional element into the definition. Also, whether conduct is corrupt may depend on questions concerning disciplinary offences or dismissal (s.9 (1)(b) and (c)). Then, because what is a disciplinary offence and what are the powers of dismissal will vary accordingly to the office, e.g. Judge, Member of Parliament, or office clerk, the same conduct will be corrupt or not corrupt according to the office held. As I pointed out in my article in The Australian, this appeared to have happened in the Metherell inquiry, where, of those found to be in breach of s.8, some were found corrupt and others not, because of differences in the dismissal powers." [20]

1.4 ***What should be done to fix the definition? Key Submissions***

1.4.1 There was broad consensus in the major submissions received by the Committee as to what should be done to fix the definition of corrupt conduct. All the major submissions agreed that section 9 should be repealed. There was also agreement that what was needed was a clear statement of the conduct the ICAC had jurisdiction to investigate. Most of the major submissions also agreed that there was no need for the term corrupt conduct to be defined or used in relation to the Commission's jurisdiction.

1.4.2 The ICAC's submission identified a number of problems with section 9. It said that section 9 was inappropriate as a seriousness test. It also said that section 9 was problematic in that it required the ICAC to make a judgement as to the quality of conduct before conducting an investigation. The ICAC argued that s.8 should be retained in order to describe the Commission's jurisdiction to investigate. The ICAC also argued that it was unnecessary to define the term corrupt conduct or to give the ICAC's jurisdiction to investigate a defined legal meaning."

"Section 9 has always caused problems. Its application to Ministers caused great difficulty in the Metherell investigation. Of equal difficulty is the need to use s.9 to define the Commission's jurisdiction. The problem

[20] The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, p 9.

is that until a complaint has been investigated it is unclear whether it comes within s.9. No doubt it was intended by using the word 'could' in s.9 that a low threshold would control jurisdiction. The Commission does not believe this threshold is now appropriate. It probably never was, although without experience this may not have been apparent...

The Commission is of the view that the conduct within the present scope of s.8 is appropriately within jurisdiction. For the reasons discussed later it may be preferable to avoid describing the Commission's jurisdiction by use of terms such as 'corrupt conduct'. It is not necessary. Rather a clear statement of the nature of the conduct which the Commission can investigate may be all that is required. Adding the label corrupt adds little, at least when defining jurisdiction.

The Commission is troubled by s.9. Apart from the difficulties adverted to in ***Greiner v ICAC*** *(which arise when conduct is being classified) it is inappropriate to define jurisdiction in a way which requires a judgement to be made of the quality of the conduct when seeking to assess whether to accept the allegation. After all the formation of this judgement is an essential part of the investigation. A sound judgement will often be possible only when the investigation is at least partially completed.*

Any concern over 'seriousness' is met by the present s20(3)(a) which should remain. This requires an evaluation of whether the allegation is trivial which can be made without difficulty if not at the complaint stage then certainly at an early point in any investigation.

If the intention was that by operating as a seriousness test s.9 would be a filter for complaints it does not operate in this manner. It never could in any practical sense. It is unlikely that complainants will be aware of s.9 when lodging a complaint. Experience has shown that many complaints do not warrant the resources of the Commission and can be referred to other agencies or if trivial not pursued. The number of complaints are such that the Commission does not have the resources to formally investigate other than a minority. The seriousness test in s.9 is of little, if any, practical utility.

It is fundamental to the independence of the ICAC that it have a discretion whether to investigate any complaint. It is accountable to the Operations Review Committee for the exercise of this discretion. Its jurisdiction should not be inhibited by artificial criteria which are difficult to apply. Section 20(3) and the inevitable limitation of resources ensure that only serious matters will ever be investigated.

For all these reasons the Commission suggests that for the purpose of defining its jurisdiction the substance of s.8 should be retained. However it is unnecessary to use and define the term corrupt conduct. It is sufficient to describe the conduct which falls within the Commission's jurisdiction without attempting to give it a defined legal meaning. If this approach is taken the difficulties of differentiating between criminal and other conduct do not arise. It would also remove the present difficulties because of the differences between types of public officials, especially Ministers." [21]

1.4.3 The ICAC submission also addressed the question of the whether the Commission's jurisdiction should be limited to criminal matters. The submission argued that there was much conduct that was not criminal but that was of "great concern" to the community and which it was appropriate for the ICAC to investigate. The submission reiterated the point made in the Second Metherell Report that the Commission needed to be in a position to investigate all public officials including the "great and powerful".

"Many people have expressed concern that all conduct within the jurisdiction of the ICAC is described as corrupt although in many cases it is not criminal. Generally the focus of the concern has been that the community understanding of corruption involves a criminal offence — typically bribery. Although the Act has provided an expanded definition carefully framed to meet the identified policy objectives most people do not have access to the legislation. If they did they would not easily understand it.

As mentioned the policy behind the Act was that all public officials should be subject to the jurisdiction of the ICAC. It can hardly be otherwise. The crisis in confidence in public administration which led to the ICAC arose out of concerns with the actions of some in high places.

There can be no confidence in an anti-corruption body which can not investigate the conduct of the 'great and powerful'. The Commission believes there should not be any limit on the public officials within its jurisdiction. Currently the interpretation of s.9 means that some, if not much, conduct of certain officials, such as Ministers, could not be investigated by the Commission. The Commission believes that this position if retained would lead to a loss of public confidence, both in the Commission and generally. The Commission need not be in a position

21 ICAC, Submission 12 October 1992, pp 4, 9-11.

to make judgements about the consequences of conduct - that can be done by the Parliament or the electorate. However the Commission has an important function to perform in finding out facts and informing the Parliament, and through Parliament, the electorate.

The Commission also believes that if it is to be effective in ensuring integrity of public administration and confidence in public institutions it must be able to examine conduct which may not be criminal. This objective was fundamental to the original legislation. The experience of the Commission reinforces this policy view. Many times the Commission has been called upon to examine conduct which although not criminal is of great concern." [22]

1.4.4 The Hon Adrian Roden QC made a very succinct, concise submission. In it he briefly outlined some of the difficulties caused by s.9 requiring the ICAC to almost prejudge a matter before it is investigated to determine whether it is within jurisdiction. Mr Roden said that s.9 fulfilled no useful purpose in terms of defining the Commission's jurisdiction to investigate. He suggested a simple statement of the Commission's jurisdiction to investigate should be included in the ICAC Act. He included in his submission such a statement in draft form.

"When the Commission embarks on an investigation, it does not know where it will lead or what the result will be. Were it otherwise, there would be no need for the investigation. At that stage it cannot know whether the facts as they ultimately emerge will, or could, constitute a criminal or disciplinary offence or ground for dismissal.

It is too early then, to seek to apply a definition such as that contained in the Act. That applies particularly to the requirements of section 9. It is almost prejudging the issue to say, before an investigation has begun, whether the facts that will emerge could fall within its terms...

When the present definition is applied for the purpose of determining whether a matter is within jurisdiction and may be investigated by the Commission, it will be seen that most of it is unnecessary.

It is difficult to imagine any matter falling within the terms of section 8, of which it could not be said that it ***could*** *fall within the terms of section 9. At least before investigation, section 9 serves no useful purpose.*

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22 ibid, pp 4-6.

And what purpose does subsection (2) of section 8 (the list of 25 types of corrupt conduct) serve? There is very little it would catch that would not already be within the terms of paragraph (a) of subsection (1).

I believe that section 13(1)(a) is plain enough without definition. If it is felt necessary or desirable to explain further the circumstances in which the Commission may embark on an investigation, those circumstances, I believe can be adequately stated in the relevant section without resorting to a definition.

Why take two steps where one would do? Why not let so much of section 8 as may remain, be used to describe the circumstances in which the Commission may investigate? Why refer in one section to corrupt conduct or corruption, and then explain in another section what that is intended to mean Why not something like this:

> Following receipt of a complaint or a report, or of its own motion, the Commission may investigate any facts or circumstances, including the conduct of any person (whether or not a public official), which, in the Commission's opinion, may impinge upon or adversely affect the honest or impartial exercise of the official functions of any public official.

No doubt that can be improved upon. I have deliberately retained a number of the expressions used at present in sections 8 and 13. The object is to show that they can be combined, and a simple, direct statement made of the Commission's power to investigate." [23]

1.4.5 The Hon Athol Moffitt QC, CMG, also called for the repeal of s.9 in his submission. Mr Moffitt said that there was no reason why s.8 on its own could not be used to describe the Commission's jurisdiction to investigate. He suggested that the conduct described in s.8 should be defined as "relevant conduct".

"For reasons earlier appearing, s.9(1) is unsatisfactory or obscure in operation. This is so, even when only used to define s.13 functions. Obscurity can only add a difficulty in the exercise of these jurisdictions and functions and could provide an unwarranted basis for the mounting of court challenges to ICAC's exercise of power.

S.9(1) really serves no useful purpose in defining the jurisdiction to inquire. There is no reason why it should not simply depend on s.8. That defines areas proper to be investigated in order to reveal unacceptable

[23] The Hon Adrian Roden QC, Submission, 05 October 1992, pp 7-8.

> *official conduct, which ought to be dealt with by others in accordance with existing laws and accepted standards, or where action should be taken by others to reform for the future such laws and standards. None of that external action depends on the definition in the Act. As to defining, s.8 conduct as corrupt even for this purpose would be publicly misleading, I suggest s.8 conduct be defined as 'relevant conduct'."* [24]

1.4.6 The Committee received a number of other submissions which called for the repeal of s.9. The Hon Ernie Knoblanche QC said that there was a "great deal of complexity" in the current definition of corrupt conduct, due to s.9. He stated that "such a troublesome thing, if it can be practically done, should be killed off".[25] The Director of the Institute of Criminology, Mark Findlay, also referred to the "lack of clarity" in the definition and the "conditional/unconditional" mix. He said that s.9 should be removed. [26]

1.5 ***Other Submissions***

1.5.1 The Bar Association and Law Society each called for a new definition of corrupt conduct in their submissions. The Bar Association called for a delineation between "serious offences in public office" which would be dealt with by the criminal law, and "conduct of a less serious nature but deserving of the community's disapproval" which would be the subject of the ICAC Act. The latter should be defined as "official misconduct" in terms of s.2.23 of the Queensland Criminal Justice Act. [27]

1.5.2 The Law Society suggested a new definition of corrupt conduct that would replace ss.8-9.

> *"Corrupt conduct is conduct by any person (whether or not a public official) that adversely affects the exercise of official functions by any public official, any group or body of public officials or any public authority and involves a criminal offence."*

The Law Society argued that this definition would remove the uncertainty caused by the use of the terms "may" and "could" in the current definition. The Law Society also called for the Act to contain a new term which would be defined so as to describe conduct of a lesser degree of seriousness than corrupt conduct. The

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24 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, p 25.

25 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, p 1.

26 Mark Findlay, Submission, 29 September 1992, p 6.

27 NSW Bar Association, Submission, 06 November 1992, pp 1-5.

term suggested was "unsatisfactory official conduct". [28]

1.5.3 Mark Findlay put forward a novel proposal in his submission. He said that, if the ICAC is to talk about corrupt conduct "in the ordinary sense" of the word or as the community would understand the term, it would be important for the ICAC to identify "community sentiment" about the definition of corrupt conduct. In order to achieve this Mr Findlay put forward two suggestions. Firstly, the ICAC could conduct surveys or panel discussions to test the community's response to the ICAC interpretations of corrupt conduct. Secondly, in cases of significant public interest the ICAC could empanel a jury to advise the Commissioner on the application of corrupt conduct in its ordinary sense to the conduct being investigated. [29]

1.5.4 Unlike most of the other major submissions which suggested that there was little benefit in the use of the term corrupt conduct, the Hon Ernie Knoblanche QC argued in his submission for the retention of the term corruption. Mr Knoblanche said that the term corruption was inextricably linked in the public mind with the ICAC and that the removal of the term corrupt conduct would diminish the standing of the ICAC in the eyes of the community.

> *"I reason that if a survey was done of ordinary citizens in this community and canvassed their opinion, of what it was 'that the ICAC was all about', it would be highly likely that a majority view would be something along the lines as follows 'it is all about finding out about and dealing with corruption amongst public servants and politicians and administration and governments'.*
>
> *It is my submission that if one seeks for a word as a short efficient communicator of the concept what it is that has 'plagued this state and nation for many years' there is none better than 'CORRUPTION'....*
>
> *It is my submission that the word 'corrupt' has become an important part of the recognition of the Commission and its aims. It is a key word in the public mind as to 'what the Commission is on about', though not many citizens would be able to verbalise the precise meaning of 'corruption' in this context, most would be able to give a fair overall statement of its content....*
>
> *I submit that the word 'corrupt' and its derivations should be retained in the Act. It is further my submission that to remove it and replace it with*

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28 Law Society of NSW, Submission, 02 October 1992, pp 2-6.

29 Mark Findlay, Submission, 29 September 1992, pp 5-6.

something softer would be to diminish the standing and power of the Commission as it is seen in the public eye." [30]

1.5.5 The Hon Athol Moffitt QC, CMG made an additional suggestion for the amendment of s.8. Mr Moffitt suggested that the ICAC's jurisdiction to investigate be specifically expanded to enable the ICAC to investigate any criminal conduct related to the conduct presently included in s.8. This suggestion was put forward to ensure the ICAC is able to investigate matters where there appears to be a link between official corruption and organised crime.

> *"The terms of s.8, particularly of s.8(2), should be reviewed in the light of any of the amendments made on the lines submitted or otherwise. I do not enter into that area except in one respect. That is to add a subject matter to s.8 which should in express and clear terms be made a separate subject matter of jurisdiction to inquire. Arguably, it may not at present exist, so inquiry into it could be a matter for court challenges as to jurisdiction. In my view ICAC should have and exercise a jurisdiction to inquire into and exercise its related powers in respect of any criminal conduct which appears to be associated with any s.8 conduct and any conduct, criminal or otherwise, which is revealed in the course of an inquiry. Official corruption is notoriously associated with organised crime. If when official corruption is being investigated there is an appearance of organised crime, ICAC should have the clear jurisdiction to follow the whole matter to the end. The same should occur in the reverse situation when organised crime is being investigated (by the NCA). The two cannot be kept in separate compartments."* [31]

1.6 ***Implementation***

1.6.1 As set out in the introduction, the Committee considered a draft of this report at its meeting on 09 March 1993. During discussion on this chapter of the draft report concern was expressed about the implementation of the Committee's draft recommendations. Specifically, Committee members noted that the proposed changes to the definition of corrupt conduct would necessitate a number of consequential amendments to other sections of the Act in which the term corrupt conduct occurred. Concern was expressed that these consequential amendments should not be allowed to lead to any risk that the ICAC's jurisdiction could be threatened. The Committee therefore sought the advice of the Crown Solicitor on

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30 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, p 4.

31 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, p 26.

this matter.

1.6.2 The Crown Solicitor's advice was considered by the Committee at its meeting on 26 March 1993. The Crown Solicitor's advice drew attention to the threat of such challenges to the ICAC's jurisdiction if s.8 conduct was termed "relevant conduct" but the term "corrupt conduct' was left to have its ordinary meeting where it occurs elsewhere in the Act. The Crown Solicitor's advice suggested that the term "relevant conduct" would need to be substituted for "corrupt conduct" throughout the Act. The Committee has accepted the Crown Solicitor's advice and the conclusions to this chapter set out below are in accordance with that advice. Due to the importance of this issue the Crown Solicitor's advice is reproduced as appendix two. The conclusions also contain a further safeguard, that is a recommendation that the Parliamentary Counsel prepare draft legislation to implement the Committee's proposed changes to the definition of corrupt conduct, along with all the necessary consequential amendments to the Act. The Committee will then be able to review the draft amendments to ensure that there are no unintended consequences.

1.7 ***Conclusions***

1.7.1 The current definition of corrupt conduct in the ICAC Act is overly complex and fraught with difficulties. The definition is conditional in nature and was found by the NSW Court of Appeal to be "apt to cause injustice".

1.7.2 The Committee endorses the proposed changes to the definition of corrupt conduct put forward in the major submissions received, including that from the ICAC.

1.7.3 The ICAC must be able to investigate all public officials, including Ministers, MPs and Judges. The "great and powerful" must not be outside the reach of the ICAC.

1.7.4 Section 9 should be repealed.

1.7.5 Section 8 should remain largely in its present form to describe the ICAC's jurisdiction to inquire. The conduct described in s.8 could be called "relevant conduct" if it needs to be defined at all.

1.7.6 As set out in this chapter, the Committee has been concerned about the implementation of these recommendations for changes to the definition of corrupt conduct. A number of consequential amendments to other sections of the ICAC Act will be necessary. It is important that these consequential changes do not inadvertently result in any threat to the ICAC's jurisdiction. The Committee therefore recommends that the Parliamentary Counsel be asked to prepare draft amendments to the definition of corrupt conduct as recommended by the Committee together with the necessary consequential amendments to other sections

of the ICAC Act, so that they can be reviewed by the Committee to ensure there are no unintended consequences arising from these changes.

1.7.7 Section 8 should be amended to expressly enable the ICAC to investigate possible criminal conduct related to official corruption, including matters where organised crime and official corruption may be linked.

-2- *FINDINGS ABOUT INDIVIDUALS*

2.1 ***High Court Decision in the Balog Case***

2.1.1 The ICAC's first inquiry involving the use of public hearings concerned land development in the Waverley Council area. Two key participants in the inquiry, Messrs Balog and Stait, took legal action to seek a declaration and injunction in the NSW Supreme Court to limit the findings the ICAC might make against them in its report on the inquiry. Justice Smart dismissed the application in July 1989 and his decision was upheld in the NSW Court of Appeal in December 1989. In both cases it was found that the relevant provisions of the ICAC Act should not be construed as restrictively as the appellants had sought. Balog and Stait appealed to the High Court and sought a declaration that the ICAC was not entitled to make any finding or state any conclusion that they were guilty of a criminal offence or that corrupt conduct had occurred.

2.1.2 The High Court found that, with a small number of exceptions expressly provided for in the ICAC Act, the ICAC's reporting powers were limited. The Court found that the ICAC could not generally make findings of either criminal guilt or of corrupt conduct. The Court found that the ICAC functions contained no implication that the ICAC should be able to make such findings in public reports. The decision referred to the damage to reputations and the possible prejudice to subsequent proceedings which could occur as a result of such findings. The Court found that a narrower construction of the relevant provisions of the ICAC Act was consistent with common law principles. However, the Court also emphasised that the granting of the declaration preventing findings of criminal guilt or corrupt conduct must not prohibit the ICAC from reporting the material it has discovered in its investigations even where this may tend to implicate persons in criminal or corrupt conduct.

> *"The expression of a finding of guilt or innocence of an offence or even of a prima facie case against an individual, in a report which is bound to be made public, must be likely to have a damaging effect on the reputation of the person concerned. And whilst such a finding may not*

necessarily have a tendency to interfere with the due administration of justice in the event of a subsequent trial, the possibility cannot be disregarded.... Clearly the legislature was aware of the dangers of a report which would be made public and was concerned to protect proceedings before a court from interference arising from the publication of such a report ...

For all of those reasons it seems to us, simply as a matter of construction, that the only finding which the Commission may properly make in a report pursuant to s.74 concerning criminal liability is that referred to in sub-s.(5), namely, whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence...

At least in theory there may be a fine line between making a finding and merely reporting the result of an investigation. But in practice the line should be not difficult to draw. It is clear enough that there is a distinction between the revelation of material which may support a finding of corrupt conduct or the commission of an offence and the actual expression of a finding that the material may or does establish those matters....

Although the pernicious practices at which the Act is aimed no doubt call for strong measures, it is obvious that the Commission is invested with considerable coercive powers which may be exercised in disregard of basic protection otherwise afforded by the common law. Were the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be a risk of damage to that person's reputation and of prejudice in any criminal proceedings which might follow. If the legislation admits of a wider interpretation than that which we have given to it (and we do not think that it does), then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred...

Moreover, it is not apparent that the objects of the legislation embrace the publication of findings by the Commission, save in the two instances for which the Act expressly provides. The Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having

regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour...

It is important that the terms of any declaration should not be too wide. It must be clear that, even if the material elicited by the Commission in the course of its investigation is such as to establish or suggest that the appellants or either of them have guilty of criminal or corrupt conduct, the Commission may set further or refer to that material in its report pursuant to s.74, notwithstanding that it cannot state any finding of its own. Of course, depending upon the nature of the material, even to deal with it in that way may inevitably implicate the appellants or one or other of them in criminal or corrupt conduct. The Commission is nonetheless entitled to report upon the results of its investigation; it is merely precluded from expressing any finding, other than under s.74(5), in relation to the appellants. We would declare in each appeal that the commission is not entitled in any report pursuant to s.74 of the Act to include a statement of any finding by it that the appellant was or may have been guilty of a criminal offence or corrupt conduct other than a statement made pursuant to sub-s.(5) of that section." [32]

2.1.3 The High Court's decision was brought down on 28 June 1990. Some time prior to this date the ICAC's Assistant Commissioner, the Hon Adrian Roden QC, had completed his Report on Investigation into North Coast Land Development. However, the tabling of that report was delayed by the legal action brought by two participants in the North Coast inquiry which was parallel to the **Balog** case. Following the handing down of the High Court's decision the litigation involving the participants in the North Coast inquiry was resolved so as to enable the ICAC to make its report on that inquiry in conformity with the High Court's declarations in relation to the **Balog** case. Mr Roden reviewed his report and revised it by 2 July. Mr Roden made it clear in a preliminary note to the report that he had little difficulty in complying with the requirements of the High Court decision.

"The Report as originally prepared, did not include a finding that any person was guilty of a criminal offence. From the outset, I was of the opinion that it was no part of the Commission's function to make any such finding. Under our system, findings of criminal guilt may only be made by criminal courts, as part of the criminal process. This Commission's investigations, and Reports published by it, are not part of that process.

32 *Balog vs. ICAC* (1990) 169 CLR 625.

The Report as originally prepared, did not include a finding that any person was guilty of corrupt conduct. 'Corrupt conduct' is a term used and defined in the ICAC Act. It has a technical meaning given to it by the Act. From the outset, I was of the opinion that no useful purpose would be served by determining whether any conduct of any person, disclosed in the course of the investigation, amounted to corrupt conduct as defined in the Act. I said that to counsel during addresses in November 1989. Whether alleged conduct does or does not amount technically to corrupt conduct, is relevant for purposes of jurisdiction only. It determines whether the Commission can properly embark upon an investigation.

Accordingly, the recent court orders create no difficulty insofar as they declare that the Report may not include a finding that a person was guilty of a criminal offence or corrupt conduct. It was not intended that the Report include a finding to either effect, and there is none in the Report as originally prepared.

The court orders also declare that, subject to the exception mentioned, the Report may not include a finding that a person ***may have been*** *guilty of a criminal offence or corrupt conduct. It is more difficult to assess the impact of that requirement. There is no problem about avoiding a finding in express terms to that effect. Indeed there is none in the Report as originally prepared....*

It is only with regard to criminal liability and corrupt conduct that the Commission's power to report findings was under challenge in the High Court. It is only with regard to findings concerning the guilt of persons in respect of criminal offences or corrupt conduct that orders were made." [33]

However, it should be noted that Mr Roden also stated that the **Balog** case demonstrated that there was some ambiguity in the ICAC Act and a need for it to be amended so as to clearly express the intention of the legislature.

2.1.4 On the day of the High Court's decision the ICAC issued a short media statement which expressed concern about the effect of the decision and suggested that it would inhibit the ICAC's effectiveness.

"The Commission has to do the job Parliament has set for it. If the Parliament wants the ICAC to provide useful reports along the lines of

33 ICAC, Report on Investigation into North Coast Land Development, July 1990, pp.xiv-xviii.

Royal Commission reports, then presumably the ICAC Act will have to be amended.

It would seem a terrible shame and waste if most of the work done in hearings to date went for nought." [34]

The next day The Sydney Morning Herald ran a front page story entitled "ICAC crippled, says Temby".

2.1.5 The Attorney General, the Hon John Dowd MP, played down the significance of the High Court's decision. He stated that the Court had interpreted the ICAC Act in exactly the way that it was intended to operate. [35] The NSW Law Society also issued a media statement which welcomed the High Court's decision and said that the decision left the ICAC's investigative function "completely intact". [36] A number of independent commentators also expressed support for the High Court's decision and argued that it left the Commission's powers intact. [37]

2.1.6 During this time Mr Temby continued to call for amendments to the ICAC Act to address the concerns arising from the **Balog** decision. In a paper presented to the Australian Bar Association Conference in Darwin on 09 July 1990 he emphasised the need for the Act to clearly state what ICAC reports must, could and must not contain. He said the High Court's decision and the present provisions of the Act were such as to invite further litigation and cause long delays in relation to future reports. [38] A number of meetings were held between Mr Temby and the Premier and on 01 August 1990 the Premier, the Hon Nick Greiner, released a media statement in which he said the Government would do whatever was necessary to ensure that the ICAC remained "an effective anti-corruption body". The statement confirmed that the Government would act to clarify the ICAC's reporting powers. [39]

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[34] ICAC, Media Statement, 28 June 1988.

[35] "Dowd rules out change to ICAC", The Australian, 29 June 1990.

[36] Law Society of NSW, "High Court Decision about ICAC Supported", Media Statement, 29 June 1990.

[37] David Solomon, "ICAC: less bark, same bite", The Australian, 03 July 1990; The Hon Athol Moffitt QC, CMG, "Let us leave findings of corruption to the courts", The Sydney Morning Herald, 11 July 1990.

[38] Ian Temby QC, "The ICAC - Individual Rights and the public Interest", Paper, presented to Australian Bar Association Conference, Darwin, 09 July 1990.

[39] The Hon Nick Greiner MP, Premier, Media Statement, 01 August 1990.

2.2 *1990 Amendments*

2.2.1 In November 1990 the NSW Parliament passed the Independent Commission Against Corruption (Amendment) Act 1990. This legislation addressed the concerns which the ICAC had expressed about the High Court's decision in the **Balog** case. These amendments expressly provided for the ICAC to make findings that individuals had engaged in corrupt conduct. In introducing the legislation the Attorney General emphasised the need to clarify the ICAC's reporting powers and to overcome the "confusion and uncertainty" arising from the High Court's decision.

> *"The principal purpose of this bill is to amend the Independent Commission Against Corruption Act 1988 so as to clarify the commission's powers in relation to the contents of its report to Parliament. The Premier foreshadowed the introduction of those amendments in August last year when he announced that the Government would take action to clarify the commission's reporting powers. The Premier emphasised that the commission has the Government's strong support and that the Government would take whatever action was necessary to ensure that the commission remained an effective anti-corruption body. This bill fulfils that commitment. Over the past 15 months or so, the effective functioning of the commission has been jeopardised by the many legal challenges brought against it. Reports of major investigations were delayed while the commission's powers in relation to the contents of those report were disputed in the courts. In late June of this year, the High Court handed down its decision in Balog and Stait v. Independent Commission Against Corruption, which examined the commission's powers to make and report findings. That decision, however, did not ultimately resolve the question of what the commission can and cannot include in its reports to this Parliament.*
>
> *The pressing need for this bill arises out of the confusion and uncertainty generated by the decision. It has even been suggested that all the commission can do is present Parliament with a transcript of proceedings before it, leaving it to the Parliament and the public to draw their own conclusions as to whether or not allegations of corruption have been substantiated. That clearly would be a ludicrous situation. The commission was established for the very specific purpose of investigating and preventing corruption in the public sector. The commission was given wide powers to compel people to give it information so that it could uncover the truth and settle allegations of corruption once and for all. Clearly the purpose for which the commission was established would be undermined if the commission were restricted in what it could report after completing its investigations. Thus the bill gives the*

commission a clear and wide power to make and report findings and opinions based on the results of its investigations and to make recommendations for the taking of further action.

The commission will be able to express definite conclusions as to whether or not allegations of corruption have been substantiated. It will be able to state its reasons for those conclusions and describe the respects in which conduct is corrupt. That is, the commission will have the authority to say whether a public official misused official information or acted dishonestly in carrying out official duties or has committed a breach of the public trust. It will be able to give a factual account of what occurred, including a description of the behaviour which it finds is corrupt. The amendments made by the bill will clearly allow the commission to examine in its report the evidence before it and state its opinion as to the weight which should be given to that evidence. It will be able to comment on the credibility of witnesses. Not only is it vital that the commission have clear and broad powers to report findings to ensure that it remains an effective anti-corruption body, it is also essential that the commission be able to reach definite conclusions as to whether allegations of corruption have been made out so that speculative allegations without any substance are not left hanging.

A public official whose reputation has been publicly damaged has a right to have his or her name publicly cleared. The commission has a charter to investigate corruption. It was not set up to investigate crime generally. Obviously, however, there will be cases where the corrupt conduct concerned involves criminal activity. In the area where corrupt conduct overlaps with criminal activity the commission will only be able to reach conclusions regarding the corrupt aspect of the person's behaviour. It is not for the commission to determine criminality. Nor is it the commission's role to conduct prosecutions for criminal or disciplinary offences. The Director of Public Prosecutions and other authorities are charged with that responsibility and the commission should not be able to pre-empt the decisions of those authorities to prosecute or not to prosecute. The bill therefore makes it clear that the commission does not have power to recommend prosecution. At most the commission will be able to state its opinion as to whether or not consideration should be given to prosecution for a criminal or disciplinary offence.

The bill also amends the provisions of the Act that describe the commission's principal functions by giving the commission clear objectives when carrying out its investigations. Without compromising the commission's powers to report in any way, the legislation provides

that the commission is to consider not only whether an individual's behaviour has been corrupt but also whether laws, practices and procedures and methods of work have created a situation where there is a potential for corrupt conduct to occur." [40]

2.2.2 The most important provisions contained in the 1990 amendments were new sections 13(2)-(5) and sections 74A and 74B. These sections which remain intact in the Act are set out in full below.

"13 (2) The Commission is to conduct its investigations with a view to determining:

(a) whether any corrupt conduct, or any other conduct referred to in subsection (1)(a), has occurred, is occurring or is about to occur; and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct; and

(c) whether any methods of work, practices or procedures of any public authority of public official did or could allow, encourage or cause the occurrence of corrupt conduct.

(3) The principal functions of the Commission also include:

(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigation are concerned, whether or not the findings or opinions relate to corrupt conduct; and

(b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

40 Parliamentary Debates (Hansard), Legislative Assembly, 21 November 1990, pp 10200-10201.

(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc. of guilt or recommending prosecution) prevents the Commission from including in a report, but this section is the only restriction imposed by this Act on the Commission's powers under subsection (3).

(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

(a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct;

(b) opinions as to whether consideration should or should not be given to the prosecution or the taking of other action against particular persons;

(c) findings of fact."

"74A(1) The Commission is authorised to include in a report under section 74:

(a) statements as to any of its findings, opinions and recommendations; and

(b) statements as to the Commission's reasons for any of its findings, opinions and recommendations.

(2) The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) the prosecution of the person for a specified criminal offence;

(b) the taking of action against the person for a specified disciplinary offence;

(c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

(3) An "affected" person is a person described as such in the reference made by both Houses of Parliament or against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.

(4) Subsection (2) does not limit the kinds of statement that a report can contain concerning any such "affected" person and does not prevent a report from containing a statement described in that subsection in respect of any other person."

Report not to include findings etc. of guilt or recommending prosecution

"74B(1) The Commission is not authorised to include in a report under section 74 a statement as to:

(a) a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence); or

(b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).

(2) A finding or opinion that a person has engaged, is engaging or is about to engage:

(a) in corrupt conduct (whether or not specified corrupt conduct); or

(b) in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),

is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.

(3) In this section and section 74A, "**criminal offence**" and "**disciplinary offence**" have the same meanings as in section 9."

2.2.3 It should be emphasised that there was very little informed debate when the 1990 amendments passed through the NSW Parliament. By the time the then Premier released his media statement on 01 August promising amendments to the Act to address the ICAC's concerns about the High Court decision the ICAC had won the political battle to get the legislative amendments it desired. Unlike the current procedure whereby the ICAC Act has been subjected to a thorough review by a bipartisan Parliamentary Committee following the Court of Appeal's comments in the **Greiner** case, there was no such considered review involving public participation which preceded the 1990 amendments.

2.3 ***Labelling***

2.3.1 A number of separate issues emerged during the Committee's inquiry in relation to the ICAC's reporting powers. The first of these was the question of "labelling". As outlined above s.13(5)(a) enables the ICAC to make findings that "particular persons have engaged, are engaged or are about to engage in corrupt conduct". There was broad consensus in the key submissions received by the Committee that this "labelling" power should be removed from the ICAC Act.

2.3.2 The Hon Adrian Roden QC said the idea that the ICAC should make findings of corrupt conduct confused the role of the ICAC and the courts. He said that nothing was achieved by such findings and that they inevitably led to unwanted, wasted litigation.

> *"The idea that the Commission should make findings of corrupt conduct, reflects a confusion between the respective functions of the Commission and the courts.*
>
> *To make such a finding involves doing what courts have to do when considering whether a person has been shown to be guilty of a criminal offence. For that purpose, it is essential that the definition of the particular offence be considered, and a decision made as to whether the conduct that has been established falls within it...*
>
> *There are many cases in which it is beyond question that conduct established in a Commission investigation falls within the definition of*

corrupt conduct contained in the Act. There are many cases in which it is equally clear that the contrary is the case.

Problems only arise when it is debatable on which side of the line particular conduct falls.

What is the point then of a finding one way or the other? One lawyer, sitting as Commissioner or Assistant Commissioner, will express one opinion. Some will agree with the decision; some will disagree. Hundreds of thousands of dollars might be spent on the argument before the Commission, and in further argument before the courts. To what purpose? The decision will have no bearing on the facts disclosed.

The findings of Tamba can be considered by way of illustration.

It was useful and valuable, I believe, to find and report that named persons and institutions had been engaged in the illicit trade in confidential government information. In consequence of those findings, systems may be changed, laws may be amended, and people may be prosecuted. Those actions would be directed towards minimising recurrence of the corrupt practices that were revealed.

But what is there of value that can be done in consequence of further findings that some of the conduct disclosed does, and some of the conduct disclosed does not, fall within the definition of corrupt conduct contained in the Act? I suggest that nothing at all of value flows from those findings.

What can flow from them is unwanted, wasted litigation.

Although no purpose is served by applying the label to a person, once that has been done the person concerned would have a real interest in clearing his or her name of it. It is then that the litigation can occur — not about the findings that served no purpose in the first place." [41]

2.3.3 The Hon Ernie Knoblanche QC submitted that the ICAC should be precluded from making findings of guilt or of corrupt conduct. He said that such findings should be left to the courts. He said it would still be open to the ICAC to make observations and recommendations for reform without "labelling' or "branding' individuals in this way.

41 The Hon Adrian Roden QC, Submission, 05 October 1992, pp 5-6.

> *"It is my submission that it is very important that there be no findings by the Commission of guilt of a criminal offence or guilt of a disciplinary offence or guilt of corrupt conduct against any specified or identifiable individual, because to do so would be to find guilt where the rules and practice of evidence are not binding and the common-law privilege against self incrimination is modified.*
>
> *The Court of Appeal and the High Court have explained the defects which such a finding against an individual may carry and how damaging it could be.*
>
> *It is my submission that there should be a clear statutory prohibition on the Commission making any finding of guilt in respect of a specified or identifiable person of any criminal, or disciplinary offence, or any conduct warranting dismissal, or corrupt conduct....*
>
> *It is my opinion that in practice it will probably be found that there is room for the Commission to make observation comments and recommendation which will attack the "culture" without labelling or branding any person as having committed a criminal offence or disciplinary offence or having been guilty of such conduct as warrants their dismissal from office or labels them as having committed corrupt conduct or being corrupt. The findings of these things in these terms should be left to the courts, or where appropriate to the public authority who has the lawful jurisdiction to discipline or dismiss in the instant case."* [42]

2.3.4 The Hon Athol Moffitt QC, CMG, argued most vigorously for the repeal of the "labelling" power. He said that a finding of corrupt conduct by the ICAC was akin to the sentencing a person to "public pillory". He described this as a judicial type power, which should always remain separate from the ICAC's inquisitorial functions. Furthermore, he said that the exercise of such a power by the ICAC would not be subject to review yet would be subject to possible error.

> *"In respect of revelations, concerning the past conduct of particular persons and in respect of future reforms, it is no part of the concept of ICAC that it should itself exercise the powers, which lie in the hands of other authorities, each according to its own jurisdiction or authority under the general law. For ICAC to do so or to be given the power to do so must inevitably result in the duplications, unfairness and other undesirable consequences, earlier stated. Judgmental, executive and*

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42 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, pp 5-6.

legislative functions should be left strictly separate from inquisitorial functions and powers, particularly where the powers of the latter are extreme and different from those of the external institutions.

Some, however, may regard what I have said as too 'technical' an approach to an innovative institution and disregard them in favour of a populist view of ICAC and what it should do....

It is said, 'Why have a power to investigate whether conduct is corrupt and not allow the institution making the investigation to find and to pronounce as corrupt conduct so found by it?'

It is here that one is forced to examine the essence of what is proposed. The quality of a finding or judgment by ICAC that the conduct of a named person is corrupt is not one quite of the character of that of a court, but is akin to the ancient practice of sentencing a person found to have done a public wrong, to the public pillory. The present day equivalent is made more effective by the modern media. However useful it may seem to be, both legislative and the judicial type powers contrary to the essentials of our democratic structures would be given to one individual, the Commissioner, not subject to any review process or removal. He holds office for a term, may be wise or benign, but always will be subject to possible error, or he may turn out to be arbitrary, dictatorial and often wrong. Under our democratic system legislative and judicial powers are subject to all sorts of checks and balances, the legislative one by public accountability, the opposition and the ballot box. In the end, surely the answer is clear: Parliament must be left to legislate and govern its own affairs wisely or unwisely. As stated earlier in this paragraph, the function of ICAC is to act in aid of outside bodies, and where necessary spur them into action." [43]

2.3.5 The ICAC in its submission put forward the arguments for and against the "labelling" power. The submission suggested that, provided the Commission was able "express conclusions applying ordinary language" it would not be necessary for the ICAC to make findings of corrupt conduct.

> *"The Commission does not believe that a power to make findings of guilt with respect to criminal offences is appropriate. It has never thought so.*
>
> *As to a power to make findings as to corrupt conduct, it is obvious that there is significant justification for it. It is strongest in the case of a*

43 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, pp 21-23.

person who has been wrongly accused of corruption. A power in the Commission to dispel the allegation in terms may be important.

But there are significant factors weighing against such a power. For many a finding of corrupt conduct is akin to a finding that a criminal offence has been committed. Its consequences may be for many just as devastating: loss of reputation and loss of employment. It also forces the Commission in any report to seek to classify conduct by reference to complicated and difficult legal concepts. The opportunity for subsequent legal debate about the Commission's conclusions is created and it is appropriate to ask whether this advances the objects of the legislation. If rather than make findings of corrupt conduct the Commission is able to express conclusions applying ordinary language the rest of the required policy objectives can still be achieved. The Commission could pass strong condemnation of a person's conduct, where required, without seeking to classify it by reference to some defined term....

Mindful of all these matters the Commission suggests that provided there is a capacity to determine the facts and characterise the conduct of participants by using ordinary language, as would a Royal Commission, it may not be necessary for it have a power to determine whether conduct is corrupt in any defined sense." [44]

[The ICAC submission also discussed the option of retaining the labelling requirement but providing for two separate labels to able to be used - "corrupt conduct" and a lessor term of "improper conduct". However, in view of the general support for the repeal of the "labelling" power, this proposal was not pursued further.]

2.4 ***Primary Facts***

2.4.1 With the emergence of the broad consensus outlined above in relation to the abolition of the "labelling" power, the major issue of contention with which the Committee had to deal in this inquiry was the question of what is a finding of fact and what sort of findings should be able to be made as a finding of fact?

2.4.2 The ICAC stated in its submission that it should be able to make findings of fact which describe conduct in "ordinary language". The ICAC suggested that it should be able to make findings analogous to those of Royal Commissions. According to the ICAC's submission findings of fact should be able to include conclusions which "pass strong condemnation of a person's conduct".

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[44] ICAC, Submission, 12 October 1992, pp 20-21.

> *"The Commission is of the view that it is essential that it have power to make findings of fact, state reasons for those findings, and where necessary describe the conduct in ordinary language. Indeed it is difficult to conceive of an investigation having a useful outcome unless such a power is available. No one has suggested otherwise. It is a power analogous to that of Royal Commissions. If that power is not available allegations would remain at large, unresolved, damage to reputations could occur from the publication of evidence without findings and the usefulness of the Commission's work would be greatly diminished...*
>
> *If rather than make findings of corrupt conduct the Commission is able to express conclusions applying ordinary language the rest of the required policy objectives can still be achieved. The Commission could pass strong condemnation of a person's conduct, where required, without seeking to classify it be reference to some defined term....*
>
> *Mindful of all these matters the Commission suggests that provided there is a capacity to determine the facts and characterise the conduct of participants by using ordinary language, as would a Royal Commission, it may not be necessary for it have a power to determine whether conduct is corrupt in any defined sense."* [45]

In the Second Metherell Report the ICAC stated that, in order for it to make the findings and recommendations which it wished to continue to make, s.74A(1) and s.74B would need to be retained. [46]

2.4.3 Mr Roden briefly outlined in his submission the nature of the findings he made in the Report on Investigation into Unauthorised Release of Government Information. He said that in that report he was able to "find and report that named persons and institutions had been engaged in the illicit trade in confidential information". When he appeared at an Institute of Criminology seminar on 15 October 1992 Mr Roden further elaborated on the findings of fact he included in that report in response to concerns raised about the ICAC's reports being limited to findings of fact. He quoted the following findings of fact:

> *"24 For a period of six months to November 1990, X corruptly purchased social security and other confidential government information from Y, a public official employed by Prospect*

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45 ibid, pp 18-21.

46 ICAC, Second Report on Investigation into the Metherell Resignation and Appointment, September 1992, p 15.

County Council.

25 Y released the prospect County Council information which he corruptly sold to X, without authority and in breach of his duty as a public official." [47]

2.4.4 In contrast the Hon Athol Moffitt QC, CMG, in his submission argued that the ICAC "should not have a power to report any opinions or findings of corrupt conduct (however defined) or any judgemental opinion concerning a named or identifiable person". [48] Mr Moffitt said that the ICAC's findings should be limited to findings of primary fact in certain circumstances. When he appeared before the Committee on 26 October 1992 Mr Moffitt identified what he saw as the differences between what he was proposing and what the ICAC and Mr Roden were putting to the Committee concerning the findings of fact the ICAC should be able to make. Mr Moffitt puts his views in extremely strong terms. He said that what the ICAC was proposing was a move to "complete absolute power" which had the potential to lead to serious injustices. He said that under the ICAC's proposal there would be no limitation upon the sort of adverse findings the ICAC could make about individuals and that such findings would be beyond any form of review. Mr Moffitt reiterated his call for the ICAC's findings to be limited to primary facts in certain circumstances.

> *"The critical difference between the ICAC view and mine is that the ICAC view is that it should retain the power, with respect to named persons, to report, either as its "finding" or "opinion" its determination of the quality of conduct which it finds proved. On this view there would be no limit on the terms open to be used in making these pronouncements....*
>
> *Should ICAC have an unlimited power to find and pronounce judgmental findings, on whatever terms it wishes, to pronounce what, as I will explain, are judgemental findings concerning the conduct of named persons? It is very simple to give the populist answer "yes", without digging deeper to consider the possible consequences. That has been basically the ICAC approach. Why shouldn't we say what we have found? That naturally will be the media approach driven by a little self-interest....*

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47 ICAC, Report on Investigation into Unauthorised Release of Confidential Government Information, August 1992, p 58.

48 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, pp 23-24.

I should at the outset say that in my view the issue I have isolated raises a question of critical importance, so much so, that I foreshadow that if the ICAC package view is adopted, then in my respectful opinion, a situation far worse than at present would be produced. ICAC's power would be far more absolute than at present. There would be a very real potential for serious injustices to be done under the authority of an Act of Parliament by an institution of State. Errors which inevitably will occur and the consequential injustices, perhaps ruinous of the careers of public officers, will be beyond the reach of any review process and of the narrow confinement of the prerogative powers of the courts. In the end, ICAC will be the victim of its own absolute power....

ICAC would have power to report any 'findings' or 'opinion' concerning the conduct of a named person. There would be no limitations. An opinion concerning the past conduct of a person is of necessity judgmental. Thus ICAC could report its judgement that the conduct was dishonest, improper, grossly improper, scandalous, unwise, misconduct, partial or corrupt, using those words in their ordinary meaning....

[A]s no finding, even of corrupt conduct, would be subject to any legal definition or legislative constraint it would not be open to challenge as an error of law. A principal basis of Mr Temby's objection to the present position is that there is "opportunity for subsequent legal debate". His proposals seek to remove what ICAC finds from legal debate in the Courts. The exercise of judgmental power would be absolute and unchallengeable, no matter how wrong....

Where a word is defined by statute its meaning is a question of law, but if it is not so defined it is a question of fact, so no finding under the ICAC package and hence even a finding using the word corrupt or corruptly would be open to challenge, no matter how wrong or unfair the finding in fact is. A challenge such as was made in the Greiner/Moore case would no longer be available. The comments of both Mr Temby and of Mr Roden regard such a challenge as an encumbrance on the exercise of ICAC power....

Absolute power with no review process becomes in time unrestrained and less careful and hence arbitrary, particularly when reasons need not be given. History tells us that....

> *Mr Temby, regrettably, is proposing a step to complete absolute power. There will be no new Greiner/Moore type of case revealing ICAC error....."* [49]

2.4.5 The Hon Adrian Roden QC had an opportunity to respond to Mr Moffitt's comments on both 26 October 1992 and 09 November 1992. Mr Roden acknowledged that findings of fact which contained judgemental statements about the conduct of individuals could be both damaging and tantamount to saying that a person had committed a criminal offence. [50] However, he said that such findings were appropriate in describing corrupt conduct. He also said that to restrict the ICAC's fact finding role would detract from its reporting powers. Mr Roden stated that where there was a perceived conflict between the operations of the ICAC and the courts it was not always necessary for the ICAC to give way, that criminal convictions might not be as important as disclosure of the corrupt conduct. He also suggested that limiting the ICAC's findings to "primary facts" would open the way for legal argument as to the meaning of "primary facts". "Almost any finding of fact by the Commission could be the subject of pointless litigation." [51]

2.4.6 When Mr Temby appeared before the Committee on 09 November 1992 he submitted that the ICAC should have the power to make findings that go beyond primary facts, even where on the facts reported "the conclusion may be available that a criminal offence has been committed". Mr Temby also reiterated that the ICAC wished to be able to describe conduct and express conclusions in ordinary language and should not be restricted in the language which it can use.

> *"[T]he Commission must have the power to report and make findings of fact beyond what are sometimes called the primary facts, even if on the facts as reported the conclusion may be available that a criminal offence has been committed. As I have said to this Committee in the past, the Commission has no desire to substitute itself for the criminal courts. It has no desire to make findings of criminal misconduct, and never has had. It is not for us to find guilt or otherwise. It is not for us to punish. We do not do those things. But it is submitted that we must have the power to describe the conduct investigated in ordinary language, as Commissions of inquiry do....*
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> *I do not want to give the impression that I have a burning desire to castigate individuals in extravagant language. For my part I believe that,*

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49 Committee on the ICAC, Minutes of Evidence, 26 October 1992, pp 18-26.

50 ibid, pp 48-60.

51 The Hon Adrian Roden QC, Further Submission, November 1992, p 9.

if reports are to stand up and if the public are to have confidence in them, they must be expressed in language which is restrained. The word 'judicious' comes to mind. The language used ought to be balanced. I hope that is the view which is held with respect to Commission reports generally....

We are urging that the Commission should not be restricted in the language it can use with respect to the conduct of individuals which, on investigation, is found to have occurred. We should remember always that individuals have to be heard and all the rest of it. Having heard the evidence and having reached conclusions the Commission should state those conclusions using ordinary language for the purpose....

The only other point to be made is that the suggestion that we should be confined to what are called findings of primary fact is, in my considered view, unworkable. We do not want to make what are called ultimate findings—findings of the guilt of a criminal offence. We do not particularly want to make findings of corrupt conduct. But we have to be able to reach and state conclusions about the conduct of individuals, just as we have to be able to reach and state recommendations with respect to legal or administrative reforms." [52]

2.4.7 Following the hearing with Mr Temby on 09 November 1992 it was felt that the Committee should take further evidence on a number of issues. A hearing was held on 08 December 1992 with his Honour Mr Justice Clarke of the NSW Court of Appeal. The main focus of this hearing was the question of appeal mechanisms and judicial review (which is addressed in chapter 3). However, Mr Justice Clarke did express his views on the question of the findings that the ICAC should be able to make. Justice Clarke called for the ICAC's "labelling" power to be removed. He also supported the restriction of ICAC findings to primary facts. [53]

2.4.8 The Committee conducted a further hearing on 05 February 1993. At that hearing Mr Tim Robertson, a barrister and Secretary of the Labor Lawyers Association, was asked for his considered view on the question of the nature of the findings of fact the ICAC should be able to make. Mr Robertson said that, on balance, he supported Mr Moffitt's submission that ICAC findings should be limited to primary facts.

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52 Committee on the ICAC, Minutes of Evidence, 09 November 1992, pp 32-34.

53 Committee on the ICAC, Minutes of Evidence, 08 December 1992.

"CHAIRMAN:

Having reviewed the key submissions and evidence taken by the Committee, do you have a concluded view on whether ICAC findings should be limited to primary facts? I might ask you to give your definition of primary facts before you give that view?

Mr ROBERTSON:

I think this is a very difficult, but nonetheless important, matter. I accept the inevitable logic of Athol Moffitt's proposition that if you are to give a statutory remit to a body such as the ICAC to make personal judgments about people's conduct which amount, in effect, to judgments of impropriety and have the consequence of punishment because one his held up to public calumny, then you must protect persons from error; not just legal error—and there is a very limited protection of legal error at the moment because the ICAC does not have any privative clause in the Act protecting it from jurisdictional or procedural review in the courts, but that is a very limited review....

On balance, I think the difficulties of restricting the ICAC to fact finding are less than the difficulties involved in creating an appellate jurisdiction. I think there is a great deal of wisdom in what Athol Moffitt has put to this Committee. I do not know Mr Moffitt personally, but I can say that if I could comment on his reputation, in my profession it is said of Athol Moffitt that he is the only Royal Commissioner since the second world war—and these were comments made, I think, before the Fitzgerald Royal Commission—whose Royal Commission did not go off the rails.

In other words, it was carefully constrained; it did the task it was asked to perform, which was affecting the confidence of the people in the then government and hence a very serious matter that justified a royal commission, and it was conducted in a conspicuously fair fashion. There is a great deal of respect for Athol Moffitt because of that, in my profession. He is, of course, a very experienced judge and lawyer and the Committee would do well to find the wisdom that Mr Moffitt has expressed in his submissions, and I must say I think that it is not beyond the wit of the drafters to produce the definition of primary fact, although I do not like the expression myself." [54]

[54] Committee on the ICAC, Minutes of Evidence, 05 February 1993, pp 9-12.

2.4.9 At the same hearing Mark Le Grand, Director of the CJC's Official Misconduct Division, was asked to describe the CJC's procedures and approach in respect of findings about individuals. Mr Le Grand said that the CJC was not required under its legislation to make "ultimate findings" about individuals and had thereby avoided some of the controversy in which the ICAC has been embroiled recently. He referred to the example of the Fitzgerald Report and was asked to elaborate on the impact of the Fitzgerald Report withholding adverse findings about individuals.

> *"[T]he CJC, at least as far as the Official Misconduct Division is concerned, has largely been able to avoid the debate about labelling, which has bedevilled the ICAC in recent times. The end product of its consideration of matters has been whether there is sufficient evidence to enliven the jurisdiction of the courts, the misconduct tribunals or the disciplinary processes of the public sector. It should be noted that Mr Fitzgerald himself avoided labelling those who appeared before him, thereby minimising any distraction to the implementation of his recommendations. Thus, it can be seen that the CJC, in other than its research capacity, has not made ultimate findings adverse to the interests of concerned persons. Its ultimate findings, where they have been made, have been findings that a complaint has not been substantiated, or occasionally positive findings that alleged misconduct did not occur where this is available on the state of the evidence....*
>
> ***CHAIRMAN:***
>
> *Do you believe the Fitzgerald inquiry was in any way made less effective by withholding adverse findings from its report and rather passing those findings on to a special prosecutor?*
>
> ***Mr LE GRAND:***
>
> *The Fitzgerald inquiry stands out as one of the most effective inquiries in modern Australian history. One of the reasons, in my submission, that it was so successful was that it was not distracted from its main task, that is reform, by labelling individuals and opening itself up to protracted litigation. Clearly the CJC is an example of the Fitzgerald model where we are fortunate in that we do not have to label as the ICAC is required to do."* [55]

2.4.10 In addition to the hearing process the Committee pursued the primary facts issue by way of written submission. The Committee sought and received written

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55 ibid, pp 44-45.

submissions on this issue from the ICAC, Mr Justice Clarke and The Hon Athol Moffitt QC, CMG. Due to the importance of this issue and the conflicting views put in these submissions, the Committee has reproduced these written submissions in appendix three to this report.

2.4.11 A number of specific questions were put to the ICAC. The Commission's written response stated that the ICAC should be able to make the same findings as Royal Commissions and that the interests of the community in being informed of the facts of a matter would be best served by minimal restrictions upon the nature of the findings the ICAC could make. The ICAC went on to delineate between findings of primary fact, secondary fact and ultimate findings. The ICAC argued that its effectiveness would be diminished if it could not report secondary conclusions as well as primary facts. The ICAC said that "to report primary facts only would entail the Commission adding little value to a raw transcript of evidence". [56]

2.4.12 The Hon Athol Moffitt QC, CMG, was asked to respond to a number of questions. Mr Moffitt was asked for his comments on Mr Roden's concerns about a limitation of ICAC findings to primary facts leading to litigation and delays through the courts. Mr Moffitt said that although "primary facts" is not a legal term of art it is well understood by lawyers and the ICAC should have no difficulty in complying with such a limitation, so that any court challenges would fail. Mr Moffitt was asked whether findings of "primary fact" could be as damaging as judgemental findings. He agreed that this could be the case but suggested that, except in cases where criminal or disciplinary offences would follow, this must be accepted as a reasonable consequence of the ICAC's exercise of its functions. Mr Moffitt also responded to concerns that limiting ICAC findings to primary facts could lessen the Commission's effectiveness. Mr Moffitt said that such concerns were the result of a misunderstanding of the ICAC's role, and that clearly separating the functions of the ICAC from the courts would strengthen the position of the ICAC in the long term. Mr Moffitt also sought to emphasise the limited nature of his proposal concerning "primary facts". He said that the ICAC should only be limited to findings of primary facts where findings or opinions would be adverse to a named or identifiable person. In all other cases there should be no limits on the nature of the findings able to be made by the ICAC. [57]

2.4.13 Mr Justice Clarke was asked for advice on a number of specific questions. Like Mr Moffitt he indicated that he thought the term "primary facts" was well understood. Justice Clarke emphasised that findings of primary fact necessarily involved the exercise of judgement. Findings of primary fact could expose in clear terms what

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56 ICAC, Written Response to Questions Contained in Letter of 22 December 1992, January 1993.

57 The Hon Athol Moffitt QC, CMG, Written Submission on Primary Facts Issue, February 1993.

had happened in a matter under investigation. Such findings would be distinctly different from the transcript of evidence which would contain disputed material and would provide no more than the views of the various actors. Justice Clarke went on to say that there was no reason why the ICAC could not deal conclusively with allegations in a report through findings of primary fact. He acknowledged that findings of primary fact could be damaging to individuals but said that such damge would be much less than that which would be caused by a combination of those findings and adverse conclusions. [58]

2.4.14 The Committee provided the ICAC with an opportunity to respond to Justice Clarke's written submission on the primary facts issue. The ICAC reiterated its view that many matters could not be brought to finality if ICAC findings were limited to primary facts. The ICAC drew on a number of its investigative reports and suggested that in these cases a limitation of ICAC findings to primary facts would have meant that the Commission could add little value to the raw transcript of evidence. [59]

2.4.15 Mr Justice Clarke was provided with a copy of the ICAC's response to his written submission on primary facts. Justice Clarke then wrote to the Committee to express concern about the ICAC's treatment of the primary facts issue. He again emphasised that in cases where a fact is in dispute a finding of primary facts will involve a determination of which competing evidence is to be accepted. He said it therefore followed that there was a world of difference between findings of primary fact and a summary of the raw transcript of evidence. Justice Clarke said that the ICAC had misconceived the meaning of primary facts, and he restated what he understood by the term. Again, Justice Clarke asserted that the concept of primary facts is well understood and that a limitation of ICAC findings to primary facts would not create any significant difficulties. [60]

2.4.16 The Committee held its final hearing during this inquiry on 19 April 1993. This hearing was held to enable the Hon Athol Moffitt QC, CMG to present a further submission to the Committee on the question of the findings the ICAC can include in reports on Parliamentary references. However, the Committee took the opportunity to question Mr Moffitt further on the primary facts issue. Mr Moffitt reiterated the limited nature of his proposal, that ICAC findings should only be limited to primary facts in respect of adverse findings about identifiable indivduals. Mr Moffitt said his proposal would not prevent the ICAC from expressing opinions about practices and recommending reforms, would not prevent the publication of

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58 Mr Justice Clarke, Letter, 19 February 1993.

59 ICAC, Written Submission on Primary Facts, 7 April 1993.

60 Mr Justice Clarke, Letter, 16 April 1993.

exculpatory statements about identifiable persons and would not prevent the ICAC from adjudicating on disputed facts. Mr Moffitt also provided a definition of primary facts which could be included in the ICAC Act.

> *"Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person."* [61]

Mr Moffitt's evidence is included in appendix three along with the written submissions on the primary facts issue.

2.4.17 Following Mr Moffitt's appearance before the Committee on 19 April the Committee received a letter from Mr Justice Clarke in which he said that he supported Mr Moffitt's proposed definition of primary facts. He said that if primary facts were defined as Mr Moffitt had suggested "nearly all of Mr Temby's objections would disappear". [62]

2.4.18 The ICAC was asked for a response to Mr Moffitt's evidence of 19 April. The ICAC again stated its view that it should be able to make the same findings as Royal Commissions and other tribunals. The ICAC said that it would be difficult to define primary facts and that any such limitation would lead to litigation. [63]

2.5 ***Findings under s.74A(2)***

2.5.1 The third aspect of the issue of findings about individuals on which the Committee received evidence was the requirement for findings under s.74A(2). Section 74A(2) requires the ICAC to include in investigative reports a statement in relation to each "affected" person as to whether consideration should be given to prosecution, disciplinary action or dismissal.

2.5.2 In his Report on Investigation into Unauthorised Release of Government Information the Hon Adrian Roden QC discussed the difficulties which can be faced by the ICAC in reaching conclusions as to whether prosecution, disciplinary action or dismissal should be considered. Mr Roden said that in complex matters

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61 Committee on the ICAC, Minutes of Evidence, 19 April 1993, p 6.

62 Mr Justice Clarke, Letter, 23 April 1993.

63 ICAC, Supplementary Submission, 30 April 1993.

the ICAC would have access to information and material upon which it could make findings of fact, but much of which might not be admissible as evidence in a prosecution. The requirement for the Commission to express an opinion about consideration of prosecution would therefore mean that the Commission must conduct further investigative work to assemble evidence in an admissible form, which would delay the finalisation of the Commission's report. Mr Roden therefore called for this requirement to be removed from the Act.

> *"I have reservations about the requirement of the ICAC Act, that in its reports produced under s.74, the Commission express an opinion one way or the other as to whether prosecution of affected persons should be considered.*
>
> *There may be occasions when it is appropriate for the Commission to do so; but there will be occasions when it is not. And it is undesirable that Reports be delayed, or that premature opinions on so serious a matter be expressed, in order to comply with a statutory requirement.*
>
> *I accordingly recommend that the Act be amended by removing the requirement os s.74A(2) that Reports include statements of opinion relating to consideration of the prosecution of affected persons. The power could be removed altogether, or the Commission left with a discretion in the matter."* [64]

2.5.3 The ICAC argued in its submission for the requirement under s.74A(2) to be changed into a discretionary power. Thus the ICAC would be able to determine when it was appropriate to include a statement of opinion about prosecutions, disciplinary action or dismissal. The Commission argued that it was not always in the best position to choose between disciplinary action or dismissal. Furthermore the Commission was uncomfortable with making statements that consideration should not be given to certain action, because the mere mention of such action could lead to confusion. However, the submission argued that the ICAC should retain the power to make such statements where this was in the public interest.

> *"The Commission is also of the view that it is essential that it have power to state opinions that others consider prosecution, disciplinary action or dismissal. However the requirement in s.74A of the ICAC Act that a report must include an opinion that consideration be given to prosecution, disciplinary action or dismissal of a person, has led in some cases to statements, made only because of the statutory requirement. It would be far better if the Commission had the power, but not the*

64 ICAC, Report on Investigation into Unauthorised Release of Government Information, August 1992, p 192.

obligation, to state such opinions whether positive or negative.

It is obvious that allegations of corruption about individuals should be determined and that affected persons should be aware of the Commission's conclusion. However, in cases where the evidence shows no impropriety on the part of an affected person, or the conduct does not constitute a criminal offence because there is no offence to match the conduct, or the person was not or is no longer a public official and therefore disciplinary offences and dismissal are not relevant, it is inappropriate to include a statement that the Commission is not of the opinion that consideration should be given to the person's prosecution, discipline or dismissal. Some people will draw the wrong conclusions from the mere mention of prosecution. In cases where further action is considered appropriate the matter should not be left to a private communication between the Commission and the DPP or other appropriate authority. Both fairness to the individual and the public interest require that this opinion be stated in a public report.

The Commission believes statements of opinions about prosecutions, disciplinary action or dismissal should be discretionary, not mandatory, and should be made when the circumstances warrant and permit, such as when the Commission's investigation results in admissible evidence, or when such evidence can be obtained, of serious criminal conduct.

The Commission may not always be in the best position to choose between disciplinary action or dismissal as the appropriate response to particular conduct. That decision is better made by the employer. However, disciplinary action, one result of which may be dismissal, does not apply to all public officials. Some are not amendable to any disciplinary provisions, but can be dismissed on the basis of the repudiation of the common law contract of employment. Accordingly the Commission must presently particularise consideration of disciplinary action or dismissal when stating the required opinions."[65]

2.5.4 When Mr Temby appeared before the Committee on 09 November 1992 he gave a further reason why the requirement for statements under s.74A(2) should be removed. He suggested that such statements were sometimes misunderstood and that it was thought that the Commission was stating that a person should be prosecuted, dismissed etc., whereas in reality the Commission was only stating that consideration should be given by another authority to the taking of such action. When the ICAC made such a statement and an authority decided against taking the

65 ICAC, Submission, 12 October 1992, pp 18-20.

action, or action was taken and later reversed, this could be wrongly seen as a set back for the ICAC.

> *"It may be better if we do not say in reports that consideration should be given to sacking because when we say that people think we are saying, "sack the man"—which we are not, but people think we are—and then when an industrial Commission decides in a way which does not support the employer, it somehow seems to be some sort of a loss suffered by the Commission....*
>
> *[I]t may well be better—in fact, it is my submission that it will be better—if we are not obliged to make the section 74A(2) statements, as we now are. It might be that sometimes we should, so perhaps we should have the discretion, but probably generally it will be better if we do not."* [66]

2.5.5 When Mr Moffitt appeared before the Committee on 26 October 1992 he sounded a warning about the possible removal of the requirement for statements under s.74A(2). Mr Moffitt said that weakening the duty under s.74A(2) would remove a spur to action by external authorities at the conclusion of ICAC inquiries. Furthermore, the removal of the requirement for exculpatory statements under s.74A(2) could lead to injustice as allegations could be "left in the air" at the end of an inquiry.

> *"(g) To remove any obligation under s.74A(2) to make any positive or negative statements concerning the need to consider criminal or disciplinary proceedings or dismissal could, and in many cases would, have very serious adverse consequences which include: -*
>
> *(i) In some cases an ICAC adverse opinion could be the only judgement, perhaps without reasons, about the conduct of a person. It could be in severe and crippling terms. The spur and the aid to outside action open to lead to contrary conclusions would be missing. Lessening this chance of external action to try the issue would make more serious the absence of any means of the finding being reviewed. There would be no appeal and no s.74(2) statement. Mr Temby, regrettably, is proposing a step to complete absolute power. There will be no new Greiner/Moore type of case*

[66] Committee on the ICAC, Minutes of Evidence, 09 November 1992, p 48.

revealing ICAC error.

(ii) *Habits are inclined to form. In time, the practice could easily develop in some classes of case (the less serious) where in effect ICAC would set itself up as the sole judge in place of the Courts and dismissal authority. In time the pattern could be that adopted in the recent Unauthorised Information Report with thinly veiled ICAC criminal convictions, but standing alone with no ICAC statements concerning prosecutions. It will be recalled Mr Roden complained that having to make such statements was a waste of ICAC time, that he only made the statements because the Act compelled him to do so and that he recommended that the Act be amended, so ICAC would have no duty and only a discretion to make such statements. In the end on the ICAC package, ICAC findings or opinions whether right or wrong but unappealable and on whatever material they may be based, and with or without adequate reasons could become the reasons for resignation and dismissals.*

(iii) *There would be no obligation to give the negative exculpatory statements at present required by s.74A(2). There could be ICAC criticism of a named person and earlier allegations against him but the matter of exculpation on the three s.74A(2) matters could be left in the air."* [67]

2.5.6 The ICAC was asked to clarify its position in relation the future of s.74A(2) towards the end of the Committee's inquiry. In its written response to questions contained in a letter dated 22 December 1992 the ICAC reaffirmed that it should have a discretion but not an obligation to include statements under s.74A(2) in its investigative reports. The ICAC said that there was a danger that statements that the ICAC was obliged to make could be misconstrued.

> *"The Commission's position is that it would prefer to have a discretion, not an obligation, to recommend that consideration be given to prosecution or disciplinary action in respect of individuals. As the*

67 Committee on the ICAC, Minutes of Evidence, 26 October 1992, p 26-27.

Committee knows some such statements made by the Commission in the past, particularly as to disciplinary action and dismissal, have been misconstrued as being more than recommendations that such action be considered, and have in some cases been given excessive weight by the decision makers. In many cases it is, and will be, neither necessary nor appropriate to make such statements; and there is therefore a danger that such statements, if the Commission is obliged to make them, can be misconstrued by decision makers, to mean something the Commission did not intend, to the detriment of individuals.

There may be cases where it is necessary or appropriate that such statements be made. That would be in cases of serious conduct which contravened the criminal law or an employee's duty of loyal and faithful service to his employer." [68]

2.5.7 Finally, it should be noted the ICAC put forward a further suggestion, that a distinction should be drawn between constitutional office holders and other public officials. In relation to constitutional office holders ICAC reports could merely find the facts and leave any consideration of follow up action such as dismissal to be left to Parliament. In relation to statements directed to the DPP or other authorities the ICAC suggested that such statements could be made by way of private communications under the provisions of s.14 of the ICAC Act.

"Everything must be done by all of us to emphasise, and where necessary restore, confidence in public institutions.

That does not mean that those I would call constitutional office holders, those who can only be sacked by the Parliament, should necessarily be dealt with in a procedural sense in just the same way as other public servants are. In particular, it is for the Parliament to decide what conduct is appropriate to justify sacking a Minister or a judge or getting rid of one of its own number. Those are decisions which Parliament must make. We are ever mindful of the fact that members of Parliament are elected and we are not. Accordingly, it would seem appropriate that with respect to those constitutional office holders the Commission should report conduct and leave it to Parliament to decide what consequences will flow. Exactly how that is worked out depends upon the extent to which we are obliged to make findings. If the obligation to make findings or to recommend criminal proceedings or disciplinary proceedings remains in something like its present form, a case could be made out for an exception to be made in the case of

[68] ICAC, Written Response, January 1993, p 1.

constitutional office holders. If, however, the Commission is to be freed from the obligation to make the findings it must presently make, which Parliament presently requires it to make, then no such difficulty would arise. I imagine anybody, present or future, writing a report concerning constitutional office holders would see it as being appropriate to report the facts to Parliament and leave it to Parliament ultimately to make judgments as to what consequences would flow." [69]

"The Commission's position vis a vis the Parliament is different from its relationship with public authorities and the Director of Public Prosecutions.

The Commission's view is that it must be able to formally bring matters to the attention of the DPP and public authority employers, where warranted. In the Parliament's case that can be done by the Commission's report to Parliament. In respect of the others the mechanism is the recommendation of consideration of prosecution or disciplinary action. It may be that there is a mechanism by which that can be done, in s.14 of the ICAC Act. That section apparently contemplates private communications between the Commission and the relevant authorities. There may be occasions when it is necessary, in the public interest, that a public recommendation be made, as the Royal Commission did in the examples noted above. It is for those reasons that the Commission would say it should have the discretionary power, but not the obligation, to make such statements."[70]

2.6 *Parliamentary References*

2.6.1 In April 1993 the Committee received a late submission from the Hon Athol Moffitt QC, CMG, on a particular matter related to the issue of findings about individuals. Mr Moffitt raised a question concerning the findings about individuals which may be included in ICAC reports upon Parliamentary references. Basically, Mr Moffitt argued that, whether or not ICAC findings were to be limited as he had proposed, the Parliament should have the discretion to determine the extent or nature of the findings which it required on a Parliamentary reference. He drew attention to the Metherell inquiry, the only Parliamentary reference to date, and suggested that the ICAC had been embarrassed by the requirement to include a recommendation concerning dismissal action. However, there was nothing in the Act which would have allowed the Parliament at that time to require findings from

[69] Committee on the ICAC, Minutes of Evidence, 09 November 1992, pp 31-32.

[70] ICAC, Written Response, January 1993, p 2.

the ICAC other than those required in investigative reports generally. Mr Moffitt called for an amendment to section 73 of the Act to expressly provide the Parliament with a discretion to specify the extent or nature of the findings it requires from the ICAC on a parliamentary reference. [71]

2.6.2 The Committee held a further hearing on 19 April to enable Committee members to explore this proposal. Mr Moffitt said that if the Parliament was provided with this discretion it could operate in two ways. In cases where the responsibility for dismissal action would lie with the Parliament, the Parliament could specify in a Parliamentary reference that it only required from the ICAC a report setting out the facts of the matter, without any recommendation or opinion as to dismissal or other action. On the other hand, if ICAC findings were limited to primary facts, there could be a case of extreme seriousness in which the Parliament might want to specify that the ICAC could report judgemental findings. [72]

2.6.3 The ICAC was asked for its response to Mr Moffitt's proposal concerning Parliamentary references. The ICAC indicated that it would not object to the proposal. The Commission noted that it had previously suggested that in respect of constitutional office holders it could be more appropriate for the Commission to report the facts only and "leave subsequent opinion forming and decision making to the Parliament".

> *"There may be other cases which will arise in which Parliament will require the Commission only to conduct the investigative work and report findings of fact.*
>
> *If the Commission's power to make findings were as the Commission advocates, and the Parliament were able to require the Commission to report findings of a lesser nature, the Commission would not cavil at that.*
>
> *If the Commission's findings powers were confined, and the Parliament were to on some occasions direct broader findings, then in principle the Commission has no objection to the parliament having that ability. The Commission is the creature of the Parliament and the Parliament can direct the Commission as it will.*
>
> *If the Commission's powers were confined, and the Parliament directed that its findings in a particular matter should be further confined, then*

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71 The Hon Athol Moffitt QC, CMG, References by Parliament under s.13(1)(a) and s.73 Contents of Reports to Parliament, April 1993.

72 Committee on the ICAC, Minutes of Evidence, 19 April 1993, pp 16-20 and Annexure One.

that may effectively diminish the Commission independence and effectiveness in investigating and informing the public in the particular case." [73]

2.7 ***Conclusions***

2.7.1 The 1990 amendments which sought to "clarify" the ICAC's reporting powers have led to a number of difficulties for the ICAC. The Committee would draw attention to the fact that there was little informed debate at the time these amendments were made. Unlike the current process whereby there has been a public inquiry by a bipartisan Parliamentary Committee following the Court of Appeal's decision in the **Greiner** case there was no such dispassionate inquiry following the High Court's decision in the **Balog** case.

2.7.2 The Committee reaffirms that the ICAC is a fact finding investigative body.

2.7.3 The Committee agrees with the major submissions to this review that the present requirement under the ICAC Act for the ICAC to place "labels" of corrupt conduct on individuals should be removed.

2.7.4 The Committee has received conflicting views on the nature of the findings of fact that the ICAC should be able to include in its reports. Athol Moffitt QC, CMG, and Mr Justice Clarke have submitted that ICAC findings should be limited to primary facts, in respect of adverse findings about identifiable persons. The ICAC has argued that such a limitation would lead to unacceptable consequences. The ICAC has suggested that such a limitation would mean that it could do little more than present a summary of the raw transcript of evidence.

2.7.5 As outlined in this chapter these views have not been able to be reconciled. The Committee believes that this issue is fundamentally important to the future of the ICAC. Although the Committee has received a great deal of evidence on this issue, there are a number of important questions which remain unanswered and the Committee does not believe it is currently in a position to make a properly informed decision on this matter. The Committee therefore recommends that the Law Reform Commission be asked to provide advice on the following questions:

Definition of primary facts — What are primary facts? Is the concept of primary facts well understood by lawyers? Is the definition proposed by Mr Moffitt when he appeared before the Committee on 19 April 1993 appropriate? If not, how should primary facts be defined?

[73] ICAC, Submission to Parliamentary Committee on the ICAC: Findings in Parliamentary References, 7 May 1993.

Effect of proposed limitation upon ICAC's effectiveness — What would be the effect of the proposed limitation upon the ICAC's effectiveness as a fact finding investigative body? Is the ICAC correct in stating that such a limitation would mean that it could do little more than present a summary of the raw transcript of evidence?

Likelihood of litigation arising from proposed limitation — What is the likelihood of the use of prerogative powers arising from the proposed limitation? How could any opportunity for the use of prerogative powers to frustrate the ICAC in the exercise of its functions be addressed?

With the benefit of the advice of the Law Reform Commission on these questions the Committee will be in a position to make an informed decision on this issue.

2.7.7 The Committee believes the requirement for the ICAC to make statements of opinion about consideration of prosecution, disciplinary action or dismissal under s.74A(2) of the Act should remain in place. However, in relation to constitutional office holders ICAC reports should not contain statements about consideration of dismissal — decisions about the dismissal of constitutional office holders must remain the prerogative of the Parliament.

2.7.8 The Committee agrees with the submission of The Hon Athol Moffitt QC, CMG, that, in relation to Parliamentary references, the Parliament must have the ability to determine the extent of the findings it requires from the ICAC, by varying the limitations/requirements which apply to ICAC findings generally. Section 73 of the ICAC Act should be amended to provide the Parliament with this discretion.

-3- *JUDICIAL REVIEW AND APPEAL MECHANISMS*

3a *JUDICIAL REVIEW*

3a.1 ***Court of Appeal's comments in Greiner decision***

3a.1.1 Each of the judgements in the Court of Appeal's decision on the **Greiner** case addressed the question of the court's jurisdiction to review an ICAC report. The Chief Justice emphasised that the ICAC Act provided no right of appeal against a finding of the ICAC but that the courts have an inherent jurisdiction to supervise tribunals such as the ICAC to ensure that they perform their functions in accordance with the law.

> *"The ICAC Act provided no appeal against a determination that a person has engaged in corrupt conduct. The Commission is not a court, but an administrative body that performs investigative functions and, in certain circumstances, makes reports. Clearly, its determinations can have devastating consequences for individuals. The public officials whose conduct may fall within the purview of the ICAC Act range from the highest to the lowest in the State; from the Governor down. Many are persons whose position in office would be untenable following a public and official finding of corruption. Yet there is no right of appeal against, or procedure for any general review of the merits of, such a finding. Indeed, a determination of corrupt conduct might be based upon the commission of an alleged crime, and might be followed by a trial of the individual involved, and an acquittal. That could happen for any one of a number of reasons. It could simply be because a jury believed a witness whom the Commission disbelieved, or vice-versa. Even so, the finding of corruption would stand.*
>
> *For reasons that will appear below, the absence of a right of appeal against, or of a procedure for a review of the merits of, a determination of the Commission has a bearing on the approach that should be taken to the meaning of the ICAC Act and the way in which the*

Commission's decision-making functions should be performed....

Although there is no right of appeal from an adverse determination of the Commission, the Supreme Court has both an inherent and a statutory jurisdiction to supervise the functioning of administrative tribunals, to ensure that they carry out their functions and perform their duties in accordance with law. The plaintiffs have invoked this narrower jurisdiction, and have instituted the present proceedings claiming that the Commissioner has exceeded his jurisdiction, and that his determinations are based upon a misapplication of the statutory provisions which he is obliged by the ICAC Act to observe.

The supervisory jurisdiction which has been invoked by the plaintiffs would ordinarily have been exercised by a single judge of the Supreme Court sitting in the Administrative Law Division. Because of their public importance and the urgency attached to them, the proceedings were, with the consent of all parties, removed into the Court of Appeal. Some of the circumstances relating to that urgency have since changed, but all parties applied for the removal to remain in effect. It is important that the fact that the proceedings were conducted in the Court of Appeal should not give rise to the misunderstanding that what is involved is an appeal. The proceedings are of a different nature. We are not being invited to agree or disagree with the findings of fact made by the Commissioner. We have no jurisdiction either to endorse or to reject those findings of fact. Except insofar as it is referred to in the report, we do not have before us the evidence that was placed before the Commissioner. Our task is to consider whether he has performed his functions according to law." [74]

3a.1.2 Justice Priestly also emphasised that the **Greiner** case was not an appeal against the ICAC's finding and did not involve the court coming to an independent assessment of the facts in the Greiner/Metherell matter. The court only considered whether the ICAC made an error of law in its report and nothing else.

"The effect of this court's decision. This court's decision is about the legal validity of the ultimate finding in the Commissioner's Report. It is not an independent finding, based on this court's own assessment of the facts, that Mr Greiner is not guilty of corrupt conduct. The effect of this court's decision is that on the facts found by the Commissioner, which included the finding that a notional jury would not see Mr Greiner's conduct as contrary to known and recognised standards of

74 *Greiner vs. ICAC*, Court of Appeal, unreported, 21 August 1992, Gleeson CJ, pp 4-6.

honesty and integrity, the Commissioner's finding of corrupt conduct was invalid.

The proceedings in this court are not an appeal. The court has no power in these proceedings to investigate the facts of Mr Greiner's conduct. It has no power to do more than consider whether the Commissioner made any error of law in reporting his finding that Mr Greiner's conduct was corrupt for the purposes of the Act. One aspect of the proceedings that highlights their very limited nature is that only a fragment of the evidence which was before the Commission is before this court. This court's decision flows from its opinion on questions of law involved in the Commissioner's findings and from nothing else." [75]

3a.1.3 Justice Mahoney's judgment included a detailed analysis of the nature of the court's jurisdiction. He argued that there were strict limits upon the ability of the court to intervene to correct injustices which were caused by an act of Parliament. He said that the courts must apply the law as established by the Parliament.

"It is important that the role of the courts in this regard be clearly understood. It is the purpose of every judge to remedy injustice. But there are limits to what can be done. A judge may — indeed he must — act only upon the evidence before him and, accordingly, in respect only of those injustices which that evidence discloses. And what he may do is limited by what the laws of the Parliament prescribe. Those laws may themselves create injustice or injustice may result from the application of those laws to particular cases. The courts can remedy an injustice only insofar as the law allows. In view of what has been said in argument in relation to the present proceedings, it is proper that at the outset this receive emphasis. It has been suggested that, where there has been sufficiently serious infringement of the rights of the individual, the courts may put aside and ignore the laws that Parliament has enacted:... In my opinion, that view has not been accepted by the High Court of Australia....

There are, of course, procedures whereby injustices which might otherwise arise from the laws of the Parliament can be reduced. Courts have formulated and applied those procedures and in some cases they are effective:...

But, in the end, if the unavoidable effect of a statute is to create injustice, then the courts cannot remedy it.

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[75] ibid, Priestly J, p 6.

> *It is proper that the courts observe these limitation notwithstanding that, in some cases, the laws of which must be enforced will produce the kind of injustice of which, in this case, complaint has been made....*
>
> *It is also proper that the courts apply the law as established by the Parliament."* [76]

3a.1.4 Justice Mahoney emphasised that the court could not intervene to correct errors made by the ICAC in its findings of fact, even where such errors could cause injustice. The court could only intervene if the ICAC had erred in its construction of the Act or by going outside the Act. He went on to say that whilst the possibility of the ICAC making errors of fact must be accepted, the capacity of the court to review such errors was extremely limited.

> *"What may the court do under this Act? Stated generally, what the Commission does is to investigate facts, form conclusions as to the facts and the application of the Act to them, report what it has done, and (in some cases) make recommendations as to action which may be considered or taken. What the Commission does has relevantly no operative effect in the sense of imposing rights or obligations upon the persons whose conduct it has investigated. If and insofar as the Commission has, in the making of its Report, acted outside the Act, it will have acted contrary to the law and the court may so declare. If it has acted within the powers granted to it by the Act then, because of the nature of the relevant functions of the Commission, the ordinary prerogative remedies are not available to correct errors or injustices of the kind here complained of. Prerogative remedies are not available to correct mere errors in the finding of basic facts. If the Commission has erred in its construction of the Act or in respect of what it is to do under it, the court may so declare. However, if the Commission has not erred in law in that regard but has done what the Act allows it to do, relief cannot be granted to set aside the Report or to declare error merely because what has been done involves errors of fact or of judgement, even though those errors have resulted in an injustice of the kind here in question....*
>
> *The Report may have to be reviewed, by a court, by an arm of the Parliament or otherwise. Such a review must be based on the terms of the report.... And there is no appeal from and no re-examination of what the Commission has found.... Experience has shown that, with the greatest care and skill, errors are apt to be made in the finding of facts.*

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[76] ibid, Mahoney J, pp 7-10.

> *In a significant number of cases, this Court, on a rehearing: Supreme Court Act 1970, s.75A; comes to different conclusions of fact from those reached by careful and skilful trial judges. It is not unknown for the High Court of Australia to take a different view of facts from that taken by this Court. It is therefore no reflection upon the fact finding processes apt to be adopted by the Commission to say that, in what it does, the possibility of error must be accepted. And, if accepted, it should be guarded against by, inter alia, the precise identification of the conduct to be impugned. The right of this Court to review what the Commission does in finding facts is extremely limited. It can act to correct errors in fact finding only where it is clear that there has been error and what that error is."* [77]

3a.1.5 Justice Mahoney also discussed the role of the court in interpreting the provisions of the Act. He said it was the court's view of the meaning of terms in the Act which was definitive.

> *"In the end, the authoritative construction of the criterion, as with the terms of any statute, is to be made by the court before which the statute comes for construction. This is not because the Act in terms commits the meaning of a term or criterion to the court. The court does functionally what the administrator does: it forms a view as to the meaning and effect of the criterion and then decides whether the case satisfies it. But it is the court's view of the meaning of the term which is definitive. This results from the fact that it is the court and the court only which, in the end, can authoritatively construe the Act and the meaning of its criterion."* [78]

3a.2 ***Extent and Nature of Judicial Review of ICAC***

3a.2.1 Very few of the submissions received by the Committee addressed the question of the extent and nature of judicial review of the ICAC's operations and reports. The Hon Ernie Knoblanche QC stated in his submission that this was a complex issue on which legal opinion differed. He said that he did not propose to enter the discussion on this issue but suggested that the Committee should seek formal legal advice to "parametrise" the areas from which judicial might be available. [79] As set out below the Committee did receive high level advice in relation to this issue.

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77 ibid, pp 10-11, 13-14.

78 ibid, pp 50-51.

79 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, p 7.

3a.2.2 The ICAC addressed this issue in both the Second Metherell Report and in its submission. In the Second Metherell Report the ICAC responded to the contention that "the ICAC should be subject to the courts" by briefly describing the extent to which the Commission is subject to the courts, in relation to the fairness of its procedures and the extent of its powers.

> *"The ICAC is subject to the Courts. Ainsworth emphasised that the Court will intervene to correct any breach of the rules of natural justice and the principles of procedural fairness they involve. Further, the Court has the same common law power to regulate the ICAC as it does any other quasi-judicial tribunal on the well recognised principles of judicial review. Judicial review allows the court to intervene if the ICAC makes any jurisdictional error of law i.e. if it attempts to go beyond its powers in any way. An example would be if a finding was not based on provable and relevant material: Australian Broadcasting Tribunal v Bond (1980) 170 CLR 321 at 368 per Deane J. So the ICAC is subject to the Courts in relation to both the fairness of its procedures, and the extend of its powers.*
>
> *If there were any doubts as to the ICAC being subject to the Courts, they are surely dispelled by the recent Court of Appeal decision."* [80]

3a.2.3 The ICAC elaborated on this issue in its submission. The ICAC stated that it believed that the present extent of judicial review provided for under the common law was appropriate. The submission briefly discussed the nature of the remedies available and asserted that there was no need for there to be a legislative statement of these remedies.

> *"There can be no doubt that the Commission must be subject to the control of the courts. Because it fulfils both investigatory and quasi-judicial functions judicial review is appropriate. This does not mean the court can re-examine, review of correct findings of fact.* ***Greiner v ICAC*** *per Mahoney JA. But declaratory relief because of legal error by the Commission, including exceeding its jurisdiction, is available:* ***Greiner v ICAC; Ainsworth v CJC*** *(1992) 66 ALJR 271.*
>
> *Certiorari is not available to quash Commission reports because they do not create or affect legal rights or obligations: Gleeson CJ in* ***Greiner and Moore v ICAC*** *applying the High Court's decision in* ***Ainsworth v CJC.*** *On the same basis the High Court has said that certiorari is not available to quash a Royal Commission Report"* ***R v Collins*** *(1976) 8*

[80] ICAC, Second Report on Investigation into Metherell Resignation and Appointment, September 1992, p 10.

ALR 691. However a declaration that a report is a nullity can be made: ***Greiner v ICAC.***

The High Court in ***Ainsworth v CJC*** *said that mandamus was not an available remedy because the CJC was not under a duty to investigate the particular matter. The same considerations must generally apply to the ICAC, with its discretion in s.20 to decide whether or not to investigate matters. Different considerations would apply to a matter referred to Parliament to the Commission for investigation, as the Commission has a duty to fully investigate a matter referred for investigation: s.73(2).*

If a person became aware of a Commission's intention to publish a report adverse to the person, without according procedural fairness, relief by way of prohibition or injunction would be available to prevent the Commission from reporting.

The fact that the Commission is amendable to judicial review was recognised early in its operation. Proceedings which have involved the Commission are listed in Appendix 1.

The ICAC should not be subject to any special legislative provision with respect to control by the courts. Some similar bodies do have legislative appeal/review provisions. However they appear to be a legislative statement of remedies available at common law." [81]

3a.2.4 The ICAC also drew attention in its submission to the various proceedings in which the Commission has been involved since in its establishment, by way of illustration of the scope of judicial review currently available. These proceedings have focussed on the two issues of the application of the rules of natural justice to the ICAC, and the nature of the findings able to be made by the Commission in its investigative reports.

3a.2.5 Following the conclusion of the first round of public hearings on 09 November 1992 and the consideration of the submissions received, it was felt that the area of judicial review (and the related question of appeal mechanisms) required further attention. A further hearing was organised for 08 December 1992 at which his Honour Mr Justice Clarke of the NSW Court of Appeal gave evidence. Justice Clarke tabled some written advice which he had prepared. This advice set out in some detail the grounds for judicial review of the ICAC and the remedies available.

[81] ICAC, Submission, 12 October 1992, pp 23-24.

This advice is reproduced in full on the following pages. [82]

82 His Honour Mr Justice Clarke, Written Advice, 27 November 1992.

JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

27 November 1992

MEMORANDUM:

To: M Kerr, MP

RE: SUPERVISION OF ICAC

1. There is no provision for an appeal in the ICAC Act.

2. ICAC as a statutory tribunal is, however, subject to the supervisory jurisdiction of the Supreme Court.

3. That jurisdiction is enlivened in circumstances far more limited than those which given rise to a general appeal to the Court. Broadly stated the principles of administrative law are concerned with:

   (a) Legality;
   (b) Procedural propriety; and
   (c) Rationality.

   Sir Robin Cook (Empowerment and Accountability: The Quest for Administrative Justice - September 1992) has said that the principles of administrative law can be stated in ten words - "The administrator must act fairly, reasonably, and according to law".

4. It is desirable that I amplify each of those heads:

   Legality - The administrator, or statutory tribunal, must act within its charter, apply correct legal principles and act upon relevant considerations. If the body in question does something which it is not authorised to do then an occasion will arise for intervention by the Court. This is often described as acting

without or in excess of jurisdiction. If in reaching a conclusion the body misapplies the law or applies an incorrect legal test or standard then it will generally be concluded that it has acted in excess of its jurisdiction. Likewise, if it has acted without regard to relevant considerations, or has placed importance upon irrelevant considerations, a serious question will arise whether it has carried out the task for which it was constituted.

Procedural Propriety - Until recently this concept was described as "natural justice". This is concerned with the right to be heard, the right to answer allegations and the right to an impartial determination. The duty to accord procedural fairness arises, if at all, because the power involved is one which may destroy, defeat or prejudice a persons rights, interests or legitimate expectations. In Ainsworth v The Criminal Justice Commission (a body similar in nature to ICAC) the High Court held that the nature of the Commission and its powers, functions and responsibilities are such that, to the extent that the Act does not provide, a duty of fairness is necessarily to be implied in all areas involving its functions and responsibilities. Furthermore, the Court importantly held that reputation is an interest attracting the protection of the rules of natural justice. In that case a recommendation was made adverse to the interests of the appellant, and highly critical of it, without the appellant having been put on notice of the possibility that the criticisms and recommendations would be made and given an opportunity to answer them. This was a clear breach of procedural propriety.

Rationality - The decision in Associated Provincial Picture Houses Ltd v Wednesbury Corporation, (1948) 1 KB 223, is usually credited as the genesis of this arm of the law. The broad proposition for which that case stands is that 'the court can interfere if the statutory body "has come to a conclusion so unreasonable that no reasonable authority could ever have come to it"'. There is an element of tautology in this expression and it could be put another way - "The conclusion is within power if it could have been reached by a reasonable authority, correctly understanding the task imposed on it and acting on relevant considerations". This particular arm of the doctrine is enlivened when it is impossible to discern the process by which the decision was arrived at, as where there are no reasons, but the decision is so extraordinary that the body must either have failed to understand the task imposed on it or overlooked relevant considerations or acted on irrelevant ones.

This ground is unlikely to arise in cases involving ICAC given that it gives reasons.

5. I should emphasise that the principles are still being developed and there is some discussion in the cases, particularly in England, as to whether a fourth ground for judicial review, that of "proportionality", which derives from civil law doctrines should not be applied. That principle is, perhaps, an extension of the doctrine of rationality and proceeds upon the lack of proportionality between the objectives sought to be achieved and the decision made. If it becomes part of the law of Australia it seems unlikely to have a great impact on the area of ICAC which does not make binding decisions.

6. Remedies - These have been developed by reference to the old prerogative writs but in relation to ICAC the following could be said:

(i) Certiorari - An order removing the record of the proceedings into the Court and quashing the finding of the tribunal. This is not available because the report made by ICAC has, of itself, no legal effect and carries no legal onsequences, whether direct or indirect;

(ii) Mandamus - An order to secure the performance of a public legal duty imposed upon a public body - to the extent that ICAC generates its own investigations mandamus would not lie (Ainsworth). It may be this writ would be available in cases in which the Parliament required ICAC to carry out an investigation.

(iii) Prohibition/Injunction - Provided someone was able to move a court before ICAC had presented its report he or she may, if able to prove a ground for relief, secure an order of prohibition although the same result could be achieved by an injunction; and

(iv) Declaration - This is the order which has been made in e.g. Balog. The superior courts have inherent power to grant declaratory relief in their discretion which must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. As Ainsworth shows an ICAC report involving the reputation of persons would not be regarded as giving rise to hypothetical or abstract questions. If a case for relief is proved this is the order most likely to be made.

3a.3 ***Conclusions***

3a.3.1 The Committee accepts that the current extent and nature of judicial review of the ICAC is appropriate. As set out in the ICAC submission, "[t]here can be no doubt that the Commission must be subject to the control of the courts. Because it fulfils both investigatory and quasi-judicial functions judicial review is appropriate".

3a.3.2 There is no need for the common law remedies which are available in the case of the legal or procedural error by the ICAC to be entrenched in legislation.

3b ***APPEAL MECHANISMS - REVIEW OF FINDINGS OF FACT***

3b.1 ***Calls for Establishment of Appeals***

3b.1.1 The Committee received a number of submissions which called for the establishment of an appeal mechanism by which ICAC findings could be reviewed. Some of these submissions referred to particular ICAC inquiries in which it was felt that there had been errors in the findings made by the ICAC and it was submitted that this demonstrated the need for an appeal mechanism. Similarly, most of the other submissions which called for the establishment of an appeal mechanism did so on the grounds of ICAC findings being open to possible error.

3b.1.2 A variety of different appeal mechanisms were advocated in the submissions received. These included:

- ◊ an ICAC appeals tribunal involving three non involved QC's; [83]
- ◊ a rehearing before a single judge of the Supreme Court; [84]
- ◊ a procedure whereby the ICAC would produce a confidential preliminary investigative report upon which a hearing would be held before an independent person appointed by the Attorney General, who could issue a final public report. [85]

3b.1.3 As the Committee's inquiry progressed it became evident that the question of whether an appeal mechanism for the review of ICAC findings should be established depended upon the nature of the findings which the ICAC should be

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83 Hilton Jones, Submission, 19 February 1993, p 4.

84 NSW Bar Association, Submission, 06 November 1992, p 6.

85 Law Society of NSW, Submission, 12 October 1992, p 8.

able to make. (This issue is dealt with in full in chapter two.)

3b.1.4 The Hon Adrian Roden QC put this matter most succinctly in his submission. Mr Roden said that an appeal mechanism would be appropriate if the ICAC was retain its labelling power. However, if the labelling power was removed, the need for an appeal mechanism would also be removed, according to Mr Roden.

> *"If the Commission is to retain the power to make findings of corrupt conduct against named individuals, then, whether or not it is called upon to do so on the basis of a definition of that term contained in the Act, I would support the call for a proper appeal procedure. And I believe there could be little argument about that.*
>
> *The very fact that it would be necessary to establish such a procedure, is an indication that such findings ought not to be expected of the Commission.*
>
> *If on the other hand the Commission is allowed to concentrate on what I believe is its proper task in its investigations and Reports, then it would be unnecessary to have a provision for appeal from, or review of, its decision."* [86]

3b.1.5 Similarly, the ICAC submission argued that the case for the establishment of an appeal mechanism would be less persuasive if the ICAC's labelling power was removed. The ICAC suggested that the creation of an appeal mechanism could lead to litigation from large numbers of people who have been subject to adverse findings in ICAC reports over the last four years.

> *"Any argument that there should be a capacity for the courts to review the facts found by the Commission is significantly diminished if a power to categorise conduct by reference to defined legal terms is not available. The powers of the Commission would be like those of a Royal Commission, in respect of which it has never been suggested that a review of factual determinations is appropriate or should be available. The fundamental purpose of a Royal Commission is to obtain an understanding of events and related circumstanced. The Commission's investigations have the same purpose, directed to generally improving conduct in the public sector.*
>
> *Even if the Commission retains a power to determine whether conduct is corrupt the prospect of full rights of appeal is daunting. A great many*

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86 The Hon Adrian Roden QC, Submission, 05 October 1992, p 9.

> *people have already been the subject of adverse finding by the Commission - some after long and complex investigations. To re-litigate these matters in the courts would place extraordinary demands on both court and Commission resources - demands which could not be justified.*
>
> *The findings of the Commission, even those of corrupt conduct, have no legal effect. Opinions are stated that others should consider particular action in respect of individuals, and recommendations about legal or procedural changes are made. These recommendations have not always been followed, or opinions acted upon. The fact that others have the power to determine those matters about the legal rights of individuals, together with the other accountability mechanisms referred to above, is an adequate protection against error by the Commission."* [87]

3b.1.6 The Hon Athol Moffitt QC, CMG, told the Committee that if the ICAC's findings adverse to individuals were limited to primary facts there would be no need for an appeal mechanism to be established for the review of ICAC findings. However, if there were no restrictions upon ICAC findings and the ICAC was able to make findings of corrupt conduct using ordinary language, it would be necessary for such an appeal mechanism to be established.

> *"Those who from time to time exercise ICAC power will be no less human than are judges so as to be no less prone to error, and so there never will be one who has no hidden prejudice politically or otherwise and so there never will be a maverick. If a permanent institution, as is ICAC, possessed of such extreme powers, is given a power to do what in reality is to pronounce judgments capable of doing great damage and making the office which is the livelihood of a person untenable and permanently tarnish his or her reputation, perhaps wrongly or unjustly, can we afford not to define the power and make it subject to adequate review, as we do the court system. It we do not, some errors and injustices in the exercise of absolute power will in time on some spectacular occasion emerge to wreck the ICAC. We cannot take that risk with this worthy and necessary institution."* [88]

3b.1.7 When Justice Clarke gave evidence to the Committee on 08 December 1992 he spoke about the practicalities of establishing an appeal mechanism in relation to ICAC findings of fact. However, he emphasised that his preference was for the ICAC's labelling power to be removed and for ICAC findings to be limited to

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87 ICAC, Submission, 12 October 1992, pp 27-28.

88 Committee on the ICAC, Minutes of Evidence, 26 October 1992, p 28.

primary facts. He said that if this occurred there would be no need for an appeal mechanism to be established.

> *"Now the other consequence of determining what should be the nature of the function, or the limitation of the function of the Commission, concerns the nature of appeals. If the Commission operated as an administrative investigative body, simply making findings of fact and not putting labels on, not calling conduct corrupt, then I would myself think that there would be little area for appeals and there would be no reason for suspecting that the review procedures which presently apply would not be adequate.*
>
> *But where, as here, as it is now, there is provision for very damning findings, given as I have said usually in the glare of publicity, there is a strong case to be made for those findings to be subjected like any judicial findings to appeal process....*
>
> *Now if, however, my preferred position is accepted, which is that there be only findings of primary fact made and the Commission operates as an investigative body and a recommendatory body in accordance with its charter and the object under which I understand it was set up, there would be no, or very little, need for any appeal process. The supervisory jurisdiction of the Courts seems to work well in relation to other investigative bodies and I can't see why it woudn't work well here."* [89]

3b.2 ***Practicalities of Appeals on Findings of Fact***

3b.2.1 Michael Bersten contained in his submission a brief discussion of some of the practicalities involved in determining whether an appeal mechanism should be established and, if so, how it could work. Mr Bersten pointed out that Royal Commission findings are not subject to appeal, however, he stated that the fact that it might be unprecedented was no reason not to establish an appeal mechanism in respect of ICAC findings. He referred to the problems of costs, legal aid and detailed appeal procedures which would need to be resolved. However, he tentatively suggested a procedure based on the model of criminal appeals. That would involve an examination of the record rather than a rehearing, with evidence only being heard when it put a new complexion on the matter.

> *"[A]s a threshold issue there is a division in the precedents available as to whether there should be an appeal. Royal Commissions and parliamentary committees, whose findings have no legal consequences,*

[89] Committee on the ICAC, Minutes of Evidence, 08 December 1992, pp 6-8.

are not subject to appeal. The CJC misconduct tribunals are subject to appeal. The point of distinction may be that the latter's findings have legal consequences (this would need to be checked). If yes, then making ICAC findings subject to appeal would be unprecedented. The fact that it might be unprecedented is no reason for no appeal. It does however sound a caution.

Appeal can mean a number of things — an appeal in the sense of a rehearing; an appeal on a question of fact; an appeal on a question of law. Examining these alternatives necessarily leads into the second hard part — what is the subject of appeal and how.

It is hard to justify recommending a full right of rehearing from a cost viewpoint alone. Other factors against such a course would be whether such a course is really necessary or serves the public interests in justice and fighting public corruption.

If there is an appeal right it should be confined to a particular finding. As is the general scheme of the courts, there should be one appeal as of right (eg. to the NSW Court of Appeal) and then appeal by leave (to the High Court).

Clearly legal findings should be appealable — but what about findings of fact? There is no rational reason to distinguish them on this question. Both have the same consequences — nil. Both can be practically damaging. Consequently, both types of finding should be appealable.

The form of an appeal (eg. against a finding of non-criminal conduct) requires breaking new ground. The finding does not arise from an adversarial proceeding. There may be many interested parties to involve in the appeal. Should the appeal court be able to hear evidence? What standards should the appeal court apply? There are no easy answers. I think that pragmatic considerations weigh against a full appeal right — cost, problems of rehearing evidence. The proper model should be the criminal appeal from a conviction ie. that the appeal court looks at the record of the proceeding in question and decides whether there has been a miscarriage of justice; evidence would only be heard where there is fresh evidence which would put a new complexion on the matter. The issue of legal aid, costs orders and the detail of appeal procedures would be also difficult but are matters of detail which need not presently be examined.

In the interests of fairness and as an additional safeguard against ICAC mistakes or miscarriages, interested persons who are dissatisfied with the

ICAC report should be able to appeal in respect of findings on a similar basis." [90]

3b.2.2 The Hon Ernie Knoblanche QC also addressed the practicalities of an appeal mechanism in his submission. Mr Knoblanche raised the problem of the cost of legal representation and suggested that such a mechanism should only be established if citizens would otherwise be deprived of a right that the community believes they should have. Should the Parliament determine that such an appeal mechanism should be established, Mr Knoblanche outlined a proposed procedure. This would enable aggrieved persons to bring an appeal against an ICAC finding, recommendation or determination before a judge, who would hear and determine the matter upon the record before the ICAC.

> *"The escalating cost of legal representation and 'going to court' has become notorious in this state. There are very many citizens who cannot afford to go to court to enter into context or disputation about some subjects that are very important to them, because they can not find the funds to do so.*
>
> *It seems to me, with great respect to everybody involved, that the provision of yet another way of taking determinations or procedures before a court for re-examination or on appeal should be avoided unless the failure to provide that way deprives citizens of a democratic right the community believes they should have.*
>
> *Whether appeal should be provided on pure questions of fact or the merits of a fact finding is a decision requiring resolution of issues of philosophical content.*
>
> *If it was the decision of the Parliament that, there ought to be available a judicial process of appeal or re-examination of the Commission's determination of matters of fact or merit as distinct from procedure or jurisdiction, a law could be made that would allow a person aggrieved by any finding recommendation or order of the Commission to bring an appeal before a judge.*
>
> *I suggest that if such a system where set up it should be provided that the appeal is not a re-hearing and should be heard and determined upon the evidence and material before the Commissioner together with such additional new material as the judge may give leave to present.*

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90 Michael Bersten, Submission, 02 October 1992, pp 4-5.

It should be provided that the decision of the judge is final and not subject to appeal except on a question of law and then only by leave.

Power should be provided to the judge to vary, quash or confirm the finding, order, recommendation or other act of the Commission which has been made the subject of the appeal, and to make such other orders as the judge decides are fit including an order for costs.

The legislation ought also to provide that to institute the appeal there must be lodged a notice of appeal which clearly and accurately sets out the matter it is intended to challenge on the appeal and with precision the grounds of appeal. Amendment of or addition to the grounds should not be allowed except by special leave of the judge for good cause shown." [91]

3b.2.3 When Mr Temby appeared before the Committee on 09 November he argued against the establishment of an appeal mechanism. Mr Temby focussed on the practical difficulties involved in establishing such an appeal mechanism. He said that these practical difficulties were insurmountable. He also sounded a warning about the potential for mischievous litigation. (However, Mr Temby reiterated the Commission's acceptance of the need for the Commission to be subject to judicial review.)

> *"[I]t is submitted that there should not be a full right of appeal from Commission investigations. The first point is that Commissions of inquiry have never been subject to appeals as to their finding—that is the closest available analogy—nor is an Ombudsman or company inspectors who make reports.*
>
> *If there was to be an appeal it would raise a series of questions which really cannot be answered. Is it to be by way of rehearing or is it to be conducted on the evidence in the Commission hearing? If it is to be by way of rehearing would the same witnesses and evidence be called? By whom would the witnesses be called? Would the Commission be a party to the appeal? Is it appropriate for the Commission to be a party defending its own findings? At least some doubt exists as to that. But if not the Commission, then who? There has to be a contending party. Who would contend against the appellant—some other State functionary? I suppose that is not impossible, but is highly undesirable and can hardly be appropriate. The Government of the day may well be greatly inconvenienced by an ICAC finding and have every reason to*

91 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, pp 7-8.

wish to throw in the towel. So there is something awkward about the Commission as an investigative body only—not a court—defending it own findings. But I cannot imagine who else would do it. If the appeal was to a court, as presumably it would be, the strict rules of evidence presumably would apply. But, of course, they do not apply for the Commission and for good reason.

What standard of proof would the court apply? If the appeal was by way of rehearing the court could, even if hearing the same witnesses, form different views about evidence and credibility. Witnesses could give different evidence from that which they had given at the Commission hearings. If that happened or if the court heard different and further evidence the court would be conducting quite a different inquiry from that which the Commission had conducted. If an appeal was conducted on the papers the court could not form views about the credibility of witnesses and the reasons for preferring some evidence over other evidence. The Committee must not overlook the potential for mischievous litigation. A full appeal from each investigation of the Commission has the potential to debilitate the Commission in its functioning. Having thought about this to a considerable extent I am of the view that the practical difficulties are enormous and, in principle, the law confers on those who wish to challenge Commission findings the right of judicial review on the ground of excessive jurisdiction or denial of natural justice. Of course, that is essential. It is that right of review which the courts have created and seen as being adequate for the purposes of a body such as the Commission and it is submitted that nothing more should be granted." [92]

3b.2.4 As outlined above, Justice Clarke appeared before the Committee on 08 December 1992. He was asked for his response to Mr Temby's concerns about the practicalities of establishing an appeal mechanism. Justice Clarke said that he thought the issues raised by Mr Temby were "non-existent dangers". Justice Clarke said that he thought it would be possible for the Parliament to lay down firm procedures by which appeals could be heard. He envisaged a hearing in which the court would look at the record before the Commission and determine whether there were any errors of fact. Justice Clarke acknowledged that there could be a lot of appeals but said that this would need to be balanced against the benefits which would flow from appeals in terms of the correction of errors and the adding of extra credibility to correct findings which are tested.

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[92] Committee on the ICAC, Minutes of Evidence, 09 November 1992, pp 35-36.

"I read with interest Mr Temby's discussion on the difficulties in having an appeal and his reference to the problems, such as would the Court, which is bound the rules of evidence, re-hear the matter, and what would it do about findings on credibility, things like that. Frankly, I think those are non-existent dangers, and whether his view reflects an insufficient understanding of well settled appeal procedures and the power of the legislature to lay down appeal procedures in clear terms in an act of Parliament I do not know. If, for instance, and I should say before I go on further there is a discussion of the various types of appeal procedures in a case in a judgement of the President which might be useful. It was the case of Watson v Hanimex Color Services, Court of Appeal and the judgement was delivered on 28 November 1991. At page 11, the learned President discusses the various types of appeal. But let me say that if ultimate findings are to be made, I would think it desirable that there be at the very least, appeals on question of law.

Now those appeals are given in the Queensland legislation. They are not difficult to give. They do not involve any of the problems about which Mr Temby spoke. And they do not involve any reworking of the evidence and they do avoid undesirable discussion as to whether the finding is in excess of jurisdiction or is an error of law on the face of the record and matters of that nature which are discussed in the paper to which I will refer. It simply gives right of appeal where there is an error of law. And I would have thought, if there were to be ultimate findings, that is the very minimum. But bearing in mind the great damage to reputations which can be done by findings, for my part, I would go further and allow an appeal on questions of fact.
Now if that suggestion were to be followed up I think there would need to be some exercise of care. Leaving the Commission totally aside, in courts of law there are well established principles under which appeal courts work and they involve accepting at all stages of the appeal process the findings of a primary judge on credibility. There would never be a re-examination on findings of credibility, except in extraordinary circumstances. Secondly, they involve a hearing, with one exception, on the record. The exception is a hearing de novo, a total, full, re-hearing such as the old appeal to quarter sessions which I don't recommend. I would never suggest that for one moment.

But they involve a hearing on the record, with a right in very limited circumstances, to adduce fresh evidence. Now let me make it clear that I would not be advocating any right in an appeal court to receive fresh evidence. When I say that I prefer an appeal against the facts, I would indicate with that preference an indication of the need for the legislation to spell out clearly that the appeal would take place on the record and

that the Court would simply look at the record before the Commission and determine whether there were any errors of fact or law.

Now I think that against what I am saying is one of Mr Temby's arguments, and that is that it may lead to a lot of appeals. That may be so. Whether it would lead to a lot successful appeals is a very different question, but it may lead to a number of appeals. And I think that the committee would need to balance the prospect that there would be an increase in appeals against the benefit which would result from appeals in the sense that if the finding of corrupt conduct is made and is found to have been erroneously made, any slur disappears, and if the finding if found to have been properly made, of course, it is given added credibility. But I would emphasise that if there is to be an appeal on a question of law, it is a simple procedure that doesn't involve anything other than the statute saying that. If there is to be a wider appeal it is necessary in my view for the statute clearly to spell out the limits and that is that the appeal take place on the record and that there be no right to adduce fresh evidence." [93]

3b.2.5 The ICAC was subsequently asked for its response to Justice Clarke's comments about the practicalities of establishing an appeal mechanism. The ICAC reiterated the position of Mr Temby at the public hearing on 09 November 1992, that there would be "grave practical difficulties". These included questions of the form of the hearing, whether the Commission would be a party to the appeal and, if not, who would be the contending party. [94]

3b.3 ***Conclusions***

3b.3.1 The question of the establishment of an appeal mechanism for the review of ICAC findings of fact is inseparably linked to the question of the nature of the findings of fact which the ICAC should be able to make.

3b.3.2 Mr Moffitt and Justice Clarke have submitted that, if ICAC findings are not limited to primary facts, fairness requires that a mechanism be established for the review of ICAC findings. Mr Moffitt, Justice Clarke and the ICAC are in agreement that the establishment of a statutory right of appeal would lead to difficulties. As well as arguing against such a right of appeal in principle the ICAC stated that the practical difficulties involved in establishing such a mechanism would be insurmountable.

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93 Committee on the ICAC, Minutes of Evidence, 08 December 1992, pp 6-8.

94 ICAC, Written Response, January 1993, pp 2-3.

3b.3.3 The Committee does not believe it is currently in a position to make an informed decision about this issue. The Committee therefore recommends that the Law Reform Commission be requested to provide advice on the following questions:

> **Necessity** — If ICAC findings are not limited to primary facts as proposed, does fairness to individuals require the establishment of a statutory right of appeal against ICAC findings (in fact and law)?
>
> **Practicalities** — If it was decided as a matter of principle that a statutory right of appeal should be provided, could the practical difficulties identified by the ICAC and others be overcome?
>
> **Alternatives** — If the practical difficulties involved in the establishment of a statutory right of appeal are insurmountable, are there any alternative means by which the concerns expressed about fairness to individuals could be addressed other than the proposed limitation of ICAC findings to primary facts? If there is such an alternative, could its terms be defined with some precision and could a statement be included setting out its benefits and disadvantages?

With the benefit of the advice of the Law Reform Commission the Committee will be in a position to make an informed decision on this issue.

3c ***INDUSTRIAL TRIBUNALS - DE FACTO APPEALS?***

3c.1 ***Industrial Relations Commission - South Sydney Council case***

3c.1.1 During 1991 the ICAC conducted an investigation into the Planning and Building Department of South Sydney Council. The investigation focussed on allegations of conflicts of interest on the part of council staff. The ICAC's report, released in December 1991, found that some council staff had undertaken private planning work for private clients in breach of provisions of the Local Government Act. More particularly, the report found that a senior town planner, Nicholas Horiatopoulos, had referred work within the council's area to his brother's architectural firm and had been involved in council assessments of work done by his brother's firm. The ICAC report found that Mr Horiatopoulos had engaged in corrupt conduct and that consideration should be given to his dismissal from the council. [95] Mr Horiatopoulos was dismissed by the council on 06 January 1992.

3c.1.2 Mr Horiatopoulos took the council to the Industrial Relations Commission seeking re-instatement to his position. On 16 June 1992 the Industrial Relations

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95 ICAC, Report on Investigation into the Planning and Building Department of South Sydney Council, December 1991.

Commission ordered Mr Horiatopoulos's re-instatement. South Sydney Council appealed against this decision to the full bench of the Industrial Relations Commission. On 01 December 1992 the full bench dismissed the council's appeal.

3c.1.3 Conciliation Commissioner Connor in his judgement of 16 June 1992 stated that although the hearing before him was not an appeal against the ICAC's findings it did involve a re-evaluation of the evidence that was before the ICAC. This was necessary in order for the Industrial Relations Commission to determine whether Mr Horiatopoulos's conduct was a sufficient basis to justify his dismissal from the council.

> *"I stress at the outset that this hearing is not in any sense an appeal against the findings of the ICAC inquiry. That is clearly not my role. Nevertheless, since the council's decision to firstly suspend and later dismiss Mr Horiatopoulos was based entirely on the findings of the ICAC report of Assistant Commissioner Collins, much of the evidence before the ICAC inquiry is obviously relevant in the hearing before me. I am required to, in a sense, re-evaluate that evidence, not on the basis that it constitutes corrupt conduct in terms of S.8(1) of the ICAC Act, but to determine whether or not Mr Horiatopoulos's conduct referred to in the ICAC report is a sufficient basis to warrant his dismissal by the council."* [96]

3c.1.4 In re-evaluating the evidence before the ICAC Conciliation Commissioner Connor came to a number of different findings of fact to the ICAC. These are set out in his judgement. [97] The Committee's attention was specifically drawn to these different findings of fact or "factual errors" in the ICAC report by a number of submissions. [98]

3c.1.5 Conciliation Commissioner Connor also came to a different conclusion to the ICAC on the important issue of Mr Horiatopoulos's credibility, vis a vis another key witness, when their evidence was in conflict. Conciliation Commissioner Connor stated that, as a result of hearing evidence in relation to Mr Horiatopoulos's character he was actually in a better position than the ICAC to assess his credibility.

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96 *Horiatopoulos vs. Council of the City of South Sydney*, Industrial Relations Commission, Connor CC, 16 June 1992, unreported, p 6.

97 ibid, pp 11, 26-34, 36, 40.

98 John and Jenelle Horiatopoulos, Submission, 28 September 1992; Tim Robertson, Submission, 24 November 1992.

> *"The truth is that Mr Horiatopoulos is not a good witness, giving long and rambling answers through his nervousness to questions put to him. But I believe him to be an essentially honest man. No real evidence as to Mr Horiatopoulos's character was produced in the ICAC inquiry as it was before me and I feel that I am in a better position to assess his honesty than Assistant Commissioner Collins on the basis of the many witnesses before me who attested to his good character.*
>
> *The upshot is that, unlike Assistant Commissioner Collins, on balance, I prefer the evidence of Mr Horiatopoulos in this hearing before me over that of Mr Fennell."* [99]

The judgement concludes that the punishment meted out to Mr Horiatopoulos did not fit the "crime" he had committed. Conciliation Commissioner Connor concludes that Mr Horiatopoulos was essentially an honest but naive person and that "naivety is not corruption".

> *"... I do not believe that it is appropriate to categorise Mr Horiatopoulos as a 'corrupt' council employee as that word would commonly be understood throughout the community."* [100]

3c.1.6 Tim Robertson in his submission to the Committee drew attention to Conciliation Commissioner Connor's judgement. Mr Robertson suggested that the Industrial Relations Commission effectively provided Mr Horiatopoulos with a de facto appeal mechanism in respect of the ICAC's findings.

> *"The South Sydney Report demonstrates the reality of error and not merely its possibility. When the South Sydney planner appealed his dismissal, which followed promptly upon and in accordance with the ICAC Report, the Industrial Relations Commission found factual errors, and formed markedly different opinions to ICAC about the planner's conduct....*
>
> *The planner was not corrupt, the IRC found, as that word is commonly understood. There is little doubt that he acted incautiously and contrary to his duty to his employer, but the gravity of his conduct deserved demotion not demolition.*

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99 *Horiatopoulos vs. Council of the City of South Sydney*, Industrial Relations Commission, op cit, p 39.

100 ibid, p 51.

The planner was fortunate in having another forum in which he could challenge the findings made against him. Whether his reputation will ever be restored is another matter. Pity the person with no right to confront and correct errors of fact and interpretation." [101]

3c.1.7 The ICAC was asked for a written response to Mr Robertson's submission. In its written response the ICAC stated that the proceedings in the Industrial Relations Commission were not an appeal from the Commission's investigations or findings. The ICAC suggested that, considering the different legal functions of the two commissions, it was neither surprising or alarming that the Industrial Relations Commission and the ICAC had come to different conclusions on a number of issues under consideration in this matter.

> *"The proceedings in the Industrial Relations Commission between Mr Nicholas Horiatopolous and the Council of the City of South Sydney were not an appeal from the Commission's investigation or findings. Mr Conciliation Commissioner Connor said as much in his judgment (pages 6 and 51). It was not his role. He has no power to do so. He considered the fairness of the Council's decision to dismiss Mr Horiatopolous. He concluded that a five month suspension from employment without pay was a sufficient response to Mr Horiatopolous' conduct....*
>
> *Connor CC was performing a different legal function and deciding different issues than the Commission.*
>
> *Connor CC formed some different views about Mr Horiatopolous and Mr Fennell. Of course he had to assess the credibility of the witnesses he heard. It is neither surprising nor alarming that he and Assistant Commissioner Collins formed different views of witnesses, as for example, different members of the Committee might form different views of a witness appearing before the Committee. It does not mean either Commissioner was wrong.*
>
> *The factual differences between the Industrial Relations Commission and this Commission, particularly given the different legal functions, have been overstated.*
>
> *On 01 December 1992 the Full Commission of the Industrial Relations Commission dismissed the Council's appeal against Commissioner Connor's order that Mr Horiatopolous be reinstated upon conditions. In*

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101 Tim Robertson, Submission, 24 November 1992, pp 5-7.

doing so the Full Commission noted that there was no issue as to Mr Horiatopolous' breach of his duty of fidelity and good faith to the Council, the real issue being the severity of the disciplinary action taken against him.

There is value in returning to the source document — the Commission report — and reading it fairly and thoroughly to gain an understanding of the conduct investigated by the Commission. There is no doubt room for personal judgments about conduct investigated there, in the range of conduct which the Commission can investigate and the range of conduct which the Commission has investigated. The Commission disagrees with the characterisation 'trivial'. If it matters, clearly the Industrial Relations Commission did not so consider the conduct. Indeed the Full Commission in its judgment, whilst finding that the finding made by Connor CC was legally open to him said 'this cannot be taken to assume that if hearing the matter at first instance we would have been necessarily prepared to make such an award." [102]

3. .8 Following the decision of the Industrial Relations Commission in June 1992 to re-instate Mr Horiatopoulos the Committee received correspondence from the Mayor of South Sydney, Alderman Vic Smith, raising questions about the legal obligation of councils and other organisations to act on ICAC recommendations. Mr Smith said that had the council not dismissed Mr Horiatopoulos in the face of the ICAC report it would have been perceived by the community as condoning corrupt conduct. When Mr Temby appeared before the Committee on 09 November 1992 he said that he had also had contact with Alderman Smith on this issue and that he had made it clear that the council did have a choice about whether or not to dismiss Mr Horiatopoulos and was under no direction from the ICAC. [103]

3c.2 ***GREAT - Water Board and Tamba cases***

3c.2.1 In late 1991 and early 1992 the ICAC conducted an investigation into the Water Board's tendering process in respect of new technologies for sewage treatment and the disposal of sewage sludge. The ICAC Report, released in May 1992 found that the Water Board's Chief Economist, Sergio Bogeholz, who was involved in assessing the tenders, favoured one of the tenderers and gave them assistance. His conduct was found to fall within the part of the definition of corrupt conduct set out in s.8 of the ICAC Act. It was recommended that consideration be given to the taking of disciplinary action against him and his dismissal. The ICAC report was released at

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102 ICAC, Written Response to Tim Robertson's submission, 3 December 1992.

103 Committee on the ICAC, Minutes of Evidence, 09 November 1992, pp 48.

on Monday 18 May and Mr Bogeholz was immediately dismissed.

3c.2.2 Mr Bogeholz appealed against his dismissal to the Government and Related Employees Appeal Tribunal (GREAT). His appeal was heard in July 1992 and on 28 August GREAT upheld his appeal and ordered his re-instatement. [104]

3c.2.3 Like the proceedings in the Industrial Relations Commission in the Horiatopoulos case, the GREAT proceedings involved a re-evaluation of the evidence before the ICAC inquiry. GREAT came to a number of different conclusions to the ICAC concerning findings of fact. [105] However the major focus of the hearing was on the Water Board's actions in dismissing Mr Bogeholz. The GREAT decision makes it clear that the Water Board had a responsibility to make an independent assessment of Mr Bogeholz's conduct and to conduct disciplinary proceedings in an appropriate manner.

> *"It is apparent from this evidence that a fundamental and important distinction between the functions of the ICAC and the Water Board so far as dismissal of an employee is concerned was not appreciated.... An ICAC recommendation does not absolve the Water Board from its responsibilities to discipline employees in a correct manner."* [106]

GREAT found that Mr Bogeholz was given no notice that his dismissal was under consideration and no opportunity to put his case before the Board. Furthermore, GREAT received evidence as to Mr Bogeholz's credibility and work history, and evidence which put the conduct considered in the ICAC report into context. GREAT found that it was not convinced that Mr Bogeholz's dismissal was justified.

3c.2.3 Mr Temby was asked for his comments on the GREAT decision when he appeared before the Committee on 09 November 1992. Mr Temby indicated that he did not see the decision as in any sense a set back to the ICAC or a poor reflection on the ICAC's findings in the Water Board matter. He said that GREAT had simply found that the Water Board's dismissal of Mr Bogeholz had been conducted in a way that denied him natural justice. "The fact is that they decided to sack without conducting a hearing. You cannot justify that." [107]

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104 *Sergio Bogeholz vs. Water Board*, GREAT, unreported, 28 August 1992.

105 ibid, pp 7-8, 10-12, 24.

106 ibid, pp 22-23.

107 Committee on the ICAC, Minutes of Evidence, 09 November 1992, p 43.

3c.2.4 The Water Board made a submission to the Committee which expressed dissatisfaction with the GREAT decision in the Bogeholz case. The submission said that it was unfortunate that fourteen months of investigation by the Water Board and the ICAC were effectively overturned by three days of hearings before GREAT. The submission noted that GREAT had no responsibility to consider the effect of its decisions upon efficient public administration and called for the legislation establishing GREAT and its procedures to be reviewed. The submission also pointed out that, in the case of Water Board employees, appeals against dismissal could be made to either GREAT or the Industrial Relations Commission. However, the opportunities for appeals against the decisions of GREAT and the Industrial Relations Commission were quite different. Appeals from GREAT decisions were only on errors of law, whereas appeals from the Industrial Relations Commission could cover questions of fact or merit. [108]

3c.2.5 When Mr Temby appeared before the Committee on 09 November 1992 he emphasised that other authorities had managed to take disciplinary or dismissal action against employees as a result of ICAC inquiries without having that action overturned by GREAT. He referred to the actions of the RTA in dismissing a number of driving examiners found to have engaged in corrupt conduct. Soon after this, in December 1992, GREAT upheld further decisions of the RTA in dismissing officers found to have engaged in corrupt conduct in the Investigation into Unauthorised Release of Government Information (known as the Tamba inquiry). GREAT found that dismissal was the only reasonable decision that the RTA could have made in these cases and that the dismissals were conducted in an appropriate manner. [109]

3c.3 ***SES Position - Trackfast case***

3c.3.1 During 1992 the ICAC conducted an investigation into the Trackfast division of the State Rail Authority (SRA). The first part of the investigation related to the tendering process for the two significant Trackfast contracts. The ICAC Report found that a Trackfast officer had engaged in corrupt conduct by providing covert assistance to one of the tenderers. The report was also critical of the Trackfast General Manager, Gary Camp, for his management of Trackfast, in respect of the following of proper procedures in the tendering process. [110] Mr Camp was subsequently dismissed by the SRA.

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108 Water Board, Submission, 01 October 1992.

109 *Elliott and ors. vs. RTA*, GREAT, unreported, 18 December 1992.

110 ICAC, Report on Investigation into the State Rail Authority - Trackfast Division, September 1992.

3c.3.2 Mr Camp made a submission to the Committee dealing with a number of the issues raised in the Committee's Discussion Paper of September 1992. Mr Camp also wrote to the Committee in January 1993 in respect of the issue of appeal mechanisms. He pointed out that, as a member of the Senior Executive Service (SES) he was precluded from seeking to have his dismissal reviewed by GREAT or the Industrial Relations Commission. Under the legislation establishing the SES there was provision for grievance mediation to take place between him and his former employer. However, in this case the SRA had refused to participate in mediation and there was no way in which the SRA could be compelled to do so. Mr Camp drew attention to the various cases in which other persons the subject of adverse ICAC findings had in effect been able to have these findings reviewed in industrial tribunals and the anomalous position he was in by being excluded from such a process. [111]

3c.4 ***Conclusions***

3c.4.1 It is clear from a number of recent cases that industrial tribunals, in considering appeals against disciplinary or dismissal action arising from ICAC inquiries, are required to re-evaluate the evidence before the ICAC. In effect the ICAC's findings of fact and conclusions may be reviewed and different findings made by the tribunal.

3c.4.2 These recent cases make it clear that authorities have a duty to make an independent assessment of ICAC findings before taking disciplinary or dismissal action and must ensure that such action takes place in a way which ensures that public officials are treated in accordance with the principles of natural justice.

3c.4.3 It appears to be anomalous that different public officials who may be subject to disciplinary or dismissal action as a result of ICAC inquiries have access to different industrial tribunals to have that action reviewed, when different appeal procedures apply to the decisions of those tribunals. In the case of some public officials (such as members of the SES) there is no avenue for disciplinary or dismissal action to be reviewed. The Committee calls for a review of the rights of public officials to have disciplinary or dismissal action arising from an ICAC inquiry reviewed, with a view to ensuring greater equity of access to industrial tribunals.

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111 Gary Camp, Further Submission, 20 January 1993.

-4- *STANDARDS TO BE APPLIED BY THE ICAC*

4.1 ***Court of Appeal's Comments in Greiner Decision***

4.1.1 The Court of Appeal's decision in the **Greiner** case turned on the Court's construction of s.9(1)(c) of the ICAC Act. The majority in the decision found that the test of whether conduct (of a Minister) could constitute reasonable grounds for dismissal (by the Governor) is an objective test which requires the application of legally recognised standards. [112]

4.1.2 The Chief Justice emphasised at a number of points in his judgement the need for the ICAC to apply "objective standards, established and recognised at law" in making determinations about the conduct of individuals. Some of his comments in this regard are reproduced below.

> *"It would be expected that Parliament would have provided for adverse determinations to be made by reference to objective and reasonably clearly defined criteria, so that at least people whose conduct had been declared corrupt would know why that was so, and would be in a position to identify, and, to the extent to which they were able, publicly dispute the process of reasoning by which that conclusion was reached."* [113]
>
> *"On the true construction of s.9 the test of what constitutes reasonable grounds for dismissal is objective. It does not turn on the purely personal and subjective opinion of the Commissioner.*
>
> *The context of s.9(1)(c) supports such a construction. The immediate context is that of a section which deals with a number of matters, most of which are clearly capable of determination according to objective, ascertainable criteria: criminal offences, disciplinary offences, and*

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112 *Greiner vs. ICAC*, Court of Appeal, unreported decision, 21 August 1992.

113 ibid, Gleeson CJ, p 5.

grounds for dismissal. The wider context is that of legislation which exposes citizens to the possibility of being declared to have engaged in corrupt conduct; it should not be construed so as to make that outcome turn upon the possibly individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits. Furthermore, the legislative history of the statute shows that it was parliament's intention that the test be objective, and that determinations should be made by reference to standards established and recognised by law." [114]

"Vague and uncertain though the standards referable to the application of s.9(1)(c) to Premiers and Ministers may be, it is for the Commission to identify and apply the relevant standards, not to create them. Just as the Courts cannot create new criminal offences so the Commission cannot create new grounds for the dismissal of public officials. The observance and application by the Commission of objective standards, established and recognised by law, in the performance of its task of applying s.9 to cases before it is essential. It is what was intended by Parliament, it is required by the statute, and it is necessary for the maintenance of the rule of law." [115]

4.1.3 Justice Priestly, forming the majority with the Chief Justice, agreed that the ICAC must apply objective standards, established and recognised at law. He said that for the Commission to be able to do otherwise would make it possible for the ICAC to introduce new standards to which public officials would then be held to account. Justice Priestly referred to an extract from the then Premier's second reading speech in introducing the ICAC Bill in May 1988.

> *"The independent commission is not intended to be a tribunal of morals. It is intended to enforce only those standards established or recognised by law."* [116]

4.1.4 On the other hand the dissenting Judge, Justice Mahoney, described the standards to be applied by the ICAC as normative standards. He said that the Commission would need to consider what the standard should be for the community in determining the standards to be applied in a particular case.

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114 ibid, p 38.

115 ibid, pp 41-42.

116 Parliamentary Debates (Hansard), Legislative Assembly, 26 May 1988, p 676.

> *"In judging the seriousness of what they did, two things are to be borne in mind: reasonableness is to be judged by reference to contemporary standards but is not concluded by them: and seriousness for this purpose is a matter of degree.*
>
> *In judging what is reasonable, ie, can justify dismissal, the standards are not those of More's Utopia, nor is the matter to be judged merely by what community standards may or should be at some distant future. On the other hand, the standard is not determined merely by how the matter is regarded by the community or the greatest number in it, nor is it determined merely by aggregating the opinions or the conduct of all those in the community who have thought or acted in the relevant way. The determination of normative standards is not made in that way: the seriousness with which bribery is to be regarded is not measured merely by how many officials accept bribes. That, though relevant, cannot determine what should be the standard against which the conduct of a public official is to be measured for the purposes of this Act. The Commission, and this Court, may in this regard see a distinction between what is and what should be, bearing in mind at all times that it is what the standard should be for the existing community which is to be considered."* [117]

4.1.5 The Committee identified the standards to be applied by the ICAC as a key issue in its Discussion Paper of September 1992. Specifically, the Committee called for submissions in relation to a proposal that the requirement for the ICAC to apply objective standards, established and recognised at law, should be entrenched in the ICAC Act.

4.2 ***Submissions***

4.2.1 The Hon Athol Moffitt QC, CMG, dealt with this issue in his original submission. Mr Moffitt stated that this aspect of the Court of Appeal's decision was of fundamental importance.

> *"Fundamental to the decision of the Supreme Court was that on the proper construction of the ICAC Act (and in respect of which the Commissioner in his finding of corrupt conduct in the Metherell Report erred in law), ICAC in making a judgmental finding, such as of corrupt conduct on the part of a named person and reporting it, has to do so against accepted standards recognised by law or laws in existence at the time of the conduct impugned, and that it was no part of the ICAC's*

117 ibid, Mahoney J, pp 53-54.

function to lay down or of the Commissioner to express his personal views on what he or it thought should be those standards, in order to base a judgment concerning past conduct of a named person. I add, it follows that it is no part of the function of ICAC itself to change laws or codes or official standards. That is the province of others, each in its own field; but of course it is fundamental to the whole concept of ICAC and the discharge of its functions, in particular that of public exposure of the facts, that it should be the spur to those changes being made by others." [118]

4.2.2 Mr Moffitt went on to outline what he saw as the philosophy behind this aspect of the Court's decision. Mr Moffitt said that philosophy was that people should only be judged by standards that were in place at the time of their conduct, not by standards which were newly created and applied retrospectively.

> *"The basic philosophy that lies behind the Court's decision, in particular as appears in the judgment of the Chief Justice, should be stated. It is inherent in the terms of the Act despite its unclear terms.*
>
> *That philosophy is that people (and this includes public officers the subject of the ICAC Act) in a democracy should only be officially dealt with adversely by State institutions in respect of their past conduct by reference to laws and recognised standards in force at the time of the conduct impugned. This applies to a person being dealt with by way of criminal penalty, disciplinary action, dismissal, or any equivalent officially imposed sanction of a penal or damaging nature such as public pronouncements by a State institution of judgmental findings concerning such past conduct in derogatory or damaging terms. In this regard official pronouncements, such as of corrupt conduct by a public officer, particularly one in the public arena, will do more damage and inflict a far greater penalty than very many classes of criminal conviction. An official reprimand as in professional, including military, disciplinary proceedings, has always been regarded as penal in character.*
>
> *For the State to enable any of these actions against a person to be taken other than for the breach of laws or standards which were in force at the time of the relevant past conduct, would permit the evils of retrospectivity, properly regarded as unacceptable in our community. It would evade the rule of law. To confer on what is essentially an inquisitorial institution the power itself to lay down new standards of conduct and pass judgment on named persons in respect of their past*

118 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, p 12.

> *conduct, not by what were then, but what it considers ought to be, the standards, and do so as a result of inquiry not subject to the usual court safeguards and not provide a right of appeal, would compound the evils of retrospectivity with the potential for wrong, arbitrary or capricious judgments not open to challenge by any review process."* [119]

4.2.3 Mr Moffitt said that this aspect of the Court of Appeal's decision was so important that it should be entrenched in the ICAC Act. Specifically, Mr Moffitt suggested that if section 9 of the Act was to be repealed, it should be replaced with a new section which would provide that the conduct described in section 8 constituted corrupt conduct only if such conduct was in breach of an existing law or standard.

4.2.4 Michael Bersten in his submission argued that there was doubt as to whether the current definition of corrupt conduct in the ICAC Act achieved one of its objectives, namely, to preclude the ICAC from applying moral rather than legal standards as to what constitutes corrupt conduct. He said that in this context it would be appropriate for the ICAC Act to be amended to include entrenchment of the requirement for the ICAC to apply objective standards, established and recognised at law. [120]

4.2.5 The Hon Adrian Roden QC also addressed this issue in his original submission. Mr Roden argued that the ICAC had never presumed to set its own standards or apply those standards to the conduct of individuals. He said it was wrong for the Committee's Discussion Paper of September 1992 to raise this issue as if the Court of Appeal's decision in **Greiner** had drawn attention to this issue for the first time or identified some failing on the part of the ICAC.

> *"The first thing to be noted is that if the Commission is not involved in findings of corrupt conduct against individuals, there is little it will be doing that will involve 'applying standards'. Finding and reporting facts has little to do with setting or applying standards.*
>
> *The passage from the second reading speech quoted by Priestly JA and referred to in the discussion paper is a little difficult to understand. The Commission, it says, is intended to enforce only those standards established or recognised by law. In what way the Commission is to* ***enforce*** *standards at all, I do not know.*

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119 ibid, pp 12-13.

120 Michael Bersten, Submission, 02 October 1992, pp 1-2.

The second thing to be noted is that there has never been any suggestion that the Commission should set standards, or impose its own moral or ethical code.

In this regard I refer the Committee to the material appearing under the heading 'A Question for the Community' at pages 213 et seq in the Tamba Report. It preceded the Supreme Court judgement, and is directly in point.

Once again an issue has been raised in the discussion paper in a manner suggesting, wrongly I believe, that the Supreme Court decision has highlighted some failing on the part of the Commission, or some misconception on its part as to its proper role.

The Commission has a role in developing community standards. It can seek to influence them. In the performance of its functions, it will from time to time point to matters that seem to it to require attention, because of their apparent bearing on the honest and impartial exercise of the official functions of public officials. It identifies those matters. That was explained in the passage at page 213 of Tamba to which I referred.

It was also explained there that Commission Reports which identify such matters, call for consideration and public debate, with the Parliament taking the lead. That is a matter I regard as being of the greatest importance if full advantage is to be taken of the Commission's work. I return to it on the next page.

For the present I remind the Committee of the passage beginning 'It is for the community to decide ...' which appeared in the North Coast Report and was repeated in Tamba. It is that type of matter that I have in mind.

I have no quarrel with what is said about standards in the quoted passages from the judgements or in the discussion paper. What I find inappropriate is the suggestion that they say something new, and that it is necessary to draw attention to them because the Commission has assumed or asserted the right to impose standards. That is simply not correct." [121]

4.2.6 As stated by Mr Roden in the above quotation, he had included some comments on this issue in his "Report on Unauthorised Release of Government Information".

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121 The Hon Adrian Roden QC, Submission, 05 October 1992, pp 10-11.

Mr Roden said that the ICAC's role was not to create or impose standards, but that it had a role in seeking to influence standards. He said that the Commission's duty was to apply community standards.

> *"There can, of course, be different concepts of probity and integrity. Standards vary. In different societies, and at different times, different demands will be made. Even in the one society, at the one time, more might be expected from people in one position, than from those in another.*
>
> *From time to time it may be necessary to draw attention to departures from accepted or expected standards. It may be necessary to deal with fears, or a perception, that conduct among public officials has fallen below those standards. It is then that bodies like this Commission are established.*
>
> *What standards are they to apply?*
>
> *The criminal law provides no answer. Despite the precision with which it speaks, and the certainty it sometimes claims to achieve, it is not the means by which community standards are set. For the purpose of the criminal law, juries, after struggling through a maze of technical requirements, are frequently left to decide whether a person acted 'dishonestly'. By accepting their verdicts, the law applies their standards.*
>
> *The Commission is in much the same position. For all the thirty-odd circumstances contained in the definition with which the Parliament has seen fit to clarify or obscure the sense in which it has used the term 'corrupt conduct' in the ICAC Act, the Commission is frequently left to decide whether a public official has acted 'dishonestly', or 'partially'.*
>
> *In so doing, its function, as I understand it, is not to create or impose standards, although it may seek to influence them. Its duty is to apply community standards. It is with that in mind that in the North Coast Report I wrote:*
>
> > 'It is for the community to decide what level of integrity it requires of its public officials, and in particular the extent to which, if at all, it will allow access to decision-makers, and influence upon them, to depend upon considerations such as friendship or payment.' (p 651)

> *It is only necessary to change a few words, for that to be equally applicable here."* [122]

4.3 ***ICAC Position***

4.3.1 In its "Second Report on Investigation into the Metherell Resignation and Appointment" the ICAC provided a brief outline of the Court of Appeal's decision in the **Greiner** case. The report noted that,

> *"Gleeson CJ and Priestly JA concluded that the test of whether conduct (of a minister) could constitute reasonable grounds for dismissal (by the Governor) is objective. It requires the application to the facts found by the Commission of legally recognised standards as to what constitute grounds for dismissal. It does not turn upon the subjective opinion of the Commissioner, formed by reference to unexpressed and possibly freshly created standards."* [123]

4.3.2 The ICAC addressed this issue briefly in its submission. The submission noted that "the Commission accepts that when determining the character of any conduct it must apply objective standards, established and recognised at law". [124] It was noted that the Court of Appeal's decision in the **Greiner** case mandated that the ICAC must apply such standards. However, it was also stated that the Commission must be able to raise standards through its corruption prevention and public education work. The Commission must be able to identify areas requiring reform and improvement and the law must be continually reformed to remain in step with rising community standards. It will not be enough to entrench a requirement for the Commission to apply objective standards unless contemporary community standards are reflected in appropriate legislation.

4.3.3 When Mr Temby appeared before the Committee on 09 November 1992 the Chairman asked him whether the ICAC would have any objection to the entrenchment of a requirement for the ICAC to apply objective standards, established and recognised at law. The question was put in the context of the likely change to the definition of corrupt conduct involving the repeal of s.9, which would remove the mandate imposed by the **Greiner** decision. Mr Temby indicated that he would not object to such entrenchment, but that the ICAC must continue to be able to identify areas of conduct which required reform and changes to standards.

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122 ICAC, Report on Unauthorised Release of Government Information, 1992, pp 213-214.

123 ICAC, Second Report on Investigation into the Metherell Resignation and Appointment, September 1992, p 4.

124 ICAC, Submission, 12 October 1992, p 28.

"CHAIRMAN:

Q: At page 28 of your submission you refer to the need to apply objective standards Greiner v. ICAC so mandates. If section 9 is removed, would this mandate not be removed as the Greiner and ICAC decision concerned operation of section 9? If section 9 is removed, would you oppose the entrenchment of a requirement to apply objective standards established and recognised by the law when making findings about individuals?

Mr TEMBY:

A: I do not think there could be any objection to such a provision so far as findings about individuals are concerned. We have to be free to say what we will about systems. But it needs to be stressed that what the law says about the conduct of individuals is not narrow and it is not confined to the criminal law.

Q: But in relation to what you said about systems, you should be free to say what the law is at the moment and what the law should be in the future.

A: Mind you, I think we would want to say that there should be an offence created. You would want to be able to say, "Here is the conduct. Anyone would view it as deplorable by any standard. There is no offence and there ought to be". I suppose that is pretty strong language but if you want to fix up the system you might have to say that. That is the sort of thing we have said in a couple of reports without demur. In fact, it would not be going too far to say there has been no demur except from the individuals concerned until politicians have been involved. Then there has been a lot of demurring, but you cannot think of much otherwise." [125]

4.3.4 Just as the Commission's application of s.9(1)(c) of the ICAC Act was able to be reviewed in the courts in the **Greiner** case, so the ICAC's application of a new section which entrenched the requirement to apply objective standards, established and recognised at law, would be able to be reviewed in the courts. However, it should be emphasised that inserting such a new section into the ICAC Act would not increase the opportunities for judicial review of ICAC findings. Rather it would be substituting a clear and concise section for an unworkable one (see chapter one

125 Committee on the ICAC, Minutes of Evidence, 09 November 1992, p 60-61.

for further details on the problems with s.9 and the reasons for its repeal) but which would achieve the intention of the original authors of the ICAC Act.

4.4 ***Conclusions***

4.4.1 The Court of Appeal decision in the **Greiner** case mandates that the ICAC must apply objective standards, established and recognised at law. This decision was based on the Court's interpretation of s.9(1)(c) of the ICAC Act. The repeal of s.9 to simplify and clarify the definition of corruption (as recommended in chapter one) will effectively remove this mandate.

4.4.2 The Committee notes that the ICAC has no objection to the entrenchment in the ICAC Act of the requirement for the Commission to apply objective standards, established and recognised at law.

4.4.3 The Committee recommends that a new section be inserted in the ICAC Act entrenching the requirement for the ICAC to apply objective standards, established and recognised at law, in any findings which it makes about named or identifiable individuals in public reports.

4.4.4 The Committee notes that the ICAC's compliance with such a requirement would be a matter of law and therefore subject to possible review in the Courts. However, it should be emphasised that this would not be creating more opportunities for judicial review, merely substituting one for the opportunity which would be removed by the removal of s.9 of the Act.

-5- *PROTECTION OF CIVIL LIBERTIES*

5.1 ***Background***

5.1.1 When the ICAC bill was introduced into Parliament in May 1988 the major criticism focussed on the powers granted to the ICAC. There was a significant degree of concern about the possibility that the misuse of these powers could have a grave effect upon civil liberties. The President of the Bar Association, Ken Handley QC, wrote to the Attorney General in the following terms.

> *"Needless to say the Bar Council is not opposed to the principles of the Bill for which the Government has a clear mandate. Indeed as the President of the Bar Council I have gone on record as supporting the establishment of such a Commission in an interview with ABC Radio in January this year.*
>
> *A detailed examination of the Bill however has revealed a number of provisions which are objectionable in principle and go far beyond the Royal Commission's Acts of the State, Commonwealth and Queensland. Some of the provisions appear to us to be unreasonable, unnecessary and to entrench upon important civil liberties."* [126]

5.1.2 During the Parliamentary Debates on the Bill a number of speakers referred to a 29 page memorandum on the Bill prepared by the Secretary of the NSW Council for Civil Liberties, Tim Robertson. Mr Robertson's comments received considerable publicity.

> *"The Government's new Independent Commission Against Corruption 'would have the power to pervert the course of justice' and would operate "as a separate police force" the Council for Civil Liberties claimed yesterday.*
>
> *Attacking the new bill to create the ICAC, detailed comprehensively for the first time, the council's secretary, Mr Tim Robertson, predicted the*

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126 Ken Handley QC, Letter, to Attorney General, 02 June 1988, p 1.

commission would operate "in a cloak of secrecy" and would be immune from damages actions if it over-reached its powers.

Mr Robertson said he had serious reservations about the proposed body, particularly in relation to it apparently being protected from review by the courts." [127]

"To hear Tim Robertson tell it, the politicians and the media generally have much to answer for. They have abandoned all principle for the dangerous cynicism of allowing the ends to justify the means. They seek the punishment of people they have prejudged without regard to the normal procedures developed over the centuries to protect the innocent." [128]

5.1.3 A number of the specific concerns raised by groups such as the Bar Association and Council for Civil Liberties were addressed by the introduction of a second, modified ICAC bill, and during the passage of that legislation. The major concerns which remained related to the ICAC's coercive powers. It is generally accepted that the grave concerns about the ICAC's possible misuse of its coercive powers have proved to be groundless. The ICAC is generally regarded to have exercised its coercive powers judiciously. However, concerns remain about the extent of some of the ICAC's coercive powers even where these powers have not been exercised to date. Two examples were raised in the Committee's Discussion Paper of September 1992 and submissions were sought on these issues. The remainder of this chapter is broken into two parts dealing with each issue separately.

5a *SEARCH WARRANTS*

5a.1 *Background*

5a.1.1 The Provisions of the ICAC Act concerning search warrants are contained in Division 4 of Part 4 of the Act. The matter that has been of particular interest is contained in section 40 which deals with the issue of search warrants.

> "(1) An authorised justice to whom an application is made under subsection (4) may issue a search warrant if satisfied that there are reasonable grounds for doing so.

127 "Corruption body's powers attacked", The Sydney Morning Herald, 25 May 1988.

128 John Slee, "Individual liberty and the ICAC", The Sydney Morning Herald, 10 June 1988.

(2) The Commissioner, on application made to the Commissioner under subsection (4), may issue a search warrant if the Commissioner thinks fit in the circumstances and if satisfied that there are reasonable grounds for doing so.

(3) Search warrants should, as far as practicable, be issued by authorised justices, but nothing in this subsection affects the discretion of the Commissioner to issue them.

(4) An officer of the Commission may apply to an authorised justice or the Commissioner for a search warrant if the officer has reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under this Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises.

5a.1.2 Section 40 provides for the Commissioner to be able to issue his own search warrants. The President of the Bar Association raised a number of concerns about this provision in his letter to the Attorney General referred to above.

> *"Clause 40(1) provides that an authorised justice may issue a search warrant. Clause 40(2) also enables the Commissioner to issue a search warrant himself thus by-passing the important and traditional safeguard embodied in clause 40(1).*
>
> *The existing legal requirements under Commonwealth and State law which prevent public officials from entering and searching private homes and other buildings without a search warrant issued by a justice or other judicial officer is the basis of the maxim that an Englishman's (Australian's) home is his castle. We are not aware at the moment of any other legislation in Australia which allows a public official to issue a search warrant in his own favour.*
>
> *We would urge therefore that clause 40 be amended by omitting sub-section (2) completely."* [129]

5a.2 ***ICAC Position***

5a.2.1 The ICAC, in its submission to the Review of the ICAC Act, pointed out that the current Commissioner has never issued a search warrant. The submission argued

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129 Ken Handley QC, Letter, op cit, pp 3-4.

that the power for the Commissioner to issue his own search warrants should be retained for use in exceptional circumstances.

> *"As the Committee notes the current Commissioner of the ICAC has never issued a search warrant in three and a half years of the operations of the ICAC, even where search warrants have been required urgently. This is not to say that circumstance may not arise when it is appropriate. Section 40(3) provides that "search warrants should, as far as practicable, be issued by authorised justices, but nothing of this subsection affects the discretion of the Commissioner to issue them". The Commission has to date always approached justices for the issue of warrants. The Commission submits that the Commissioner's power to issue search warrants should be retained, for circumstances where necessity requires its use. This might arise if a justice could not be contacted to issue one and the urgency is such that without a warrant the investigation could be irretrievably prejudiced. Both s.40(3) and s.40(8) apply the accountability mechanisms under the Search Warrants Act 1985 to ICAC. This is sufficient safeguard.*
>
> *The Commission reports in its Annual Report the number of search warrants obtained from authorised justices. To date it has also reported that the Commissioner has not issued any search warrants. If the Commissioner did issue a search warrant, the Commission would report that in the Annual Report, and if operational requirements did not prevent, a summary or the circumstances which required that action."* [130]

5a.2.2 When Mr Temby appeared before the Committee he suggested a large scale conspiracy amongst members of the judiciary as the sort of hypothetical circumstance in which it would be appropriate for the Commissioner to issue his own search warrant.

> *"There is no cause for change because there has not been an abuse of the power and it may be useful to retain it. So far as search warrants are concerned, I have never issued a search warrant. If I did so, I would have to report that fact. So the fact would become known. The Committee then in power would naturally want to know the circumstances that warranted the exercising of that power. The general proposition that we should ordinarily go to a judge or to a justice cannot be doubted; it is obviously sensible. So the situation would come under scrutiny, as is proper.*

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130 ICAC, Submission, 12 October 1992, pp 31-32.

I can visualise circumstances where it may be highly convenient for the provision to be there, although it might not arise for a decade. You can visualise circumstances of extraordinary urgency and isolation. Let us presume it is midnight, the telegraph lines are down and it is critically important to issue a warrant. It has to be done immediately because someone is about to burn something. You can imagine that happening. It probably would not arise, but you can imagine it happening. One could imagine—I hope this is notional—a large scale conspiracy involving members of the judiciary, at whatever level or at several levels. It could be extraordinarily imprudent to go to one of their colleagues to seek a warrant. That situation probably would never arise, but you cannot say that it will not. There is no danger in retaining the present situation because we have not done it. If we do it, we will have to answer for it. It is therefore self rectifying." [131]

5a.3 ***Submissions***

5a.3.1 A small number of submissions and witnesses addressed the matter of search warrants. The Hon Ernie Knoblanche QC argued that the ability of the Commissioner to issue his own search warrants could be a valuable investigative weapon and should be retained.

> *"I see no ground upon which I would be prepared to submit there should be any change in the statutory authority in the Commissioner to issue his own search warrants.*
>
> *The Act provides that "search warrants should, as far as practicable, be issued by authorised Justices, but nothing in this subsection effects the discretion of the Commissioner to issue them", s.40(3).*
>
> *The advice contained in this subsection is probably wise and there is probably some good reason for it. I do not see that there is any ground to suggest that the power to issue his own warrant should be removed from the Commissioner.*
>
> *In conducting investigations into complex criminal activities which may involve any one or more of the evils tabulated in s.8(2) (a)-(y), I am sure the ability of the Commissioner to issue his own warrants can be a very valuable investigative weapon especially where there is urgency or*

[131] Committee on the ICAC, Minutes of Evidence, 09 November 1992, p 69-70.

the evidence may be lost." [132]

5a.3.2 On the other hand, the Law Society submitted that all search warrants should be issued by an independent third party. The Law Society submitted that the fact that the ICAC has not yet used the power to issue its own search warrants demonstrated that the power could be deleted from the Act without adverse consequences.

> *"It is inappropriate for ICAC to retain the power to issue its own search warrants. The issue of search warrants by an independent third party provides an important check to the powers of an investigator. The process of preparing evidence to support an application for a search warrant, presenting that evidence to an independent party and the qualifications which may be placed on a warrant having regard to issues identified by the issuing party all provide a moderating influence on the potentially zealous attitude of the investigator's concern.*
>
> *The conduct of a search is an aggressive act which can be extremely disturbing to those persons subjected to it. The protection offered by independent consideration of the need for a search warrant is of increased importance because of the speculative nature of ICAC's investigations. The fact that the Commission has chosen not to use the power adds weight to the suggestion that it may be deleted from the Act without adverse consequences."* [133]

5a.3.3 Michael Bersten had previously criticised the ability of the ICAC to issue its own search warrants. It was therefore not surprising that he submitted that the power should be deleted from the Act. When he appeared before the Committee on 12 October 1992 Mr Bersten was asked for his response to the ICAC's submission. He suggested that the extraordinary case cited as an appropriate time for the Commissioner to issue his own search warrant "is an example where an extreme case makes bad law".

> *"CHAIRMAN:*
>
> *Q: The Commission has provided a written submission this morning — so you would not have had an opportunity to see it — which says that the present Commissioner of ICAC 'has never issued a search warrant in the three and a half years of operation of the*

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132 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, p 9.

133 Law Society, Submission, 12 October 1992, p 9.

ICAC, even where search warrants have been required urgently. This is not to say that circumstances may not arise where it is appropriate.'?

A: *In that regard special circumstances could be, according to the media article provided to me by Quentin Dempster, that if ICAC was investigating a judge it could hardly expect to get a fair hearing before another judge to get a search warrant, but I assume that there is some suggestion that the judges would band together and close ranks. It is an extreme case. I am not sure that that would apply to the full run of search warrants that ICAC might seek to have.*

Q: *If the police were investigating a criminal matter that involved a judge, they would be in that situation?*

A: *Yes, they would be.*

Q: *We are dealing with a fairly extreme kind of case.?*

A: *Only where a judge is the subject of investigation. In all the other cases that ICAC has I do not see any problem going for it before a judge, so we are left with that one area that has been marked out. I would be inclined to suggest that that is an example where an extreme case makes bad law, where the extraordinary tightening up of the issue of search warrants might be justified in a very extreme case. If the Committee thought that to be a particular case that required a special provision in the Act, it could be appropriately amended to deal with that particular situation. Otherwise I think the powers of the Commissioner to issue his own search warrants lacks any justification."* [134]

5a.4 ***Conclusions***

5a.4.1 The Committee endorses the principle that judicial scrutiny should be applied to the exercise of coercive powers by the ICAC. The Committee endorses the policy decision adopted by the current Commissioner that all search warrants should be sought from judges. The Committee would hope that future Commissioners would also adopt this policy.

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134 Committee on the ICAC, Minutes of Evidence, 12 October 1992, p 23.

5a.4.2 However, the Commissioner has made out a case that in extraordinary circumstances the power for the Commissioner to issue his own search warrants could be an important investigative tool. Therefore, the Committee does not recommend any changes to the search warrants provisions in the Act.

5b ***CONTEMPT***

5b.1 ***Background***

5b.1.1 Part 10 of the ICAC Act sets out the provisions relating to contempt of the Commission. Section 98 sets out the nature of the actions which constitute contempt of the ICAC. Sections 99 and 100 provide for the means by which contempt is to be punished. Section 100 provides for the ICAC Commissioner to summon an alleged contemner to a hearing, where they must show cause why they should not be certified to the Supreme Court for contempt. Section 99 provides that once the Commissioner certifies a person for contempt the Supreme Court shall inquire into the alleged contempt, determine the matter and take steps for the punishment of the person.

"**PART 10 — CONTEMPT OF COMMISSION**

Definition

97 In this Part:

'offender' means a person guilty or alleged to be guilty of contempt of the Commission.

Contempt

98 A person who:

(a) having been served with a summons to attend before the Commission as a witness, fails to attend in obedience to the summons; or

(b) having been served with a summons to attend before the Commission, fails to produce any document or other thing in the person's custody or control that the person is required by the summons to produce; or

(c) being called or examined as a witness before the Commission, refuses to be sworn or to make affirmation or refuses or otherwise fails to answer any question put

to the person by the Commissioner or Assistant Commissioner; or

(d) wilfully threatens or insults:

(i) the Commissioner, an Assistant Commissioner or an officer of the commission; or

(ii) a legal practitioner appointed to assist the Commission as counsel; or

(iii) any witness or person summoned to attend before the Commission; or

(iv) a legal practitioner or other person authorised to appear before the Commission; or

(e) misbehaves himself or herself before the Commission; or

(f) interrupts the proceedings of the Commission; or

(g) obstructs or attempts to obstruct the Commission, the Commissioner, an Assistant Commissioner or a person acting under the authority of the Commission or the Commissioner in the exercise of any lawful function; or

(h) does any other thing that, if the Commission were a court of law having power to commit for contempt, would be contempt of that court; or

(i) publishes, or permits or allows to be published, any evidence given before the Commission or any of the contents of a document produced at a hearing which the Commission has ordered not to be published,

is guilty of contempt of the Commission.

Punishment of contempt

99(1) Any contempt of the Commission under section 98 may be punished in accordance with this section.

(2) The Commissioner may certify the contempt in writing to the Supreme Court.

(3) If the Commissioner certifies the contempt of a person to the Supreme Court:

(a) the Supreme Court shall thereupon inquire into the alleged contempt; and

(b) after hearing any witnesses who may be produced against or on behalf of the person charged with the contempt, and after hearing any statement that may be offered in defence, the Supreme Court (if satisfied that the person is guilty of the contempt) may punish or take steps for the punishment of the person in like manner and to the like extent as if the person had committed that contempt in or in relation to proceedings in the Supreme Court; and

(c) the provisions of the Supreme Court Act 1970 and the rules of courts of the Supreme Court shall, with any necessary adaptations, apply and extend accordingly.

(4) Such a certificate is prima facie evidence of the matters certified.

(5) Neither liability to be punished nor punishment under this section for contempt referred to in section 98(a) excuses the offender from attending before the Commission in obedience to the summons, and the Commissioner may enforce attendance by warrant.

(6) A person is not liable to punished under this section where the person establishes that there was a reasonable excuse for the act or omission concerned.

General provisions regarding contempt

100(1) In the case of any alleged contempt of the Commission, the Commissioner may summon the offender to appear before the Commission at a time and place named in the summons to show cause why the offender should not be dealt with under section 99 for the contempt.

(2) If the offender fails to attend before the Commission in obedience to the summons, and no reasonable excuse to the satisfaction of the Commissioner is offered for the failure, the Commissioner may, on proof of the service of the summons, issue a warrant to arrest the offender and bring the offender before the Commissioner to show cause why the offender should not be dealt with under section 99 for the contempt.

(3) If a contempt of the Commission is committed in the face or hearing of the Commission, no summons need be issued against the offender, but the offender may be taken into custody then and there by a member of the Police Force and called upon to show cause why the offender should not be dealt with under section 99 for the contempt.

(4) The Commissioner may issue a warrant to arrest the offender while the offender (whether or not already in custody under this section) is before the Commission and to bring the offender forthwith before the Supreme Court.

(5) The warrant is sufficient authority to detain the offender in a prison or elsewhere, pending the offender's being brought before the Supreme Court.

(6) The warrant shall be accompanied by either the instrument by which the Commissioner certifies the contempt to the Supreme Court or a written statement setting out the details of the alleged contempt.

(7) The Commissioner may revoke the warrant at any time before the offender is brought before the Supreme Court.

(8) When the offender is brought before the Supreme Court, the Court may, pending determination of the matter, direct that the offender be kept in such custody as the Court may determine or direct that the offender be released.

Act or omission that is both an offence and contempt

101(1) An act or omission may be punished as a contempt of the Commission even though it could be punished as an offence.

(2) An act or omission may be punished as an offence even though it could be punished as a contempt of the Commission.

(3) If an act or omission constitutes both an offence and a contempt of the Commission, the offender is not liable to be punished twice."

5b.1.2 The contempt provisions of the Act received considerable criticism at the time the first ICAC bill was debated in Parliament.

> *"The legal profession has been quite justifiably incensed by the contempt powers of the commission contained in part 10 of the bill. This part treats the commission as if it were a court. It is to be no more a court than the New South Wales Police Force or the Corporate Affairs Commission. It is to be an investigating body.*
>
> *Clause 98(e) and (i) seek to create the new crime of criticism of the commission not limited to its hearing functions. Citizens can criticise judges and their decisions and even the Governor, and not be gaoled. They will, however, not be allowed even to tell the truth about this commission. As the Council for Civil Liberties points out, this clause is modelled on the South African Police Act which prohibits criticism of police under penalty of gaol. This is the way the administration of justice in New South Wales is headed."* [135]
>
> *"Any member of this Parliament who dares to criticise the workings of the commission will run the risk of being in contempt of the commission, under the provisions of clause 98(e). What the New South Wales Council for Civil Liberties has to say about clause 98(e) provides an interesting comparison of this clause with section 27B(1) of the South African Police Act 1958, which the council points out was used to arrest Archbishop Hurley for revealing police misconduct in Namibia. The council stated:*
>
> > 'Clause 98(e) of ICAC Bill makes it a criminal offence to use words that are false and defamatory to ICAC, the Commissioner or Assistant Commissioner. It is not a defence that the publisher believed that the words were true. The only defence is where the publisher establishes that there was a reasonable excuse, a concept which is not defined. The onus is upon the publisher to establish this defence. The penalty is imprisonment for an unlimited number of years.'
>
> *Who will be game to criticise the workings of this commission when such draconian provisions are in the bill. All the while people who criticise will be in fear of being dealt with for contempt of the commission for making a statement about a commissioner or the commission that is*

135 Parliamentary Debates (Hansard), Legislative Council, 08 June 1988, p 1692.

false or defamatory, particularly when the obligation will be upon the person making the statement to establish his or her innocence of the contempt charged. Any member of Parliament who criticises this commission, even this Parliament, may be dragged before the commission." [136]

"The clearest attack on freedom of speech comes in Section 98(e) which makes it an offence to write or make false or defamatory statements about the commission.

The onus is on the defendant to show the statements are true which may be impossible if a report relies on sources inside the commission itself.

While the Queensland Royal Commission Act and a South African Police Act can be cited as examples of Acts with similar provisions, this section runs against the drift of Australian court decisions and law reform commissions reports on contempt.

As the Australian Law Reform Commission report on contempt found, 'when a royal commission is investigating matters of considerable public importance and interest, the public should not be inhibited from debating them openly'.

Recent reports of bungling by the NCA show just how important it is for public criticism to continue.

As police task forces investigating corruption in NSW have found repeatedly, the privileged and powerful do not make a habit of confessing. The power to seize documents and to force answers are needed if the attack on corrupt conduct is a serious one. But, to protect a body with such robust powers from criticism adds considerably to the inherent dangers presented by any powerful State tool.

The Greiner Government is debating whether to repeal this section. Those interested in freedom of the press should urge them to do so." [137]

5b.1.3 It should be pointed that some of the concerns expressed during the Parliamentary debates on the first ICAC bill quoted above were addressed in subsequent

136 Parliamentary Debates (Hansard), Legislative Council, 08 June 1988, p 1699.

137 Wendy Bacon, "It is important for public criticisms to continue", The Australian Financial Review, 05 July 1988.

amendments. Section 98(e) was replaced and section 122 was added to specifically provide that nothing in the Act could encroach upon the privileges of Parliament "in relation to the freedom of speech, and debates and proceedings, in Parliament".

5b.1.4 The former Committee considered the contempt issue in its Inquiry into Commission Procedures and the Rights of Witnesses. The Committee received evidence from Doug Moppett who had been the subject of contempt proceedings and a response was sought from the Commission. The Committee identified the contempt issue as one which required further work before any recommendations for legislative change could be recommended.

> *"The contempt issue is one which requires further consideration before any legislative change could be recommended.*
>
> *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'."* [138]

5b.2 ***Exercise of the power to date***

5b.2.1 To date the ICAC has exercised its contempt powers on two occasions. In the first instance a witness who refused to answer questions at a hearing during the inquiry into Driver Licensing was certified for contempt and dealt with by the Supreme Court. He received a $500 fine. In the second case, the State Chairman of the NSW National Party, Mr Doug Moppett, issued a media statement which criticised the conduct of the North Coast inquiry. Mr Moppett was summoned to attend a "show cause" hearing. He was subsequently certified for contempt of the Commission.

> *"I certify that on 16 and 17 November 1989 Mr Moppett did commit a contempt of the Commission pursuant to section 98(h) of the Independent Commission Against Corruption Act 1988 in that he made publications calculated to i) lower the authority and standing of the Commission in the eyes of the public; ii) reduce the confidence of the public in the Commission's reports to the Parliament; and iii) cause misgivings about the impartiality brought by the Commission to the*

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138 Committee on the ICAC, Inquiry into Commission Procedures and the Rights of Witnesses - Second Report, February 1991, p 140.

exercise of its functions." [139]

The matter was set down for a hearing before the Supreme Court. However, before it was to be heard, Mr Moppett made a statement in which he apologised for his media statement. The ICAC accepted Mr Moppett's apology and costs were awarded against Mr Moppett.

5b.3 ***Submissions***

5b.3.1 A small number of submissions addressed the ICAC's contempt powers. The Law Society submitted that the word "insults" should be deleted from s.98(d) and suggested that the criminal and defamation laws provided the ICAC with sufficient powers to deal with strident criticism.

> *"The words 'or insults' should be deleted from subsection 98(d) and subsections 98(c), (f) and (h) should also be deleted. The words 'or insults' should be deleted from subsection 98(d) because to the extent that the Commission requires protection in this regard the criminal law will apply. The words provide the Commission with the power to deal with strident criticism as contempt whereas sufficient power resides in the criminal and defamation laws. Subsections 98(e) and (f) are too wide and vague. Similarly, subsection (h) provides the Commission with power to cite the contempt greater than is reasonably required.*
>
> *All the practical power required by the Commissioner to ensure that it can conduct an investigation is granted by subsection (g)."* [140]

5b.3.2 Similarly Michael Bersten suggested that the ICAC did not require the use of contempt powers to deal with criticism. He stated that the Commission should respond to criticism by way of rebuttal.

> *"On the contempt power first, my opinion is that the ICAC does not require a power to be able to bring a person before a court for contempt because of comments they make outside the ICAC. The ICAC is big enough and ugly enough to be able to handle that by an appropriate rebuttal which can be recorded in the media, and I think the answer there is for the ICAC to exercise its own powers of speech in response to that. I do not think it needs it to protect itself. I have framed my answer in that way because I am not dealing with other types of*

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139 Ian Temby QC, Certificate under s.99(2) of the ICAC Act, 29 December 1989.

140 Law Society, Submission, 12 October 1992, pp 9-10.

> *contempt which might arise such as contempt in the face of the ICAC including powers to prevent people from interfering with its processes by things they might do to scandalise it or to interfere with its investigation. We are dealing with the question of what people say. I think the ICAC does not need that power and I cannot see any just reason for retaining it."* [141]

Mr Bersten also drew attention to the High Court's recent decision in the Nationwide News case.[142] Mr Bersten suggested that this case established the principle that it was inappropriate for contempt provisions to be provided for statutory bodies to deal with criticism.

> *"The Committee might be aware of a court decision in a nation-wide news case; the media reports have been quite widespread.*
>
> *The case, as the Committee might be aware, concerns the legislative power of the Commonwealth Parliament to legislate to enact contempt provisions in connection with statutory bodies, and the High Court found that the Commonwealth Parliament lacks that legislative power. That of course would interfere with the system of representative government, and accordingly contempt provisions of the type in which they are involved is one which created a criminal offence by which a journalist was charged for making comments which it thought to be in contempt of the Industrial Relations Commission. That particular provision has been struck down.*
>
> *I am not suggesting that that particular decision has any legal bearing on the New South Wales legislative powers, but I would suggest that the political principle which has been established by the High Court is something at least to be borne in mind, as it is focused rather sharply. In this country the question of freedom of speech and freedom of expression might be affected by contempt powers."* [143]

5b.3.3 On the other hand The Hon Ernie Knoblanche QC submitted that the ICAC's contempt provisions should be retained. He said that contempt provisions were a valuable tool in controlling proceedings. He also said that, under the current provisions, fair criticism of the ICAC does not constitute contempt.

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141 Committee on the ICAC, Minutes of Evidence, 12 October 1992, pp 22-23.

142 *Nationwide News Pty Ltd vs Andrew Garry Wills*, High Court, unreported, 30 September 1992.

143 Committee on the ICAC, Minutes of Evidence, 12 October 1992, pp 21-22.

> *"Fair criticism which is not insulting and not calculated to wrongfully reduce public confidence or trust in the Commission is not contempt....*
>
> *It is my submission that power in the Commission to bring a contemner before a court of competent jurisdiction to account for his alleged contempt and to suffer the sanction which lawfully may be imposed by that court, if he his proved to be guilty of the contempt, is a very valuable adjunct to ensuring quiet, even and controlled hearings of the Commission. It can also be used for protection of those who come to the Commission or are involved in the exercise of a lawful function under the authority of the Commission.*
>
> *It is my submission that the provisions of the Act in respect of contempt are valuable and should be retained."* [144]

5b.4 ***The Hon Athol Moffitt QC, CMG***

5b.4.1 Thoughtful and considered evidence was presented to the Committee on the contempt issue by the Hon Athol Moffitt QC, CMG. Mr Moffitt made a lengthy oral submission on this issue when he appeared before the Committee on 26 October 1992. Mr Moffitt began by identifying three fundamental questions that had to be addressed in relation to the contempt issue. He stated that it was essential that nothing be done or be seen to be done which would suppress or discourage criticism of a body such as the ICAC.

> *"The first fundamental question is whether the freedom of people to criticise administrative bodies should be curtailed by the exercise, or even the possible exercise or the mere existence of an unspecified contempt power such as s.98(h) provides.*
>
> *The second is whether the right to criticise ICAC or its structure, which is so novel and so powerful, should be suppressed either directly or indirectly.*
>
> *The third is, assuming there is to be some general contempt power such as s.98(h), whether ICAC should, by virtue of s.100, be the one to exercise the power and make findings of contempt. Should it have a power which enables it to compel its critics to appear before it and publicly justify their criticism, on pain of being publicly pronounced guilty of contempt, in a proceeding of which one officer of ICAC is the prosecutor and another the Judge? That is a very serious question.*

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144 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, pp 9-10.

It is, I suggest, no answer that the power has been or will rarely be used. The mere existence of a power and its use already with great publicity against one critic, is a powerful deterrent with the prospect of expensive proceedings and a doubtful outcome, in which he is put into the public witness box before two ICAC officers, and then is offered a chance to withdraw the criticism or pain of being found guilty of contempt, and then sent up to the Supreme Court to be punished.

I suggest the mere existence, particularly in view of what has happened on one occasion, makes it a very real question. How dare anybody, not quite knowing what his criticism will result in, offer any criticism, even a general criticism or out of frustration say something about ICAC's finding against him?

I make this general comment. It is important that nothing be done, or be seen to be done,, to suppress or discourage, or not to be given the opportunity, criticism which may be right or wrong, about the structure or performance of so powerful body as ICAC. It can only survive if it stands on its own feet by the soundness of its structure and performance. Citizens must be free to say ICAC should be abolished, if they want to, or do so in strident terms, or that decisions are unfair or that cases selected are one sided. Compared with the traditional silence of judges, ICAC is free to make public replies, as the Commissioner has not hesitated to do, and, in fact, did in the Moppett case immediately after Mr Moppett's press release and even before the s.100 proceedings were commenced.

In my view s.100 should be repealed and s.99 redrawn. To accommodate this repeal, there would have to be some provisions substituted. There may need, with the repeal of s.100, to give ICAC some power concerning unacceptable but specified conduct in the face of the inquiry, as distinct from newspaper comments or comments made outside. S.98(h) should be repealed and replaced with some specific powers.

It is difficult and productive of great uncertainty to endeavour to transpose to an administrative body, particularly an investigative one, the concept of contempt worked out at common law in relation to the unacceptable interference with the administration of justice, particularly in the field of what is known as scandalising. Unless kept under a tight rein, it can easily degenerate into suppressing criticism. To give an administrative body such a task, that's of itself dealing with this question, a task which is confusing of itself, inevitably will produce uncertainty and error and arguably it has already. There needs to be

debate on this issue in the light of modern law, and there is a whole lot of learning of modern law in this field, and many comments on the right to criticise.

In my view criticism of ICAC functions and their exercise should never provide the basis for inquiry into those criticisms leading to the possible imposition of quasi criminal penalty, which could include imprisonment. The DPP, on its own initiative, could have some lesser power properly defined in relation to insults and malicious comments." [145]

5b.4.2 Mr Moffitt then went on to present a brief analysis of the Moppett contempt case. He argued that what Mr Moppett was certified by the ICAC for saying was actually valid criticism of the conduct of the ICAC's North Coast inquiry.

"I think it may also be relevant to such a consideration of the contempt power, to look at the exercise of s.100 and for this Committee to examine what occurred in the exercise of s.100 in the Moppett case and the ICAC statement. Consideration should be given to its reference to its possible exercise in the case of the Alan Jones' criticism of the public release of the Metherell diary. A similar course of examination was taken by this Committee in the Preston case. The Committee may well find that there was an unjustified reliance or use of s.100 in each case. I suggest it will appear that the substance of what Moppett and Jones were respectively saying was a valid criticism or, at least, one they were entitled to make concerning ICAC power or its exercise. In one Moppett was led to withdraw his criticism which originally he declined to do and in the other for Jones to be silent.

Almost all the matters of criticism by Moppett in his press release, if examined, will be seen to be the very matters which this Committee later anxiously examined. The substance of his primary criticism which was directed to ICAC's counsel's final submissions was not only justified, but by the inquiry of this Committee, has been rectified. This major criticism, in effect, concerned the unfairness concerning the ICAC final submissions being in public and there being delay until opposing counsel could reply and delay in ICAC issuing its findings. In the meantime the ICAC submissions imputed the truth of what was alleged and were treated as preliminary ICAC findings - those were the words used by Moppett. This is what, in fact, happened. Submissions by ICAC are treated by the press as ICAC preliminary findings. There were, in fact, over two weeks before opposing counsel were given an opportunity to

145 Committee on the ICAC, Minutes of Evidence, 26 October 1992, pp 43-44.

reply. To remedy this Moppett made his own reply which, admittedly, was in somewhat positive terms.

I raised this very type of problem in the discussion which was had on the issues paper prepared by me for this Committee in 1990. I criticised the lack of use of the suppression power and what I referred to as the "day one" problem, based on what had been said in the Salmon Report. Following discussion on that paper ICAC, in fact, changed its practise, so now a temporary suppression order is placed on counsel's closing submissions pending the release of the report, as was done in the Metherell inquiry. This was expressly done for the very reason given by Moppett.

The assertion by Moppett that the inquiry was one sided, so one political party is exposed to adverse publicity for five months was also examined by this Committee and it did appear that at that inquiry ICAC did concentrate on one or two parties to a greater degree than the other. This was explained by one party producing its party donation documents while the other had its documents out of the jurisdiction and did not produce them.

The Committee may wish to consider some matters to which I suggest call for consideration. I won't say anything further in respect of the Moppett proceedings but you may wish to look at the findings in the certificate issued under s.100 by ICAC. The view is open that what was found contempt, in law wasn't contempt at all. I don't want to go any further in that except to suggest that if this issue of contempt comes to be looked at, separately, the Committee may feel that it may wish to look at what has happened in respect of the exercise in one case, or the indication that it would be considered in the other. In one case it led to the critic withdrawing his criticism which was later rectified by ICAC itself and in the other case, with Jones making no further comment.

I can only say what I have said before that I think this is a most critical matter concerning ICAC. It is on the fringe of the general matters being considered and I think it deserves separate treatment." [146]

5b.4.3 Finally, Mr Moffitt suggested that the issue of contempt was too large for the Committee to deal with as one segment of the Review of the ICAC Act. He suggested that a separate inquiry be held by the Committee which focussed on the contempt issue and enabled all the necessary material to be carefully reviewed.

146 ibid, pp 45-47.

> *"The issues to which I have referred are of sufficient importance and complexity to be dealt with separately from the present general review of the Act. I suggest there should be a separate and detailed discussion paper followed by an inquiry of some kind in which the legal profession, civil liberties groups, the media, the Press Council and others including those who may wish to criticise, to be invited to make submissions. Such a discussion paper could, and as I suggest should, extend to the prior exercise and use of s.100 by ICAC....*
>
> *Reference will need to be made to comparative legislation such as the Australian Royal Commission Act and the National Crimes Authority Act in neither of which is there an equivalent of s.100. For example, under the NCA Act the only action that can be taken has to be on the entire initiative of the Australian DPP. In other words, the question of criticism is left entirely to the authority which has created the body, not the body which may use it to protect itself from criticism."* [147]

5b.5 ***ICAC Position***

5b.5.1 The ICAC submission dealt with the issue of contempt briefly. The submission pointed out that the ICAC's power in relation to contempt is limited to certifying the contempt and that the ultimate determination in relation to any alleged contempt is made by the Supreme Court.

> *"The Commission has only used its contempt powers twice in three and a half years of operation. The first was in relation to a witness in a hearing who repeatedly refused to answer a question which was not only relevant, but fundamental, to the investigation. The second was in relation to publications which were obviously calculated to lower the authority and standing of the Commission, reduce the confidence of the public in a forthcoming Report of the Commission and cause misgivings about the impartiality brought by the Commission to the exercise of its functions. The extremely limited use of the power could not be considered excessive.*
>
> *The Commission has never used, and does not use, its contempt power to protect itself from criticism. There has been much critical comment published about the Commission to which the Commission has not responded, at all, let alone by resort to its power to certify contempt.*

147 ibid, pp 44-45.

It must be remembered that the Commission's power in respect of contempt extends only to certifying the contempt to the Supreme Court. It is for the Supreme Court to examine and determine these allegations. The Commission submits that this supervision of the Commission's power gives sufficient protection against inappropriate use of the power." [148]

5b.5.2 When Mr Temby appeared before the Committee on 09 November 1992 he again emphasised the role of the courts in determining any contempt proceeding. He said that the risk of criticism from the courts represented a restraint against any potential for abuse of the power. He also referred to the Nationwide News case highlighted by Mr Bersten.

> *"A: The position is the same so far as the contempt power is concerned. I have mentioned the figures. It needs to be stressed that we do not punish for contempt; we cannot punish for contempt; we have to go to court. If we go to court in inappropriate circumstances, we will lose. The court will throw us out and no doubt then we would come under criticism from this Committee. In that way it is self-rectifying. The sort of restraint that is in any event appropriate and has been exercised has to continue to be the position, because otherwise the Commission of the day will be hit for a six. There is just no cause for changing it, because abuse is bound not to occur. If it does occur, the courts will throw us out, we will be chastened and the lesson will be learned. Two contempt citations in three and a half years, one of which was not proceeded with because the alleged contemnor was prepared at court to make a statement and we were prepared to accept it, is a very modest record.*
>
> ***Mr GAUDRY:***
>
> ***Q:*** *There is an argument that it acts to suppress, its very existence.*
>
> ***A:*** *Suppress criticism?*
>
> ***Q:*** *Suppress criticism which might be justified and which might be in the public interest.*
>
> ***A:*** *I have not observed that and I do think that those who say that are speaking with remarkably forked tongues, because most of*

148 ICAC, Submission, 12 October 1992, pp 32-33.

those who say it so contend and then immediately go on and criticise. So they are begging us to treat them as martyrs and we courteously decline the invitation. You would be aware that we have come under most stinging criticism, and so far as it is aimed at reports I do not mind; it is a good thing. You would wish for a bit more temperance on occasions, but we are prepared to accept the intemperate. So long as it is aimed at our functions I do not mind. Even some of the things that are said by Mr Patrick Fair from the Law Society have been so far wide of the mark it is absurd. But let them be said. That is part of democratic debate. But there are other things which are rightly punishable as contempt. One hopes the occasion will not arise, but if somebody behaves in a manner that is going to flagrantly undermine a current investigation—a possibility that cannot be ignored with respect to the one we are commencing a week today—you have to be able to take steps. I do not want to keep repeating myself, but we say that we can stand on our track record and even if there is doubt as to that, if we overstep the mark we will lose and that will teach us a lesson.

Q: *How broad is the provision under section 98(h) that is available to you?*

A: *I do not know if you are aware of the decision of the High Court in the Nationwide News case, which was fairly recent. That decision struck down the provision in the Industrial Commission, Federal industrial legislation which it was said went too far because it struck at any abusive criticism of the Commission, even if truthfully based. It was said that that went beyond the legislative head of power in the Constitution. I am informed that a provision which is, in effect and probably in terms, identical to section 98(h) has just been substituted for that, which is seen as being an appropriate reach. There is a lot of law as to how far one can go in criticism of courts. To summarise, there is no need to express oneself in temperate language; the intemperate is permissible. There is no need even to be precisely accurate in all that one says. The contempt laws are not to be equated with defamation laws. I cannot bring the cases to mind but I could give you examples of quite stinging rebukes of those who have brought contempt proceedings too lightly, based upon the proposition that in a democracy vigorous debate, which may have as a component criticism, is a good thing. I do not have difficulty with that; but even if I did have, I would have to cop it.*

Q: *Your reading of that would not prevent acrimonious criticism of yourself or the Commission, so long as it did not in some way impact upon a present inquiry?*

A: *I would not want to quite limit myself so far, because as soon as you limit yourself in that way you find after the event that you can think of an exceptional case that does not quite come within that category. I certainly see the contempt power as being of much greater significance with respect to conduct which interferes with a current inquiry than that which relates to the past. I have said repeatedly that the time for criticism is after the report has been published; do not pre-empt it."* [149]

5b.6 ***Conclusions***

5b.6.1 The Committee endorses the principle that nothing should be done which suppresses or discourages constructive criticism of the ICAC. However, it is essential that the ICAC have available to it all the means necessary to maintain proper control over investigations and hearings. The ability to take action against contempt in the face of the Commission is an essential tool to this end.

5b.6.2 The Committee does not recommend any legislative changes to the contempt provisions in the ICAC Act.

5b.6.3 The Committee recommends that the Attorney General establish an inquiry into the contempt provisions which operate in the Courts and other tribunals, including the ICAC, with a view to ensuring consistency across the range of bodies which have contempt powers.

[149] Committee on the ICAC, Minutes of Evidence, 09 November 1992, pp 70-72.

-6- *FOLLOW UP ACTION ON ICAC REPORTS*

6.1 ***Background***

6.1.1 Since its establishment in March 1989 the ICAC has produced 25 public reports on investigations and 6 public reports on corruption prevention projects. Many of these reports are very substantial both in terms of size and significance. They have included recommendations for changes to legislation, and administrative systems and procedures. The investigative reports have also included recommendations that consideration be given to prosecution or the taking of other action against individuals.

6.1.2 In his 'Report on Unauthorised Release of Government Information', the Hon Adrian Roden QC drew attention to what he saw as the lack of action which had been taken on recommendations contained in his earlier report on North Coast Land Development. He referred to recommendations that he had made for reforms to the law in relation to bribery and corruption, and false pretences, and to the election funding laws. Mr Roden expressed disappointment about what he saw as a lack of action on these recommendations.

> *"One benefit of Commission investigations and Reports, is that they can highlight general issues touching integrity in the public sector. Those issues can be more important than the particular facts and circumstances that bring them to light. The investigations and Reports would be of more value, I believe, if there was more serious debate about the issues they raise, and less preoccupation with the individuals whose conduct was under consideration. The community may feel it is entitled to look to the Parliament for leadership in that regard.*
>
> *And what of the recommended changes to the law? Nobody expects a government to agree with every recommendation of every Commission it establishes. But when an anti-corruption Commission expresses the view that the law relating to bribery and corruption in the public sector is in urgent need of review, it should not be too much to expect that after two years the recommendations would have been acted upon or rejected, or*

at least debated.

In the 1990 call for review of the law relating to official corruption, I pointed to the need to consider exchange of favours, as well as the more obvious and well understood traditional form of bribery. That recommendation was apparently given a comfortable home on a shelf. Now, 'impropriety', as a lesser form of wrongdoing than corruption, has become a live issue because of events which occurred while the uncertainty in the law remained; the very uncertainty to which attention had been drawn." [150]

6.1.3 It should be pointed out that, since the release of the 'Report on Unauthorised Release of Government Information', there has been considerable activity in relation to two of the matters raised by Mr Roden. In September 1992 the Joint Select Committee upon the Process and Funding of the Electoral System tabled its Second Report. This report ran to over 500 pages and was the result of over two years detailed research. The report sought to address a number of the concerns raised by Mr Roden in his North Coast Report about political donations. Then in December 1992 the Attorney General's Department and the Cabinet Office jointly issued a Discussion Paper on Reform to the Criminal Law Relating to Official Corruption, Bribery and Extortion. This Discussion Paper was also the result of a considerable amount of work and included draft legislation.

6.2 ***Committee Proposal***

6.2.1 The Committee's Discussion Paper of September 1992 noted that Parliament must retain the right to consider, debate and at times ultimately reject ICAC recommendations for legislative change. Similarly the Government must retain the right to consider and at times reject ICAC recommendations for changes to management practices or administrative procedures. However, the Committee suggested that where this takes place it would be reasonable for there to be a statement of the reasons for the decision to reject the ICAC's recommendations. The Committee called for submissions on a proposal for the ICAC Act to be amended to include a requirement that would require the relevant Minister to inform Parliament of his/her response to any ICAC report concerning his/her administration. The Committee suggested that six calendar months would be an appropriate time frame for such a response.

6.2.2 The Committee has noted that such a requirement operates in respect of Committee reports in a number of Parliaments. The procedures of the NSW

150 ICAC, Report on Unauthorised Release of Government Information, August 1992, pp 215-216.

Legislative Council provide for reports of the Legislative Council's two standing committees to be responded to by the relevant Minister within six months of tabling. Legislation concerning Victorian Parliamentary Committees contains a similar requirement, as do the procedures of the Commonwealth Parliament. Recently the Queensland Parliamentary Criminal Justice Committee has called for the standing orders of the Queensland Parliament to be amended to ensure that its reports are responded to by the Government.

6.3 ***Submissions***

6.3.1 A small number of submissions received by the Committee addressed this issue. Most were supportive of the Committee's proposal. The Hon Athol Moffitt QC, CMG, stated that,

> *"I fully support what is said in the Discussion Paper. As I pointed out in A Quarter to Midnight and since, there is a need to have some positive follow-up mechanism formally to bring to attention, until dealt with, the many recommendations of Royal Commissions into organised crime, otherwise left to gather dust. It may also be noted that in respect of a particular ICAC function I made a suggestion in conformity with that proposed in the issue (see p.26 of my submission)."* [151]

As mentioned above Mr Moffitt had drawn attention to the problem of Government inaction on Royal Commission reports in his book A Quarter to Midnight. Having outlined the recommendations for reform and the calls to urgent action against organised crime made by various Royal Commissioners during the 1970's and 1980's, Mr Moffitt stated that,

> *"In 1985 to the time of my writing, little has been done towards implementing the Costigan recommendations. Despite the urgent need for positive action, all the indications are that Governments lack 'the courage to take bold initiatives' and will be 'deflected from this course by pressures' relating to matters of convenience...."* [152]

6.3.2 In the context of this issue, Mr Moffitt put forward an important suggestion in his first submission, dated 02 October 1992. Mr Moffitt stated that the ICAC had an essential role to play in terms of identifying laws and practices which required reform in order to prevent corruption in the future. In recognition of this role Mr Moffitt proposed that the ICAC Act should be amended to give the ICAC an

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151 The Hon Athol Moffitt QC, CMG, Submission, 26 October 1992, p 7.

152 The Hon Athol Moffitt QC, CMG, A Quarter to Midnight, Angus and Robertson, Sydney, 1985, p 24.

express function to recommend changes in existing laws and standards that it considers to be in the public interest. This would be combined with a requirement for agencies to respond to such recommendations within a specified time frame.

> *"I believe it would be of public importance that the amendments to the Act be accompanied by ICAC being given a power and express function to recommend (at its option in general or specific terms) such changes in the existing laws and standards as it considers to be in the public interest. This could be done by an addition to s.13. It could follow the pattern of s.13 (1)(d), but it would be important that it be made a separate function. I would favour this being also made a duty in the case of any report to Parliament. That could be done by amending s.74A.*
>
> *To render the exposure and recommendation function more effective, I would favour there being an obligation of the authority, parliamentary or otherwise, to which the recommendation is directed, to implement within a specified time (which could be extended) the recommendation and report on so doing to the ICAC, and in the event of a recommendation not being followed in whole or part, to give detailed reasons for that. In addition, ICAC should report to Parliament, at specified times, setting out the recommendations made and the reports to ICAC including those by Parliament and including the commentary of ICAC thereon, such reports to be tabled in Parliament."* [153]

6.3.3 The Hon Ernie Knoblanche QC, expressed support for the Committee's proposal in his submission. He also put forward an interesting additional proposal, that where an ICAC report has contained a recommendation for prosecution, disciplinary or dismissal action against an individual, those proceedings should be commenced within six months or be forever stayed. Mr Knoblanche elaborated on this proposal when he appeared before the Committee on 26 October 1992.

> *"... That [proposal] recognises this, that if a body of the standing and strength of the ICAC reports that consideration should be given to the prosecution of X, for a criminal offence or for a disciplinary offence, that is in the press, and it is spread about. In fact, I heard on my car radio, only a couple of days ago, a private inquiry agent saying a recommendation had been made in respect of him, so he was not going to have anything to say until the proceedings (if they were going to come) had come. It seems to me a great burden to carry for the rest of your life, a recommendation that you be prosecuted, and that*

153 The Hon Athol Moffitt QC, CMG, Submission, 02 October 1992, p 27.

prosecution does not occur.

Here at the heart of the law of New South Wales it is dangerous to say, I suppose, that the recommendation could be lost, or be under the too hard bundle in the bottom drawer somewhere, and so I make that suggestion with a view to limiting or terminating what I see as an injustice. That is, a man or woman recommended by a responsible body, much respected, to be considered for prosecution, and the prosecution hangs there over their head forever.

I would submit that fairness and justice requires that that be brought to an end within a reasonable time, and the figure off the top of my head of six months was just put there. It could be longer. There is power for the Attorney-General to extend it. I did not put it in my paper, but I would support the requirement by regulations, or amendment to the Act, that after the elapsing of the statutory time the citizen so affected could make an application to the DPP or Attorney-General, or ICAC for a certificate that the recommendation had been considered and he was not going to be prosecuted." [154]

6.3.4 The ICAC was asked for a response to Mr Knoblanche's proposal. The ICAC indicated that six months may not be a sufficient time frame for prosecution action to commence. The ICAC would have to reinvestigate the matter and assemble the evidence in admissible form, the DPP would have to consider the evidence and proceedings would have to be commenced. The ICAC suggested that the Committee should seek the DPP's views on Mr Knoblanche's proposed time frame.

6.4 ***ICAC Position***

6.4.1 The ICAC's submission put the view that follow up action on its reports was necessary if its work was to be effective. The submission also noted that, as a long-term body, the ICAC had a role to play in following up its own recommendations.

> *"Follow up action on recommendations is necessary, if the ICAC's work is to be effective. The Committee has made the important point that many recommendations of Royal Commissions and Commissions of Inquiry have not been acted on. As those bodies have no life after the report is brought down, there is not always an incentive to implement recommendations, except where the relevant Minister and/or authority have the will to do so.*

154 Committee on the ICAC, Minutes of Evidence, 26 October 1992, p.9

> *The ICAC's Report on Investigation into Driver Licensing demonstrated how the lack of proper response to the Lewer Inquiry, which found serious deficiencies in the driver licensing and vehicle registration systems, not only meant that the deficiencies were not addressed, but would have encouraged the corrupt in their practices,and discouraged those who knew of such practices from interfering.*
>
> *The ICAC is a long-term body and has a role in following up its recommendations. However, the ultimate responsibility for taking corrective action lies with governments and their agencies, whether State or Local. The Commission agrees that Parliament must retain the right to consider, debate and at times reject ICAC recommendations for legislative change, as must Government, with respect to recommendations for change to systems and procedures."* [155]

6.4.2 The ICAC's submission went on to delineate between different sorts of recommendations contained in its reports. The submission then went on to argue that different methods of following up recommendations were appropriate depending upon the type of recommendation involved. The submission suggested that reporting to Parliament would not be appropriate in relation to some recommendations. The different categories identified in the submission are set out below:

Legislation - Recommendations for changes in legislation are contained in investigative reports and are directed to the Parliament and Government. Reporting back to Parliament would be appropriate.

Broad Principles in Administrative Systems - Recommendations for changes in administrative systems are contained in investigative reports and are directed at all public sector agencies. Responsibility for implementation lies with central agencies. "The issues are administrative, and reporting to Parliament may not be appropriate."

Detailed changes to Systems and Procedures - Recommendations for changes to systems and procedures in particular agencies are contained in corruption prevention reports. Responsibility for follow up lies with the ICAC's Corruption Prevention Department.

Prosecution - Recommendations that consideration be given to prosecution are contained in investigative reports and are directed to the DPP.

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155 ICAC, Submission, 12 October 1992, pp 34-35.

> *"[T]he timeliness of prosecution action and the resources required to achieve timely action may be a suitable matter for the Committee to consider. The Committee may wish to request reports from the DPP on prosecution actions arising from ICAC recommendations. Generally, this could be done on a periodic basis, however, it might be appropriate to seek special reports in relation to investigations which make recommendations for consideration of a large number of prosecutions (eg Unauthorised Release of Government Information)."*

Disciplinary action or Dismissal - Recommendations for consideration of disciplinary action or dismissal are contained in investigative reports and are directed to the heads of agencies.

> *"There will always be many factors to consider which may make an alternative option appropriate in the particular circumstances. Those are matters for the particular agency. Neither the agency or the relevant Minister should be required to report to the Committee or to Parliament regarding action on this type of recommendation. However, the Commission wishes to be informed of the outcome of considerations of its opinions, a requirement that the relevant authorities so inform the Commission would be appropriate."* [156]

6.4.3 Mr Temby was questioned about this issue when he appeared before the Committee on 09 November 1992. The Chairman asked whether the ICAC accepted the principle that when an ICAC report to Parliament contains recommendations, whether for changes to legislation or for prosecutions, it is the Parliament which should be informed of any follow up action on those recommendations. Mr Temby stated that the principle was "clear enough". [157]

6.5 ***Committee's Role - s.64(1)(c)***

6.5.1 Section 64(1)(c) provides that one of the functions of the Committee is "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". To date the Committee has not exercised this function in any formal way. However, during the six-monthly public hearings with the Commissioner on General Aspects of the Commission's Operations which are held in October or November, there are always a number of questions asked about the annual report which has been tabled shortly before. In this way the Committee pursues issues of interest arising from those

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156 ibid, pp 35-39.

157 Committee on the ICAC, Minutes of Evidence, 09 November 1992, p 67.

annual reports. It should also be pointed out the Committee is conducting an inquiry into Pecuniary Interest Provisions and a Code of Conduct for MP's. To some extent this inquiry has arisen from the ICAC's Report on Neal and Mochalski and the Committee has certainly been examining that report during the course of that inquiry.

6.5.2 The Committee drew attention to its responsibility under s.64(1)(c) in its Discussion Paper of September 1992. Mr Roden commented on this in his submission.

> *"The discussion paper reflects an appreciation of the role that Parliament can and should play in seeing that matters raised in ICAC Reports are properly considered. By its reference to the provisions of section 64(1)(c) of the Act, the Committee indicates an appreciation of its own responsibility. That is pleasing."* [158]

6.5.3 When Mr Temby appeared before the Committee on 09 November 1992 he encouraged the Committee to pursue its functions under s.64(1)(c). Mr Temby said that the Committee could play a useful role under s.64(1)(c) in partnership with the Commission, in following up and encouraging greater action on ICAC recommendations. Mr Temby suggested that for the Committee to play such a role would send a powerful signal throughout the public sector that the Parliament was behind the ICAC's recommendations and that they must be taken seriously.

6.5.4 The Queensland Parliamentary Criminal Justice Committee (PCJC) has an identical function under s.4.8(c) of the CJ Act to examine and report on CJC reports. The Queensland Committee has pursued this function with vigour, particularly in relation to CJC reports on broad areas of criminal law reform. In these matters a procedure has been established in which the CJC prepares a detailed report setting out the options for reform. The PCJC has then conducted its own inquiry on the issue and prepared a report for Parliament.

6.5.5 The Parliamentary Joint Committee on the National Crime Authority has a similar but more limited function under s.55(1)(c) of the NCA Act. This section requires the NCA Committee to examine and report on NCA Annual Reports. The NCA Committee has done this on three occasions. In each case a brief report has been prepared and tabled in Parliament.

6.6 ***Conclusions***

6.6.1 If the ICAC is to have a long term effect upon corruption in NSW it is essential that its recommendations be acted upon and followed up.

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158 The Hon Adrian Roden QC, Submission, 05 October 1992, p 12.

6.6.2 The Parliament must retain the right to consider, debate, and sometimes ultimately reject ICAC recommendations for legislative change. Similarly, the Government must retain the right to consider and sometimes ultimately reject ICAC recommendations for changes to administrative procedures and practices. However, when this happens there should be a public explanation of the reasons for the decision to reject the ICAC's recommendation.

6.6.3 Where recommendations are contained in reports to Parliament (that is, in public investigative reports and annual reports) the Parliament should be informed of the response to these recommendations. This includes the response to recommendations for changes to legislation and administrative changes, and recommendations that consideration be given to prosecution, disciplinary or dismissal action against individuals. Where the ICAC reports directly to an agency (that is, in corruption prevention reports) the agency should inform the ICAC of its response direct.

6.6.4 The Committee recommends that the ICAC Act should be amended to provide that the relevant Minister should inform the Parliament of his/her response to any ICAC report concerning his/her administration within six calendar months of the tabling of the ICAC report.

6.6.5 The Committee has an important role to play in regard to ICAC reports under s.64(1)(c) of the ICAC Act.

6.6.6 The Committee has carefully noted Mr Knoblanche's comments about the risk of injustice to individuals from delays in the completion of prosecutions, disciplinary or dismissal action arising from an ICAC report. The Committee does not support Mr Knoblanche's proposal for a statutory time limit for such action to take place or be forever stayed. Instead, the Committee recommends that the ICAC develop a protocol with the Director of Public Prosecutions which would recommend an appropriate time frame in which prosecutions arising from ICAC reports should be completed. Similarly, in each case in which the ICAC states that consideration should be given to disciplinary or dismissal action, the ICAC should recommend an appropriate time frame in which such action should be completed.

-7- *PROFILE OF CORRUPTION*

7.1 ***Bersten Proposal***

7.1.1 The idea that the ICAC should prepare and publish a profile of corruption was first raised by Michael Bersten in 1989. Mr Bersten is a Canberra based lawyer who has become a prolific commentator on the ICAC. He has had a number of papers on the ICAC published in legal journals and has assisted the Committee with a number of its inquiries. On 21 June 1989 Mr Bersten presented a paper entitled "Making the ICAC Work: Effectiveness, Efficiency and Accountability" to an Institute of Criminology seminar. This paper was subsequently published in the Institute's journal ***Current Issues in Criminal Justice***. While discussing the ICAC's accountability Mr Bersten suggested that the Annual Report's provisions of the ICAC Act should be amended to require the ICAC to prepare a profile of corrupt conduct across the NSW public sector each year. Such a profile would contain a breakdown of the corruption problem and the ICAC's response to it in relation to each section of the public sector. Over time an appreciation of the nature and extent of the corruption problem in NSW could be developed. This would enable an historical record of corruption in NSW and the work of the ICAC to develop and provide the basis for a qualitative evaluation of the ICAC's effectiveness against specified criteria.

> *"The importance of the ICAC regularly and systematically presenting information about the profile of corrupt conduct in NSW should be recognised by the ICAC aiming to satisfy this requirement now. At an appropriate time the Parliament should add such a requirement to the annual report provision of the ICAC Act.*
>
> *As to the substance which should be reported on to meet this sort of requirement, I have in mind a descriptive analysis of some length which will provide a breakdown of the corruption problem and ICAC's response to it in relation to each section of the NSW public sector. In particular it would indicate:*
>
> *(1) number and type of complaints of corrupt conduct;*
>
> *(2) action taken by the ICAC, investigative, advisory or educational in relation;*

(3) follow-up action of other agencies;

(4) an assessment of the effectiveness of ICAC and follow up activity;

(5) an assessment of the displacement factor produced by ICAC and follow up activity;

(6) an assessment of conditions making corruption possible and likely, and;

(7) legal and administrative reforms which address these conditions.

From this an appreciation of corruption in NSW and the impact of the ICAC can be developed, allowing for the operations of the ICAC to be interrogated with some specificity but without interfering in particular investigations.

This kind of analysis allows for a historical record of corruption in NSW and the operations of the ICAC to develop so as to allow for a qualitative evaluation of the ICAC against specified criteria.

It is noteworthy that the lack of an adequate information base was expressed as one of the reasons behind the Parliamentary Joint Committee on the NCA being forced to make only an initial rather than final evaluation of the NCA in its recent study published in June 1988, over three years after the NCA commenced operations.

This situation must be avoided in the case of the ICAC. The only way to do it is for the ICAC to start now and the Annual reports seem to be he appropriate vehicle in which to present much of this material." [159]

7.2 *NCA Committee Report*

7.2.1 This issue next came to the Committee's attention in November 1991 when the Parliamentary Joint Committee on the National Crime Authority tabled the report on its Evaluation of the NCA. The Committee in its report drew attention to the fact that the NCA was preparing an overview of organised crime in Australia. The Committee commented that this overview would then form a benchmark against which the NCA's target selection and impact upon organised criminal activity could be assessed.

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159 Michael Bersten, "Making the ICAC Work", Current Issues in Criminal Justice, March 1990, p 105.

"5.77 *As already noted, the Corporate Plan will help in assessing the Authority's efficiency and effectiveness in the future. Difficulties will however remain. In 1988, the* ***Initial Evaluation*** *observed:*

The Authority freely admits that it does not as yet have an overall strategic view of organised crime in Australia. Its selection of targets to become the subject of references is not animated by some grand plan which will result in the progressive suppression of organised crime in this country.

5.78 *The Committee considers that this is still valid. The mechanisms put in place under Justice Phillips avoid duplication of investigative effort. They also reinforce existing measures to ensure the Authority does not undertake matters able to be dealt with by other agencies. In other words, they identify what matters the Authority should not undertake. The measures do not, however, identify in a positive, rigorous way what targets the Authority should pursue.*

5.79 *Justice Phillips told the Committee on 29 July 1991:*

I report that the National Crime Authority has commissioned Dr Grant Wardlaw to design a course for the training of senior intelligence officers in strategic intelligence. The term 'strategic intelligence' is used in contradistinction to the term 'operational intelligence'. It connotes a broad overview of intelligence matters. This commissioning, together with the series of intelligence conferences I have described, is directed towards being able to give this Committee and, through it, the Australian Parliament and people an overview of organised crime in Australia.

5.80 *The Committee comments that assessment of the Authority's target selection and impact on organised criminal activity will only be possible when this overview is available to provide a benchmark. Without this overview, the Authority will not be able to demonstrate that in choosing to pursue target X rather than Y it has made the right choice — that X is more important in Australian organised crime than Y. An Authority investigation may result in the target suspect being convicted. The benchmark provides a way of assessing the impact of this conviction on organised criminal activity. It also provides a means of addressing the more general question of what inroads the Authority's activities have made on the level of organised*

criminal activity." [160]

7.2.2 The Committee has been advised that work is well under way on the preparation of this overview. It has now become a joint project with the Australian Bureau of Criminal Intelligence. It has also been confirmed that it is the intention of the NCA that a public report will be prepared as a result of this project. Attention was drawn to the NCA's recent work on Money Laundering. This included the preparation of a public report which provided a picture of money laundering in Australia and made recommendations for reform. [161]

7.2.3 In November 1992 the Committee visited the Criminal Justice Commission in Brisbane. The Committee met with the Directors of each of the CJC's divisional directors, including the Director of the Intelligence Division, Paul Rodgers. Mr Rodgers said that the CJC had completed a number of projects which provided profiles of particular forms of organised crime. He said the CJC also intended to prepare a profile of corrupt conduct in Queensland over the next year. [162]

7.3 ***Committee's Questions***

7.3.1 In March 1992 the Committee put a number of questions to Mr Temby in relation to the ICAC's strategic intelligence work. The Committee drew attention to the NCA's commitment to prepare an overview of organised crime and asked whether the ICAC saw value in the preparation of an overview of corrupt conduct in the NSW public sector.

> *"Q: 4.1 Does the Commission see value in the development of an overview of corrupt conduct in the NSW public sector?*
>
> *Q: 4.2 Is the Commission's Strategic Intelligence work directed at the provision of such an overview? If not, what is it aimed at?*
>
> *Q: 4.3 Would the Commission undertake to prepare such an overview for:*
>
> *(a) This Committee?*

160 Parliamentary Joint Committee on the National Crime Authority, Who is to Guard the Guards? An Evaluation of the National Crime Authority, Australian Government Printing Service, November 1991, pp 96-98.

161 National Crime Authority, Taken to the Cleaners: Money Laundering in Australia, Australian Government Printing Service, December 1991.

162 Committee on the ICAC, Report on Visit to Brisbane 02-03 November 1992, p 13.

(b) The Parliament and, through it, the people of NSW?

A: *The Commission sees value in the development of an overview of corrupt conduct in the New South Wales public sector. That is easy to say but less easy to do, given the covert nature of corruption and the intensive resources required over a lengthy period of time to produce a worthwhile product. It involves the application of techniques such as telephone interception and listening devices, surveillance and research, all of which are resource intensive. There is a dearth of adequate, considered and reliable research of this kind of which the Commission can avail itself to produce an overview.*

The Commission's Strategic Intelligence Unit has the ability but not presently the capacity to conduct such an overview; it has the capacity to concentrate on segments of the public sector, which it is doing. The strategy for choosing topics for strategic intelligence research is that priority should be given to examining the areas or organisations reputed to give rise to systematic or institutionalised corruption or to areas of the public sector where corruption could have a more serious and deleterious impact. Strategies include an analysis of the work done by the Commission and an examination of overseas literature on corruption with a view to determining whether the corruption climates are different or whether there are subject areas to which the Commission should give attention.

The purpose of the Commission's strategic intelligence work at present is to inform, direct and target the Commission's work. This will contribute to developing a picture of corruption at least in segments of the public sector." [163]

7.3.2 Mr Temby was asked a number of questions by Committee members at the hearing on 31 March 1992. He indicated that he foresaw considerable practical difficulties in the preparation of any sort of overview of corrupt conduct. He took on notice a number of more specific questions the answers to which were provided to the Committee and tabled at the hearing on 09 November 1992.

163 Committee on the ICAC, Collation of Evidence, 31 March 1992, pp 26-27.

Questions Taken on Notice by Mr Temby

"***4.4*** ***As to the "picture" so far revealed by the work of the Strategic Intelligence Unit and of the Commission otherwise, could the Commission provide a report on the areas and nature of corruption in the "segments" so far revealed?***

A: *The Strategic Intelligence's Research Group has been principally engaged in work in respect of the Commission's investigation into possible police corruption. Due to the sensitivity of the material it is not possible to report on that material to the Committee. At least some of the material produced as a result of the SIRG work will be used in the Commission's investigation including the hearings.*

4.5 ***Could the report go on to make reference to other areas of corruption in NSW, which are suspected or believed to or may exist?***

A: *Because the work of the Strategic Intelligence Research Group has been concentrated in one area the Commission does not have a basis to refer to other areas of corruption in New South Wales, other than the areas disclosed through Commission investigation reports to date.*

4.6 ***In dealing with 4.4 and 4.5 could the Commission indicate what is known or believed to be the position of institutional corruption associated with organised crime in NSW and in particular such corruption in aid of the operation of organised crime and that in aid of its concealment or to prevent action against it?***

This is raised on the basis of the view now established and accepted that organised crime is almost always dependent on institutional corruption of these kinds.

A: *The Commission is aware of the views about the links between organised crime and institutional corruption, although to some extent they remain untested in Australia. The Commission accepts that organised crime could not be as effective were it not for assistance provided by corrupt public officials - that is practically axiomatic. The Commission does not have any basis for making any reliable statements about the association between institutional corruption and organised crime in New South Wales. If the Commission were to discover any such information in the*

course of its investigations, and was in a position to disclose it publicly then it would likely do so. If it discovered information which had to be provided confidentially to law enforcement agencies in order to facilitate investigations by such agencies then the public interest would require that the material be used in that way.

4.7 ***The Commission having the ability to do so, in what respects does the Commission at present lack the capacity to provide an overview of corruption in the public sector of NSW, in particular by reason of***

(a) ***lack of legislative or other power;***

(b) ***staff consideration;***

(c) ***financial resources; and***

(d) ***other considerations.***

4.8 ***So far as capacity is lacking, what precisely is considered necessary (as to nature and quantity) to giving the Commission that capacity and in particular in reference to (a)-(d) of 4.7?***

A: *The Commission does not lack legislative power to gather strategic intelligence and provide an overview of corruption in the public sector of New South Wales. The Commission does not have presently sufficient resources to conduct its investigative program as well as provide an overview of corruption in the public sector. Analytical resources are fully deployed on current investigations, particularly the current police investigation. People experienced and able in intelligence analysis and particularly in strategic analysis are not a plentiful occupational group.*

Lastly the overview of which the Committee speaks cannot be done in reliance upon complaints received from the public but requires significant pro-active work, including the exercise of powers to obtain warrants for the use of listening devices and telephone intercepts.

The Commission has the power to apply for warrants for the use of listening devices but such applications require a fair degree of reliable information before the application can be made and a warrant granted. As to telephone interception powers the

Commission is legislatively able to apply for a warrant for such, but the offences in the Telecommunications (Interception) Act in respect of which such warrants may be sought does not include corruption related offences and therefore the Commission does not in reality have full benefit of this power at present. The Commission has made submissions to the Attorney General's Department in the course of a review of the Telecommunications (Interception) Act but the legislative reform process is proceeding slowly and those reforms will not occur this year.

4.9 It is noted that in its earlier reply the Commission considered there to be value in an overview. Could this answer be enlarged upon?

Obviously the value of an overview of corruption in the State, if it could be done so that the result would be considered reliable and comprehensive, could be use by the Commission as a management tool in deciding how to focus its investigative, corruption prevention and education work. The overview would have to be kept up-to-date and reliable if it was to be useful in that regard and that would be a demanding task.

However there are reasons why an intelligence overview of corruption should not be published.

Intelligence is an investigative and management tool. According to the Commission's intelligence experts, no intelligence agency around the world publishes its intelligence reports. Intelligence does not contain proof, but indicators which suggest where investigative work could be concentrated. Intelligence is not reliable, and therefore publication of intelligence reports could be dangerous, and would most likely be unfair to individuals named in intelligence.

The Commission's investigative work is in significant part directed to producing strategic intelligence. The Commission's investigation reports are in the nature of strategic intelligence reports of a high level of reliability." [164]

When Mr Temby appeared before the Committee on 09 November 1992 he emphasised the point made in answer to question 4.9 above concerning the status of intelligence. He stated that "intelligence, by definition, is unreliable". He added

164 Committee on the ICAC, Collation of Evidence, 09 November 1992, p 30-33.

that the publication of intelligence reports "would be grossly unfair to individuals named in them". In this regard he cited the CJC's report on Gaming Machine and the subsequent litigation on that report which ended up in the High Court. [165]

7.4 ***ICAC Workload***

7.4.1 In addition to Mr Temby's concerns about the reliability of intelligence, the ICAC in its submission to the Review of the ICAC Act emphasised the practical difficulties involved in the preparation of a profile of corruption and the Commission's heavy workload. The submission suggested that the preparation of a profile of corruption by the ICAC may be more appropriately performed by the Commission when it has been in existence for a longer period.

> *"The preparation of a profile of corruption has been the subject of discussion between the Committee and the Commissioner before — (see the Commissioner's evidence to the Committee in March 1992.)*
>
> *To provide a reliable overview of corrupt conduct in the public sector would be a difficult and time consuming exercise. The Report on Unauthorised Release of Government Information constitutes an overview of corrupt conduct in one particular sector of public activity. It involved two years investigative work. To do a similar exercise across the public sector would divert significant resources from the Commission's other work. It is a huge job. The generally covert and insidious nature of operations make it difficult to detect and to obtain reliable information about it. If not done properly the information could be misleading if not dangerous.*
>
> *Mr Bersten, in an article referred to by the Committee, suggested than an annual profile of corrupt conduct across the New South Wales public sector would commence by indicating the number and type of complaints of corrupt conduct. That would give a profile of complaints received by the Commission, not a profile of corruption in the public sector; they are not the same thing. The information the Commission has will not provide an accurate statistical picture of corruption in New South Wales. Complaints concentrated in a particular area may indicate a significant degree of corrupt activity, or a higher public awareness of particular conduct, or a public misconception about corrupt conduct. A lack of complaints in an area may mean there is no corrupt activity, or significant corrupt activity well concealed. To draw conclusions about corrupt conduct from an analysis of complaints is too*

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165 ibid, p 3; *Ainsworth vs. Criminal Justice Commission* (1992) 66 ALJR 271.

simplistic, and potentially dangerous and misleading. For one thing, it ignores the quality, or lack thereof, of complaints, which upon analysis or investigation may prove mistaken or baseless.

A requirement that the Commission's annual report contain a profile of corrupt conduct across the New South Wales public sector each year would mean that the report was only perfunctory, which would not be useful and could be dangerously misused.

The National Crime Authority and New South Wales Crime Commission are required to include in their annual reports descriptions of patterns or trends and the nature and scope of, respectively, criminal activity and drug trafficking, organised and other crime, which have come to their attention during the year in the course of their investigation. Two points need to be made. The National Crime Authority and New South Wales Crime Commission, unlike the ICAC, do not report publicly on their investigations, and therefore their annual reports are the only vehicles for informing the public of the work those organisations have done. The ICAC provides detailed public reports which set out the corrupt conduct disclosed in its investigations involving hearings, and describes in its annual reports conduct examined in other investigations. Secondly, it may be easier to measure crime, at least some types, than corrupt activity, which often involves satisfied participants and is invisible to outsiders.

There are many reasons why the Commission should not be given an additional statutory function of preparing such a profile. However the Commission accepts that if resources are available and information which is useful can be reported it should do so. Such work could be valuable but may be more appropriate when the Commission has existed for a longer period and has accumulated more information.

Summary: The important but difficult and resource-consuming task of preparing a profile of corruption in New South Wales may be more appropriately performed by the Commission when the Commission has been in existence for a longer period. The Commission's investigation reports and annual reports deal with the conduct investigated by the Commission and, to a lesser extent, annual reports deal with the subject of complaints received. Neither can be used as a reliable measure of corruption per se." [166]

166 ICAC, Submission, October 1992, pp 40-42.

7.5 ***Views of Witnesses***

7.5.1 A small number of submissions received by the Committee addressed the issue of a profile of corruption. The Hon Athol Moffitt QC, CMG put his view most definitely.

> *"I believe it is essential that there be a strategic assessment of corrupt practices however defined (or of conduct simply within s.8 ie. my "relevant conduct"). Without it, updated at intervals, ICAC cannot plan its practices for the best use of resources and your Committee and Parliament cannot effectively overview ICAC operations or otherwise take action. The parallel again is organised crime. The operations of each are clandestine and so their existence and incidence are concealed from the public and those in authority. I recommended an Australian strategic review of organised crime in my Royal Commission Report in 1974. It had been done in the US but never to now in Australia. I complained of this in my book in 1985 and since.*
>
> *I believe there should be some amendment which compels this to be done on some periodic basis and not left to ICAC, understandably pre-occupied with other pressing matters. Extra resources may be needed."* [167]

7.5.2 Not surprisingly, Michael Bersten had some comments to make about this issue when he appeared before the Committee on 12 October 1992. Mr Bersten suggested that the ICAC's expressed concerns about its workload, were in the nature of "a bureaucratic kind of response".

> *"A: As the discussion paper notes, the profile of corruption possibly has its origin in what I and some other people have said from time to time. One of the things that it would be very useful to know is what ICAC knows about corruption. There are a number of reasons why that might be a good thing to know. The main one I want to focus on is that it tells us something about its own effectiveness. It provides an information base on which the operation of ICAC can be evaluated against its proper objectives. I see that Mr Temby and others have raised the question of ICAC's resources that would be required, and the question of diverting ICAC away from its primary objectives to meet this particular task. That is something that would need to be investigated.*

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167 The Hon Athol Moffitt QC, CMG, Submission II, 14 October 1992, p 7.

I think that in trying to create an authoritative profile of corruption, a lot of effort would have to be put into it. Perhaps that is a relatively small price to pay in the overall context, if it is a profile from which we can get a real picture of ICAC's effectiveness and the position of corruption in this State.

Q: *In relation to that matter, I think you referred to the collation of evidence to March of this year, when a series of questions were put on notice to Mr Temby, and Mr Temby's response. Have you any comment on that collation?—*

A: *My reaction, with no disrespect to Mr Temby, was that it was a bureaucratic kind of response, if I might put it that way. There is an understandable response that organisations have to requests for information which they perceive as not relating to their own central objectives. They try to shift them off a little bit to one side. That sort of reaction of trying to avoid being diverted from what they see as their main task runs through that particular response, and I suspect that some other approaches that ICAC takes to some requests made of it are also of that sort."* [168]

7.5.3 The other witness who addressed this issue in evidence before the Committee was Mark Findlay, Director of the Institute of Criminology. Like Michael Bersten, Mr Findlay was not persuaded by the ICAC's concerns about its workload and described the exercise of preparing such a profile as "extremely important".

"On the suggestion of a profile of corruption, you will notice the comments I made about getting back to some assessment of what the public feeling is about corruption. If we are going to assess the public feeling about corruption, it is necessary for us to review what the ICAC has said and what the ICAC has determined. Although I note in the discussion paper the Commissioner's expression that such a profile would be a difficult exercise, I think it is an extremely important one if we are to invite the public to express their view, or as the Chief Justice has done recently in the Court of Appeal decision, to say that the ICAC through the Act is making definitions which are at odds with what the public would hold or believe.

Then we must establish at least as part of that distilling process of what the public does believe, a profile for ourselves of what has developed; the forms of corrupt behaviour, the types of corrupt acts, the types of corrupt

168 Committee on the ICAC, Minutes of Evidence, 12 October 1992, pp 23-24.

individuals which have come before the Commission. I think perhaps it would be a co-operative endeavour, not resting only with the Commissioner and the Commission. Perhaps the Committee as well could join in the process. It would be a timely process now, in which the public also could be effectively involved in determining what a profile of corruption might be, under sections 13 and 76." [169]

7.6 *Conclusions*

7.6.1 The preparation by the ICAC of a profile of corruption in the NSW public sector on a timely basis could be a valuable exercise. It could enable an historical picture of corrupt conduct and the ICAC's work to build up over time. It could provide a benchmark against which the effectiveness of the ICAC and its target selection could be measured. It could also be an important tool in corruption prevention.

7.6.2 The Committee recognises that the preparation of such an overview is not an easy task. However, the fact that the NCA is preparing an overview of organised crime, and the CJC intends to prepare an overview of corrupt conduct means that it is not an impossible task. Furthermore, the fact that the NCA intends to publish a report on its overview of organised crime, and the report it has already produced on money laundering suggest that any concerns about the dangers of publishing such an overview can be addressed.

7.6.3 However, the Committee recognises the ICAC's current heavy workload. The resources of the Commission's Strategic Intelligence Research Group are fully committed to Operation Milloo, the investigation into alleged Police corruption. The Committee therefore recognises that it is unlikely that the Commission will be in a position to produce such a profile of corruption within the next twelve months. It would therefore be inappropriate for a requirement for the ICAC to prepare such a profile to be included in the ICAC Act at this time.

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169 Committee on the ICAC, Minutes of Evidence, 12 October 1992, p 62.

-8- *FALSE COMPLAINTS AND PUBLIC STATEMENTS*

8.1 ***Background***

8.1.1 To a large extent the ICAC is complaints driven. Section 10(1)-(3) of the ICAC Act provides that

> "(1) Any person may make a complaint to the Commission about a matter that concerns or may concern corrupt conduct.
>
> (2) The Commission may investigate a complaint or decide that a complaint need not be investigated.
>
> (3) The Commission may discontinue an investigation of a complaint."

Section 13(a) lists as the first of the ICAC's principal functions as being "to investigate any allegation or complaint" about corrupt conduct. Section 20(1) provides that the ICAC "may conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it". Section 20(4) provides that "before deciding whether to discontinue or not to commence an investigation of a complaint, the Commission must consult the Operations Review Committee in relation to the matter."

8.1.2 During the 1989-1990 year the ICAC received 916 complaints. [170] During the 1990 -1991 year the ICAC received 501 complaints. [171] This number increased by more than 88%, to 942 in the 1991-1992 year. [172] Of the complaints received a certain percentage concerns matters that are outside the ICAC's jurisdiction (6.4%

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170 ICAC, 1990 Annual Report, p 22.

171 ICAC, 1991 Annual Report, p 16.

172 ICAC, 1992 Annual Report, p 11.

in the 1991-1992 year). [173] Complaints are assessed by the ICAC's Assessment Unit. If a matter is revealed, through the assessment, to be significant or of interest to the ICAC a preliminary inquiry will be conducted. About 25% of complaints reach the preliminary inquiry stage.[174] The preliminary inquiry is designed to determine whether there is significant corrupt conduct which requires investigation. About 2% of complaints are made the subject of formal investigations. [175]

8.1.3 As set out below the Committee has had some long standing concerns about the possible abuse of the complaints process. The Committee has been particularly concerned about the practice whereby persons making complaints to the ICAC have made public statements about their complaint. This practice seems to be occurring most often at the Local Government level and represents an attempt to use the ICAC for political purposes against ones political opponents. The Committee has also received unsolicited submissions about the dangers of persons making vexatious or malicious complaints. In its Discussion Paper of September 1992 the Committee called for submissions about how these problems could be addressed.

8.2 ***Committee's concerns***

8.2.1 Concerns about the abuse of the complaints process were first raised by the former Committee in 1990. The Hon Ron Dyer MLC raised concerns about a particular Council in which "there appeared to be a consistent course of conduct where one member of that Council was virtually waging a vendetta against another" by making complaints of alleged corrupt conduct to the ICAC and then making public statements about those complaints. [176] Mr Temby confirmed that 17 complaints had been received concerning that Council, ten of them from the one person. Mr Temby said that the ICAC had taken a number of steps to counter this problem. At the ICAC's suggestion the Premier had written to all departmental heads to make it clear that s.11 reports should be kept confidential. He also stated that he had given an address to the annual meeting of the Shires Association in which he encouraged those present to ensure that complaints were made on a confidential basis. Finally, Mr Temby indicated that, at that stage, he did not favour legislative amendment to compel confidentiality in the making of complaints.

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173 ibid.

174 ICAC, 1991 Annual Report, p 22.

175 ICAC, 1990 Annual Report, p 22.

176 Committee on the ICAC, Collation of Evidence, 15 October 1990, p 37.

8.2.2 This issue was then discussed by the former Committee and Mr Temby in March 1991. Mr Temby made the interesting point that at a meeting with media representatives, the media representatives had expressed concerns to the ICAC about the danger of them being used for political purposes when persons make public statements about complaints.

> *"The view expressed by several of those present, particularly from country and suburban newspapers, was that there was a high potential for complaints to the ICAC to be used for political ends, which if announced they — the media — would have to report as being newsworthy; but they said they would then feel they were being used, and the Commission might also feel it was being used."* [177]

Mr Temby also spoke about an initiative the Commission was about to make to discourage this practice. He said that the ICAC would soon be writing to all local Councils and State MPs "to request and urge that complaints and information be made and provided respectively on a confidential basis, whenever practicable, which should be nearly all the time". [178] Mr Temby made it clear that the ICAC's prime concern was with Local Government, particularly in the lead up to the September 1991 Local Government elections. State MPs were also written to due to the potential for similar abuse of the complaints process by State MPs and also so as not to make Local Government representatives feel that they were being exclusively singled out.

8.2.3 The ICAC later stated that "the Commission received positive responses to the letters". The Commission said that the number of public statements about complaints decreased throughout 1991, although there were a number of public statements shortly before the Local Government elections in September. [179]

8.2.4 The former Committee also raised the issue of vexatious complaints with Mr Temby in March 1991. The Committee asked Mr Temby what action could be taken by a person who believes they have been the subject of a frivolous or malicious complaint. Mr Temby commented that whether a complaint was frivolous, malicious or just misguided was a matter of viewpoint, and that the Commission believed that most complainants sincerely believed that their complaint was genuine. Mr Temby said that in his view the ICAC received very few malicious complaints which were made simply to cause harm to the subject of the complaint.

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177 Committee on the ICAC, Collation of Evidence, 27 March 1991, p 4.

178 ibid.

179 Committee on the ICAC, Collation of Evidence, 14 October 1991, p 47; ICAC, 1991 Annual Report, p 17.

Mr Temby stated that where a complaint reaches the preliminary inquiry stage in the majority of cases very few people would know about it. He suggested that the greatest amount of harm is caused not by the preliminary inquiry taking place but by the fact of the inquiry or the complaint itself becoming public knowledge.

> *"Most complaints that are received are dealt with internally and no one ever knows they have been received.... The next biggest group involves us making some inquiries of some outsiders. For instance, the making of a telephone call to a council or the Department of Planning or the Department of Local Government to get some information in order to enable us to wrap up a matter. That group does not involve a person who is the subject of the complaint, if there is any individual that is the subject of the complaint, ever knowing about it. We go outside, but only to a limited extent. The next group of cases involves those that are assessed to the extent where some interviews are conducted so that it may become known within a limited circle that the Independent Commission Against Corruption is interested in such and such. If anyone is silly enough to talk about it publicly, it may become publicly known. That group is fairly small — measuring a number of dozens a year, but no more. That is very small compared with what we get in a year."* [180]

Mr Temby added that whilst the ICAC was sympathetic to those who are the subject of false complaints he had grave reservations about revealing the identity of complainants. Mr Temby said that some complainants approached the ICAC in a "fairly tremulous state" and that to reveal their identity would have a discouraging effect upon other potential complainants. Mr Temby was reluctant to state whether the subject of a "demonstrably baseless allegation" could have recourse to defamation action against a complainant.

8.3 ***Submissions***

8.3.1 Last year the Committee received an unsolicited submission from the Shire President of Ballina Shire Council, Keith Johnson, which raised a number of issues linked to the question of false complainants. Mr Johnson outlined his experience whereby over a period of time the ICAC had sought his views/advice on a number of allegations which had been made concerning other councillors and senior staff of the council. Mr Johnson argued that it was clear that the complaints were without substance and repetitive. He said that it took a great deal of his time to respond to the complaints in detail. Mr Johnson made a number of specific suggestions for reform:

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180 Committee on the ICAC, Collation of Evidence, 27 March 1991, p 62.

- ◊ that the ICAC should only investigate those anonymous complaints which contain facts verifiable by an independent source;
- ◊ that signed complaints should be dealt with initially by way of the ICAC interviewing the complainant to establish the complainants credibility;
- ◊ that the ICAC's database should be improved so that complaints could be cross referenced; and
- ◊ that the ICAC take steps to ensure the security of correspondence seeking responses to complaints. [181]

8.3.2 The Committee referred Mr Johnson's submission to the ICAC for comment and response. The ICAC responded that it is aware of the variable credibility of anonymous complaints, but that some anonymous complaints have contained significant information. The ICAC also indicated that some complainants are interviewed as a first step in inquiries but that any decisions on how an investigation should proceed must be dealt with on an individual case by case basis. Mr Johnson was provided with a copy of the ICAC's response to his submission. He remained dissatisfied with this response and subsequently gave evidence before the Committee on 12 October 1992. Mr Johnson outlined his concerns in some detail for the Committee. He also raised questions about the quality of the questions that were put to him for response by the ICAC. He also emphasised the debilitating effect that concerted complaints could have upon a unit of public administration such as a Shire Council. [182]

8.3.3 The Hon Ernie Knoblanche QC addressed this issue in his submission to the Committee. Mr Knoblanche suggested that provision be made for civil action against false complaints.

> *"It is my submission that it would be beneficial to provide for a statutory cause of civil action sounding in damages available to a victim of false complaint against the person who made it. It should be provided that the cause of action should be prosecuted in a summary manner without a jury before a judge or a magistrate. the proceedings are intended to be far less complex and far shorter and cheaper than an action at common law in defamation.*

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181 Keith Johnson, Unsolicited Submission, 30 April 1992.

182 Committee on the ICAC, Minutes of Evidence, 12 October 1992, pp 38-48.

> *I make the suggestion of civil cause of action because false accusations can frequently gravely interfere with the business, the way of life, the peace of mind, and the finances of a citizen against whom the false accusation has been made.*
>
> *It seems to me plain justice that where this sort of damage has been caused by a false accusation then he who wilfully made the false accusation should pay the piper."* [183]

Mr Knoblanche elaborated on this proposal when he appeared before the Committee on 26 October 1992.

> *"... a person who wilfully publishes to the Commission a report of corrupt conduct, or an allegation of corrupt conduct which is untrue, is liable to a cause of action by the subject of the allegation which sounds in damages after all the special pleadings and interrogatories and pre-trial hearings by judges who are specialists in defamation. What seemed to me here to be worth the suggestion, and so I made it, is, the victim of a false allegation of corrupt conduct to the Commission - that is a wilfully false allegation as my papers says - should have available a quick, non expensive means of bringing the wrong before a court where the wrong can be attempted to be remedied by the order for the payment of a sum of money....*
>
> *I think it probable that a fairly simple cause of action, which for instance might say, "where the plaintiff has been damaged by a wilfully false allegation of corrupt conduct, upon proof of that he may be awarded compensation in a sum not exceeding X or Y dollars. The matter shall be heard in a summary fashion before a judge or magistrate". Perhaps it is an over-simplification but I think it would be providing a speedy useful remedy in vindication of character, and attempting to put the hip pocket nerve back into silence and quite for many people who may be wronged, not in a tremendously serious way but wronged in a serious enough way by wilfully false allegation to the Commission."* [184]

8.3.4 The Law Society made a similar suggestion in its submission. The Law Society stated that the subject of a false complaint should be entitled to receive a copy of the complaint and thereby be able to sue the complainant for any damages suffered

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183 Hon Ernie Knoblanche QC, Submission, 30 September 1992, pp 11-12.

184 Committee on the ICAC, Minutes of Evidence, 26 October 1992, p 10.

as a result of the false complaint. The heads of damages would include "all loss caused as a result of the complaint including damage to reputation and economic loss". [185]

8.4 ***Criminal Justice Commission (CJC)***

8.4.1 The Queensland Criminal Justice Commission (CJC) has been concerned for some time about the issues of false complaints and public statements about complaints. The Director of the CJC's Official Misconduct Division gave evidence to the Committee on this issue on 05 February 1993. Mr Le Grand said that the CJC had sought an amendment to the Criminal Justice Act in 1991 to enable it to take action against false complaints more easily. Mr Le Grand emphasised that, in addition to the trauma caused to the victims of false complaints, the CJC's limited resources should not be consumed by having to deal with false complaints.

> *"The commission recognised that the investigation of a complaint against a police officer can be a traumatic experience for that officer or indeed any public official, especially where the complaint against him or her is unfounded. It is extremely difficult to defend oneself against a completely unfounded allegation....*
>
> *Since the inception of the complaints section, two persons have been successfully prosecuted in the magistrate's court and fined $400 and $250 respectively. There are three other matters pending. One other matter involves a person facing three counts of perjury and one count of attempting to pervert the course of justice under the Queensland criminal code. The commission recognises the inadequacies of the current provisions involving false complaint and the demotivating effect that it has on police officers when complainants who make false complaints cannot be brought to account for their acts. Furthermore, it is considered essential that the commission's resources, which are strained by the volume of complaints and information made to it in good faith, are not further stretched by being utilised for the investigation of false complaints. The commission has recommended, through its parliamentary committee, the following amendment:*
>
> False representation causing Commission investigations.
>
> (1) A person who falsely and with knowledge of the falsity gives or causes to be given information or makes or causes to be made a complaint to the Commission, commits an offence against this Act.
>
> (2) A court —

185 Law Society, Submission, 12 October 1992, p 11.

> (a) by which a person has been found guilty;
>
> or
>
> (b) before which a person has pleaded guilty;
>
> of an offence defined in subsection (1), whether or not it imposes a penalty in respect thereof, may order the person to pay the Crown a reasonable sum for the expenses of or incidental to any investigation made by the Commission as a result of the false representation.

> *The provision does not have a requirement for corroboration and further, it does not require the information to have been acted upon to cause an investigation. If enacted this provision would go a long way to assist the commission to adequately deal with false complaints, in our submission."* [186]

8.4.2 Mr Le Grand also gave evidence in relation to the CJC's concerns about public statements by complainants about their complaints. He said that it was of grave concern when complainants sought to use the Commission as a political tool and for personal gain. The CJC had recommended an amendment to the Criminal Justice Act in 1991 which would ensure strict confidentiality in the making of complaints by making public statements about complaints an offence under the Act. Mr Le Grand noted that this recommendation was supported by the Parliamentary Criminal Justice Committee but had been criticised by one media outlet in Brisbane.

> *"Furthermore, I noticed from the material you sent me, Mr Chairman, that the commission has had the same unfortunate experience in recent times that the ICAC has experienced, of having persons running in the local authority elections making complaints about their opponents to the commission prior to the election and then publicly disclosing the nature and subject of those complaints with a view to damaging the prospects of their competitors being elected. A clear inference has been that the complaints have been made for this personal benefit. The commission has at all times seriously maintained its independence and deprecated this perversion of its function. The commission objects to being used as a political tool. Often complaints of this nature are complex and cannot be summarily dismissed. Therefore a timely response cannot be made to the complainant and the person subject of the allegations. Of course, in many cases, even if the complaint is genuinely based, it can be detrimental to the prospects of a successful investigation. Our parliamentary committee has expressed*

186 Committee on the ICAC, Minutes of Evidence, 05 February 1993, pp 46-47.

similar concerns. The commission considers that the only way to ensure that persons who complain or furnish information to the commission maintain strict confidentiality of that fact and the details thereof, is to make it an offence against the Act. The commission has recommended accordingly and this has found favour with our parliamentary committee, although not with certain media outlets in Queensland." [187]

8.5 ***ICAC Position***

8.5.1 The ICAC's submission addressed the issues of false complaints and public statements about complaints together. The ICAC argued that it had sufficient powers, including statutory power, to deal with both false complaints and public statements. The submission also stated that to date no situation had arisen which warranted resort to prosecution.

> *"The Commission's experience remains that the number of malicious and vexatious complaints, and the number of occasions on which people make public statements and false statements about complaints to the Commission are very low when compared with 4,500 or so complaints received by the Commission to date. That is not to say they are not serious. The Commission is prepared to act sternly in appropriate circumstances; such circumstances have not yet arisen.*
>
> *Public statements about complaints occur more frequently than malicious or vexatious complaints. The Commission's approach to public statements about complaints, either accurate or false, has been to make timely general statements and also take up individual problems. That has seemed the appropriate response and has generally worked well.*
>
> *Section 81 of the ICAC Act is the equivalent of clause 13B of the Hong Kong ICAC Ordinance. The Commission has not yet had a situation which in its view warranted the use of that power. It could arise although it may be difficult to prove the offence."* [188]

8.5.2 The ICAC also provided some comments in response to the suggestion from The Hon Ernie Knoblanche QC and the Law Society for the provision of a statutory cause of action against false complaints. The ICAC emphasised that any harm to individuals the subject of false complaints is likely to be as a result of publicity

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187 ibid, p 44.

188 ICAC, Submission, 12 October 1992, p 43.

about the complaint rather than any inquiries into the complaint. The Commission noted that defamation action would already be available in cases where a complainant published the complaint. The ICAC argued against provision of a statutory cause of action on the grounds that it might discourage genuine complainants and that there was potential for abuse of such an action.

8.6 ***Conclusions***

8.6.1 Complaints from members of the public are an important source of information for the ICAC and the ICAC has an important role to play in dealing with complaints. Any amendments to the ICAC Act to deal with the problems of false complaints and public statements about complaints must not discourage or inhibit genuine complainants from coming forward and providing information to the ICAC.

8.6.2 False complaints can cause unnecessary trauma and hardship to the subjects of such complaints. The conduct of investigations or even preliminary inquiries into such complaints can also divert the ICAC's limited resources.

8.6.3 Section 81 of the ICAC Act provides a sanction against false complaints. The Committee recommends that section 81 be reviewed with a view to determining whether it can be improved to ensure that action may be taken in all appropriate cases. Consideration should be given to providing the Operations Review Committee with an additional responsibility of advising the ICAC whenever it feels that action under s.81 would be appropriate in relation to a complaint with which it has dealt.

8.6.4 The Committee notes that the ICAC is cognisant of the varying levels of credibility of anonymous complaints. The Committee encourages the ICAC to treat anonymous complaints with appropriate circumspection.

8.6.5 Public statements about complaints have the potential to cause great harm and to lead to the ICAC being used for personal or political gain by complainants. The Committee commends the ICAC on the steps that it has taken to discourage public statements about complaints and encourages the ICAC to continue to take such steps in the future.

8.6.6 The Committee notes that defamation action is presently available in respect of false complaints which are published by a complainant.

8.6.7 The Committee notes the concerns expressed by Mr Johnson about the security of the ICAC's communications in making preliminary inquiries into complaints. The Committee recommends that the ICAC take steps to ensure the security of such communications.

-9- SECTION 11

9.1 ***Background***

9.1.1 Section 11 of the ICAC Act imposes a duty upon certain public officials including the heads of government departments to report suspected corrupt conduct to the ICAC.

"11(1) This section applies to the following officers:

(a) the Ombudsman;

(b) the Commissioner of Police;

(c) the principal officer of a public authority;

(d) an officer who constitutes a public authority.

(2) An officer to whom this section applies is under a duty to report to the Commission any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct.

(3) The Commission may issue guidelines as to what matters need or need not be reported.

(4) This section has effect despite any duty of secrecy or other restriction on disclosure.

(5) The regulations may prescribe who is the principal officer of a public authority, but in the absence of regulations applying in relation to a particular public authority, the principal officer is the person who is the head of the authority, its most senior officer or the person normally entitled to preside at its meetings."

The section provides the ICAC with an important source of information about corrupt conduct. As the ICAC has stated, "[t]hese reports are important to the work of the Commission because usually they involve the communication of information from the "**inside**". [189]

9.1.2 In September 1990 the ICAC released guidelines as provided for in s.11(3) to assist principal officers to comply with the provisions of section 11. These guidelines were subsequently published in the ICAC's 1990 Annual Report and are reproduced on the following pages.

189 ICAC, 1990 Annual Report, p 23.

Appendix 3

THE COMMISSION'S REPORTING POWERS

(Extract from the Commission's Report on Investigation into North Coast Land Development, July 1990, pp xiii-xxv)

There has been recent litigation, both in the Supreme Court of New South Wales and in the High Court of Australia, relating to the Commission's reporting powers. Regard must be had to the outcome of that litigation, in determining what may and what may not properly be stated in this report.

The litigation

The litigation arose from two Commission investigations. One may conveniently be referred to as the Waverley investigation. The other is this present matter.

Two persons concerned in the Waverley investigation, sought court orders declaring that the Commission does not have the power to make certain types of finding. Their cases were considered in the Supreme Court, including the Court of Appeal, and then in the High Court. I shall refer to them as the Waverley cases.

Arising from the investigation with which I am presently concerned, similar cases were brought by Paul Edward Glynn, Robert William Steel, Ocean Blue Fingal Pty. Ltd. and Ocean Blue Club Resorts Pty. Ltd. I shall refer to them as the Ocean Blue cases.

Preparation of a Report on this investigation was completed before the High Court handed down its judgment in the Waverley cases. The Ocean Blue cases were at that time pending in the Court of Appeal. They were left in abeyance in that court, while the High Court judgment in the Waverley cases was awaited.

The court orders

That judgment has now been delivered. Its effect is to set aside an earlier

order of the Supreme Court, and in lieu thereof to make a declaration in the following terms:

> "... *that the (Commission) is not entitled in any report pursuant to s.74 of the Independent Commission Against Corruption Act 1988 to include a statement of any finding by it that the respective appellants or either of them was or may have been guilty of a criminal offence or corrupt conduct other than a statement made pursuant to s.74(5) of that Act.*"

Expressed in general terms, and subject to one exception, that means the High Court has ruled that in a Report such as this, the Commission may not make a finding in respect of any person that he or she was or may have been guilty of a criminal offence or of corrupt conduct. (The exception is a finding under s.74(5) of the ICAC Act. The significance of that provision need not be considered here. It is fully explained in Chapter 32 of this Report).

The Ocean Blue cases have now also been resolved. Orders have been made by consent, in similar terms to the High Court orders in the Waverley cases. That is to say, the Court of Appeal has declared that in this Report, subject only to the exception referred to above, the Commission may not make a finding that a person was or may have been guilty of a criminal offence or corrupt conduct. Although the orders only apply in terms to Mr. Glynn, Mr. Steel and the two Ocean Blue companies, it is obviously appropriate to regard the principle as applicable in respect of all persons whose conduct was considered in the course of the investigation.

Before the Report is published, it is necessary to ensure that it contains nothing which, by reason of the court orders that have been made, ought not to be there.

This Report

The Report as originally prepared, did not include a finding that any person was guilty of a criminal offence. From the outset, I was of the opinion that it was no part of the Commission's function to make any such finding. Under our system, findings of criminal guilt may only be made by criminal courts, as part of the criminal process. This Commission's investigations, and Reports published by it, are not part of that process.

The Report as originally prepared, did not include a finding that any person

was guilty of corrupt conduct. "Corrupt conduct" is a term used and defined in the ICAC Act. It has a technical meaning given to it by the Act. From the outset, I was of the opinion that no useful purpose would be served by determining whether any conduct of any person, disclosed in the course of the investigation, amounted to corrupt conduct as defined in the Act. I said that to counsel during addresses in November 1989. Whether alleged conduct does or does not amount technically to corrupt conduct, is relevant for purposes of jurisdiction only. It determines whether the Commission can properly embark upon an investigation.

Accordingly, the recent court orders create no difficulty insofar as they declare that the Report may not include a finding that a person was guilty of a criminal offence or corrupt conduct. It was not intended that the Report include a finding to either effect, and there is none in the Report as originally prepared.

The court orders also declare that, subject to the exception mentioned, the Report may not include a finding that a person **may have been** guilty of a criminal offence or corrupt conduct. It is more difficult to assess the impact of that requirement. There is no problem about avoiding a finding in express terms to that effect. Indeed there is none in the Report as originally prepared. However, many statements that have been made in the Report, are capable of indicating or suggesting that a person may have been guilty of a criminal offence or corrupt conduct.

What has to be determined is whether those statements must be deleted before the Report can properly be published. I propose to approach that question, by considering one of the matters which the Commission is clearly empowered to state in its Reports.

Reporting the results of an investigation

One of the Commission's principal functions is to communicate to the appropriate authorities the results of its investigations. Section 13 of the Act so provides. The High Court, in its judgment in the Waverley cases, expressly confirms that the Commission has the power, and in some cases an obligation, to perform that function. I quote from the judgment:-

> *"It follows that while the Commission may, and in some instances must, report the results of its investigations to Parliament..."*

The matters which the Commission may, and in some instances must, investigate, are also set forth in s.13 of the Act. As one would expect of a Commission established to deal with corruption in the public sector, those matters include "*any circumstances implying, or any allegations, that corrupt conduct may have occurred...*", and "*any conduct which, in the opinion of the Commission, is or was connected with or conducive to corrupt conduct*".

What is involved in reporting the results of such an investigation? It must include, one would think, stating whether the allegations appeared to be well founded, and whether and in what circumstances conduct of the type described had occurred. In short, if you investigate something, and are then required to report the results of your investigation, what you must do is say what you have found out.

How is that to be done by a Commission which for the purposes of its investigation has held hearings and taken evidence? Surely not simply by stating what the evidence was. That could be achieved by providing the transcript without comment. If the Report is to be of value, it must analyse, distill and weigh the evidence, and consider the inferences available from it. The High Court, in passages which I shall shortly quote, refers to "*the material elicited by the Commission*" and "*the revelation of material*", as among matters the Commission can properly report to Parliament.

As the evidence is considered in that way, and as the material elicited during an investigation is revealed in a Report, matters are likely to be stated suggesting that a person may have been guilty of a criminal offence or corrupt conduct. If they carry such suggestion, does that preclude the Commission from including them in the Report? The answer to that question is provided in the judgment in the Waverley cases. I quote again from the High Court:-

> "*It is clear enough that there is a distinction between the revelation of material which may support a finding of corrupt conduct or the commission of an offence, and the actual expression of a finding that the material may or does establish those matters;*"
>
> "*It must be clear that even if the material elicited by the Commission in the course of its investigation is such as to establish or suggest that the appellants or either of them have been guilty of criminal or corrupt conduct, the Commission may set forth or refer to that material in its report pursuant to s.74, notwithstanding that it cannot state any finding of its own. Of course, depending upon the nature of the material, even to deal with it in that way may inevitably implicate the appellants or one*

or other of them in criminal or corrupt conduct. The Commission is nonetheless entitled to report upon the results of its investigation; it is merely precluded from expressing any finding other than under s.74(5)."

Accordingly, I must take the position that material which it is proper to state as a result of the investigation, is not to be excluded from the Report because of any tendency it has to show that a person may have been guilty of a criminal offence or corrupt conduct.

Other findings of fact - the High Court

Since the High Court judgment was handed down last week, there has been some public discussion about the extent to which it curtails or restricts the reporting powers of the Commission. In particular, questions have arisen as to whether the Commission may make findings of fact which fall short of findings that a person was or may have been guilty of a criminal offence or corrupt conduct. That is a matter I must consider if I am to ensure that the Report complies with the court orders by which the Commission is bound.

In the passage from the judgment which I have just quoted, there are two statements which may appear relevant to this question. They are, "(the Commission) cannot state any finding of its own", and "it is merely precluded from expressing any finding other than a finding under s.74(5)". Read in isolation, they suggest an overall prohibition on findings by the Commission.

They must, however, be read in context.

Both statements were made in the course of considering questions of guilt, related to criminal offences and corrupt conduct. The court was saying what the Commission can and cannot do in that regard. It was in that context that it said the Commission can report on the results of its investigation, notwithstanding that they may inevitably implicate a person in a criminal offence or corrupt conduct. It was in that context that it said the Commission cannot state findings of its own.

Support for the view that the High Court was there referring only to findings related to criminal liability or corrupt conduct, is to be found in the judgment itself, and in an appreciation of the question which the court was considering.

In each of the Waverley cases, the court was considering an application in which a declaration was sought in terms very similar to the order the court eventually made. The High Court was asked only to rule on the Commisssion's powers relating to findings of criminal liability and corrupt conduct. No other fact-finding power which the Commission might assert or seek to exercise was under challenge.

The judgment records that the appellants submitted "*that the Commission is precluded from reporting that corrupt conduct involving the appellants or either of them may have occurred, may be occurring or may be about to occur*". The court did not make an order in those wider terms.

Five short passages now quoted from the judgment are instructive in this regard:-

> "*... it is apparent that (the Commission's) primary role is not that of expressing, at all events in any formal way, any conclusions which it might reach* ***concerning criminal liability.***"
>
> "*... the Commission is intended to be primarily an investigative body and not a body the purpose of which is to make determinations, however preliminary,* ***as part of the criminal process*** *...*"
>
> "*If the legislature had intended ... to confer upon (the Commission) a power to express a finding* ***concerning the criminal liability of a specified person,*** *then it would have been unnecessary to include sub-s.(5) of s.74.*"
>
> "*... the only finding which the Commission may properly make in a report pursuant to s.74* ***concerning criminal liability*** *is that referred to in sub-s.(5) ...*"
>
> "*(The Commission's) investigative powers carry with them no implication ... that it should be able to make findings against* ***individuals of corrupt or criminal behaviour.***"

(In each case the emphasis is mine.)

It is only with regard to criminal liability and corrupt conduct that the Commission's power to report findings was under challenge in the High Court. It is only with regard to findings concerning the guilt of persons in respect of criminal offences or corrupt conduct that orders were made.

That is what can be drawn from the judgment of the High Court in the Waverley cases. I turn now to consider the Ocean Blue cases, which of course have a more direct bearing on the Report now being produced. The appellants' claims and the Court of Appeal judgment in those matters, refer specifically to this Report.

The Ocean Blue cases

Mr. Glynn, Mr. Steel and the Ocean Blue companies, had before the Court of Appeal a wider challenge to the Commission's reporting powers, and in particular to its power to make findings, than was considered in the High Court. They originally sought declarations, including that the Commission is not entitled in any Report:-

(a) to publish any adverse findings, conclusions or evidence as against them, or

(b) to make a finding or reach a conclusion in respect of them:-

  (i) that they are guilty of any conduct which may constitute a criminal offence;

  (ii) that they are guilty of any conduct whether of a criminal kind or not which may be conducive of corrupt conduct;

  (iii) which in any respect purports to arrive at or state the Commission's own opinion as to the ultimate effect or significance of any evidence gathered in the investigation, or

  (iv) which is adverse to them.

When the High Court judgment in the Waverley cases was handed down, the Commission took the following position regarding the Ocean Blue cases. Accepting that the High Court's order regarding findings on criminal liability and corrupt conduct was binding, the Commission was ready to consent to orders in similar terms in the Ocean Blue cases. The Commission so informed the appellants. The Commission also informed the appellants that their claim for declarations further limiting or restricting its reporting powers, was still opposed, and that if they wished to pursue it, it would be resisted. From statements I had made during the public hearings, it was known that I intended to make findings of fact.

The appellants opted for consent orders in terms of the orders made in the Waverley cases. The claim to have the Commission's reporting powers, and in particular its powers to make findings, further limited or restricted was abandoned.

The present position

It is on the basis of that appreciation of the litigation and judgments in both matters, that I have considered whether the Report that has been prepared, can now properly be furnished. The Act requires that it be furnished to the Presiding Officers of both Houses of Parliament "*as soon as possible after the Commission has concluded its involvement in the matter*". The litigation delayed presentation of the Report. That litigation is now complete in both matters.

In summary:-

1. The Commission is not entitled to include in a Report, a finding that any person was or may have been guilty of a criminal offence.

2. The Commission is not entitled to include in a Report, a finding that any person was or may have been guilty of corrupt conduct.

3. The Report prepared in this matter does not contain a finding to either effect.

4. No court order has been made restricting or limiting the Commission's reporting powers in any other way, nor is there any litigation pending in this or any other matter, in which such order is sought.

5. The Commission may report to Parliament the results of its investigations. The power to do so is unaffected by the fact that the matters revealed may inevitably implicate a person or persons in criminal or corrupt conduct. The power to do so is unaffected by the fact that the material elicited and reported upon, may establish or suggest that any person or persons have been guilty of criminal or corrupt conduct.

6. Provided that points 1 & 2 above are observed, the Commission may analyse, distill and weigh the evidence received at its hearings, and may consider and draw inferences from it, and reach conclusions and make

findings with regard to it, insofar as that is incidental to its power and duty to report the results of its investigations. In so doing, the Commission is not to be taken to be making determinations, however preliminary, as part of the criminal process. The Commission also has the power to evaluate the evidence for itself, for the purpose of deciding whether it warrants further consideration as contemplated in s.74(5).

Wherever reference is made in the Report to a finding or a conclusion, or to my being satisfied as to a fact, the intention is to convey that the investigation, in my assessment, has revealed that fact. It is something I am reporting as a result of the investigation. It should be read and understood in that way.

Adjusting the Report

In order to ensure that those principles are both observed and seen to be observed in the Report, I have reviewed and revised it. In particular, I have tried to avoid the use of language which might give a false impression of departure from the requirements as they are now known. Other more substantial changes have been made, and the emphasis shifted still further from the conduct of individuals, to patterns of behaviour and means by which corruption in the public sector may be minimised. The changes to the Report as originally prepared, are numbered in hundreds.

Some matters remain that should be explained.

In some parts of the Report, I have referred to corruption or corrupt practices. Where that has been done, the words are used in their everyday sense, and not with the intention of indicating corrupt conduct, with its special meaning defined in the Act. Where used, such expressions are to be found in descriptions of behaviour or practices disclosed, not with relation to adverse findings concerning individuals.

The Report does contain summarised conclusions regarding each of a number of the persons named as substantially and directly interested in the subject-matter of the investigation. Those conclusions are not expressed in terms of criminal offences or corrupt conduct, and are not intended to refer to either. The conclusions are stated and summarised in that way for two reasons. One is that some of those persons are mentioned in a number of different places in the Report, and it is convenient to collect and bring the various references together. Another is that it is useful to collect and assess all relevant material

concerning each person, as a preliminary to later making the findings necessary under s.74(5) & (6).

For purposes explained in the Preface which follows, I have concentrated upon relevant patterns of conduct rather than people. Disclosing what occurred, and the circumstances in which it was able to occur, is regarded as more important than identifying those who were responsible. The parts played by individuals have been investigated and are reported upon, however, as they are necessary to an understanding and explanation of what has emerged from the investigation. It is really impossible to report the results of the investigation without referring to them.

It is also to be borne in mind that the many days of public hearing were widely reported. Circulation has been given to allegations of serious improprieties, in some cases affecting persons who hold high public office. There is, I believe, a legitimate expectation, on their part and on the part of the community at large, that, where possible, those matters not remain unresolved. Foreshadowed challenges to the Commission's power to make findings of fact, as distinct from findings of criminal or corrupt conduct, have not been pursued. I am certainly not prepared to assume that if they were, they would succeed.

It cannot have escaped attention that in the Waverley cases, the Court of Appeal was unanimously of one view as to the stated intention of the legislature, as expressed in the ICAC Act, and the High Court was unanimously of a contrary view. That must justify the conclusion that there is some ambiguity in the terms of the Act.

Against that background, may I express the hope that debate over a barren legalistic question as to the meaning of words in an Act of Parliament, will not be allowed to overshadow or detract from the important public debate which I believe is called for by the significant issues raised by this Report, and the investigation which led to it.

While the Act remains in its present state, there is always the prospect of Commission Reports being delayed by litigation, with uncertainty as to its outcome. Amendment is required as a matter of urgency. The intention of the legislature should be clearly expressed.

- A.R.
2 July 1990

9.1.3 As outlined in the Committee's Discussion Paper of September 1992, two quite separate issues had come to the Committee's attention in relation to the operation of s.11. Firstly, the ICAC had drawn attention in a number of Annual Reports to what it saw as inadequate compliance with s.11 by certain government departments. Secondly, there had been a suggestion that s.11 was so broad in its scope that it could have a deleterious effect upon public administration. Each of these issues are outlined below.

9.2 ***ICAC Concerns - Inadequate Compliance***

9.2.1 The ICAC first raised its concerns about inadequate compliance by some government agencies with the provisions of s.11 in its 1990 Annual Report. The report noted that during the 1989-1990 reporting year 1091 approaches were made to the Commission concerning possible corrupt conduct. Some 16%, or approximately 175, of these had been received by way of reports under s.11.

> *"A good number of reports under s.11 were received, but probably not as many as should have been made.... Publication of the guidelines under s.11, which were mentioned earlier, will further assist heads of agencies in bringing matters forward, in a timely manner, whenever required by statute."* [190]

9.2.2 The ICAC next raised this issue in its 1991 Annual Report. The Commission drew attention to the number of reports received from the RTA and suggested that other agencies with similar budgets and responsibilities should be reporting at a similar level. The report also noted the importance of timely reports under s.11. The report stated that the Commission intended to take up this issue with authorities which appear to be providing too few reports.

> *"The Commission received 245 individual reports of corrupt conduct this year. While this is about 70 more than received last year, it is still not as high as expected. The Commission has received individual reports from just over 50 authorities. It received in excess of 40 reports from each of the Police, the RTA, and local councils as a group. From each of the other Departments and agencies the Commission received between one and ten reports, mostly at the lower end of that range. It reflects well on the RTA that they have conscientiously reported. It reflects badly on other authorities, some with characteristics similar to the RTA, such as high staff numbers, significant operational budget and annual revenue received, a high degree of acquiring goods and services and a large capital works program, that they have reported so little. Similarly the*

190 ibid.

Commission would have expected a higher reporting profile from authorities with investigative and management functions, or with a large public client base, and those which administer the rights and freedoms of a large client base.

The Commission recognises that some smaller authorities which report only a few matters are reporting at appropriate levels. However, in the case of authorities with the characteristics mentioned above, the Commission is not so confident. It suspects that insufficient efforts are being made by principal officers to find out about suspected corrupt conduct within their authorities, or to convey such information to the Commission. The Commission intends to take up this issue with authorities which appear to be providing too few reports. Reports are an important means for the Commission to develop a picture of the nature and extent of possible corruption...

As noted above, the Commission has not received as many s.11 reports as expected. Often it does not receive reports when events happen, but some time later. Reporting a matter to the Commission well after it occurs, and when inquiries by the authority or the police are well advanced or completed, effectively deprives the Commission of a real decision about whether and how to deal with the matter. To enable the Commission to effectively perform its work, and make decisions about what it investigates, it needs to receive full and timely reports." [191]

9.2.3 The Committee took this issue up with Mr Temby when he appeared before it at a public hearing in October 1991. Mr Temby declined to name the agencies which were perceived to be making too few reports under s.11. However, he did outline some of the strategies the Commission proposed to adopt in order to encourage greater compliance. Mr Temby said that he would prefer to tackle this problem by way of contact between the Commission and the agencies rather than through any legislative amendment.

"MR GAUDRY:

Q: If we can go to the report section, of particular interest is the fact that you state, Commissioner, that there are authorities providing too few reports under section 11. Would you be able to expand that with the names of organisations that you think should be giving more thorough and frequent reports to the Commission?

191 ICAC, 1991 Annual Report, p 19-21.

A: *I am very happy to expand upon it although, if permitted to do so, I would prefer not to name agencies because we would like to approach them first. I have to say that we are proceeding only by way of impression because we do not know what we should have got that we have not got, and that is really in the nature of things. But inevitably any organisation of significant size, if it has officers exercising discretionary judgments or if it is handling money and public property, may be exposed to corrupt influences...*

The Annual Report is the first step in a campaign to try to get them to lift their game. A second step will be to work out how, by way of survey or otherwise, we can raise the consciousness of other agencies. A third step will or may include correspondence or visits from Commission officers or contact between myself and chief executives to try to ensure that they understand what their obligations are. If permitted, I would prefer not to name those that I think we are going to have to do some work on because I am working only from impressions. It seems there is a disparity in the numbers and we want to raise consciousness....

MR TURNER:

Q: *Is there any need for us to look at that section?*

A: *I do not think there is. It is broad in its scope. If you were going to change it, you would have to change it by way of putting in a penalty. That just creates another offence and we would probably all agree there are too many offences. It is hard to see them being prosecuted. I think it is best if we just push for better compliance....* " [192]

9.2.4 One Committee member, the Hon Jan Burnswoods MLC, suggested that government departments and authorities should be required to include statistics in their annual reports of the number of s.11 reports made each year.

"MS BURNSWOODS:

Q: *Would it be useful if there was a clause in relation to the Annual Reports of departments and authorities that they had to actually say whether they had made any section 11 reports, so that it*

192 Committee on the ICAC, Collation of Evidence, 14 October 1991, pp 58-60.

would be one of the range of things that are expected to be briefly reported under the Annual Reports Acts?

A: *Yes. I have to confess that I have not thought of that. My immediate reaction is, yes, it is a useful suggestion.*

Q: *I take your point about offences and penalties but given the range of matters that are in the reports of authorities and departments, it could perhaps be a reminder?*

A: *That is, with respect, a useful suggestion. It might be that even there you do not need a statutory amendment. It could be done by government direction. Let us keep as much out of the statute as possible."* [193]

9.2.5 The Committee next took this matter up with Mr Temby in March 1992, when he appeared before the Committee at a public hearing. Mr Temby indicated that the Commission had been engaged in discussions with some agencies and that letters would shortly be sent to all agencies which the ICAC felt were providing too few reports. He also foreshadowed the possible need for an amendment to s.11 to require timely reports.

*"**CHAIRMAN***

Q: *What action has been taken in relation to the problem identified in the last Annual Report of some authorities providing too few s.11 reports?*

A: *In a couple of instances of public authorities providing too few s.11 reports or providing them too late the Commission has engaged in individual discussions. Shortly a letter will be sent to the agencies which the Commission feels are not providing sufficient reports or not providing them sufficiently early, encouraging better compliance with the statutory obligation in s.11. The Commission is also considering requesting an amendment to s.11 in respect of timeliness of s.11 reports, in an effort to have reports made when the principal officer of a public authority first becomes aware of a matter, so that the Commission can make proper decisions, rather than after an*

193 ibid, p 60.

agency has completed an investigation of the matter." [194]

In answer to questions from the Hon Jan Burnswoods MLC, Mr Temby indicated that he did not believe the time had yet come for the Commission to name the agencies involved.

9.2.6 The ICAC again discussed this matter in the 1992 Annual Report. That report noted that a review of s.11 reports had been conducted which identified twenty agencies which were inadequately complying with their s.11 duties. The report noted that letters had been sent to the heads of these agencies but that this action had resulted in only a minor improvement in the reporting level.

> *"In April this year the Commission conducted a review of s.11 reports, in an attempt to identify organisations which were not complying or inadequately complying with the statutory obligation. The Commission was also concerned about the lack of timeliness by some organisations in providing reports. The review identified that reports received by the Commission came from a narrow spectrum of public authorities and that a large number of organisations were either not reporting as much as they should, or not reporting at all.*
>
> *The Commission expects that organisations with characteristics such as large numbers of staff, a significant operational budget, a high degree of activity in acquiring goods or services, a large capital works program, investigative or management functions or a large client base will supply s.11 reports. It is also not uncommon for the Commission to receive few reports from organisations about which it receives many complaints. Organisations having these criteria were identified by the review.*
>
> *Twenty such public authorities were selected and a letter was sent to the principal officers reminding them of their obligations. This action resulted in only a minor improvement in the number of agencies furnishing reports or periodic schedules. Accordingly, there remains a number of government departments and authorities apparently not fully observing the obligations of s.11 reporting, which in the Commission's view is unacceptable.*
>
> *To assist organisations in their obligations, the Commission is ready to discuss reports and s.11. The Commission is also prepared to assist in developing arrangements with organisations whereby reports are forwarded by periodic schedule. Reporting by schedule is an efficient*

194 Committee on the ICAC, Collation of Evidence, 31 March 1992, p 20.

way of reporting for organisations which must report allegations of corrupt conduct frequently.

In order to make timely and informed decisions as to how to deal with matters, the Commission requires early and full reports of matters of possible corrupt conduct when they occur or when the organisation first becomes aware of them. Often the Commission will leave the investigation of the matter to the reporting agency or the police, taking only a monitoring or advising role, but in order to make such decisions on a properly informed basis, the Commission must have timely and full advice." [195]

9.3 ***Other Concerns - Breadth of Duty***

9.3.1 During 1991 and 1992 the ICAC conducted an inquiry into "The Sydney Water Board and Sludge Tendering" which resulted from a s.11 report from the Director of the Water Board. Patrick Fair, a councillor of the Law Society of NSW, acted as solicitor for one of the parties involved in that inquiry. Following the conclusion of that inquiry in May 1992, Mr Fair gave a paper in which he was critical of the scope of s.11.

> *"Section 11 of the Act makes it a positive duty of the Ombudsman, the Commissioner of Police, the principal of a public authority and an officer who constitutes a public authority to report to ICAC any matter 'that the officer suspects on reasonable grounds concerns or may concern corrupt conduct'. Deciding what constitutes reasonable grounds for a suspicion that a matter may concern corrupt conduct is not an easy matter. Public officials would be well advised to err on the side of caution. As a result rumours, gossip and prattle of all kinds have been elevated to the status of subject matter for public duty and official report."* [196]

9.3.2 Mr Fair elaborated on his concerns when he appeared before the Committee during a separate inquiry on 4 August 1992.

> *"The criterion 'suspect on reasonable grounds' is not a criterion readily understood at law.... Trying to determine on an intelligent basis what might be reasonable grounds for suspecting that something may concern corrupt conduct is extremely difficult. Any responsible public official*

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195 ICAC, 1992 Annual Report, pp 13-14.

196 Patrick Fair, "ICAC Under the Microscope", Speech to Law Week Seminar, 28 July 1992, pp 4-5.

> *considering that definition would have to make a decision to notify rather than not to notify so that he did not run the risk that he did in fact have reasonable grounds to suspect that something may concern corrupt conduct. I think there is a reasonable submission to be made that that requirement ought to be."* [197]

Mr Fair also suggested to the Committee that public officials not wanting to be the subject of a report under s.11 will take steps, keep records and exercise conservatism in their practices which are unwarranted and may cause the administration of government to become slow and inefficient.

9.4 ***Submissions***

9.4.1 A small number of submissions and witnesses addressed section 11. The Law Society submitted that s.11 be amended to provide that reports would be required to be made only once a reasonable belief had been formed that a matter concerns corrupt conduct.

> *"Section 11 should be amended to require public officials to report matters to ICAC only once a reasonable belief has been formed that a matter concerns corrupt conduct. An appropriate wording would be;*
>
> > 'An officer to whom this section applies is under a duty to report to the Commission any matter that the officer has reasonable grounds to believe concerns corrupt conduct.'
>
> *Almost any grounds are 'reasonable grounds' for a suspicion. The word 'may' in the phrase 'reasonable grounds for suspicion that conduct may concern corrupt conduct' is redundant and difficult. Once the word suspicion is used the fact that the conduct is only a possibility is established and the word 'may' is unnecessary."* [198]

9.4.2 The Hon Ernie Knoblanche QC made the helpful submission that the Committee should, in determining what should be done to s.11, gather and carefully consider the views of any principal officers referred to in s.11(1) who make submissions to the inquiry. The Committee received submissions and evidence from senior officers of two public sector organisations in relation to s.11.

9.4.3 The Deputy Auditor-General, Kevin Fennell, gave evidence to the Committee on 12 October 1992. He spoke about the experience of the Auditor-General's Office

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197 Committee on the ICAC, Minutes of Evidence, 04 August 1992, p 65.

198 Law Society, Submission, 12 October 1992, p 12.

in applying s.11 and drew attention to some conflict which had emerged over the time at which matters should be reported. Mr Fennell stated that it was important for Chief Executive Officers to be able to conduct their own investigation of matters to be reported under s.11.

> *"That brings us to section 11. We have had some problems with section 11 in the Audit Office, and I guess some other people have as well. Section 11 is taken to mean that if the CEO has any reasonable suspicion that conduct has taken place, he is duty bound to make an immediate reference to ICAC. We have been doing that. We have been making references to ICAC but by the same token we have also in the Audit Office carried out certain inquiries and investigations by way of special reports and other reports we put to Parliament, before we made the report to ICAC. That brought down the wrath of the Commissioner, who roundly condemned us for that and said that we should have reported those things to him immediately.*
>
> *One case in point was a fairly lengthy report we put in on the Housing Department. That was at a time when the Royal Commission was in full swing, and the Royal Commissioner in fact wanted a copy of the report. It had not yet been tabled in Parliament so we told the Royal Commissioner he could not have it until it had been tabled in Parliament, and we virtually told ICAC the same thing. ICAC took a different view and said 'It should have come to us'. In other words, in the midst of the inquiry we should have sent what documentation we had to ICAC. We did not see it that way, and I would like to see something going into section 11 which would enable us to make an investigation in the first instance and then make a report to ICAC."* [199]

The Chairman asked Mr Fennel for his views on the guidelines that the ICAC had issued in relation to the operation of s.11.

> *"CHAIRMAN:*
>
> *Q: Dealing with section 11, you have the guidelines that ICAC has issued to principal officers?*
>
> *A. Yes.*
>
> *Q. Are these guidelines effective?*

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199 Committee on the ICAC, Minutes of Evidence, 12 October 1992, pp 32-33.

A. They are fairly wide-ranging. I would like to see them reviewed. I know for a fact that ICAC is getting material that is having a snowing effect on them. They are getting hold of things that could be investigated but are not to be worried about. I think there is some concern over in ICAC itself that possibly the guidelines might need to be revised." [200]

9.4.4 Two senior officers of the Sydney Water Board gave evidence to the Committee on 12 October 1992. That evidence focussed on the question of judicial review and appeal mechanisms, with specific reference to the Government and Related Employees Appeal Tribunal (GREAT), as outlined in chapter three. The Committee took the opportunity to question the Board's officers on their views on, and their experience in relation to, s.11. The officers took a number of questions on notice and subsequently wrote to the Committee with their comments. The letter emphasised that s.11 reporting could only be effective when part of an organisation's overall program of corruption minimisation. The letter suggested that the ICAC's guidelines for s.11 reporting did not adequately address this requirement.

> *"An authority cannot effectively report to the Commission unless a strategy has been put in place by the authority to investigate and prevent corruption. Developing effective s.11 reporting should be part of that strategy...*
>
> *It is only through an holistic approach to tackling corruption that effective reporting will begin to take place.*
>
> *The guidelines provided by the Commission do not adequately encourage an authority to develop effective reporting in the context of an overall strategy to combat corrupt conduct.*
>
> *S.3(h) of the ICAC Act states that one of the functions of the Commission is* ***to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct;***
>
> *This function is mentioned in the Commission document entitled 'Public Affairs Strategy'. Yet neither this document or any other publicly available Commission document appear to relate the above function to assisting a public authority in developing such overall strategies.*

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200 ibid, pp 33-34.

The Effective Reporting document sets out a suggested reporting procedures, but in a vacuum." [201]

9.4.5 The Water Board's letter raised two further concerns about the current operation of s.11. Firstly, the letter drew attention to confusion over the time at which reporting was required.

> *"Page 1 of the Guidelines state that a matter should be reported when an officer has reason to consider that there is 'a real possibility' that corrupt conduct is or may be involved.*
>
> *On page 4, however, the direction is given that 'a matter should be reported as soon as it comes to attention'.*
>
> *On page 20, the Annual Report states (disapprovingly) that the Commission often does not receive reports when events happen, but some time after. Does this imply that the matter should be reported as soon as an allegation is made or only when it has been ascertained by the Principal Officer that the allegation involves a real possibility of corrupt conduct? If the latter is the case then certain preliminary inquiries may need to be undertaken by the authority which means that a matter will **not** always be reported as soon as it comes to attention.*
>
> *An effective corruption minimisation program is required to establish the right time to report a matter. Regardless of whether the basis for reporting is 'suspicion reasonable grounds' or 'reasonable belief', the onus is still on a Principal Officer to make a judgement on whether or not a fresh set of facts and circumstances fall within the s.11 threshold. An authority will become more proficient in determining when to report if it has an effective corruption minimisation program in place.*
>
> *It would not be difficult to ascertain the s.11 threshold in order to report all matters, however, the guidelines as they stand, appear inconsistent."* [202]

Secondly, the Water Board's letter suggested that a greater degree of joint investigations and timely referral of matters back by the ICAC for internal investigation by the Water Board might encourage more effective reporting by the Water Board, and other agencies.

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201 Water Board, Letter, 09 November 1992, pp 2-3.

202 ibid, pp 4-5.

"An integral part of s.11 administration is what happens after a matter is reported.

Guidelines indicate that the Commission will not investigate every matter referred but wishes to have the option to investigate.

Timely and effective results might be achieved through joint investigation efforts. Co-operation could occur either at the preliminary inquiry or during a formal Commission investigation.

The Sludge investigation illustrates the concern of the Board in regard to s.11 reporting:

- ◊ *Long delays in achieving an outcome;*
- ◊ *Effect on the personal lives and workplace of employees who are subject to an investigation;*
- ◊ *Line managers will be less likely to co-operate in referring s.11 matters if they observer negative effects of ICAC investigations.*

On the other hand, in regard to one complaint referred this year by the Commission to the Board, internal investigators took the matter as far as they could then handed the matter back to Commission investigators to pursue. The Commission eventually decided not to formally investigate the matter. The Board, using facts supplied by the Commission, conducted further internal inquiries which resulted in disciplinary action against one employee.

Incorporating effective s.11 reporting into an overall strategy of corruption minimisation would address inherent problems with the administration of s.11. For instance:

- ◊ *the Commission would leave more matters for the Board to follow up on itself as the Commission becomes more confident that the Board has an effective internal investigation function in place; and*
- ◊ *investigation of serious matter is undertaken on a joint basis."* [203]

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203 ibid, pp 5-6.

9.5 ***ICAC Position***

9.5.1 The ICAC in its submission to the Review of the ICAC Act outlined the operation of s.11. The submission emphasised the significance of s.11 in terms of the number of major Commission investigations which had resulted from s.11 reports. It was submitted that the ICAC would prefer to have the reporting requirement remain at the level of "reasonable suspicion".

> "*... more than two thirds of the Commission's investigations involving public reports or public hearings have commenced from s.11 reports, or equivalent reports. These investigations include some of the Commission's most significant investigations, including Driver Licensing, Informants, and Unauthorised Release of Government Information. The Commission therefore considers s.11 reports a valuable source of quality information, and would be reluctant to see any diminution in the scope or effect of the section.*
>
> *The Commission's comments in its 1991 Annual Report about the operation of s.11 remain applicable. The Commission suggested there that it should have a discretion to limit reporting of old, minor or minor disciplinary matters, by guidelines. The Commission would rather see the scope of the reporting requirement remain, with a discretion for it to limit the matters which need to be reported, than see the reporting requirements reduced, which may cause the loss of valuable information.*
>
> *The Commission also suggested amendments in relation to the content, manner and timing of reports. The timeliness of reports is still an issue and has been the subject of further comment in the Commission's 1992 annual report.*
>
> *Summary: Section 11 reports are a valuable source of information for the Commission and have been the genesis of many of the Commission's most significant investigations. The Commission would prefer to see the scope of the reporting requirement remain at a 'reasonable suspicion', with a discretion for the Commission to specify old or minor matters which need not be reported, than to see the reporting requirement reduced to 'reasonable belief' which may cause the Commission to be deprived of valuable information."* [204]

9.5.2 When Mr Temby appeared before the Committee on 09 November 1992 he again emphasised the values of s.11. He described it as a "critically important provision"

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204 ICAC, Submission, 12 October 1992, pp 46-47.

and said that any weakening of it would be "a seriously retrograde step". He did acknowledge though that there was scope for s.11 to be improved and that at present there was a requirement for the Commission to be told more than it it was really interested in.

> *"Section 11 is a critically important provision and it must be retained. Weakening it so that there is no need to report things to us unless there is a reasonable suspicion or reasonable cause exists, which would mean we were told less, would be a seriously retrograde step. A great deal of the useful work we have done has flown from section 11 reports. Section 11 is critically important and should not be weakened. It is capable of being improved, in particular by enabling the Commission to say that which has not been reported to us; that is to say, to impose a general obligation but entitle the Commission to exempt certain classes of matters. At the moment there is perhaps a difficulty with section 11 which is that it obliges people to tell us more than we would truthfully be interested in. Conceivably, if the absolute obligation was somewhat reduced, that would lead to a regime that was seen on all sides as being more workable and that might lead to better compliance with the parts of section 11 that matter. We might be told more of the things we surely ought to know about. That is the sort of change to section 11 that ought to be contemplated, if any. But there should be no weakening of it. It is a very important provision. It is one of the great strengths of our Act."* [205]

Mr Temby also indicated, in answer to a question from the Committee, that he did not believe that s.11 imposed an onerous obligation on public officials.

> *"Mr GAUDRY:*
>
> *Q:* *Is it possible for the present level of contact to have a deleterious effect upon the efficiency of public administration in New South Wales?*
>
> *A:* *I cannot bring to mind an occasion where that has occurred.*
>
> *Q:* *So it is not that onerous?*
>
> *A:* *I do not think so. It depends upon the attitude with which you approach it. If it is approached positively as being an aid to improving integrity there is a bit of work involved but you can get*

[205] Committee on the ICAC, Minutes of Evidence, 09 November 1992, pp 61-62.

a lot of benefits out of it." [206]

9.5.3 Following the hearing on 09 November 1992 the Committee received a letter from the Solicitor to the Commission, Deborah Sweeney, which outlined a proposal for reform of the operation of s.11. The object of this reform would be to ensure that the ICAC was informed of important matters on a timely basis but at the same time provide "a more workable regime from the point of view of public authorities". The first part of the reform proposal was for a clear distinction to be drawn "between serious matters which require immediate reporting and less serious matters which can be reported by schedule".

> *"The reporting scheme which the Commission proposes will address the claims that s.11 reporting is an onerous burden on public officials and public authorities; the Commission's experience is that the work required to be done for reporting to the Commission by schedule has generally to be done for internal audit or other purposes of public authorities. Some of the public authorities which report to the Commission by schedule have confirmed that this is so.*
>
> *The scheme which the Commission proposes distinguishes between serious matters which require immediate reporting and less serious matters which can be reported by schedule.*
>
> *The matters which the Commission proposes be reported by schedule are described as follows:*
>
> ◊ *those matters normally and routinely dealt with by the Internal Audit function of the relevant authority and which did not require reference to an external agency other than suspected minor criminal offences referred to the Police Service.*
>
> ◊ *minor matters of misconduct by public officials which resulted in warning, counselling, transfer or demotion.*
>
> *Provision will be made for adequate consultation and negotiation between authorities reporting by schedule and the Commission to ensure that in relation to particular authorities they have some guidance on what matters are likely to be regarded as minor.*
>
> *The Commission accepts responsibility for responding to authorities if interested in particular matters reported by schedule, and for contacting*

206 ibid, p 65.

authorities if matters reported by schedule or individual report are inappropriate for that particular method of report.

Matters regarded as being serious would be required to be reported to the Commission by individual report. In some circumstances prior phone contact and consultation may also be appropriate. Those matters regarded as serious could be those incorporating any of the following characteristics:

- ◊ *serious criminal offences particularly including those which relate to corruption offences such as bribery, the payment of secret commissions and so on;*
- ◊ *conduct which was part of an organised scheme or plan;*
- ◊ *the conduct was systematic and had occurred over a long period of time or involved a number of staff;*
- ◊ *the public officials involved were senior or held sensitive positions;*
- ◊ *involving misconduct sufficient to result in dismissal;*
- ◊ *the persons involved obtained or expected to obtain money or other benefit or advantage which could not in the circumstances be regarded as merely token;*
- ◊ *matters which commence as minor matters where their size and nature change significantly."* [207]

The second part of the reform proposal was for a provision to be inserted in s.11 to require the timely reporting of serious matters.

> *"The one further matter to raise is the timing and timeliness of s.11 reports about serious matters. The Commission commented in its 1991 and 1992 Annual Reports about how it needs such reports to be made early so that it can decide effectively whether it should take prompt action, particularly investigative action. Some authorities are quite happy to report serious matters on that basis. However, s.11 contains no provision about the timing or timeliness of reports. Some authorities have made that point when the Commission has requested reports early*

[207] ICAC, Letter, 17 November 1992, pp 2-3.

rather than late. The Commission understands that at least one public authority has considered obtaining independent legal advice about, as s.11 contains no provision requiring reports to be made immediately or promptly, whether the authority need do so.

This is disappointing to the Commission, from the perspective of the lack of co-operative attitude on the part of some public authorities, and given also that the Commission quite often leaves the investigation of matters with the authority or the Police already handling it. The Commission would not commence an investigation on the basis of a s.11 report from an authority without consulting that authority. Many of the s.11 reports which have been the basis of investigations have been requests for the Commission to investigate something which the authority could not pursue or could pursue no further and wished the Commission's powers to be brought to bear upon the matter.

The Commission will understand from the above that reports by schedule are likely to be more common than individual reports. Therefore a provision as to timely individual reports of serious matters should not create an undue burden on public authorities. However, it would strengthen the Commission's ability to secure compliance with s.11 in respect of those matters which matter. The Commission asks that the Committee consider it." [208]

9.5.4 The Committee immediately sought the response of those who had given evidence on s.11 to the ICAC's reform proposal as outlined in Ms Sweeney's letter. Patrick Fair described Ms Sweeney's proposal as "a sensible one". The only concern he raised was that, if there is to be a distinction drawn between categories of matters, the categories need to be clearly defined. Kevin Fennell was also supportive of Ms Sweeney's proposal. However, he reiterated his earlier submission that s.11 should be amended to to require a principal officer to conduct due inquiry and take any necessary action arising from such inquiry before reporting the matter to the ICAC. He also asked about the frequency of reporting minor matters by schedule that would be required. The Water Board was also supportive of Ms Sweeney's proposal and stated that reporting minor matters by schedule makes sense.

9.6 ***Conclusions***

9.6.1 Section 11 is an essential part of the Independent Commission Against Corruption Act 1988. A number of the ICAC's most important inquiries have resulted from reports under s.11. The ICAC has emphasised, and the Committee agrees, that the

[208] ibid, pp 3-4.

reporting requirement under s.11 should not be weakened.

9.6.2 On the other hand the ICAC has acknowledged that s.11 can be improved. There is scope for the section to be amended so as to provide "a more workable regime from the point of view of public authorities".

9.6.3 The Committee supports the reform proposal contained in Deborah Sweeney's letter of 17 November 1992. Section 11 should be amended to provide for a clear distinction to be drawn between serious matters which require immediate reporting and minor matters which can be reported by schedule. Section 11 should also be amended to include a provision as to the timeliness of reports of serious matters.

9.6.4 It is important that s.11 reporting not stand in the way of principal officers conducting due inquiry into matters of suspected corruption within their agencies, and taking necessary action resulting from those inquiries. If necessary, s.11 should be amended to ensure that there is full and adequate consultation between the ICAC and principal officers as to action to be taken on s.11 reports.

-10- ENTRENCHMENT OF COMMITTEE RECOMMENDATIONS

10.1 ***Committee Recommendations***

10.1.1 Over the past three years the Parliamentary Joint Committee on the ICAC has conducted a number of formal inquiries which have resulted in reports to Parliament. These reports have contained recommendations for changes to the ICAC Act, which have largely been implemented. They have also contained recommendations for changes to ICAC procedures. In many cases the Committee has accepted assurances from the ICAC that procedural changes either had already been adopted or would be adopted. Some examples of these recommendations are set out below.

Inquiry into Commission Procedures and the Rights of Witnesses - First Report, November 1990

"The ICAC should make greater use of temporary suppression orders to protect reputations from hearsay allegations. Suppression orders should be used when an allegation is made about a person who is unrepresented or who cannot respond to the allegation on the day it is made. The suppression order can be lifted at a later date when the allegation and response are made public concurrently. However the ICAC should retain discretion over when such orders are made. The document "Procedure at Public Hearings" should be amended to note the general circumstances in which suppression orders will be made.

The Committee endorses the procedure adopted during the Fitzgerald inquiry in relation to the prior notification of persons against whom allegations were made during public hearings. The Committee commends the ICAC on the development of a similar procedure. The Committee also recognises that the Commission must retain some discretion to determine when prior notification is appropriate. However, the Committee believes this procedure needs to be enunciated, in the document "Procedure at Public Hearings".

The Committee commends the ICAC upon the provision of a right of reply to persons against whom allegations are made, even though there is no statutory requirement for the provision of such a right. The

Committee also notes the reference to this practice in the document "Procedure at Public Hearings". In light of the development of this practice the Committee does not see a need for amendment of the ICAC Act at this time to provide for a statutory right of reply.

Wherever possible the Commission should seek to provide an opportunity for a person against whom an allegation is made to make a brief response on the day the allegation is made. Where this is not possible the Commission should make use of a temporary suppression order (see 6.4.2). This procedure should be enunciated in the document 'Procedure at Public Hearings'."

Inquiry into Commission Procedures and the Rights of Witnesses - Second Report, February 1991

"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.

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."

"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.

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."

"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'."

Inquiry into Matters Raised by Paul Gibson MP, December 1991

"Whilst acknowledging the need for flexibility and the use of multi-disciplined teams by the Commission, the Committee believes it is essential that the command structure outlined in SOP 1/91 "Command and Responsibility - Operations Department" is followed. Until such time as matters reach the public hearing stage, investigations should be run by Chief Investigators who are under the command of the Director of Operations through the Deputy Director."

10.2 ***Calls for Entrenchment***

10.2.1 This issue was first raised publicly by Patrick Fair in a speech he gave at a Law Week seminar in July 1992. Mr Fair's paper, entitled "ICAC Under the Microscope", was critical of the ICAC and called for fundamental changes to the way in which the ICAC operates. In that context he discussed the work of the Parliamentary Joint Committee on the ICAC.

"As indicated above many of the issues which give rise to these suggested reforms have been considered by the Committee on the ICAC. The Committee has recommended some minor reforms. Generally the Committee has been prepared to accept undertakings of the Commission that it will improve its management and moderate its conduct in the future. In the writer's view the powers of ICAC should be moderated by changes to the Act rather than statements and undertakings. It is bad public policy to tolerate the existence of powers and discretions on the basis that there has been a statement of broad policy by the empowered

entity that the powers will not be exercised." [209]

10.2.2 The Hon Athol Moffitt QC, CMG addressed this issue in some depth in his second submission on the Review of the ICAC Act, dated 14 October 1992. Mr Moffitt first discussed the issue as a matter of principle. He argued that the Parliament should in future define in legislation the limits which should be applied to the exercise of power by the ICAC. More particularly, specific provision should be made in guidelines to ensure the protection of individual rights.

> *"I believe any review of this question should be directed to it, at least primarily, as a matter of principle.... A balance has to be struck, in the case of any public institution, between the public interest and that of individuals. This is so with the court system. Some rights of some individuals must necessarily be intruded into in order to serve the general public interest. However, there are many safeguards to prevent unnecessary intrusions into individual rights and to minimise unfairness. These are secured principally by detailed procedures, rules of evidence and review processes. Their terms do not depend on whether there can be reliance on the goodwill of particular office holders at any one time.*
>
> *A similar, but different balance needs to be struck with the ICAC, because it has new and draconian powers given in near absolute terms. It has been, in my opinion, rightly accepted that this is necessary in the public interest to serve the special functions of ICAC. It is also necessary, indeed imperative, that such powers, some of them in conflict with ordinary democratic concepts, be subject to some limitations and be exercised within some guidelines and with care, so as to minimise, so far as is possible any interference with the ordinary rights of individuals. It is a nice, but critically important question to decide where the line should be drawn, what are to be the priorities and where is the balance.... Who, should draw the line and what mechanism should there be to see it is observed? At the moment all these things are left almost entirely to ICAC. Discretions, which will require a consideration of private rights, are in unrestricted terms without guidelines.*
>
> *Is it sufficient that so independent a body given such powers, should itself be left to define and enforce its own safeguards against its own possible excesses of power? Should not it be the responsibility of Parliament, which set up such a body, to define where the limits on power should be, or at the very least, define some guidelines? Surely Parliament should not be deterred from doing so, because ICAC*

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209 Patrick Fair, "ICAC Under the Microscope", Speech to Law Week Seminar, Sydney 29 July, pp 19-20.

complains that if any restrictions, even guidelines, are legislatively imposed to cut down its absolute powers, some persons, perhaps deliberately to delay ICAC operations, will take court action to challenge what ICAC does, on a claim that it is in excess of power, contrary to what Parliament has provided?

Minds will differ greatly where the line should be drawn and where the priorities should lie. If left at large, successive Commissioners most likely will take different views. The many different assistant commissioners, who conduct different inquiries, almost certainly will differ on some matters concerning what the approach should be concerning individual rights. As I pointed out in an earlier appearance before your Committee, this has already happened in respect of a private rights issue. In respect of ICAC, there is no internal or external mechanism (as there is with the courts) to procure uniformity.... The arguments in favour of Parliament itself to some extent laying down where the line should be drawn already appears to a degree by way of the rhetorical questions above posed. It is not acceptable that the body with such wide powers is left totally responsible without any appeal mechanism to be its own arbiter against its own possible excesses. It is the province of Parliament to ensure that there are mechanisms designed by it which will guard against excesses of power and which will serve to protect appropriate individual rights. Left to itself with no guidelines different officers will draw the line differently." [210]

10.2.3 To illustrate the application of this general principle Mr Moffitt referred to the recommendations contained in the Committee's First Report on Commission Procedures and the Rights of Witnesses concerning suppression orders, and the ICAC's failure to make a suppression order in respect of the Metherell diaries.

"On the issue of whether the matter should be left to the goodwill of ICAC, it must be said that, with the best of will, the ICAC, its commissioner, assistant commissioner and other officers are just as capable of error as is any person, including any judge. It will be more so with ICAC with no legislative guidelines or uniformity structures. The clearest example of the possibility of error, of course, are the fundamental errors of the experienced Commissioner in the Metherell Report, only pronounced null because of a fundamental error of law.

Another matter, relevant to the present debate, of apparent importance and worthy of examination by your Committee is a course of cases

[210] The Hon Athol Moffitt QC, CMG, Submission II, 14 October 1992, pp 1-3.

where there has been a failure of ICAC to exercise its suppression order discretion given in general terms by s.112, with resultant unnecessary unfairness to individuals. This issue was raised by me in the 1990 discussion paper and in my oral comments and was debated at length by others. I submitted there should be express provision made for making temporary suppression orders to the intent that in appropriate cases such a temporary order should be made at the time of admission of some classes of material at an open inquiry, so persons who could be adversely affected by its publication are accorded an opportunity to be heard on whether the suppression order should be continued or reversed. Before the Committee a glaring example of an unfair failure to make a suppression order resulting in most serious an unnecessary damages to a person was raised and debated at length. It is known as the Preston case. ICAC conceded the damaging error and assured your Committee there was no need to make the amendment, because this would not happen again. There would be temporary suppression orders made until persons could be heard.

With this background what occurred in relation to a failure to make any temporary suppression order concerning Dr Metherell's diary to enable affected persons to be heard, so that access, under privilege, was thrown open to the media seems to warrant some examination, as was done with the Preston Case. The contents of the diary no doubt were relevant in relation to Dr Metherell, because he was the author. It is most difficult to see what function of ICAC it served to put it all in the public arena. Much of it is what Mr Costigan QC referred to as "tittle-tattle" which even if he received it, he suppressed from the public arena. It was tittle-tattle harmful to a political party and embarrassing to and harmful to some of its members and a gross invasion of privacy. The ultimate point, however, is not whether it or some parts of it should in the end have been put into the public arena. Not even the agreed procedure of making a temporary suppression order until affected persons could be heard was followed. The private musings were obtained under the compulsion of a subpoena and published to the world. Disclosure of a private washing of dirty linen was capable of doing damage to a political party and some damage to reputations. As the content of most of what was published could not go to any issue, what most of those affected might wish to or could say by was of contradiction would be irrelevant and there could be no occasion to rule on where the truth lay. This exactly was the position complained of in the Preston Case. The media had a field day which they extensively exploited to the enjoyment of the opposing political party. Of course the exact reverse could have happened or could happen in the future. Surely ICAC should not be the place where private political wranglings can be revealed under the

compulsion process. It will not help the ICAC's image.

A radio commentator criticised what was done in strong terms. The response of ICAC was to say consideration would be given to whether contempt proceedings were open, but no further announcement was made one way or the other. There was no further criticism of ICAC on this issue.

The other response of the Commissioner was that he had no time to go through the diary and pick and choose. This was fair enough concerning receiving the diary for consideration in relation to Dr Metherell as its author. It was no answer to not imposing a temporary suppression order and hearing affected persons before the damage was done, the matter central to what I earlier raised in my reference to "Day one". If there was no time to pick and choose, or hearing of persons affected, the simple course would have been to have made permanent suppression order and in the ultimate report made such reference to the diary as was considered relevant to decision.

I submit this matter should be examined from all sides. As a matter of principle and what followed the 1990 report supports the view that more must be put into the legislation of a protection nature." [211]

10.3 ***ICAC Response***

10.3.1 The ICAC's submission to the Review of the ICAC Act contained a brief response to this issue. The submission argued that legislative entrenchment of investigative policy and procedure could lead to increased litigation and the need for frequent legislative amendment.

> *"Any attempt to prescribe matters of investigative policy and procedures in legislation is likely to lead to increased litigation and probably frequent need for legislative amendment. Both would impede the efficient and effective achievement of the Commission's objectives.*
>
> *Legislation has been defined as "the creation and promulgation of a general rule of conduct without reference to particular cases": Pearce and Geddes Statutory Interpretation in Australia, Butterworths 1988, page 1. The usual approach is to include in legislation discretionary powers in general terms, which are to be exercised to achieve the purpose and objects of the statute, and in accordance with the scope and subject*

[211] ibid, pp 4-5.

matter of the statute. In the ICAC Act the paramount principles are the protection of the public interest and the prevention of breaches of public trust.

The Commission's procedures, by which it exercises its powers, are publicly known to the extent consistent with preventing prejudice to investigations.

The Commission can advise the Committee, if required, of procedural and legislative changes which have already occurred as a consequence of Commission recommendations. However the Committee is probably already aware of them.

Summary: Any attempt to prescribe matters of investigative policy and procedures in legislation is likely to lead to increased litigation and probably frequent need for legislative amendment, both of which would impede the efficient and effective achievement of the Commission's objectives." [212]

10.3.2 Mr Temby also commented very briefly on this issue when he appeared before the Committee on 09 November 1992. He said that, "As the Americans say, If it ain't broke, don't fix it." [213] This suggests that the ICAC takes the view that there have been no mistakes in its operations and no instances where Committee recommendations have not been acted upon.

10.4 ***Regulations***

10.4.1 The Law Society, in its submission on the Review of the ICAC Act suggested that Committee recommendations could be entrenched by way of regulations. This would effectively overcome the objection that such entrenchment would require frequent legislative amendment, as regulations may be made in a far more efficient way.

> *"The procedures which the ICAC has assured the Joint Parliamentary Committee it has adopted should be imposed upon it by law. The process of legislative amendment may be excessive in relation to some procedural matters. Accordingly, from time to time, the Joint Parliamentary Committee on the ICAC should recommend to Parliament regulations setting out the procedures which ICAC must*

212 ICAC, Submission, 12 October 1992, pp 47-48.

213 Committee on the ICAC, Minutes of Evidence, 09 November 1992, p 69.

adopt to reduce the possibility of recurrence of mistakes which have been made by the ICAC and to provide protection to those who appear before it.

Formal procedural requirements enacted by a legislation or by regulation will not result in "costly delaying litigation" if the requirements are clear and consistently applied by the ICAC. To say that the requirements should not be enacted because litigation might result is to suggest that one expects ICAC is not in fact complying with its undertakings and that it is more acceptable for ICAC's undertaking to be breached from time to time than it is for those subjected to investigation by the Commission to be granted reasonable rights enforceable at law." [214]

10.4.2 This suggestion is similar to a reform proposal put forward by Michael Bersten in 1989. Mr Bersten suggested that the Parliamentary Joint Committee (PJC) be given the power to issue guidelines to the ICAC on matters of policy relating to the performance of its functions. Such guidelines would be restricted to matters of general policy and would not be able to touch upon operational matters. All such guidelines would be published in the Government gazette and tabled in Parliament. They would therefore be subject to Parliamentary review and possible disallowance.

> *"**Accountability proposal 3: The PJC be given the power to issue guidelines to the ICAC on matters of general policy relating to the performance of its functions.***
>
> *The proposal is this:*
>
> ◊ *the PJC be given the power to issue guidelines to the ICAC on general policy matters relating to the performance of its functions;*
>
> ◊ *these guidelines should be expressly circumscribed so as not to allow the PJC to investigate any "corrupt conduct" itself or review a decision of the ICAC in a particular investigation; and*
>
> ◊ *the guidelines are only valid if the ICAC is consulted, the guidelines are in writing and they are published in the government gazette and tabled in the NSW Parliament within 15 sitting days of being issued to the ICAC.*

214 Law Society, Submission, 12 October 1992, p 12.

The background to this proposal is as follows:

In the event that the exercise of its various discretions proves unsatisfactory, suggesting that the internal guidelines of ICAC sets itself are either inadequate or not observed, consideration should be given to strengthening mechanisms of accountability. Nevertheless it is not easy to strengthen accountability as this may in truth or perception interfere with the central feature of the ICAC structure, namely its independence from external, government direction. Accordingly external regulation such as making the ICAC subject to Ministerial direction or investigation by the Ombudsman may prove antithetical to the basic philosophy of having an agency like the ICAC.

There is however a half-way position, one which exists in relation to a number of agencies which are regarded as properly having considerable independence, namely the NSW Police, the Australian Federal Police (AFP), the Federal Director of Public Prosecutions (DPP) and the NSW DPP, the SDCC and the NCA. This position is the statutory provision for guidelines to be issued by some external authority such as the Minister or a monitoring agency. These guidelines generally provide for matters of general policy, rather than intervention in specific operational matters. Consequently the issuing authority is able to at once influence the general operations of the agency but must assume responsibility for such policies as the guidelines cover. A further advantage of guidelines is that by making their validity depend upon publication in the Government Gazette and tabling in Parliament, no valid but secret guidelines or directions, formal or informal can be issued by the government. It is noteworthy also that guidelines can vary from being mandatory to being merely advisory and from being limited to general matters to being quite specific." [215]

10.4.3 The question which immediately arises in relation to such a proposal is whether the provision of such a regulation making power could compromise the ICAC's independence. This point was made most strongly by the Hon Ernie Knoblanche QC in his submission to the Committee. [216] It goes without saying that the Committee was anxious to ensure that if this proposal was to be taken any further there would be no threat to the Commission's independence. After all, it is the ICAC's independence that is its greatest strength and most distinguishing feature. Patrick Fair was asked about this when he appeared before the Committee,

215 Michael Bersten, "Making the ICAC Work", op cit., pp 107-108.

216 The Hon Ernie Knoblanche QC, Submission, 30 September 1992, pp 12-14.

representing the Law Society of NSW, on 12 October 1992.

> *"Q: Could you elaborate on the proposal that the Parliamentary Committee recommend regulations on ICAC procedures and whether such regulations compromise the ICAC's independence?*
>
> *A: The independence of the ICAC depends on its ability to make decisions within its own administrative structure and not be influenced by the potential reaction of other institutions. To some extent that is impossible because all the institutions of the State are inter-related to some extent.*
>
> *Whether or not the power to make regulations could be a matter that would influence ICAC and thereby affect its independence would depend on whether ICAC considers that Parliament might make regulations as a kind of punitive measure against it, and therefore decides not to do certain acts because of the potential that regulations would be made as a punitive measure. Or regulations might be made in a way that would tie up ICAC and make it less effective. In the first case surely Parliament would not see fit to make a regulation unless there was good reason for doing so, and in the second case the same answer applies, that setting out procedures which should be followed in dealing with witnesses, which is the context in which this first arises, is a matter which is pretty much the same as writing powers and procedures into the ICAC legislation. It does not really change the relationship between ICAC and the Parliament in any significant respect."* [217]

10.4.4 The ICAC Act already contains a regulation making provision in section 117.

> (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
>
> (2) In particular, the regulations may make provision for or with respect to:

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217 Committee on the ICAC, Minutes of Evidence, 12 October 1992, pp 9-10.

(a) the appointment, conditions of employment, discipline, code of conduct and termination of employment of staff of the Commission; and

(b) security checks of officers of the Commission and applications for appointment or engagement as officers of the Commission; and

(c) the service of a notice to an occupier whose premises are entered under a search warrant; and

(d) the issue of identity cards to officers of the Commission and use; and

(e) forms to be used for the purposes of this Act; and

(f) the use and custody of the seal of the Commission.

(3) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

(4) Regulations may be made only on the recommendation of the Commissioner, except regulations made under section 110.

10.4.5 The significant thing to note about the current provision in s.117 is the restriction which is imposed by s.117(4). That subsection provides that, with the exception of regulations concerning the disclosure of pecuniary interests by ICAC officers, regulations can only be made on the recommendation of the Commissioner. Obviously this means that the sort of issues raised by Mr Moffitt and the Law Society, where it is felt that the ICAC has not followed the Committee's recommendations, would not be able to be addressed. The ICAC is at present in a position to effectively veto any proposed regulations with which it does not agree. That means that the current regulation making power is not an appropriate vehicle for the entrenchment of Committee recommendations.

10.4.6 As the Law Society had put forward the proposal for procedural or policy matters to be addressed in regulations, the Committee sought information from the Law Society on the sort of issues that it would like to see dealt with in this way. In a letter dated 17 December 1992 the Law Society nominated the following matters.

> *"1 The Law Society has identified the following matters which might be included in Regulations relating to ICAC from a consideration of the papers published by ICAC and the Joint Parliamentary Committee: -*

1.1 Where the conduct of a person has been the subject of a complaint and ICAC determines not to take the matter further, it should inform the person complained about that it has determined not to take the complaint any further.

1.2 If in doubt regarding whether a matter is a complaint which requires report to the Operations Review Committee, ICAC should inform the Operations Review Committee regarding the matter so that it may determine whether or not the matter is a complaint within the meaning intended for that word in the ICAC Act.

1.3 All witnesses before ICAC should be provided with a copy of the transcript of their evidence free of charge, and the amount of witnesses expenses allowed should be contained in the Regulations.

1.4 All persons who make statements to ICAC should be given a copy of their statement upon its being signed.

1.5 ICAC should provide persons who have property seized pursuant to a search warrant with a comprehensive list of all property seized and should return all property to its owners promptly as soon as it is not longer required.

1.6 A considerable amount of the Commission's time it taken up in considering complaints which are trivial and vexatious. Some guidelines might be introduced to enable easier identification of such matters to avoid the wasting of precious resources.

1.7 The guidelines followed by ICAC which it uses to categorise matters such as: a complaint; a report; information; an enquiry; dissemination; own initiative; referral from Parliament; outside jurisdictions; should be contained in Regulations for easier identification by the Operations Review Committee.

1.8 Matters requiring the attention of the Operations Review Committee under the heading of "a complaint" should be outlined in the Regulations.

2 If ICAC is to retain its power to make findings: -

2.1 it should provide every person named in the report with an opportunity to be heard in relation to any evidence which

concerns them and in relation to a draft report by the Commission before that report is published;

2.2 *each report should contain in a prominent position in the front of the report the following statement: -*

"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."

2.3 *ICAC should not make "adverse findings" against any person unless the conduct of that person has been found to be "corrupt conduct" within the meaning of that phrase in the ICAC Act. Any person in relation to whom a claim is made under Section 10 of the ICAC Act shall be given notice of that power and sufficient time to apply for an order under Section 20(3) of the Act, such application to be heard in private, the claimant open to be questioned and the applicant entitled to give and call evidence.*

3 *In the conduct of hearings:*

3.1 *heresay and other legally inadmissible material should only be received insofar as it appears to the person presiding that it may further the investigation for the purposes of which the hearing is being held and the person presiding must not have regard to that evidence for any other purpose;*

3.2 *the Commission should not permit public hearings to become vehicles for purveying of gossip, rumour or speculation;*

3.3 *questions should not be asked of, or propositions put to, a witness, without justification on the basis of the knowledge of, or instruction given to the person asking the question;*

3.4 *when questions are put to a witness which go to the credit but not to an issue in the investigation, the matter the subject of the question may be fully explored by the parties to the inquiry;*

3.5 *statements and records of interview taken by ICAC investigators from significant witnesses should, as a matter of course, be made*

available to affected persons;

3.6 where a serious allegation is made about a person in a public hearing the Commission should afford the person the subject of the allegation opportunity to respond by evidence in writing or such other means as appropriate.

3.7 The Commission should inform all witnesses of their entitlement to witnesses expenses.

4 These matters represent issues that have been the subject of controversy or discussion at various times and because of the undertakings given by the Commission in some of these matters they should be dealt with in Regulation. In my submission they represent a starting point for the creation of appropriate Regulation. A comprehensive and logical set of Regulations would be created by a thorough consideration of the civil rights and other policy issues which have given rise to concern over these matters. For example, consideration of the rights of witnesses and person the subject of investigation could result in Regulations that describe the steps and precautions ICAC must take in every investigation." [218]

10.5 ***Conclusions***

10.5.1 The Committee endorses the principle that it is the responsibility of the Parliament to prescribe by way of legislation and guidelines appropriate limits upon the exercise by the ICAC of its extraordinary powers.

10.5.2 The Committee acknowledges that it is essential that the ICAC's independence is maintained. However, it is the Commission's independence from executive government that is important. After all the ICAC is a creation of and accountable to the Parliament.

10.5.3 The Committee recommends that the regulation making power in s.117 of the ICAC Act should be expanded to enable regulations to be made on procedural or policy matters on the initiative of the Parliamentary Joint Committee. It should be expressly stated in the legislation that such regulations could not deal with operational matters or in any way seek to direct the ICAC in the conduct of any particular investigation. The procedure by which such regulations are to be made should also be spelt out in the legislation, including the requirement that they be

218 Law Society, Letter, 17 December 1992, pp 2-4.

published in the Government Gazette, tabled in Parliament and subject to possible disallowance. In formulating any such regulations the Committee must consult with the ICAC, but the ICAC should not be able to veto the regulations.

-11- *PUBLIC SECTOR MANAGEMENT ACT*

11.1 ***Background***

11.1.1 During the course of the Review of the ICAC Act the Committee has continued to perform its regular functions of monitoring and reviewing the exercise by the Commission of its functions. One of the most important ways in which the Committee discharges this function is through six monthly public hearings with the Commissioner of the ICAC. During the conduct of this review the Committee conducted two such public hearings, on 09 November 1992 and 26 March 1993. A wide range of issues was dealt with at these hearings. One which received particular attention was the question of the application to the ICAC of the Public Sector Management Act. Over time consensus emerged as to how this issue could be addressed. As this involved the amendment of the ICAC Act, it was sensible for the Committee to include reference to this matter in this report.

11.2 ***Rights of ICAC Employees***

11.2.1 The Committee first raised the question of the rights of ICAC employees at the public hearing with Mr Temby on 14 October 1991. The Commission provided written advice to a number of questions on notice concerning the rights of ICAC employees in the case of dismissal. The Commission confirmed that it is able to dismiss persons without giving reasons and that employees do not have recourse to the Government and Related Employees Appeal Tribunal (GREAT) or the Industrial Commission. Furthermore, it was acknowledged that the employment contracts entered into by Commission employees are not subject to any award, industrial agreement or determination of an industrial tribunal. The Hon Jan Burnswoods asked Mr Temby a number of questions about the employment of ICAC staff, covering such areas as the advertising of vacancies and the application of the Anti-Discrimination Act. The ICAC later advised that parts 2 - 5 of the Anti-Discrimination Act, proscribing discrimination on various grounds, apply to the Commission, but that part 9A of the Act does not apply. [219]

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219 Committee on the ICAC, Collation of Evidence, 14 October 1991, pp 30-37.

11.3 ***Public Sector Management Act***

11.3.1 At the public hearing with Mr Temby on 09 November 1993 the Committee pursued a number of questions about the employment of staff by the ICAC. The ICAC provided written advice on a question about the application of the merit principle and the advertising of vacancies by the Commission.

> *"Q:* ***Have you always followed the practice you advocated in your Metherell report for merit recruitment, namely advertising vacancies and holding interviews, for ICAC senior management positions?***
>
> *A:* *Comments in the Metherell report about merit selection were made in the context of the statutory requirements of the Public Sector Management Act 1988, particularly s26 which requires merit selection in respect of public service positions other than Department Heads. The ICAC Act (s104(10)) provides that the Public Sector Management Act does not apply to the appointment of staff to the Commission. Nevertheless the Commission generally observes the principles of merit selection.*
>
> *Persons appointed to senior management in the Commission have been recruited in a number of ways. Initially, when the Commission was being established, the process involved some recruitment of persons known to the Commissioner through prior professional contact. They were hand-picked to ensure the establishment and operation of the Commission occurred quickly and effectively. More recently, selections have followed merit selection principles except in one case. The individual concerned is responsible, amongst other matters, for security."* [220]

The Chairman asked Mr Temby whether the Commission should, in light of its experience over a number of years, be subject to the Public Sector Management Act. Mr Temby said that it was important that the Commission not appear to be too close to Government or the public sector generally. He also undertook to provide the Committee with a considered analysis of the advantages and disadvantages of making the ICAC subject to the Public Sector Management Act.

11.3.2 Following this hearing the Committee received a letter from the Premier in which he expressed concern at the ICAC's answer to the question about the application of

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220 Committee on the ICAC, Collation of Evidence, 09 November 1993, pp 53-54.

merit principles. The Premier stated that he thought the ICAC should be made subject to the Public Sector Management Act.

> *"I am disturbed at the response given by the Commissioner in respect of merit recruitment. Commissioner Temby's failure to use merit selection procedures, at the very least, appears inconsistent with his publicly stated position during the recent Metherell Inquiry.*
>
> *I acknowledge that the Public Sector Management Act does not currently apply to the ICAC. However, it is my view that your Committee should recommend that employment within ICAC should be made subject to the Public Sector Management Act.*
>
> *I would be grateful if in your deliberations on the current structure and operation of the Commission this matter is also considered by the Committee."* [221]

11.3.3 The ICAC's considered view on whether it should be subject to the Public Sector Management Act was received by the Committee in a letter from Mr Temby dated 17 February 1993. In that letter Mr Temby stated that he opposed the ICAC being made subject to the Act. Mr Temby referred to the ICAC (Amendment) Act 1989 which introduced provisions into the ICAC Act which limited the rights of ICAC employees to seek redress for dismissal from the ICAC. Mr Temby quoted from a number of speakers who participated in the second reading debate and supported those amendments. He then asks "what has changed?" Mr Temby then put forward two reasons why the ICAC should remain exempt from the Public Sector Management Act. Firstly, security reasons. Mr Temby suggests that in cases where a person's relationships/family connections make them a security risk any appeals against dismissal could force the ICAC to reveal "confidential sensitive material prejudicial to its investigations" in an industrial tribunal. The second reason put forward by Mr Temby is "independence from standard control by the executive government".

> *"Further, as the Public Sector Management Act is administered by the Industrial Authority and the Premier's Department, both of which can be investigated by the Commission, the Commission's independence could be compromised, and awkward situations might arise, if the Public Sector Management Act applied to the Commission."*

Mr Temby noted that ICAC employees sign employment contracts in which they accept that the usual public service appeal processes do not apply. He also noted

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221 The Hon John Fahey MP, Letter, 23 December 1993.

that the ICAC's general recruitment process applies the merit principle which is the basis of s.26 of the Public Sector Management Act. Finally, Mr Temby noted that when the ICAC was being established in December 1988 he obtained the concurrence of the former Premier to recruit staff directly by approaching potential staff members. [222]

11.3.4 In view of the position put by the Premier in his letter of 23 December 1992, the ICAC's considered response on this issue was referred to the Premier for comment and response. The Committee received a response from the Director-General of the Premier's Department, dated 29 March 1993. That response said that whilst at the time of the establishment of the ICAC it was considered that the Commission need not be staffed under the provisions of the Public Sector Management Act there were nevertheless good reasons why all employment from public funds should comply with merit selection principles.

> *"The key point is that management commitment to public employment principles and practice should be re-enforced by statutory duty. This provides agencies and the community with a touchstone for the expenditure of public funds.*
>
> *It is suggested that the merit selection provisions of the Act should be 'imported' into the ICAC Act. The relevant provisions are contained in section 26 of the Act....*
>
> *On public policy grounds there is a compelling case for the Commissioner to be required to observe merit selection principles in all selections for advertised vacancies as a statutory duty, as it is for all Public Service Department Heads. As the Commissioner advises this is already ICAC practice there should be no difficulty in giving this practice the statutory recognition it deserves."*

It was also suggested that the concerns expressed by the ICAC about security had been overstated. [223]

11.3.5 The question of the application of the Public Sector Management Act to the ICAC was raised again with Mr Temby at the public hearing on 26 March 1993. A question on notice was put to the ICAC about whether the Commission would object to being "statutorily bound to observe the key public sector employment principles contained in the (PSM) Act". The ICAC stated in a written answer that,

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222 ICAC, Letter, 17 February 1993.

223 R G Humphry, Letter, 29 March 1993.

> *"The Commission would have no objection to being required, by its own statute, to observe principles of merit selection - it does so already. Nor would the Commission object to a requirement for mandatory advertising, with provision for the Premier to approve exceptions, for example when security required. The Commission fills vacancies by means of interview panel and written report, so requirements for that procedure, by the ICAC Act or regulation thereunder, would not be objectionable."* [224]

11.3.6 Committee members asked Mr Temby a number of questions about the possible application to the ICAC of other provisions of the Public Sector Management Act, such as those covering the Senior Executive Service and the application of determinations of the Industrial Authority. Mr Temby indicated his continued opposition to the application of provisions other than those dealing with merit selection principles. Committee members also questioned Mr Temby again about the appeal procedures available for ICAC employees. Mr Temby indicated that the ICAC had recently established an internal procedure for grievance mediation, involving the designation of one of the General Counsel as Grievance Mediator. [225]

11.3.7 Shortly after Mr Temby's appearance before the Committee on 26 March 1993 the ICAC's final report on the Metherell matter was tabled in Parliament. This report dealt with general questions about the integrity of public sector recruitment practices with a view to improving those practices for the future. Two recommendations from that report are worthy of note in the context of the foregoing discussion.

> *"1 There should be a statutory requirement for all public sector jobs at every level to be filled on the basis of merit, ie the best person for the job.*
>
> *2 There should be a statutory requirement for every public sector job (other than temporary jobs) at every level to be the subject of a public advertisement, and to be filled following a merit selection process."* [226]

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224 Committee on the ICAC, Collation of Evidence, 26 March 1993, p 59.

225 ibid, pp 60-63.

226 ICAC, Integrity in Public Sector Recruitment, March 1993, p iv.

11.4 ***Conclusions***

11.4.1 While at the time of its establishment there were reasons why it was considered that the ICAC need not be staffed under the Public Sector Management Act, there are strong public policy reasons for all public sector employment to comply, at the very least, with the merit selection principles contained in the Act.

11.4.2 The Committee therefore recommends that the ICAC Act should be amended to require the ICAC to comply with the merit selection principles in the Public Sector Management Act.

11.4.3 The Committee notes the concerns raised by the ICAC about the possible application of the Public Sector Management Act generally to the ICAC. The Committee therefore does not recommend that the Public Sector Management Act generally should be applied to the ICAC at this time.

11.4.4 The Committee has had an interest in the question of the appeal mechanisms available to ICAC staff for some time. The Committee commends the ICAC on the establishment of a process of internal grievance mediation. The Committee will continue to take an interest in this issue as part of its monitoring and review function.

APPENDIX ONE

Press Release —
21 December 1992

Secretariat
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Tel (02) 230 3055
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COMMITTEE ON THE ICAC

ICAC FUTURE CLEARER - REVIEW OF THE ICAC ACT

The future of the ICAC is clearer as a result of the deliberations of the Parliamentary Joint Committee on the ICAC.

The Committee has now determined its broad position on a number of the key issues being considered in the Review of the ICAC Act.

"The ICAC is not going to be emasculated", the Committee Chairman, Malcolm Kerr MP, said.

"The reforms to the ICAC Act agreed to by the Committee will result in a better and more effective legislative base from which the ICAC will operate."

"The Committee was able to come to a firm position on a number of particularly significant issues." These are set out below.

1 **Labels** - The present requirement under the Act for the ICAC to apply labels to individuals' conduct should be removed. The ICAC is a fact finding investigative body.

2 **Definition of Corruption** - The ICAC must be able to investigate all public officials, including Ministers, MPs and Judges . Section 9 of the Act should be repealed. Section 8 should remain in its present form to set out the Commission's jurisdiction.

3 **Coercive powers** - The ICAC should retain all of its investigative powers. There should be no watering down of the ICAC's coercive powers.

4 **Follow up action on ICAC Reports** - There must be greater follow up action on ICAC reports to ensure that its recommendations for reform are responded to. The Act should be amended to require Ministers to report to Parliament on their response to relevant ICAC recommendations within six months.

"There are two main issues on which further work will be necessary", Mr Kerr said. These are set out below.

1 **Nature of ICAC findings** - Now that the Committee has reaffirmed that the ICAC is a fact finding body, should its findings of fact be limited to "primary facts"? Or should its findings of fact be able to include judgemental statements of opinion about individuals using ordinary language?

2 **Appeals** - If ICAC findings are to go beyond "primary facts", should there be an appeal mechanism established so that ICAC findings can be reviewed?

"The Committee will be deliberating further in the new year and will take further evidence in an effort to resolve these and other remaining issues", Mr Kerr said.

"I hope the Committee will be in a position to report when Parliament resumes in February 1993."

"I would emphasise that the views outlined above represent the results of the Committee's initial deliberation on these issues."

"The Committee's ultimate position on each issue will be finalised in its report to Parliament."

"However, in view of the public interest in the future of the ICAC, the Committee wanted to signal at the earliest opportunity its views on the key issues under review.", Mr Kerr concluded.

For background information: David Blunt (Project Officer) 230 3055

For comment and interviews: Malcolm Kerr MP (Chairman) 230 2269 (Parliament)
523 0989 (Electorate)
525 0598 (Home)

21 December 1992 mediar.046

APPENDIX TWO

Crown Solicitor's advice on draft recommendations on Definition of Corrupt Conduct

NEW SOUTH WALES
ATTORNEY GENERAL

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

Dear Mr Kerr

In response to your request of 10 March 1993, I am enclosing a copy of the Crown Solicitor's advice in relation to the impact of the provisional conclusion of the Committee on the definition of "corrupt conduct".

I trust this advice is of assistance. Should the Committee wish to discuss further the legal implications of this or any other matter under review, please feel free to contact Mr Laurie Glanfield, Director General of my Department (ph: (02) 228 7313) or Mr Hugh Roberts, Crown Solicitor (ph: (02) 228 7444).

Yours faithfully

The Hon John P Hannaford MLC
Attorney General

RECEIVED
25 MAR 1993

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17 March 1993

The Director General
Attorney General's Department
Goodsell Building.

Re: Parliamentary Joint Committee on ICAC Act; review of s.9

Advice sought

In your letter of 12 March you have informed me that the Chairman of the Parliamentary Joint Committee on the Independent Commission Against Corruption ("ICAC") has written to the Attorney General, seeking my advice on questions that have been raised about the provisional conclusions of the Committee on the definition of "corrupt conduct" in the Independent Commission Against Corruption Act 1988 ("the ICAC Act"). The conclusions are set out as follows:-

1.6 Conclusions

1.6.1 The current definition of corrupt conduct in the ICAC is overly complex and fraught with difficulties. The definition is conditional in nature and was found by the NSW Court of Appeal to be "apt to cause injustice".

1.6.2 The Committee endorses the proposed changes to the definition of corrupt conduct put forward in the major submissions received, including that from the ICAC.

1.6.3 The ICAC must be able to investigate all public officials, including Ministers, MPs and Judges. The "great and powerful" must not be outside the reach of the ICAC.

1.6.4 Section 9 should be repealed.

1.6.5 Section 8 should remain largely in its present form to describe the ICAC's jurisdiction to inquire. The conduct described in s.8 could be called "relevant conduct" if it needs to be defined at all.

1.6.6 Where the words corrupt conduct occur in the ICAC Act (eg s.13) they should have their ordinary meaning.

1.6.7 Section 8 should be amended to expressly enable the ICAC to investigate possible criminal conduct related to official corruption, including matters where organised crime and official corruption may be linked.

For ease of reference, I have outlined the relevant provisions of the Act below, under the heading "The provisions of the Act". In order to explain the questions, it is necessary to refer to some of the contents of the Chapter containing them, and I will deal with that now before referring to the questions.

The Committee's Draft Report

In the draft Chapter on the definition of "corrupt conduct", the Committee cites extracts from a number of submissions made to it, and then proceeds to state its conclusions. Most, but not all of the extracts appear to have been reflected in the conclusions.

The first four of the conclusions are all to do with s.9. The "conditional" nature of the definition (comprised in s.7-9) of "corrupt conduct", referred to in para.1.6.1, is a reference to the provision of s.9(1) that conduct does not amount to corrupt conduct unless it "could" constitute or involve a criminal offence, etc.[1]. The changes proposed to the definition, put forward in the major submissions received by the Committee and referred to in the draft Chapter, are directed to the removal of s.9, on various grounds. The threat, referred to in draft para.1.6.3, to the ability of ICAC to investigate all public officials, including Ministers and Members as well as Judges, comes about because of the problems, dealt with in relation to Ministers in **Greiner v ICAC**[2], of applying s.9 in the case of Ministers.

The submissions referred to include ICAC's own submission that s.9 imposes a test of ICAC's jurisdiction to investigate conduct that may be impossible to apply (despite what is aptly called "the low threshold" of the "could") at the time when ICAC is considering whether it has jurisdiction to commence an investigation. There may simply be too little information available to ICAC about the facts, without investigation, to satisfy the criterion of its jurisdiction. ICAC's submission also is that s.9 has never effectively filtered out complaints, because most complainants are unaware of the section; and that

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[1] The same conditional "could" is also found in various parts of s.8, though in the different context of what is the potential effect of the conduct in question upon the behaviour of a public official etc.

[2] Court of Appeal, 21 August 1992: not yet reported.

there is an effective power in s.20(3) to enable the Commission to refrain from investigating matters which are not worth investigating.

Most of the submissions cited, having recommended against the retention of s.9, go on to recommend that s.8 stay more or less as it is[3]. It seems to be agreed that the legislation should stipulate the kind of conduct which ICAC may investigate and report on. I have not read the submissions generally (though I have read all the extracts from them appearing in the draft Chapter I), but in the cited extracts there appears to be no ground swell of opinion that s.8 is itself stated too widely. I think everyone agrees with the Court of Appeal, however, that there are forms of conduct included in the great sweep of s.8 that would not be described in ordinary language as "corrupt" conduct.

It seems to me that this last matter has caused substantial difficulties to the Committee. On the one hand, it is inappropriate, in the ordinary use of language, to describe some of the conduct in s.8 as "corrupt"; and hence it is one of the draft conclusions (reflecting one of these submissions) that the tag "corrupt conduct" should not be attached in the Act to the conduct described in s.8, and that that conduct should be called something like "relevant conduct", if it needs to be defined at all[4]. On the other hand, as one of the submissions points out, the Commission, no doubt because of its name, is viewed through public eyes as having as its essential task the detection of "corruption".

The draft conclusions then go on, in para.1.6.6, to stipulate that "where the words corrupt conduct occur in the ICAC Act (eg s.13) they should have their ordinary meaning".

Questions for advice

One matter I am asked to advise on is what the effect of repeal of s.9, and in particular ss.(2) of that section, might be.

The other matter is the draft recommendation in para.1.6.6 just referred to, that "where the words corrupt conduct occur in the ICAC Act (eg s.13) they should have their ordinary meaning".

The provisions of the Act

The Commissions's name, embodied in the short title to the Act, itself, of course, contains the word "corruption". The long title to the Act states its purpose to be to constitute the Commission and define its functions.

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[3] See the draft paras.1.6.5 and 1.6.7 of the Committee's recommendation.

[4] "Examinable conduct" might perhaps be an alternative.

The Act uses the expression "corrupt conduct" in various provisions, defining it by reference to the meaning given to it by Part 3[5]. The provisions of Part 3 about what is "corrupt conduct" for the purposes of the Act, and particularly s.9, were, of course, the focus of **Greiner v ICAC**.

Section 7 provides that for the purposes of the Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of sub-ss. (1) and (2) of s.8, but which is not excluded by s.9[6]. Sections 8 then goes on, according to its heading, to deal with the "general nature of corrupt conduct". It refers to a "public official", a term defined in s.3(1) to mean an individual having public official functions or acting in a public official capacity, and as including the officials listed in the section, including Ministers, Members and Judges. In sub-s.(1), corrupt conduct is declared to be any of the various forms listed in paras. (a) to (d) of that sub-section[7]. Sub-section (2) then goes on to provide that corrupt conduct is also certain other conduct there specified[8].

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[5] See the definition in s.3(1).

[6] s.7(1). The section goes on to classify conduct comprising a conspiracy for attempt to commit or engage in conduct that would be corrupt conduct under s.8(1) or (2) as itself corrupt conduct under those provisions; and to provide for how frustration of such a conspiracy or attempt is to be regarded in applying s.9.

[7] (a) Any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or (d) any conduct of a public official or former official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not to his or her benefit or for the benefit of any other person.

[8] Any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the matters that are then listed in the following paragraphs (a) to (y). The list contains a mixture of wrongs, from criminal offences to a wide range of forms of official misconduct.

Then there are provisions relating to conduct engaged in before the commencement of the Act[9]; conduct committed by or in relation to a person not a public official at the time[10]; and conduct occurring outside the State or outside Australia[11]. It is also provided that the specific mention of a kind of conduct in a provision of the section is not to be regarded as limiting the scope of any other provision of the section[12].

Then follows the s.9, headed "Limitation on nature of corrupt conduct", that was the focus of attention in **Greiner v ICAC**. Sub-section (1) provides that, despite s.8, conduct does not amount to corrupt conduct unless it could constitute or involve (a) a criminal offence; or (b) a disciplinary offence; or (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official. Sub-section (2) provides that it does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken. Sub-section (3) defines the terms "criminal offence" and "disciplinary offence" for the purposes of the section.

Section 10 in Part 3 provides for a complaint to be made to the Commission about a matter that concerns or may concern corrupt conduct, and empowers the Commission to investigate it or decide that it need not be investigated. Section 11 imposes on various officers the duty to report to the Commission any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct.

In Part 4, dealing with the functions of the Commission, s.13(1)(a) stipulates as one of its principal functions the investigation of any allegation or complaint that, or any circumstances which in the Commission's opinion imply that, corrupt conduct, or conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur. It will be noted that this goes further than s.10, in Part 3: it particular, it extends to the investigation, not merely of complaints made to ICAC, but of allegations, and of circumstances which in ICAC's opinion carry one or more of the implications referred to.

There are also conferred on ICAC by s.13 functions designed to minimise the occurrence of corrupt conduct, by review of relevant laws, practices and procedures, education and the enlistment and

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[9] ss.(3).

[10] ss.(4).

[11] ss.(5).

[12] Subs.(6).

fostering of public support[13]. The Commission is by subs.2 to conduct its investigations with a view to determining (a) whether any corrupt conduct, or any other conduct referred to in ss.(1)(a), has occurred, etc; (b) whether any laws governing any public authority or public official need to be changed to reduce the likelihood of occurrence of corrupt conduct; and (c) whether any methods of work, etc, of any public official, etc, did or could allow etc the occurrence of corrupt conduct. The Commission's principal functions also include (a) the power to make findings and form opinions on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct; and (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations[14].

It is convenient to mention at this point that in Part 8, the Commission is empowered to prepare reports in relation to any matter that has been or is the subject of an investigation, or of a reference to it by both Houses of Parliament[15], and to include in such a report statements as to any of its findings, opinions and recommendations, and statements as to its reasons for any of its findings etc[16]; but by s.74B the report is not to include findings etc of guilt or recommendations as to prosecution for a criminal offence or disciplinary offence.

The Commission may assemble evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and furnish the evidence to the Director of Public Prosecutions[17]. It may also apply to the Supreme Court for an injunction restraining any conduct in which a person (whether or not a public authority or public official) is engaging or appears likely to engage, if the conduct is the subject of, or affects the subject of, an investigation or proposed investigation by the Commission[18]; though the Court is not to grant such an injunction unless it is of the opinion that (a) the conduct sought to be restrained is likely to impede the conduct of the investigation or proposed investigation; or (b) it is necessary to restrain the conduct in

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[13] s.13(1)(d)-(j).

[14] s.13(3). The Commission is not, however, to make a finding, form an opinion or formulate a recommendation which s.74B prevents the Commission from including in a report.

[15] s.74.

[16] s.74A.

[17] s.14(1)(a).

[18] s.27.

order to prevent irreparable harm being done because of corrupt conduct or suspected corrupt conduct.

In Part 7 provision is made for the establishment of the Parliamentary Joint Committee, one of whose functions is to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct[19].

Advice

(1) The effect of repealing s.9

The first matter I am asked to advise on is what the effect of repeal of s.9, and in particular ss.(2) of that section, might be.

So far as the difficulties which s.9 has given rise to are concerned, I feel there is nothing I can add to the considerations already expressed in the various submissions to the Committee, as cited in its draft Chapter. The point being made by ICAC and others is that, in the case of non-criminal conduct, there are no disciplinary proceedings affecting, in particular, Ministers and Members of Parliament, to which reference may be made in applying s.9 to them in order to determine whether ICAC has any jurisdiction to make an investigation. It is also thought to be very difficult to apply the provisions about dismissal in relation to Ministers, and they have no application to Members[20]. Since the same difficulties do not arise in relation to other public officials, Ministers and Members of Parliament are less likely to fall within ICAC's jurisdiction for conduct not considered capable of amounting to criminal conduct. There appears to be no suggestion forthcoming as to how this imbalance could be corrected by substituting some new test of the jurisdiction of ICAC in relation to the conduct of Ministers and Members of Parliament, so the solution recommended is to repeal s.9 altogether.

Undoubtedly the repeal of s.9(1) would remove a limitation that is on paper a safeguard of the position of those public officials who are, under the laws governing their employment of office, liable to proceedings for a disciplinary offence, or to dismissal, dispensing with their services or termination of their services. The safeguard is that ICAC cannot investigate a complaint about their conduct unless their conduct "could"

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[19] s.64(1)(d).

[20] Ministers are, of course, capable of being dismissed by the Governor, but, at least where the conduct is not criminal conduct, the criteria for the exercise of that power are uncertain. Members do not hold offices from which they may be "dismissed", though the Parliament may expel them for its own protection, and they lose office in certain circumstances specified in the Constitution Act 1902.

constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissal, etc. ICAC's point is that it will be often difficult to determine such a possibility before an investigation. Accordingly, while that difficulty erects a protective barricade for the official, it is hardly right to call it a "safeguard" in those cases in which it might serve as a barricade against investigation of conduct that ought to be investigated. ICAC's answer to any danger attending the removal of the barricade is that ICAC is itself be open to Parliamentary scrutiny, and would be criticised if, without the restrictions of s.9, it abused its powers of investigating conduct falling within the very wide scope of s.8. It says that it can be trusted to dismiss unimportant complaints.

There is little I feel able to say about the difficult task of balancing these considerations, and I am by no means sure that I am being asked to offer a view on it in any case. Section 8 is of very wide scope, so that the jurisdiction of ICAC, and the opportunity for oppressive exercise of power by ICAC, would be correspondingly widened if the section stood unqualified. The questions for the Committee appear to be (1) whether there is any real risk of abuse of that widened power if s.9 were repealed; (2) whether, if there is, the risk could be reduced in way other than the retention of s.9; (c) whether the risk, whatever it might be, is a worse evil than the inequality that s.9 brings about between the position of Ministers and Members (and perhaps Judges), on the one hand, and other public officials, on the other.

If s.9(1) is to be repealed, then I agree with you that there is no point in retaining the other provisions of s.9, including subs.(2), for they are all ancillary to s.9(1), and become unnecessary if it is removed. It would clearly not affect the jurisdiction of ICAC to investigate conduct of a kind falling within s.8, no longer qualified by s.9, that the conduct could no longer be the subject of proceedings or action for an offence, or action for dismissing, dispensing with or terminating the services of the public official concerned.

(2) The effect of not calling s.8 conduct "corrupt conduct"

If the conduct described in s.8 (whether or not s.9 was retained) were to cease to be called "corrupt conduct", then consequential changes would have to be made in the provisions of the Act using that expression. I cannot see how it would be possible to leave the expression "corrupt conduct" in other provisions of the Act, as recommended in the draft para.1.6.6, without leading to the following complex and (to my mind) unjustifiable consequences.

Assuming that s.10(1) substituted for "corrupt conduct" some such expression as "relevant conduct", it would presumably still be possible for the Commission to investigate under that section a complaint about a matter that concerned or might concern "relevant conduct", including conduct that would amount to "corrupt conduct" in some popular, though indistinct, sense. However, s.13 confers powers on ICAC also to investigate any

allegation, as distinct from a complaint to it, of "corrupt conduct", or any circumstances which in its own opinion might imply that corrupt conduct, or conduct liable to allow etc the occurrence of corrupt conduct, or conduct connected with corrupt conduct, might have occurred etc. The result of substituting "relevant conduct" for "corrupt conduct" as the description of s.8 conduct, but leaving "corrupt conduct" (undefined) in s.13, would be (subject to what is said in the next sentence of this advice) to take away those additional powers in relation to any "relevant conduct" (defined) that was not "corrupt conduct" (undefined). The Commission could no doubt, however, investigate under s.13(b) any "matter" referred to it by both Houses of Parliament (pursuant to the power given to the Houses by s.73).

ICAC would not be empowered to examine laws, practices and procedures of public officials, etc, under the remaining powers in s.13(1), or carry out educational programs, except in relation to so much of "relevant conduct" as might constitute "corrupt conduct".

ICAC's powers under s.14 to assemble evidence and furnish it to the Director of Public Prosecutions, already limited to evidence that might be admissible in the prosecution of a person for a criminal offence against a law of the State, would be limited to the indistinct class of conduct connected with "corrupt conduct".

The Supreme Court's powers to grant an injunction under s.28 would be similarly confined, unless the conduct sought to be restrained was likely to impede the ICAC's investigation or proposed investigation.

The Joint Committee's powers of examining trends and changes in conduct, under s.64(1)(d), would be similarly limited.

The result would be, then, that all of these provisions would have a very different operation from the operation that the legislature intended them to have when it enacted the Act; and undoubtedly the limitation of them to an undefined class of "corrupt conduct" would lead to challenges to the jurisdiction of ICAC and in certain circumstances to the jurisdiction of the Supreme Court. If there were to be established a special regime about "relevant conduct" that was also "corrupt conduct" in some (undefined) ordinary sense, the whole of the Act would require careful rethinking. I find it difficult to see, however, how there would be any alternative to substituting "relevant conduct" (or whatever it might be called) for "corrupt conduct" throughout the Act.

It would remain the case, however, that "corruption" is written into the title of the Commission, and therefore of the Act. I doubt that that matters much. Undoubtedly much of the conduct described in s.8 is "corruption" or "corrupt conduct" in the everyday meaning (indistinct though it might be) of those terms, and the investigation of the latter conduct would no doubt remain the chief function of the Commission. There would seem to me to

be no particular reason not to continue to describe the Commission as a "Commission Against Corruption". From the legal point of view, the difficulty would be the implication of a requirement of "corruption" affecting the otherwise broad terms of s.8 standing alone. That, however, could be cured by an amendment making provision against any such implication.

I am not sure that I have covered all the matters of concern to the Committee, but if there is anything more I would, of course, be glad to try to assist.

H K ROBERTS
Crown Solicitor

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COMMITTEE ON THE ICAC

10 March 1993

The Hon John Hannaford MLC
Attorney General and
Minister for Industrial Relations
Parliament House
SYDNEY NSW 2000

Dear Attorney,

I am writing to seek, through you, the advice of the Crown Solicitor on a matter before the Committee on the ICAC.

As you are aware the Committee has been conducting a review of the ICAC Act. At its meeting last night the Committee considered a draft report on this review. The draft report contains one chapter on each of the ten key issues identified as requiring review in the Committee's Discussion Paper of September 1992. Chapter one deals with the definition of corrupt conduct.

During last night's meeting a number of Committee members raised concerns about the effects of the conclusions contained in chapter one of the draft report, particularly conclusion 1.6.4 which calls for the repeal of section 9 of the ICAC Act. Concern was expressed about the effects of the repeal of s.9(2). A question was raised as to the effect of the ordinary meaning of the words corrupt conduct applying where they appear elsewhere in the Act (eg s.13) and whether the way may in fact be opened up to possible court challenges to the ICAC's jurisdiction to investigate particular matters.

Enclosed for the information of the Crown Solicitor is a copy of chapter one of the draft report. Also enclosed is a copy of the media release issued by the Committee on 21 December 1992 outlining the Committee's interim findings, and a set of the key submissions received by the Committee.

The Committee is next meeting on Friday 26 March 1993, at which meeting the Committee intends to finalise its report on the Review of the ICAC Act. It would be greatly appreciated if the Crown Solicitor's advice on the matters of concern to the Committee as outlined above could be received before that meeting.

If the Crown Solicitor's officers require any further information they should contact the Committee's Project Officer, David Blunt, on 230 3055.

Yours sincerely

Malcolm J Kerr MP
Chairman

APPENDIX THREE

Minutes of Evidence and Correspondence on Primary Facts Issue

◊ Extract from Minutes of Evidence	-	26 October 1992
◊ ICAC	-	January 1993
◊ Hon Athol Moffitt QC, CMG	-	February 1993
◊ Mr Justice Clarke	-	19 February 1993
◊ ICAC	-	19 March 1993
◊ ICAC	-	07 April 1993
◊ Mr Justice Clarke	-	16 April 1993
◊ Extract from Minutes of Evidence	-	19 April 1993
◊ Mr Justice Clarke	-	23 April 1993
◊ ICAC	-	30 April 1993

CORRECTED

MINUTES OF EVIDENCE

TAKEN BEFORE THE

JOINT PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

At Parliament House, Sydney
On Monday, 26 October, 1992

PRESENT

Mr M.J. KERR (Chairman)

Legislative Council	Legislative Assembly
Ms J. BURNSWOODS	Mr B. GAUDRY
Mr S. MUTCH	Mr J. TURNER
	Mr P. ZAMMIT

Proceedings recorded and transcript supplied by:

Judith Sears (Ph. 533-2359)
Elaine Airth (Ph. 337-5553)

ATHOL RANDOLF MOFFITT, QC, CMG, of 26A Powell Street, Killara, (retired), on former oath:

CHAIRMAN: Mr Moffitt, you have received a summons from me, is that correct?

Mr MOFFITT: Yes, I have received a summons, some time ago, some time in the past. I acknowledge it.

CHAIRMAN: Could I invite you to make an opening statement, if it is a prepared statement copies could be made available.

Mr MOFFITT: Yes, it is in the most part. I have done that so I could speak in a fairly compact form. It has been typed up for the most part and I thought I should deliver it orally, having regard to the stage we are at and so people can make any comment they wish.

Might I emphasise at the outset that any statements which may appear to be blunt, made by me, on the written material or later, are certainly not intended to be personal to anybody. I am dealing with ICAC as an institution, and how it is operates today and that should be clearly understood.

I should also emphasis a view which I have expressed elsewhere that ICAC has done most effective and commendable work towards changing the climate of corruption. That doesn't mean that there should not be blunt criticism of matters which may help to improve the institution. I think, Mr Chairman, you would realise from other things I have done here before that is my objective from beginning to end. I think that only blunt comments and a little devil's advocacy can help a Committee such as this to perform the important task it is now confronting.

What I would like to do, and this appears in the document now before you, is to try and draw together what seems to me to be the emerging issues on 1, 2 and 3 which seem to be the critical matters which this Committee is really looking at. I have looked at some of the written submissions, I can't say all. I have certainly looked at those by Mr Temby and Mr Roden and I have read some of the panel material.

If it would help the Committee, I can express what I think seems to be the emerging issues, I will go to what I have prepared.

(Document of Athol Moffitt tabled, as follows)

PARLIAMENTARY COMMITTEE ON THE ICAC

Issues 1, 2 and 3

The Emerging Issue

ORAL COMMENT OF ATHOL MOFFITT

It may be helpful, if I distil and then discuss what appear to be the points of difference on issues 1, 2 and 3 expressed by Mr Temby and Mr Roden on the one hand and myself on the other. For convenience I will refer to their views as the ICAC view. In order to understand what Mr Roden is proposing, it is necessary to go beyond his written submissions to what he said in his recent report (The Unauthorised Information Report) and to particular passages in the transcript of what he said as a panel member in the 15th October discussion. Although not apparent at first sight, the substance of the views of Mr Temby and Mr Roden are almost the same.

All three of us agree on the importance of ICAC and of its ability, by virtue of its special powers, including the right to override the privilege against self incrimination, to flush out the true facts which otherwise would never see the light of day. All agree there is no need to define "corrupt conduct" and to do so satisfactorily is difficult and produces artificial results.

All agree that jurisdiction to inquire can, without such a definition, be adequately defined by the present s.8 alone or by some variation of it. I think some suggestions by Mr Roden have considerable merit. All agree there is no need for a right of appeal but here there is an important difference. I think it would be a great disadvantage if ICAC has powers which meant we have to necessarily accord a right of appeal. I think a right of apepal alongside other criminal processes would be a disaster, but if the power is given which justifies a right of appeal, so be it, and that is my view. If you adopt ICAC's proposal it is absolutely necessary, unfortunately, to have a right of full appeal.

In my case, that view depends on the power to make findings adverse to named persons being strictly confined to findings of primary facts. On ICAC's proposals, I am of the firm view there must be a full right of appeal.

The critical difference between the ICAC view and mine is that the ICAC view is that it should retain the power, with respect to named persons, to report, either as its

"finding" or "opinion" its determination of the quality of conduct which it finds proved. On this view there would be no limit on the terms open to be used in making these pronouncements. I will later enlarge on this. On this view, none of the words used to describe or categorise the conduct would be defined by the Act, so that any words selected by ICAC would have their ordinary meaning.

It is at this point that the ICAC views and mine are fundamentally opposed. The relevant part of the schedule to my written submissions would apply to any significant adverse pronouncement about a named person which the ICAC view would empower to be made. As stated I would strictly limit adverse findings concerning named persons to primary facts. There are some limitations (see pp. 1 and 22 of my written submissions).

That then appears now to be the real issue between us. It could well be the real question which confronts this Committee on issues 1, 2 and 3. Should ICAC have an unlimited power to find and pronounce judgmental findings, on whatever terms it wishes, to pronounce what, as I will explain, are judgemental findings concerning the conduct of named persons? It is very simple to give the populist answer "yes", without digging deeper to consider the possible consequences. That has been basically the ICAC approach. Why shouldn't we say what we have found? That naturally will be the media approach driven by a little self-interest.

To consider this question, one must dig a little, because there lie hidden great and real dangers. Further the question needs to be considered on the context of the package of reform according to the ICAC view which would make ICAC power more absolute than at present.

I should at the outset say that in my view the issue I have isolated raises a question of critical importance, so much so, that I foreshadow that if the ICAC package view is adopted, then in my respectful opinion, a situation far worse than at present would be produced. ICAC's power would be far more absolute than at present. There would be a very real potential for serious injustices to be done under the authority of an Act of Parliament by an institution of State. Errors which inevitably will occur and the consequential injustices, perhaps ruinous of the careers of public officers, will be beyond the reach of any review process and of the narrow confinement of the prerogative powers of the courts. In the end, ICAC will be the victim of its own absolute power.

It is axiomatic that ICAC, set up to inquire into conduct which may be in breach of public duty, should be able to reveal the truth of what it finds. The real question is what it and others should do with what it finds to be true - what it finds to be the true facts. It is easy to substitute the axiom when answering the real question. As to the future the answer is easy. It is only by knowing what goes on and why and how it occurs that other functions of ICAC and the powers of others can be directed to make things different in the future. The question as to what is to be done about individuals in relation to past conduct revealed is difficult and complex. It is far from axiomatic. This is the point where the real issue arises. The ICAC view is close to treating the answer as axiomatic, carried forward by axiomatic media support.

To answer the question, I suggest it is necessary to inquire into how the power given by s.74A(1) with the Act shorn of other provisions in accordance with ICAC proposals could be used. Attention must be given to what the terms "findings" and "opinions" open to be given may include in respect of past conduct. The Act does not limit "findings" to findings of primary facts. As Mr Roden contends and has done, it can be a finding concerning the quality of conduct inferred from the primary facts found. Such a finding will be judgmental in character. Likewise to state an "opinion" as to the quality of past conduct based on facts found is to make a judgmental pronouncement. Mr Temby says s.74A(1) should stand as it is and that ICAC should have the power "to express conclusions applying ordinary language" and "pass strong comments on a person's conduct without seeking to classify it by referring to some defined term" (ICAC submission p.21).

A close look at what Mr Roden has done and said makes it clear that by reliance on ICAC power to make "findings", his view on s.74A(1) coincides with those of Mr Temby. This is well illustrated by his report on the Unauthorised Information inquiry and what he later said on 15th October as a member of the discussion panel (see generally but particular at pp. 23-24 and 32-33.)

His recent report referred to warrants a close study by the Committee, because it illustrates what could happen, even become the usual practice, if the ICAC proposals are accepted.

In the Report on Chapter 3 under the heading "summary of principal findings of fact" there is a summary of specific findings concerning a very large number of named persons. Very frequently added to findings of primary facts are added the word "corruptly" (ie. "corruptly sold" or "corruptly purchased") and in some cases there are added "in breach of his duty as a public officer" or an "abuse of his position as a public officer". As to the use of the word "corruptly" this, surely, is not other than a finding or judgement that the sale (or purchase) found to have occurred was corrupt or that the receipt of money for giving the information was corrupt. In his panel speech, Mr Roden made it clear that by using the adverb "corruptly", it would have its ordinary meaning and not be tied to the definition "corrupt conduct", of which he was highly critical. He said nobody had "taken him to court" over the use of the word "corruptly" because in its context it clearly "means what it says" (panel p.33). Of course, the word, so used in its ordinary sense, would be understood in the context of the particular primary findings of fact to mean the conduct was in fact criminal. That was that money had been received in breach of duty of the officer.

If it had been used in accordance with the statutory definition, this would not be a finding of criminality, but only that the conduct could be one of three things, one of which is not criminal.

Of course, as we all agree, this definition is unsatisfactory and misleading. However, the point is that Mr Roden in effect (but not by use of the direct words criminal offence) has pronounced a large number of named persons to be in fact guilty of a criminal offence.

In his panel speech (p.41) Mr Roden, even in respect of findings of "corrupt conduct" (ie. as defined) has described them as "thinly disguised convictions". Surely the disguise in the "corruptly" findings is so thin as to be almost non-existent. It is not for me to say whether the "corruptly" findings would survive a challenge that they infringe s.74B(1) as being a finding of guilt of a criminal offence. "Corruptly" as a lay word is indefinite in meaning as we heard this morning, and I think everybody would agree, and normally no error of law arises from the use of a word not defined by statute. Any error is treated as an error of fact.

The "corruptly" findings were not forced on ICAC by any provision in the Act. Under s.74(1) it had a discretion to make or not make findings such as these. That is the provision which both Mr Temby and Mr Roden want left unchanged. Mr Roden's panel speech makes it clear that it is the definition of "corrupt conduct" to which he objects, and the possible challenges in the court that it leaves open. That he sought to do in a way to prevent legal challenge by the use of the word "corruptly".

The consequence of the use of the power under s.74A(1) to make such findings, as "corruptly", as Mr Roden did, is worse, in that such a finding of criminality thinly disguised can be made on any material before ICAC, and according to Mr Roden upon evidence extracted under compulsion, which under s.37(3) would be inadmissible in a criminal trial. That provision does not apply to restrict the use of such material to base a judgemental pronouncement under s.74A(1). This Mr Roden accepts (report p.189) and it seems clear he did this in making his "corruptly" judgments. As the ICAC Report on the Azzapardi Inquiry says, "... findings by ICAC are on the balance of probabilities".

Both Reports were prepared by different Assistant Commissioners but each were the reports of ICAC under the hand of its Commissioner.

I add that I wish it clearly understood that I am merely using this as an example which I think the Committee might anxiously look at to see what could be the position, so far as power is concerned. Assuming the definition has gone and there is an unrestricted power, under s.74A(1). I think it warrants consideration as an example.

Of course it is necessary to expose what goes on in secret and of course with care override, for the purpose, the right to silence. I suggest these are very serious matters which this Committee, looking into this matter on behalf of Parliament, needs to think about. Of course use what is found to base future action, so it can aid the DPP, whether by way of indemnities or otherwise, to present a case for trial and convict in accordance with law those who have done what has been exposed as apparently criminal. People who do the things apparently exposed in an inquiry in that way exposed should be convicted and dismissed. But are we in this country prepared publicly to convict people by back door methods and, in order to do so, ignore the right of silence and the safeguards of a trial? This is one of the blunt statements that I said I proposed to make, and it should be understood. Are we prepared to give the power to an administrative body, not subject to the review process, the power to conduct what is a thinly veiled criminal trial and pronounce what, in Mr Roden's

words, are thinly disguised criminal convictions and do so on the balance of probabilities and ignoring the right to silence? Applying what the Chief Justice in the Greiner/Moore case said, if there are no criminal proceedings (as well there could be because of proof difficulties) or there are acquittals, the findings - the thinly veiled convictions and the "corruptly" tag will stand and continuation in office will be difficult if not impossible.

There are other serious and different problems if the ICAC package of reforms is looked at as a whole. I have then set out those which appear to me to arise from the ICAC submission by Mr Temby.

The only submissions Mr Temby makes as to any amendment which should or should not be made which is relevant to issues 1, 2 and 3 are: -

(1) S.8 as it now is and on its own should define the jurisdiction of the ICAC to inquire.

(2) S.9(1) should be repealed because it unnecessarily confines jurisdiction and gives rise to various legal complexities and consequences.

(3) There should be no definition in the Act of "corrupt conduct". It is not necessary to do so in order to define jurisdiction under s.8.

(4) S.74A(1) and S.74B should be retained (This must mean S.74B(1) and (2)).

(5) S.74A(2) should be amended so there is no duty (obligation) but only a discretion to make statements (positive or negative) concerning criminal or disciplinary offences or dismissal in relation to an "affected person".

(6) There is no proposal made that s.13(1)(a) and (c) taken together or taken with s.74A(1) should be amended in any way.

(7) There should be no amendment which provides any right of appeal (eg. by a person against whom an adverse opinion has been reported and made public). It is contended that resort to the prerogative powers will suffice.

What Mr Roden has said if the extra material is to look at, I suggest accords with (1) to (7), except that as to (1) he submits that s.8 should be in simpler terms and as to (4) does not mention s.74B.

I will return to consider the consequences of these amendments. First, however, some precise examination needs be made to what is being submitted.

It appears that what is being dealt with at p.20 of the ICAC's submissions is the undesirable nature of the power to pronounce conduct corrupt as defined by the Act. This is so because it does not accord with the ordinary meaning of the word "corrupt", so a finding of statutory corruption in respect of conduct which is not criminal has unacceptable and "devastating" consequences. There is no objection expressed to lay

words being used to define conduct found as corrupt. The objection stated is to the artificial definition. That this is the limit of the objection expressed appears when he adds (at p.20) "It also forces the Commission in any report to seek to classify conduct by reference to complicated and difficult legal concepts". Then (at p.20) reference is made to the "opportunity for subsequent legal debate" concerning "finding of conduct corrupt". This is an obvious reference to there being available a challenge on a legal bases, as there was in the Greiner-Moore case, because there was a finding based on a legal definition. Then at p.21, the preferred option is stated to be that ICAC have the power "to express conclusions applying ordinary language". It is then added that ICAC could then "pass strong comments on a person's conduct without seeking to classify it by reference to some defined term" (emphasis is mine). Then at p.21, it is said "... provided there is a capacity to determine the facts and characterise the conduct of participants using ordinary language, as would a Royal Commissioner, it may not be necessary to have a power to determine whether conduct is corrupt in any defined sense".

Then in the Second Metherell Report (p.15) Mr Temby concludes "putting the matter simply, it would be necessary to retain s.74A(1) and s.74B". In his submission a month later (p.1) he expressly confirmed as still his views, what appeared in his earlier Report. Accepting that Mr Temby speaks precisely, s.74B refers to both s.74B(1) and (2). As to s.74A, this is specifically limited to s.74A(1). This limitation was deliberate because, as appears in the submissions, the view is that s.74A(2) should not be retained but amended (see later). That is, this is action which places an obligation to make positive and negative statments about criminality. Thus, what is being said in both the Report and the submission is that the wide powers of s.74A(1) to report opinions concerning conduct should remain and so should s.74B(2) (and also s.74B(1)). In itself, s.74A(1) would be wide enough to cover an "opinion" that conduct was corrupt.

The terms of s.74B(2), by its reference to "corrupt conduct", which on his submission would remain would confirm this and s.74B(2) would mean that such a finding would be deemed not to infringe s.74B(1). With there being no definition in the Act of "corrupt conduct", as Mr Temby submits, then the reference to "corrupt conduct" in s.74B(2) would be to it in its ordinary meaning, whatever that may be. The problems earlier referred to arising from a statutory definition and the "opportunity for subsequent legal debate" quoted earlier would be gone. This of course would mean that the possibility of any legal challenge in the Courts (under the prerogative powers based on error of law) would be gone.

Even if s.74B(2) and s.13(1)(c) were not retained in their present form, but s.74A(1) is and there is no s.9(1) and no definition of corrupt conduct, then, under s.74A(1), ICAC would have power to report any "findings" or "opinion" concerning the conduct of a named person. There would be no limitations. An opinion concerning the past conduct of a person is of necessity judgmental. Thus ICAC could report its judgement that the conduct was dishonest, improper, grossly improper, scandalous, unwise, misconduct, partial or corrupt, using those words in their ordinary meaning.

As will later appear, the package of amendments proposed by Mr Temby, on analysis, are capable of permitting and producing some extraordinary consequences.

Mr Temby, to justify the proposals for unlimited power under s.75A(1), seeks to draw a parallel from the unlimited powers of Royal Commissioners to express opinions.

I suggest there is no real parallel and that in any event what should be done should be related directly to ICAC as a very special type of permanent institution. A Royal Commission is set up to perform, on a single occasion, a specific task in accordance with specific terms, set by the authority responsible for constituting it. They are limited to some subject considered to be of such great national or public importance, that special means to investigate and pronounce judgemental opinions are given. The revered Salmon Report which deals with commissions of inquiry summed the matter up by saying these inquiries;

> "... should never be used for matters of local or minor public importance, but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crises of confidence. In such cases we consider that no other method of investigation would be adequate" (The report is set out in the schedule to this Committee's report on the Rights of Witnesses pp 312-352).

The Western Australian inquiry was such a case. Where they made comments to a whole lot of matters is secret and sent them off to be dealt with in accordance with the ordinary principles of law. Surely, those terms do not apply to an inquiry into any private complaint such as one concerning the conduct of a clerk in a Shire office or in some county traffic office.

ICAC is a permanent institution constituted by detailed legislation, which defines its functions and powers. It can deal with the low or the high. Some functions are novel. For the most part the functions look to the future (see s.12). As to the past conduct of individuals, it sets up a precise mechanism whereby past conduct revealed can be dealt with in accordance with law by external bodies. ICAC, and its revelations and its statements provide a spur and aid to such action being taken. To this intent, s.75A(2) imposes not a discretion, but a duty, the purpose of which is exculpation or setting the law in motion according to which is appropriate having regard to revelation in inquiries aided by the exceptional investigatory powers of ICAC. With respect, the Royal Commission analogy is inapt.

Let me now turn to the consequences of the amendments (1) to (7) set out earlier proposed by Mr Temby.

In what follows, I emphasis that in any debate on the terms of a legislative grant of power, the critical question is what does it permit and could possibly be done within the terms of the power, rather than how it is hoped or expected the power will be exercised. This is more so if the power can be exercised by different persons and there is no factual review process.

Some of the possible consequences of the suggested amendments which warrant consideration are these:

(a) Under s.74A(1)(a), ICAC would have an unlimited power to report and make public any finding or judgmental opinion concerning the conduct of a named person. By reason of s.74A(1)(b), ICAC would have the power, but no obligation, to give reasons for such a finding or opinion.

(b) It would be open to ICAC to express the judgmental opinions using the term corrupt conduct (which would be according to its "ordinary" meaning, whatever that may be taken to be). Other equally damaging terms could be used, such as grossly improper, deceitful, dishonest or scandalous.

(c) Whatever the basis for reporting conduct corrupt, and reasons may not show this. S.74B(2) would allow it to stand and deem it not to infringe s.74B(1). Although its usual or ordinary meaning implies criminality or dishonesty, it is an inexact term and may carry for different persons a wider meaning.

(d) Opinions (and hence judgements) about the conduct of named persons, even that it was corrupt, would not now be limited to conduct in breach of an existing law or standard imposed by law. An opinion, what ever it is, could be based, rightly or wrongly, on the view of any commissioner on matters of morality or what he personally considers ought to be the standard. The Greiner/Moore decision depended on the corruption findings being of that defined by the Act and hence tied by s.9(1) to a criminal or disciplinary offence or a dismissal, which, of course, tied it to breaches of existing law. To delete any definition of corruption and to repeal s.9(1) and not replace it with any substitute would free all findings, including one of corrupt conduct, from the Greiner/Moore decision. A judgemental finding could ignore the fundamental philosophy to which I referred in my written submissions at C(11).

(e) If follows from what is said in (d), that as no finding, even of corrupt conduct, would be subject to any legal definition or legislative constraint it would not be open to challenge as an error of law. A principal basis of Mr Temby's objection to the present position is that there is "opportunity for subsequent legal debate". His proposals seek to remove what ICAC finds from legal debate in the Courts. The exercise of judgmental power would be absolute and unchallengeable, no matter how wrong.

(f) There should, on Mr Temby's submission, be no right of appeal. He claims that the prerogative power will suffice. However, as appears from (e), the amendments he suggests would avoid, as they are intended to avoid, any challenge in the courts to any ICAC findings, because they will not involve any error of law. Where a word is defined by statute its meaning is a question of law, but if it is not so defined it is a question of fact, so no finding under the ICAC package and hence even a finding using the word corrupt or corruptly would be open to challenge, no matter how wrong or unfair the finding in fact is. A challenge such as was made in the Greiner/Moore case would no longer

be available. The comments of both Mr Temby and of Mr Roden regard such a challenge as an encumbrance on the exercise of ICAC power. Nowhere is there an acknowledgment of the important construction limiting ICAC power or the philosophy inherent in it, which I set out in my submissions C(10) and (11). The back door result of the ICAC reform package would be that a limitation on ICAC power to make findings and that philosophy would no longer be imposed on ICAC power. Nowhere does the ICAC package or supporting argument that prerogative power will suffice make reference to the court's comments on the extreme narrowness of that power, listed in part in my submissions at C(12). Now, the only error made in findings would be of fact and not law. The only challenge would be on the narrowest of basis, namely procedural unfairness. Prerogative intervention on the bases of a failure to give any or adequate reasons would be unavailable against ICAC, because, by s.74A(1)(b), ICAC is given the express power not to give reasons.

The mere presence of a right of appeal serves to induce a more careful exercise of power. In my experience, it is otherwise when an appeal is limited to errors of law. Absolute power with no review process becomes in time unrestrained and less careful and hence arbitrary, particularly when reasons need not be given. History tells us that.

(g) To remove any obligation under s.74A(2) to make any positive or negative statements concerning the need to consider criminal or disciplinary proceedings or dismissal could, and in many cases would, have very serious adverse consequences which include: -

(i) In some cases an ICAC adverse opinion could be the only judgement, perhaps without reasons, about the conduct of a person. It could be in severe and crippling terms. The spur and the aid to outside action open to lead to contrary conclusions would be missing. Lessening this chance of external action to try the issue would make more serious the absence of any means of the finding being reviewed. There would be no appeal and no s.74(2) statement. Mr Temby, regrettably, is proposing a step to complete absolute power. There will be no new Greiner/Moore type of case revealing ICAC error.

(ii) Habits are inclined to form. In time, the practice could easily develop in some classes of case (the less serious) where in effect ICAC would set itself up as the sole judge in place of the Courts and dismissal authority. In time the pattern could be that adopted in the recent Unauthorised Information Report with thinly veiled ICAC criminal convictions, but standing alone with no ICAC statements concerning prosecutions. It will be recalled Mr Roden complained that having to make such statements was a waste of ICAC time, that he only made the statements because the Act compelled him to do so and that he recommended that the Act be amended, so ICAC would have no duty and only a

discretion to make such statements. In the end on the ICAC package, ICAC findings or opinions whether right or wrong but unappealable and on whatever material they may be based, and with or without adequate reasons could become the reasons for resignation and dismissals.

(iii) There would be no obligation to give the negative exculpatory statements at present required by s.74A(2). There could be ICAC criticism of a named person and earlier allegations against him but the matter of exculpation on the three s.74A(2) matters could be left in the air.

(h) If a judgmental opinion of any type is reported by ICAC concerning a named person, then whether or not statements are made under s.74A(2), as it is or as amended, exactly the same type of problems that I have listed in the Schedule to my written submissions would apply. In considering what I am now saying, I ask the Committee to go back to the detail of that Schedule. It applies to any of the situations where ICAC makes a serious finding adverse to a named person.

(i) In respect of all the foregoing and the judgemental opinions in particular, there is nothing to prevent the opinion being based on inadmissible or hearsay evidence or evidence given under compulsion. The latter has already happened.

(j) In summary, some judgements open to be made under s.74A(1), taken with the other amendments proposed could cause immeasurable damage and make continued office untenable, yet their making is not subject to any due process requirements, and error is not reviewable. Such absolute power just cannot be acceptable in our democracy.

(k) The amendments proposed could well produce some unacceptable possibilities concerning the exercise of power extending into or on the fringe of the Parliamentary and judicial fields (and perhaps others). These need to be understood. Some inquiries in some of these areas would be affected by s.112 concerning Parliamentary privilege, but political pressures or numbers could lead to it being waived, as it was in the Metherell Inquiry, extending into casting of a Parliamentary vote. If s.112 privilege were claimed and not waived, it would be said there was one law for members of parliament and another for more lowly public officers, such as aldermen. On the ICAC package, on a mere complaint of partiality, perhaps politically motivated, ICAC could inquire, using its compulsive powers, and make any unappealable finding it wished. It would no longer be confined by the Greiner/Moore decision to conduct which is in breach of some existing law or standard imposed by law. Take a few examples:

(i) partiality of a Speaker

(ii) partiality in the appointment of a chairman of a Parliamentary Committee

(iii) partiality in the appointment of a judge

(iv) partiality in the casting of a parliamentary vote

(v) partiality in favour of a particular group of persons in a vote cast by a member or members following some general deal done say with independent members, the deal being investigated by the compulsive powers of ICAC

(vi) partiality of a judge in giving a particular decision adverse to a woman, a migrant or an aborigine (even where there is an available appeal.)

In any of these cases ICAC could judge the conduct, for example as, partial, improper or an abuse of power.

I emphasise again that the only legitimate approach to a consideration of the terms on which legislative power is given, is to consider how power could be exercised. It is no answer for ICAC to say we would not do that or give us absolute power and we will exercise it wisely. ICAC is a permanent institution. So are the courts. With courts powers are carefully defined and constantly refined and limited. Judges are not given absolute powers on trust. An appeal is not denied because it may delay the execution. Some judges make errors. All do at some time. A few are maverick. Above them all, good, bad and trusted there is a double appeal system.

Those who from time to time exercise ICAC power will be no less human than are judges so as to be no less prone to error, and so there never will be one who has no hidden prejudice politically or otherwise and so there never will be a maverick. If a permanent institution, as is ICAC, possessed of such extreme powers, is given a power to do what in reality is to pronounce judgments capable of doing great damage and making the office which is the livelihood of a person untenable and permanently tarnish his or her reputation, perhaps wrongly or unjustly, can we afford not to define the power and make it subject to adequate review, as we do the court system. It we do not, some errors and injustices in the exercise of absolute power will in time on some spectacular occasion emerge to wreck the ICAC. We cannot take that risk with this worthy and necessary institution.

I believe the matters at issue can only be resolved by reference to some detail. I trust the responses to my written and oral submissions are not confined to claims "we would not do that" or populist generalities or by resort to what I described in a *Quarter to Midnight* in the Chapter entitled "Side Swipes" (pp.92-102) by condemning the whole by an attack on one particular.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

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

January 1993

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COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The plaintiff fell to the ground

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PARLIAMENTARY COMMITTEE ON THE ICAC

"PRIMARY FACTS" ISSUE

Further Comments by: ATHOL MOFFITT

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

The three comments can be summarised as follows:—

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

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

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

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

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

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

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

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

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

Illustrations of primary facts are:—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The ~~Hon~~ Athol Moffitt

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JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

19 February 1993

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

Dear Mr Kerr,

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

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

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

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

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

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

I turn then to the questions -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely,

Justice M J R Clarke.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

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

19 March, 1993

Dear Mr Kerr,

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

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

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

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

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

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

Yours sincerely,

Ian Temby QC
Commissioner

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

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

April 7, 1993

Dear Mr Kerr,

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

Submission of Mr. Justice Clarke

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

The role of the ICAC

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

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

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

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

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

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

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

Findings of primary fact and conclusions

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

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

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

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

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

RTA Driving Licensing: Vernon Forsyth

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

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

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

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

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

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

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

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

The Blackmore Report

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

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

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

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

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

A public and a private report

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

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

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

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

The advice of the Crown Solicitor

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

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

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

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

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

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

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

Yours sincerely,

Ian Temby QC
Commissioner

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JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

16 April 1993

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

Dear Mr Kerr,

I C A C

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

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

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

... 2

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

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

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

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

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

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

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

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

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

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

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

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

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

It will be recalled that in Bracegirdle Lord Denning said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That appears in Mr Temby's letter as:

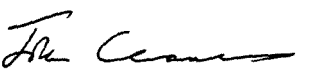
> "Mr Justice Clarke suggested that ICAC reports which might damage persons who may be charged should not be published until a decision has been made not to prosecute or the prosecution has been concluded. This would have the effect of delaying all reports for months and many for years - the position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

become intolerable for all concerned including those under suspicion."

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

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

Yours sincerely,



Justice M J R Clarke.

CORRECTED

MINUTES OF EVIDENCE

TAKEN BEFORE

THE PARLIAMENTARY COMMITTEE ON

THE ICAC

At Sydney on Monday, 19 April, 1993

The Committee met at 3.00 p.m.

PRESENT

Mr M. J. KERR (Chairman)

The Hon J C BURNSWOODS MLC
Mr B J GAUDRY MP
The Hon D J GAY MLC
Mr J E HATTON MP
The Hon S B MUTCH MLC
Mr P R NAGLE MP
Mr J H TURNER
Mr P J ZAMMIT MP

CHAIRMAN: At the outset I think it would be helpful for me to say a few words about the purpose of today's hearing.

In September last year the Committee released a discussion paper on the review of the ICAC Act. The Committee received a large number of submissions and conducted public hearings through October, November and December last year. In December the Committee issued a press release which identified areas in which the Committee had come to preliminary conclusions.

A further hearing was held in February and since then the Committee has spent some time deliberating further on the review. The Committee has yet to resolve one issue. That is the issue of the findings about individuals which the ICAC should be able to include in its investigative reports.

I have recently received a late submission from the Hon. Athol Moffitt QC, CMG which I feel raises an important matter related to this issue. That is the special place of Parliamentary references to the ICAC and the need for the Parliament to be able to determine exactly what sort of findings it requires from the ICAC on a Parliamentary reference.

It was because this issue had not been raised before and because of its significance that I arranged today's public hearing. This will enable Committee members to question Mr Moffitt about his proposal and ensure that this important proposal receives a public airing.

I have also invited Mr Tim Robertson to attend this afternoon's hearing. That is for two reasons. Firstly, Mr Moffitt's proposal seems to have been motivated in part by a reading of a report of a Commission of Inquiry that Mr Robertson drew to the Committee' attention in his submission to this inquiry, and I would like to question him further about that report. Secondly, when Mr Robertson appeared before the Committee in February he raised a number of issues about the functions of the ICAC which may be able to be addressed in part by Mr Moffitt's proposal.

(Response to a submission by Clarke J. from the ICAC tabled)

(See annexure)

(Further submission by the Hon. A Moffitt QC CMG tabled)

(See annexure)

ATHOL MOFFITT, of 26A Powell Street, Killara, on former oath:

CHAIRMAN: You were formerly President of the Court of Appeal, Supreme Court of New South Wales?

Mr MOFFITT: That's correct, a few years ago now.

CHAIRMAN: Is there an opening statement you would like to make?

Mr MOFFITT: Yes, there is, and I rather anticipated it and if its all right I think that I should go back to the premise on which this submission is made, and perhaps for the record on this occasion, if its acceptable, make a statement at some length which would summarise what I think this question is all about.

When I was asked to attend this hearing it was rather foreshadowed that I might be asked to go back and summarise what had gone before it, because what I put now is rather premised on the basis of eventual acceptance of something in the order of what I had originally submitted to this Committee. I suppose this further question of Parliamentary references really only arises, if there is some acceptance of that earlier submission.

This makes it important that I put this earlier matter with some care and put it on the record. I do this for two additional reasons. The first is that my proposals, that is the original ones, their consequences and the supporting arguments have been spread over a number of written and oral submissions and need to be drawn together in order to be fully understood.

The second is that since those proposals were put in various forms and developed from time to time, the ICAC, through Mr Temby, has made various criticisms which, at this final session so far as I am concerned, needs to be dealt with, if that's permissible. I think its necessary, as an introduction, to the very question I have raised in this last submission.

I do that particularly because I would be wishing to put forward the submission that some of the ICAC's submissions directed to this issue are based on some misstatements or lack of appreciation of the contents of the proposals and what they involved, so that, basic to my response to those criticisms, it is necessary again to detail those proposals because it seems that the ICAC, in meeting them, hasn't really faced up to what they are, and I think they need to be summarised, if that's in order.

CHAIRMAN: Yes.

Mr MOFFITT: To justify that approach perhaps I should make some reference at the outset to that second matter, namely the basis of the ICAC's criticisms.

Most of Mr Temby's comments on the issue do not advert to the narrow area in which proposed restrictions to finding of primary facts would apply, and to a reader appear to treat the entirety of the reports to be restricted to primary facts. Then, in fact, as Mr Temby has directly said, will mean being restricted to just stating the raw evidence, without reporting the ICAC judgment of which of conflicting versions was correct or reporting which were the true facts, or as he put it at one stage, it would be just like setting out the transcript of evidence.

On premises such as these, it is said the reports and inquiries would be inconclusive and that the ICAC would not have the ability to remedy, for the future, systems. This might well be so, if the premises were correct but, with respect, as will appear in my summary, they are quite wrong.

By way of further criticism, it is said that the ICAC would not be able to report an exculpatory finding, where a public allegation against a named person had been found by an ICAC inquiry to be wrong. This assertion of the ICAC is quite wrong. My proposal would not prevent it and one of my submissions expressly says so. This is one of the reasons that it is necessary, I think, to go back and summarise what the proposals really are, before we move on to the exception covered by my last submission.

It should also be said that the primary facts issue raises a fundamental civil rights issue, which has been at the forefront of the submissions made by myself and other persons. This issue and the Salmon report type of question concerns the acceptability under our democratic concept of justice of an inquisitorial body, armed with exceptional powers, using them to pronounce adverse public judgments concerning named persons, at times in substitution for trial and judgment under the court system.

In the criticisms of the proposal the ICAC has virtually made no mention of this question and, in my submission, has made no attempt to come to grips with it. That is a point of which I should remind this Committee in this final stage.

I say these things with respect, but the issue faced by this Committee, and in the end, by Parliament is of such public importance that I believe that these things should be said quite frankly. What I have said, I believe will be borne out by my summary.

I don't know whether I am out of order in using this occasion to summarise these matters which will take me some little time - it might take me 15 minutes?

CHAIRMAN: No, I think that will be useful.

Mr MOFFITT: I don't know whether the rest of the Committee find that acceptable. I don't want to press it if its not convenient.

Mr GAY: I do. It is a question that I asked Mr Roden on the rule of law.

CHAIRMAN: There is no objection to that course of action.

Mr MOFFITT: As always, I think this Committee will understand, I like to speak with precision and I am, therefore, to some extent speaking fairly closely to prepared material.

The very limited scope of my proposals concerning finding of primary facts need to be understood. That proposal is directed solely to preventing adverse judgmental findings against named persons being publicly pronounced. Their precise terms ensure that that is <u>all</u> that is prevented. The primary functions of the ICAC will be untouched.

The proposal to prevent such public ICAC judgments against named persons, tried, using procedures and material not in accordance with the democratic safeguards of our system, is based on the view that the primary function and purpose of the ICAC is by exposure, mostly in open sittings, by finding and then pronouncing what are the true facts and by recommendations, to create a climate for change and to change <u>for the future</u> the long standing corrupt culture and corrupt practise of this State. The secondary function is to reveal <u>the past</u> conduct of identifiable persons in aid of external authorities, including courts, dealing with such past conduct.

My proposal concerning the contents of public reports is based on the view it should not be the function of an inquisitorial body, exercising extreme powers,

not hedged in by democratic safeguards, to operate as a kind of trial system in parallel and inevitably, at times, in conflict with the court system, so that the ICAC pronounces judgments which, as the Chief Justice and others have said, may cause devastating damage. I add, the damage may be greater in some cases than a criminal conviction. Further, in the use of such a judgmental power, some errors in its use and some public perceptions of unfairness puts, and has already put, the public image of, and support for, the ICAC in some jeopardy.

The proposal concerning primary facts is no more than a convenient way of preventing public pronouncement of adverse judgments against named persons. I think it could have been done in other ways.

The precise terms of the proposal should be stated and understood. It is no more than that reports to Parliament, and hence those necessarily made public, shall not include any finding adverse to a named person or identifiable person, other than a finding of primary facts. This, as intended, excludes adverse judgmental findings concerning the quality of the conduct of named persons, and I emphasise, does no more.

Let me enumerate what it does not include or prevent:

(1) It does not prevent including in a report to Parliament any finding or opinion without limitation, such as to the nature and quality of practises, revealed by the inquiry, in particular areas of the public service and what needs to be done by way of remedy.

(2) It does not prevent the publication of an exculpatory or neutral statement concerning a named person. This is important because if a specific public allegation has been made under privilege against a named person, and the ICAC has investigated the allegation and found it to be not sustained, there is no effective way open for the person to be cleared and justice done to him except by an exculpatory report by ICAC. I emphasise, contrary to what has, on one occasion, been put by the ICAC itself, that that is not prevented by the proposal.

(3) It places no restriction on the ICAC adjudicating on disputed facts and pronouncing the true facts found, even when adverse to a named person. So there is no limitation on what it can find so far as facts are concerned.

(4) It places no restriction at all on the advices or opinions, written or oral, open to be given to prosecution authorities, such as the DPP.

An important consequence of the proposal should be noted. If the reform is not made and the ICAC continues to have power to pronounce judgmental findings against named persons, capable of causing great damage and open to possible error, there is a very strong case in justice to allow a full appeal. Necessary as this will be, in my view it would create intolerable difficulties, added expense, delay and confusion, particularly when it comes to operate in parallel with court proceedings. Elimination of judgmental findings and adopting the reform proposed would relieve the system of these problems which, I submit, is very important.

What are primary facts needs to be understood because there has apparently been some confusion about it, particularly on the part of the ICAC. I have dealt with this in one of my later written submissions. It is a term well understood by lawyers, although Mr Temby, with respect, has clouded the matter by wrongly stating that it would almost be the equivalent of setting out the transcript of evidence.

Primary facts are what a person does, including what he says and what he thinks or intends. A finding of primary facts involves the most important part of

the judgment in any inquiry by the ICAC or in a court case. Where there are two conflicting versions, it involves a judgment of what is true and this may depend on inferences from other evidence and other facts. Almost the entire province of the jury is to find what are the primary facts. Then relying on the judge's direction as to the elements of criminal conduct, they make a secondary finding or value judgment of the conduct of the person charged relying on their finding of primary facts.

In an ICAC inquiry, finding the primary facts will involve a considerable amount of judgment to say which of the accounts about events and conversations are correct. In order to make such judgments direct evidence, inferences from other facts and decisions concerning the credibility of witnesses will be brought to account. The intention or knowledge of a person is a matter of fact, a thing well known to all lawyers, and a determination of that fact would depend on what the person asserts about his intention and the inferences to be drawn from other facts. In short, finding the primary facts is judging all of what happened but excluding judgmental opinions about the quality of the conduct of persons.

In one of my submissions, I remind, that I gave this illustration of findings of primary facts: A met B at X RSL club on 1 January 1992; the version of the conversation at the RSL club given by B is correct but that of A is false; C paid $100 in cash to D; at the time both C and D intended that D should pay the $100 to X. You will see that its important to understand that and that it is quite wrong to say it is just a matter of setting out the transcript of evidence. It permits the whole of the judgmental finding of facts by the ICAC which is really central to most of the inquiry.

In one of my written submissions I gave a precise definition of primary facts and suggested that an option open would be to include such a definition in any amendment to the Act. If I might go back and quote it so this can be put together when it is transcribed.

> "Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person."

In view of the misconceptions to which I have referred, originating from the ICAC, I now believe, and now submit, that in the interests of clarity and certainly, a definition on these lines should be included in any amendment of the Act. Of course, it would need to be much polished by a Parliamentary draftsman. Mine is merely to indicate the way.

Basic to Mr Temby's claim that, if limited to finding primary facts, the ICAC's function would be unworkable and prevent matters being finalised, is his claim that the reports would not be able to say what happened and, in effect, be limited to

just stating the raw evidence and that on what I have just referred, is not correct.

With the proposed change most of the former reports, in my submission, would be little different in substance to what they were. The substance of them, as in the past, would be to report the true facts found; what evidence was accepted and what was rejected; what inference of facts were made; and what were the intentions of persons. They would still exculpate persons from public allegations not sustained. They would still make general value judgments concerning past practises and make recommendation for reform of systems and make general value judgments about what has happened in the past without identifying persons.

The ICAC asserts that the proposal would affect its ability to reform systems. I would submit that the ability to include an adverse judgmental finding against a person named in the public report would not affect such an ability to make recommendations for reform.

If the change were made, for example, it would have made little difference to the substance of the Local Government report, directed to reforms in relation to conflicts of interest. The only change in respect of reports would be to exclude from reports adverse judgmental findings against named persons which, in fact, appear in only some of the reports. In the past such findings, in some cases, far from producing finality, produced the very opposite. Findings of corrupt conduct have led to almost automatic dismissals which have been reversed by courts in some cases on their own view of the facts.

If the narrow limits of the proposals earlier stated are understood, and its also understood that the ICAC can fully find and report the true facts, it is quite wrong to just assert baldly that the change is unworkable, a not unusual attitude to any change. On the best review I can make, and after some further thought about it, the only possible difficulty I can see is quite minor and avoidable. It could arise if the ICAC elects to enlarge without restrictions on its reasons for its findings of fact, this is by categorising in a critical way the conduct and evidence of a person as a witness or complainant.

Although I do not think it is really necessary, because I think it is avoidable, an option open, which indeed I had set out in one of my earlier submissions, is to qualify the terms of the amendment which restricts adverse judgmental opinions concerning the conduct of named persons by adding words such as "other than concerning the conduct of named persons in their capacity as witnesses before or complaints to the ICAC." In other words, the ICAC could criticise, in a value judgment kind of way, what it finds about the quality of evidence of a particular witness or the quality of a complaint made or of the complainant.

If the restriction on reports advocated had been in force at the time, in my submission, the substance of the Metherill report would have been little different, except in one important respect. Central to the inquiry was finding and reporting the true facts which had been either in dispute or were unknown and also to investigate an allegation of bribery against Mr Greiner which could lead, in some circumstances, to a statement being made under s.74A in relation to a criminal trial.

Under the reform, the ICAC could have reported its findings as to what were the true facts, in substantially the same way it did. It could have exonerated Mr Greiner of the bribery allegation, in much the same way as it did. The only substantial difference is it could not have made and reported the corruption finding concerning Mr Greiner and Mr Moore.

However, Parliament did not need these findings to discharge its own function, on its own responsibility and decision - that's concerning no confidence motions. All it needed to know from an independent inquiry was what were the facts? That is, what were the primary facts? The addition of the judgmental findings were unnecessary and, indeed, I think it can be said, confused the issue as some, including Mr Hatton, claimed. That addition usurped the function of Parliament in that it prejudged and, therefore, prejudiced the independent exercise by Parliament of what was its sole responsibility. Far from finality, the judgmental finding, the error involved and the court proceedings which followed confused and compounded the issue for Parliament and, in some quarters, seriously damaged the public image and support for the ICAC.

With hindsight it would have been better if only primary facts had been found and reported and the limited exoneration pronounced concerning the allegation of bribery and the judgment left to Parliament. Should not that hindsight provide foresight for the future?

Mr Temby's submission would leave it open for the ICAC in future to pronounce judgmental findings of corruption as ordinarily understood or in any other adverse terms considered appropriate, even when criminal proceedings are in possible contemplation.

A further question arises because Mr Temby has submitted that the limitation to primary facts would lead to more litigation. This is quite wrong and, in fact, I suggest the reverse is the case. If the amendment is not made, there will have to be, as earlier stated, a right of appeal provided against erroneous adverse judgmental pronouncements which will greatly increase court challenges of a most difficult kind.

If the primary facts proposal is adopted and with it the statutory definition of primary facts, the only room for a court challenge would be if the ICAC, in direct conflict with the definition, included an adverse judgmental finding about the quality of conduct of a named person. There would be no difficulty in avoiding that, so that any basis for challenge would be the fault of the ICAC. Any other challenge would be after the report was issued, would not interfere with the ICAC function, and would fail with costs against the challenger. Thus, the proposal so defined would really leave no room for delaying litigation and little room for vexatious litigation.

I should not leave this summary of my proposal concerning primary facts, without reminding you and putting on the record an important, but separate, qualification which I have added to my package. I believe it is critical to the civil rights issue, which I believe our Parliament in this democracy will be concerned about.

In some cases reporting publicly findings of primary facts adverse to a person which would be permitted by my proposal, will prejudice the fair trial of the person concerning the same event. My package, therefore, needs a safeguard. It is that if criminal proceedings are reasonably in contemplation, the report should not include findings of primary fact which may be in issue at the trial, so as to prejudice its fairness.

Let me take an example. A central issue of fact in an inquiry may be whether a well known senior police officer received cash in a brown paper bag, denied by the officer. The ICAC report finds as a fact that the officer received the money in the brown paper bag, highlighted on T.V. radio and the press. These publications, under Parliamentary privilege and free from the contempt laws, would make a fair trial of

the officer for bribery most difficult and could, for this reason, deter the DPP from laying a charge. Perhaps that is acceptable - I would submit not.

All this could be worse if the ICAC finding were based on or were influenced or the ICAC just had before it material which would not be admissible in court proceedings. It may be said that without any such statutory requirement, such as I have suggested, the ICAC in such cases would refrain from including such findings in its public reports. However, in some reports it has failed to do so. Then one assistant commissioner, in oral evidence before this Inquiry, expressed the view that the intended function of the ICAC was to pronounce its own findings without being concerned with the prospects of later criminal proceedings so that DPPs and the courts should be left to make their own decisions in the light of what the ICAC had pronounced.

In my respectful submission Parliament which has conferred the power should make express statutory provision on the lines indicated to ensure that the power so conferred is not so exercised as to prejudice the fair trials which are in reasonable contemplation.

I am conscious what I have said in this final session may seem to mean that I have been somewhat a devil's advocate in dealing with the ICAC's submissions, which oppose almost any change to its near absolute and unreviewable power. I make no apology for my trenchant but respectful comments. The ICAC and its defence of its powers is properly under public and Parliamentary scrutiny. The present issue being important to our democratic processes, nothing less than trenchant comment will suffice.

I might add that in all I have said before this Committee, and most members of this Committee will know, I am a strong supporter of the concept of the ICAC and the need for it as a permanent institution if we are to uncover corrupt practises and reform systems, practises and attitudes. For years, I have contended, not enough is being done in Australia to expose and counter organised crime and corruption and immediately on retirement wrote in 1985 a book of warning, *A Quarter to Midnight*. In the public conference held in the Australian Senate chamber just before the National Crimes Authority was set up I was one of a number, but against great opposition, who advocated the introduction of the compulsive powers.

I still believe these strong, inquisitorial powers can and should be used, mostly in public, to expose organised crime and corruption and their methods of operation and to change systems in order to counter and prevent them, and also to aid a change of public opinion which is so important in these matters.

However, I believe equally that these objectives can and should be achieved using these powers in ways which do not trample on those individual rights which are basic to our democratic ideals. The present structure of the ICAC leaves the ICAC able to trample on those rights, and it has done so, in my respectful submission, in the past on a significant number of occasions, some, of course, directly caused by the statutory requirement itself.

Mr HATTON: I would welcome your assistance in that I understand that Parliamentary counsel would need to do a great deal of research to define in legislation what a primary fact is. I was very interested to hear what you were saying about what primary facts are. Although I am not open to tell you who I have spoken to because it was only a private conversation, but there is some confusion in the minds of some lawyers that I have spoken to in terms of what primary facts are, and

we would need to ask the Parliamentary counsel to undertake some research so that it could be defined in legislation. That is really my major concern.

Mr MOFFITT: The definition I gave is what my belief it is from both experience. Also in one of my submissions I rather enlarged on it a bit more than I have now, and referred to what you mean by primary and secondary things and so forth. It seemed to me whatever doubts tere may be that a definition would resolve it. Whether everybody accepted the definition, you would make it a statutory definition, much on the line I have put.

Mr HATTON: I understand it is not referred to in *Cross on Evidence* and, therefore, as far as I know as a laymen, there is not a definition in existence, so it is bound to cause some contention if we define it legislatively.

Mr MOFFITT: I had thought about that, Mr Hatton - it is a very good question, if I might say. I thought the lawyers might clearly know but its emerging a bit that there is some confusion about it. The thing I put as an option I have now come to the view it is not an option, it is something that should be done. I would not be concerned about what Cross said about it because, in the ordinary course of events, there is no occasion in the law to say what a primary fact is or is not. All you would need to say here is that the ICAC can find the "ordinary facts". I don't care whether you call them "primary facts" or what they are called. You can call them the "relevant" facts. You can use any word you like and then define it. You can drop the "primary" if you like and call them "relevant" facts and then define it in the way I have. In other words, any fact which can be an event or conversation which has occurred, like "I have done it" or any state of mind is a statement of fact. Every lawyer will accept that a state of mind is a question of fact. It doesn't matter what the views are you could create the definition of the purpose of this Act.

Mr HATTON: There is one other matter that excited my interest which gets to the core of it. In the example of whether you find that a policeman had accepted a bribe, wouldn't it be so that Mr Temby could not really make a statement about that if there were litigation pending? Secondly, if however, he made a statement as to what he believed are the primary facts that that, in any case, in the way it is reported by the press would prejudice the trial, therefore, would emasculate his power in regard to dealing with that matter in any event?

Mr MOFFITT: That's two concepts: one is the press would report it, it wouldn't be possible to have a fair trial. So the question is, first of all, should Mr Temby do it? If he did it you couldn't have a fair trial. If its satisfactory to say so, then the next question is that he does it in substitution for a trial. You now come to the situation, are you going to have the ICAC which isn't bound by the rules of evidence coming to that determination? What happens if its based on hearsay? What happens if its wrong?

Mr HATTON: No, that was not the point of my question. I understand the point you are making about the ICAC behaving as if it were a court. The point of my question is that Mr Temby should not, in your reasoning, find against the officer if there is going to be a court hearing later on?

Mr MOFFITT: Yes.

Mr HATTON: Is it your submission that he can, in fact, find primary facts or relevant facts? If he does, I submit, wouldn't that also prejudice a later trial and, therefore, if we follow your line of reasoning, Mr Temby in investigating that

police officer, is neutered because he can not report?

Mr MOFFITT: He is only muted in respect to a matter where a criminal trial is reasonably in contemplation. If a criminal trial is reasonably in contemplation and he makes, particularly against a person who is well known the jury will certainly know all about it, if he then makes that finding, he is muted because otherwise you can't have a fair trial. Or, unless you are quite happy to let Mr Temby say it and not have a trial.

Mr HATTON: If, in fact, his recommendation is that the matter be referred to the Director of Public Prosecutions then he should not make a public report which comes to any conclusion or exposes primary facts as regards that officer?

Mr MOFFITT: Anything which is likely to be relevant. It would depend on what the fact is. A fact certainly such as that one or any other fact which is reasonably likely to be in issue at that trial. It would be very much an issue whether the policeman received the brown paper bag, of course, and therefore, if there is going to be a criminal trial he shouldn't do it. Because the position is if he hadn't said that under privilege and a newspaper had reported it and a pending trial, they would be up for contempt of court.

Mr HATTON: I understand the logic of it. I am just trying to get to where your logic goes in terms of what he should or should not do if there is an impending court trial because he has recommended to the DPP -

Mr MOFFITT: In any case where it is in reasonable contemplation, yes. Certainly where he has recommended or he has made a statement saying it should be considered, that he should not in those cases. The ICAC, unfortunately, has not observed that rule in some cases in the past.

Mr GAY: Would that mean that the probability would be that the DPP should review all draft reports before they are finally published?

Mr MOFFITT: No. I think the ICAC has to act within whatever the statute says and on its responsibility. I am very much against other people intruding into the function. I think the ICAC has to have the responsibility.

Mr GAY: You would be relying on the commissioner concerned to make a judgment on whether there is a valid case for the DPP rather than the DPP making the decision?

Mr MOFFITT: Yes. There are some provisions similar to this in the NCA Act right from the beginning, you know, about making statements which would prejudice a fair trial and there is nothing unusual about that if this was introduced here.

Mr GAUDRY: One of the problems though in the direction you are going in, surely, you are going to have to look at the whole function and format of the ICAC which is to look at corruption or whatever we like to call it, systemic change and the impact of reports in relation to that. Really what we are leading towards is the ICAC becoming a compiler of evidence which may be used by the DPP. This would take it right away from that more broad function that it has at the moment which flows from the more comprehensive reports and the fact that the commissioner does make statements as to the general nature of conduct?

Mr MOFFITT: There is nothing to prevent the Commission in a general way to say all that happened in a particular industry, like what was done in the Local Government report. I haven't got exact detail in front of me but basically

what was done there was dealing with the conflict of interest situation. It wasn't concerned with dealing with prosecuting people. It made no recommendation but it could make without much difficulty, general statements, and saying there is something that has got to be done. It set out all the facts which had happened in different councils. On that basis it said that systems, laws and rules have to be changed about conflicts of interests. I don't see any difficulty there.

It is only in respect of the past where you have something that is revealed which ought to be dealt with by the courts. Then in those cases you have got to make up your mind, is the court going to deal with it or are you going to have an inquisitorial body making the judgment? My contention is you can't have both. The situation is that, in our democracy, it has to be the courts. For that purpose when you get to that point, the ICAC, it can deal with all the other things, but so far as findings of fact affecting that particular person, all it does is to say "I don't propose to deal with the facts dealing with that person because, in my opinion, it has to be dealt with by the courts."

Mr GAUDRY: Doesn't that automatically provide in the context in which the ICAC has developed a situation where the public will automatically convict that person without the corroboration of a comment by the commissioner? So that "not dealing with a person", infers that its going forward for contemplation by the DPP?

Mr MOFFITT: I think that is a thing you have got to accept. That happens every day when you see a picture on T.V., with a man with a coat covering his head and then you hear his name that he has been arrested after the murder of a little boy and the police have charged him, he must be guilty. That's something which happens in every system. It certainly couldn't really be anything like that, merely because the ICAC has said that consideration should be given to criminal proceedings. You have just got to accept that. As soon as the DPP charges a person people are going to say "Oh well, the ICAC has inquired and the DPP has charged the fellow he must be guilty".

Mr GAUDRY: If they don't do it, if there isn't a charge by the DPP?

Mr MOFFITT: If there is not a charge by the DPP, you must assume that reasonable people - and we are trying to deal with reasonable people - will say "When it was investigated the DPP has found there wasn't a case to charge." That's happening all the time. You have somebody committed for trial by the Magistrate and the DPP then decides there is not a case to be tried or for some reason doesn't launch a prosecution. That goes right through the system.

Mr GAY: You said that the various commissioners would make the decision on whether it should go to the DPP - the DPP wouldn't make that decision. Do you envisage that in that instance the whole report is withheld or is it just the situation where you would withhold the part pertaining to charges against a particular person? If there isn't a charge after you hold it back would you imagine the Commission would then publish the report?

Mr MOFFITT: I would think that the Commission would publish its report. The Act itself contemplates in s.74A(2)(a) - off the top of my head - that, in issuing its report, it will make a statement whether or not criminal proceedings should be continued. That has always been in the Act. Therefore, there is nothing wrong that that is contemplated and the issued report would state that. The only addition I am

making is that, while it can state all the facts, where its going to identify a person, it shouldn't state the facts which are going to prejudice the trial. It seems to me the law is pretty clear that you should do that if you are going to give people fair trials.

Mr GAY: You say the report is published and in the case of B there would be a short statement saying that we are have recommended to the DPP that charges be laid?

Mr MOFFITT: That he "give consideration" to that. Its that softer statement.

Mr GAY: In the event that the DPP decides not to go ahead with charges against B, would you then publish those primary facts?

Mr MOFFITT: I would think normally speaking the ICAC would wish at the start to complete its report, throw it open to court, then if the court doesn't take any action about it, because it wasn't sufficiently serious or the evidence wasn't there, there wouldn't be a great deal of point in going back to it. In so far as it was an example of what the ICAC was trying to do, it could have, in its report referred to the general position without referring to the particular facts of the particular case, and so deal with the proposition generally about the reform of law. I wouldn't think it would go back again. If it did go back again it might, in fact, create an injustice, if the DPP says that the man shouldn't be charged with bribery and then the later report of the ICAC found facts that the brown paper bag had been handed over and it came from inadmissible evidence, I think it would only lead to a mischievous situation and complications that wouldn't serve any purpose.

Mr GAY: What about a situation where you refer the facts on B to the DPP for possible charges because the Commissioner felt there was a lot more involved than say, person C, person C gets a mention in the report and person B gets no mention, yet the Commissioner felt that he was worse than person C, then the DPP doesn't go ahead and person C gets worse than person B?

Mr MOFFITT: The other person referred is mentioned but all that's done are the statement of facts and by definition the statement of the facts were such that they didn't warrant any consideration of any proceedings. It is true to a degree what you say but when you have a look at it, its going to be more of an innocuous situation. Its only the person who might be the bad guy who is left out.

Mr GAUDRY: What about those instances where the person may be subject to departmental or administrative sanction but not the DPP, would the Commissioner then publish more than just facts?

Mr MOFFITT: I would think, so far as they were concerned, you may have a question there as to whether you should prejudice a departmental trial. I would think a lot of those matters would have to be dealt with by private communication and say "these are the facts and these are the findings of facts". I would think there ought to be a lot of cooperation between the DPP and the ICAC. That happens very closely in respect of the National Crimes Authority. I don't see any reason why the same rules shouldn't apply in respect of departmental offences but that's a bit more of a different area. I think the same thing applies, they shouldn't prejudice fairly dealing with departmental offences.

The question of dismissal is a very difficult question. What do you do if you find, and I don't know whether I will give you the complete solution to this, that the person has done something which seems to warrant consideration for dismissal?

Under my submission you shouldn't make any judgmental findings because the moment you say "I find the person is corrupt" the departmental head has not really much practical option than to dismiss the person. Then the person has got an appeal to the Public Service Board or GREAT and they then look at the facts. The departmental head hadn't looked at the facts because the statement of the ICAC was sufficient. As has already happened they look at the facts and say "Oh no" and they set aside the dismissal. So you get to this confused situation.

That problem really doesn't arise, once you prevent the judgmental statements being made if merely the facts are stated. Then the departmental head states "these are the facts found, we will have a look at it. We want to have a look at what the evidence is". They may or may not but just say "on these facts we think we should dismiss the fellow" or "we will give him a caution" as they case may be. I don't see much problem in the dismissal question if you state the facts.

There is a problem the moment you start making findings of statutory corruption or corruption according to ordinary meaning or some other finding which is derogatory of the person. It doesn't carry any weight once you get to the appeal, GREAT of whatever the case may be. They have got to get back to the facts and in my view it only adds to confusion as it has already done. We have had quite a few such cases and the kickback is people say "Oh well, the ICAC is not very good they have got it wrong." The ICAC comes back and says "Oh no, we didn't get it wrong, its just for some other reason" but that's not how the public sees it.

Mr GAUDRY: In the Moffitt view you have the finding of the facts, and then perhaps some statement about systemic implications of those and recommendations which might look at change in departmental processes or whatever?

Mr MOFFITT: Yes, and if you have a look at some of the reports and I go back to some of the particular ones, what you are looking at is defined over a whole lot of different members of the public service - it is a practise that's there. The crunch thing is that people have got the thrust of what is happening. That's the critical thing. You don't necessarily have to have every detail, executing every person involved, in order to point out what's wrong with the system. You have to give a lot of the facts to back it up, but you don't need to give judgmental findings. That's my point.

Mr ZAMMIT: Mr Moffitt, I think your words were that the "ICAC has yet to come to grips with it" and you were referring to the protection of the civil rights of the individuals. Specifically what safeguards or protective measures would you like to see put in place to allow the ICAC to function without the damaging consequences to the civil rights of the individuals who are being investigated?

Mr MOFFITT: Basically I think two things: one is to prevent judgmental findings. Whether you do it by saying confining to primary facts or whatever, you straight out prohibit it, whatever you do, but first of all you say you are not a court, you can't pass judgmental findings adverse to people - that's number one. The other one I have said is that where you have a trial reasonably in contemplation you shall not publish the facts which are likely to be in dispute and critical and therefore prejudice the fair trial of that person. Those are two democratic principles. One is, leave judgments and trials of people to the courts and to the ordinary processes and so forth. The other one is, if you find something wrong, don't prejudice the trial. Those are the two things when it all boils down, of course.

Mr TURNER: It would on the scenario you have put through that there

may still be the implication that a person has got a stigma about them. I think that is one of the criticisms of how the ICAC presently operates, that often people are left with a stigma. Your proposal is that there would be no finding of primary facts and then mention of the person is under investigating by the DPP. On the old adage that justice delayed is justice denied it doesn't really fix the problem because the stigma is there. Have you contemplated something along the lines of a seconded DPP official working parallel or in tandem with the ICAC?

Mr MOFFITT: I hadn't thought that but I think there is some merit in that. I would need to think about that. You may confuse functions if you did that, is a possibility. Certainly there should be a great deal of oral communication and there should be, I would think, within the ICAC something set up that people can get the material, organise it and sift it. The NCA has got that direct responsibility to prepare material etc. etc. for the courts.

Mr TURNER: There would be the possibility - and I haven't developed this in my own mind - of running the DPP in tandem and parallel that you could bring your report down and details of any charges flowing from that report almost simultaneously?

Mr MOFFITT: Well you could.

Mr TURNER: Which would mean the stigma may not be hanging over a person who is otherwise later found by the DPP to have no case to answer?

Mr MOFFITT: Yes, I think that's a very good point. In other words, consideration should be given and you could, in fact, as it were telescope those two things what you are putting. Instead of saying "consideration should be given" and you don't hear for six months what the DPP is doing about it. In the meantime the fellow has got the thing hanging over his head, that's what you are saying?

Mr TURNER: Yes.

Mr MOFFITT: I think it would be very ideal if you could telescope them. There may be a time factor. The DPP on some occasions may have to go out and collect other evidence. The ICAC has got evidence which really isn't going to be admissible and he may have to go to the Attorney General if he has some witness who has compulsorily given evidence and he might need to get some undertaking from the Attorney General. A whole lot of things could happen, but to some degree it might be possible.

CHAIRMAN: You wanted to continue?

Mr MOFFITT: No, I don't want to say anything further about that. If you are coming now to this Parliamentary reference, did you want to go to that?

CHAIRMAN: Yes.

Mr MOFFITT: If I have got the message across concerning the earlier part of what I raised that you have got in some way to have a limitation to finding of primary facts or excluding judgmental findings adverse to a person, assuming I have had whatever I have said understood in respect of that and I hope I have clarified it and livened up the debate a bit and acted a bit as the devil's advocate and I apologise for doing that but I thought it was necessary then what I have said in respect to reference to Parliament is almost self evident on its reading. I don't know if the members of the Committee have had an opportunity of reading this prior to today or not?...

JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
SYDNEY 2000

23 April 1993

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

Dear Mr Kerr,

RE: I C A C

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

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

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

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

Yours sincerely,

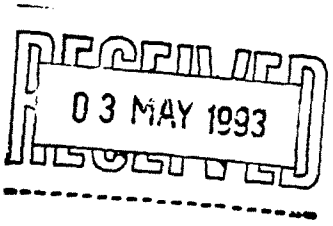
Justice M J R Clarke.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

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

30 April 1993



Dear Mr Blunt,

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

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

Yours sincerely,

Deborah Sweeney
Solicitor to the Commission

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SUPPLEMENTARY SUBMISSION BY THE ICAC

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

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

The Commission offers these views about that suggestion.

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

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

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

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

(i) Matter X has occurred;

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

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

has always been most effective.

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

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

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

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

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

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

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

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

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

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

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

APPENDIX FOUR

List of Submissions

COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

Submissions Received

1 Mr K Lawson, 19 September 1992

2 Mr Max Mueller, 23 September 1992

3 Sir Max Bingham, Criminal Justice Commission, 25 September 1992

4 Mr John Bracey, Australian Institute of Private Detectives, 25 September 1992

5 John and Jenelle Horiatopoulos, 28 September 1992

6 Mr Mark Findlay, Institute of Criminology, 29 September 1992

7 Mr E P Knoblanche QC, 30 September 1992

8 Marie Tayler, 30 September 1992

9 Debra Berkhout, 01 October 1992

10 Mr R E Wilson, Water Board, 01 October 1992

11 Mr L A Baxter, 01 October 1992

12 Mr Aleksander Czapla, 01 October 1992

13 V Singh, 01 October 1992

14 Mr Michael Bersten, 02 October 1992

15 Hon Athol Moffitt QC, CMG, 02 October 1992

16 Judith Rossi, 02 October 1992

17 Hon Adrian Roden QC, 05 October 1992

18 Law Society of NSW, 09 October 1992

19 ICAC, 12 October 1992

20 Ian M Johnston, A W Simpson and Co Solicitors, 14 October 1992

21 Mr Gary Camp, 14 October 1992

22 Hon Athol Moffitt QC, CMG, 14 October 1992

23 Mr Kevin Fennell, NSW Deputy Auditor General, 21 October 1992

24 Mr David Kettle, President, Royal Australian Planning Institute, 22 October 1992

25 Mr Chris Watson, Secretary, Local Government Engineers' Association, 23 October 1992

26 Murray Kidnie, Secretary, Local Government Association of NSW, Shires Association of NSW, 23 October 1992

27 John Coombs QC, President, NSW Bar Association, 09 November 1992

28 Mr N G Phngas, 14 October 1992

29 Mr Cliff Long, 28 October 1992

30 Mr Peter McIntyre, 08 November 1992

31 Mr Tim Robertson, Labor Lawyers Association

32 Mr Don Budge

33 Mr Gary Camp, 20 January 1993

34 Mr Evan Whitton, 20 January 1993

35 Mr N G Pangas, 18 January 1993

36 Mr R A Hancock, 12 January 1993

37 Mr Hilton Jones, 19 February 1993

38 Mr N J Lethlean, Gernal Manager/Town Clerk, Tamworth City Council, 27 January 1993

APPENDIX FIVE

List of Witnesses

COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

List of Witnesses Appearing before the Committee

- 12 October 1992 -

- ◊ Patrick Fair, representing Law Society of NSW
- ◊ Michael Bersten
- ◊ Kevin Fennell, Deputy Auditor General
- ◊ Keith Johnson, Ballina Shire President
- ◊ Warren Hart, Director of Human Resources, Water Board
- ◊ Mark Findlay, Director of Institute of Criminology

- 26 October 1992 -

- ◊ The Hon Ernie Knoblanche QC
- ◊ The Hon Athol Moffitt QC, CMG
- ◊ The Hon Adrian Roden QC

- 09 November 1992 -

- ◊ The Hon Adrian Roden QC
- ◊ Ian Temby QC

- 08 December 1992 -

- ◊ The Hon Mr Justice Clarke

- 05 February 1993 -

◊ Mr Tim Robertson, Secretary, Labor Lawyers Association

◊ Mr Mark Le Grand, Director, Official Misconduct Division, Criminal Justice Commission

- 19 April 1993 -

◊ The Hon Athol Moffitt QC, CMG

◊ Mr Tim Robertson, Secretary, Labor Lawyers Association

APPENDIX SIX

Minutes of Proceedings of the Committee

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS OF THE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 04 AUGUST 1992

AT PARLIAMENT HOUSE, SYDNEY AT 10.10 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Nagle
	Mr Tink
	Mr Turner

An apology was received from Mr Hatton.

The Committee then went into a public hearing concerning Section 52 of the ICAC Act and the Cost of Legal Representation before the ICAC.

The media and the public were admitted.

The Clerk read the Legislative Assembly Standing Order No.362 relating to the examination of witnesses and the terms of reference for the inquiry.

Simon Stretton, General Counsel, Independent Commission Against Corruption, was sworn and examined.
Deborah Anne Sweeney, Solicitor, Independent Commission Against Corruption, under previous oath was examined.
Evidence concluded and the witnesses withdrew.

Laurie Glanfield, Director-General, Attorney-General's Department, was sworn and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned for lunch.

The media and the public were admitted.

Roger Wilkins, Cabinet Office, was sworn and examined.
Evidence concluded and the witness withdrew.

Patrick Griffin, Director, Public Interest Advocacy Centre, was sworn and examined.
Evidence concluded and the witness withdrew.

Patrick Fair, Solicitor, was sworn and examined.
Evidence concluded and the witness withdrew.

Simon Stretton, General Counsel, Independent Commission Against Corruption, under previous oath, responded to the day's evidence.

The media and the public withdrew

The Committee then held a brief deliberative meeting.

The Committee discussed the correspondence received.

Resolved on the motion of Mr Tink, seconded by Mr Mutch

1 That the letter from Deborah Sweeney, dated 07 July 1992, concerning steps taken by ICAC to ensure confidentiality of information about its investigations when statutory powers are exercised be deferred until the next Committee meeting for further consideration.

2 That Mr Tom Hogan be sent a copy of the letter from Deborah Sweeney, dated 07 July 1992, concerning correspondence the Committee had received from Tom Hogan and his solicitor in relation to his property and claims for witness expenses.

3 That Mr Johnson be sent a copy of the letter from Deborah Sweeney, dated 07 July 1992, in response to correspondence the Committee had received from Keith Johnson, Ballina Shire President, concerning the ICAC's handling of anonymous complaints and asked for his response to it.

That Mr Johnson be asked whether he would like to appear before the Committee in relation to this issue.

4 That Mr Knight and Bill Rixon MP be sent a copy of the letter from Deborah Sweeney, dated 07 July 1992, in response to correspondence received by the Committee in relation to the ICAC's inquiry into Roadworks in Kyogle Shire and asked for their response to it.

That the Committee write to Bill Rixon MP asking whether, in view of this response form the ICAC, he still believes there would be benefit to be gained from a visit to Kyogle by the Committee.

5 That the letter from Mr Wintour, dated 13 July 1992, be referred to the ICAC for comment and response.

6 That Alderman Crisp be sent a copy of the letter from Ian Temby QC, dated 14 July 1992, responding to correspondence the Committee had received from Alderman G A Crisp.

The Committee adjourned at 4.40 pm until 10 August 1992, at 10.00 am.

.....
Chairman

.....
Clerk

MONDAY 10 AUGUST 1992

AT PARLIAMENT HOUSE, SYDNEY AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Kerr
	Mr Nagle
	Mr Tink
	Mr Turner

Apologies were received from Ms Burnswoods and Mr Hatton.

The Committee then went into a public hearing concerning Pecuniary Interest Provisions and a Code of Conduct for Members of Parliament.

The media and the public were admitted.

The Clerk read the Legislative Assembly Standing Order No.362 relating to the examination of witnesses and the terms of reference for the inquiry.

Michael Wesley Jackson, Associate Professor, Director of the Public Affairs Research Centre, University of Sydney, was affirmed and examined.
Evidence concluded and the witnesses withdrew.

Gerard Francis Carney, Associate Professor of law, Bond University, was sworn and examined.
Evidence concluded and the witness withdrew.

Jacqueline April Morgan, Executive Member, Privacy Committee of NSW, was affirmed and examined.
John Howard Gaudin, Research Officer, Privacy Committee of NSW, was affirmed and examined.
Evidence concluded and the witnesses withdrew.

Meeting of the Committee on the ICAC
10 August 1992

Patrick Griffin, Director, Public Interest Advocacy Centre, was sworn and examined.
Evidence concluded and the witness withdrew.

Gerard Francis Carney, Associate Professor of Law, Bond University, on former oath was examined.
Evidence concluded and the witness withdrew.

The Committee adjourned for lunch.

The media and the public were admitted.

Gail Barton Furness, Principal Lawyer, Independent Commission Against Corruption, was sworn and examined.
Elizabeth Gai Moore, Principal Corruption Prevention Officer, Independent Commission Against Corruption, was sworn and examined.
Evidence concluded and the witnesses withdrew.

The Committee then went into a public hearing concerning the Independent Commission Against Corruption.

Jeffrey Paul Wilson, Asset Security Manager, was affirmed and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 4.40 pm until 11 August 1992, at 10.00 am.

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Chairman

.....
Clerk

TUESDAY 11 AUGUST 1992

AT PARLIAMENT HOUSE, SYDNEY AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Kerr
	Mr Nagle
	Mr Tink
	Mr Turner

Apologies were received from Ms Burnswoods and Mr Hatton.

The Committee then went into a public hearing concerning Pecuniary Interest Provisions and a Code of Conduct for Members of Parliament.

The media and the public were admitted.

The Clerk read the Legislative Assembly Standing Order No.362 relating to the examination of witnesses and the terms of reference for the inquiry.

Edward Carrington Mack, Federal Member of Parliament for North Sydney, was affirmed and examined.
Evidence concluded and the witness withdrew.

Paul Desmond Finn, Professor of Law and Barrister of Law, Division of Philosophy and Law, Research School of Social Sciences, Australian National University, was sworn and examined.
Evidence concluded and the witness withdrew.

Simon Allen Longstaff, Executive Director and Philosopher, of the St James Ethics Centre, was sworn and examined.
Evidence concluded and the witness withdrew.

Patrick Griffin, Director, Public Interest Advocacy Centre, was sworn and examined.
Evidence concluded and the witness withdrew.

The media and the public withdrew.

The Committee then went into informal discussions concerning Pecuniary Interest Provisions and a Code of Conduct for Members of Parliament with the Hon Max Frederick Willis, President, Legislative Council and John Evans, Clerk of the Parliaments.

The Committee adjourned at 4.40 pm until 02 September 1992, at 6.30 pm.

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Chairman

.....
Clerk

NO 27

WEDNESDAY 02 SEPTEMBER 1992

AT PARLIAMENT HOUSE, SYDNEY AT 6.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon D J Gay	Mr Hatton
The Hon S B Mutch	Mr Kerr
	Mr Nagle
	Mr Turner
	Mr Zammit

The Committee noted the correspondence from: Hon Peter Collins QC, MP dated 07 August 1992; Roger Wilkins, dated 07 August 1992; Alderman Vic Smith, dated 14 August 1992; Luisa Pink, dated 14 August 1992; various letters in response to the Committee's reports on the Operations Review Committee and the Fifth I.A.C.C. and Hong Kong Study Tour; and Sir Max Bingham, dated 25 August 1992.

Meeting of the Committee on the ICAC
02 September 1992

Resolved on the motion of Mr Nagle, seconded by Mr Turner:

1 That the letters from Patrick Fair, dated 30 July 1992; Allen Janas, dated 23 August 1992; and Tom Hogan, dated 29 July 1992, be referred to the ICAC for comment and response;

2 That Bill Rixon MP be informed that the Committee will be visiting Kyogle on 01 October;

3 That Robin Rodgers be contacted in relation to the Committee's visit to Kyogle; and

4 That Allen Janas be informed of the limits imposed upon the Committee's jurisdiction by s.64(2) of the ICAC Act.

Resolved on the motion of Mr Gay, seconded by Mr Kerr:

That the Committee's concern be recorded over the leaking of the draft discussion paper.

Resolved on the motion of Mr Gay, seconded by Mr Nagle:

That the Clerk to the Committee distribute material on confidentiality provisions related to Parliamentary Committee documents and the obligations of Members of Parliament and the sanctions which apply in this area.

The Committee then deliberated on the draft Discussion Paper.

Resolved on the motion of Mr Gay, seconded by Mr Hatton:

1 That the draft Discussion Paper, as amended, be tabled in Parliament as the Committee's Discussion Paper and that Friday 02 October be the closing date for submissions.

2 That the Chairman write to the Attorney-General and Judicial Commission regarding the standards applying in relation to Judges, Ministers of the Crown and Members of Parliament, including in other jurisdictions.

The Committee adjourned at 7.30 pm sine die.

Chairman

Clerk

NO 28

TUESDAY 22 SEPTEMBER 1992

AT PARLIAMENT HOUSE, SYDNEY AT 6.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon D J Gay	Mr Hatton
The Hon S B Mutch	Mr Kerr
	Mr Nagle
	Mr Turner
	Mr Zammit

The Committee noted the correspondence from: Deborah Sweeney, dated 27 August 1992; Deborah Sweeney, dated 27 August 1992; Mr N McLeod, dated 25 August 1992; Mr Keith Johnson, dated 29 August 1992; Mr Ian Collie, dated 01 September 1992; Mr Mark Findlay, dated 09 September 1992; Mr Peter McClellan QC, dated 11 September 1992, Mr J Czapla, dated 14 September 1992 and Mr Mitchell dated 21 September 1992.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

1 That the letter from Mr McLeod, dated 25 August 1992, be referred to the ICAC for comment and response.

2 That Mr Wintour, Alderman Crisp and Mr Collie be advised of the restrictions imposed upon the Committee by s.64 of the ICAC Act and that Mr Collie be informed of the role of the Commonwealth Ombudsman in relation to his complaint.

3 That Ms Peters and Mr Wintour be provided with a copy of the ICAC's response to their complaints.

4 That Mr Johnson be invited to appear before the Committee at one of the hearings during the review of the ICAC Act.

5 That Mr Czapla be asked if he wishes his letter to be considered as a submission to the Committee's Review of the ICAC Act. That Mr Czapla be sent a copy of the Committee's Discussion Paper.

Resolved on the motion of Mr Gay, seconded by Mr Mutch:

That the letter from Mr Mitchell dated 21 September 1992 be referred to the ICAC for comment and response.

The Committee then discussed arrangements for its one day visit to Kyogle on 01 October 1992.

The Clerk then tabled a document on the confidentiality of Committee documents.

The Committee then went into a brief public hearing concerning Section 52 of the ICAC Act and the Cost of Legal Representation before the ICAC.

The media and the public were admitted.

Peter David McClellan, Queens Counsel, was sworn and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 7.30 pm sine die.

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Chairman

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Clerk

THURSDAY 01 OCTOBER 1992

AT KYOGLE, AT 10.20 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon S B Mutch	Mr Kerr
	Mr Turner
	Mr Zammit

Apologies were received from Mr Gay, Mr Hatton, and Mr Nagle.

The Committee then went into a public hearing concerning the ICAC's conduct of hearings at Kyogle.

The public were admitted.

Patrick Vincent Knight, Shire Engineer and Chief Town Planner was sworn and examined.
Evidence concluded and the witness withdrew.

Harold (Murphy) John Standfield, Contractor, was sworn and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned for lunch.

The public were admitted.

David William Lovell, farmer, was sworn and examined.
Evidence concluded and the witness withdrew.

Anthony Lazaredes, practising pharmacist, was sworn and examined.
Evidence concluded and the witness withdrew.

Val Crozier Johnston, company director and councillor and deputy president of Kyogle Shire Council, was sworn and examined.
Evidence concluded and the witness withdrew.

Robin Lyle Rodgers, post office agent, was sworn and examined.
Evidence concluded and the witness withdrew.

Meeting of the Committee on the ICAC
01 October 1992

Robert Henry Standfield, service station operator, was sworn and examined.
Evidence concluded and the witness withdrew.

Robert George Boden, shopkeeper, was sworn and examined.
Evidence concluded and the witness withdrew.

Peter Neil McIntyre, relieving teacher and grazier, was affirmed and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 3.45 pm until 12 October 1992, at 10.00 am.

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Chairman

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Clerk

NO 30

MONDAY 12 OCTOBER 1992

AT PARLIAMENT, SYDNEY, AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon S B Mutch	Mr Hatton
	Mr Kerr
	Mr Zammit

Apologies were received from Mr Gay, Mr Nagle and Mr Turner.

Meeting of the Committee on the ICAC
12 October 1992

The Committee then went into a public hearing concerning its inquiry into a Review of the ICAC Act.

The media public were admitted.

Patrick Fair, Solicitor, under previous oath was examined.
Evidence concluded and the witness withdrew.

Michael Charles Bersten, solicitor, under previous oath, was examined.
Evidence concluded and the witness withdrew.

Kevin Thomas Fennell, Deputy Auditor General of New South Wales, was sworn and examined.
Evidence concluded and the witness withdrew.

The Committee adjourned for lunch.

The media and the public were admitted.

Keith Henry Johnson, self-employed farmer, was sworn and examined.
Evidence concluded and the witness withdrew.

Warren Francis Hart, Director of Human Resources for the Sydney Water Board, was sworn and examined.
Brian Douglas Lenne, Manager of Audit and Review, Sydney Water Board, was sworn and examined.
Evidence concluded and the witnesses withdrew.

Mark James Findlay, Director, Institute of Criminology, under previous oath, was examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 4.45 pm until 15 October 1992, at 3.30 pm.

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Chairman

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Clerk

THURSDAY, 15 OCTOBER 1992

AT PARLIAMENT, SYDNEY, AT 3.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Hatton
The Hon D J Gay	Mr Kerr
	Mr Turner
	Mr Zammit

Apologies were received from Mr Nagle, Mr Mutch and Mr Gaudry.

The Committee noted the correspondence from Mr Ian Temby QC, dated 15 October 1992; the Hon John Hannaford MLC, dated 01 October 1992; Ms Deborah Sweeney, dated 09 October 1992; Ms Deborah Sweeney, dated 15 September 1992; Mr John Tuckfield QC, dated 30 September 1992; Ms C Peters, dated 29 September 1992; and Mrs Joy Humphries, dated 02 October 1992.

Resolved on the motion of Mr Zammit, seconded by Mr Hatton:

That Mr Mitchell and Mr Janas be provided with copies of the ICAC's response to their complaints.

That the letters from John Tuckfield QC and Ms Peters be forwarded to the ICAC for comment and response.

The Committee adjourned at 3.40 pm until 26 October 1992, at 10.00 am.

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Chairman

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Clerk

MONDAY, 26 OCTOBER 1992

AT PARLIAMENT, SYDNEY, AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon S B Mutch	Mr Gaudry
	Mr Turner
	Mr Zammit

Apologies were received from Mr Gay, Mr Nagle, and Mr Hatton.

The Committee then went into a public hearing concerning its inquiry into a Review of the ICAC Act.

The media and public were admitted.

Ernest Paul Knoblanche, Queens Counsel, was sworn and examined.
Evidence concluded and the witness withdrew.

Athol Randfolf Moffitt, Queens Counsel, under previous oath, was examined.
Evidence concluded and the witness withdrew.

The Committee adjourned for lunch.

The media and public were admitted.

Adrian Roden, Queens Counsel, under previous oath, was examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 4.10 pm until 03 November 1992, at 11.10 am.

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Chairman

.....
Clerk

TUESDAY 03 NOVEMBER 1992

AT PARLIAMENT HOUSE, BRISBANE AT 11.12 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Turner
	Mr Zammit

Apologies were received from Mr Nagle, and Mr Hatton.

The Committee then deliberated over the forthcoming public hearing with Mr Ian Temby QC and the questions on notice.

The Committee considered the draft report on the Inquiry into Section 52 of the ICAC Act and the Cost of Legal representation before the ICAC.

The Chairman tabled the draft report on the Inquiry into Pecuniary Interest Provisions and a Code of Conduct for MPs.

The Committee deferred further consideration of both draft reports to a future meeting. The draft findings and recommendations of the report on the Inquiry into Pecuniary Interest Provisions and a Code of Conduct for MPs were returned to the Secretariat.

The Committee adjourned at 1.00 pm until 09 November 1992, at 9.00 am.

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Chairman

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Clerk

MONDAY 09 NOVEMBER 1992

AT PARLIAMENT, SYDNEY, AT 9.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Hatton
	Mr Turner
	Mr Zammit

An apology was received from Mr Nagle.

The Committee then went into a public hearing concerning its inquiry into a Review of the ICAC Act.

The media public were admitted.

Adrian Roden, Queens Counsel, under previous oath, was examined.
Evidence concluded and the witness withdrew.

Ian Temby QC, Commissioner, Independent Commission Against Corruption, under previous oath, was examined.
Evidence concluded and the witness withdrew.

The Committee adjourned for lunch.

The Committee held a brief deliberative meeting.

The Committee considered the amended findings and recommendations on the draft report on the Inquiry into Section 52 of the ICAC Act and the Cost of Legal representation before the ICAC.

The key issues arising from the Kyogle hearing were discussed.

Resolved on the motion of Mr Hatton, seconded by Mr Turner:

That the draft letter on the key issues arising from the Kyogle hearing be held for 24 hours to enable the Hon Jan Burnswoods MLC and the Temporary Project Officer to amend some of the questions.

Meeting of the Committee on the ICAC
09 November 1992

That the draft letter then be sent to the ICAC for a response.

That the Chairman write to the RTA concerning the Kyogle inquiry.

The media and the public were admitted.

The Committee then went into a six-monthly review of the operations and general functions of the ICAC with Commissioner Ian Temby QC.

Ian Douglas Temby QC, Commissioner, Independent Commissioner Against Corruption, under previous oath, was examined.
Evidence concluded and the witness withdrew.

The Committee adjourned at 3.45 pm until 24 November 1992, at 6.30 pm.

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Chairman

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Clerk

TUESDAY 24 NOVEMBER 1992

AT PARLIAMENT, SYDNEY, AT 6.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Hatton
	Mr Nagle
	Mr Turner
	Mr Zammit

The Committee noted the correspondence from Tom Hogan, dated 30 September and 9 November 1992; Andrew Tink MP, dated 7, 16 and 22 October 1992; Hon Wal Murray, dated 19 October 1992; Dr Simon Longstaff, dated 26 October 1992; Mr A W Mitchell, dated 4 November 1992; Warren Hart, Water Board, dated 09 November 1992; Ms Deborah Sweeney, dated 17 November 1992; and Mr Simon Stretton, dated 10 November 1992.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

1 That Mr Hogan's letter of 09 November be referred to the Commission with a request for information on the progress which has been made on resolving the matter of Mr Hogan's witness expenses.

2 That Mr Pratt, and Mr Tink MP, be advised of the Committee's functions under s.64 of the ICAC Act, including the restrictions imposed by s.64(2).

3 That the Committee write to the ICAC seeking more detailed information in relation to Mr Mitchell's complaint in terms of the draft letter.

4 That Dr Longstaff's letter of 26 October 1992; Mr Hart's letter of 09 November 1992; and Ms Sweeney's letter of 17 November 1992 be considered in the context of the Committee's Review of the ICAC Act.

5 That the Chairman acknowledge the letter from the St James Ethics Centre and keep open the option of a round-table discussion with the major interests involved in the Review of the ICAC Act.

6 That the Chairman write to Mr Temby in relation to Mr Stretton's letter of 10 November, asking whether there was any compelling reason why the Committee's usual practice of forwarding a copy of the ICAC's response to a complainant should not be followed in this case.

The Committee noted the late submissions to the review of the ICAC Act from Mr N G Pangas, dated 14 October 1992; Mr Cliff Long, dated 24 October 1992; and Mr Peter McIntyre, dated 11 November 1992.

The Committee considered the draft report on the Inquiry into Section 52 of the ICAC Act and the Cost of Legal representation before the ICAC.

The Hon Jan Burnswoods MLC tabled a letter to the Chairman concerning this draft report, and spoke to the letter.

The Committee considered the second draft report on the Inquiry into Pecuniary Interest provisions and Code of Conduct for MPs. The draft findings and recommendations were tabled for further consideration.

Resolved on the motion of Ms Burnswoods, seconded by Mr Gaudry:

That further consideration of the draft report on the Inquiry into Section 52 of the ICAC Act and the Cost of Legal Representation before the ICAC and the draft report on the Inquiry into Pecuniary Interest Provisions and a Code of Conduct for MPs be deferred until the Committee's next meeting.

The Committee also deferred discussion of the issues arising from the Review of ICAC Act until its next meeting.

The Committee then considered issues arising from Mr Temby's evidence before the Committee on 09 November 1992.

Resolved on the motion of Mr Hatton, seconded by Mr Nagle:

That the Chairman write to Mr Temby to bring to his attention the view of the Committee that the public hearing on 09 November 1992 was not the appropriate forum for him to criticise a member of the Committee staff over the matter of delivering a paper expressing a point of view at an international conference.

The Project Officer read to the Committee the text of a letter he proposed to send Mr Temby on this matter.

Mr Zammit read to the Committee the text of letter he proposed to send Mr Temby on the question of contempt.

The Committee adjourned at 7.15 pm until 27 November 1992, at 3.30 pm.

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Chairman

.....
Clerk

NO 36

FRIDAY 27 NOVEMBER 1992

AT PARLIAMENT, SYDNEY, AT 3.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Hatton
	Mr Nagle
	Mr Turner
	Mr Zammit

The Chairman tabled correspondence from Ian Temby QC, dated 24 and 27 November 1992 concerning the Operations Review Committee

The Committee noted that the proposed date for the meeting with the Operations Review Committee was Friday 05 February 1993.

Meeting of the Committee on the ICAC
27 November 1992

The Chairman tabled as late submissions to the Review of the ICAC Act submissions from Tim Robertson, dated 24 November 1992; and the Hon Mr Justice Clarke, dated 27 November 1992.

The Committee agreed to take evidence from Justice Clarke at 9.00 am on Tuesday 08 December 1992.

The Committee authorised the Chairman to write to Mr Temby seeking a detailed written response to the key submissions to the Review of the ICAC Act, including late submissions.

The Committee considered the draft Collation of Mr Temby's Evidence from 09 November 1992.

Resolved on the motion of Mr Hatton, seconded by Mr Nagle:

That the draft Collation, as circulated, be adopted as the Committee's report, subject to minor typographical and grammatical changes.

The Committee discussed the inquiry into s.52 and Legal Representation. The Committee deferred detailed consideration of the draft report to a meeting to be arranged in December.

The Committee discussed the inquiry into Pecuniary Interest Provisions and a Code of Conduct for MPs. The Committee deferred detailed consideration of the draft report to a meeting to be arranged in December.

The Committee adjourned at 4.40 pm until 08 December 1992, at 9.00 am.

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Chairman

.....
Clerk

FRIDAY 18 DECEMBER 1992

AT PARLIAMENT, SYDNEY, AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon D J Gay	Mr Gaudry
The Hon S B Mutch	Mr Nagle
	Mr Turner
	Mr Zammit

An apology was received from Mr Hatton.

The Committee noted the correspondence from Deborah Sweeney, dated 26 November and 04, 07 and 14 December 1992; Ian Temby, dated 27 November and 07 December 1992; Hon Wal Murray MP, dated 27 November 1992: Brad Hazzard MP, dated 27 November and 03 December 1992; Patrick Fair, dated 01 and 17 December 1992; Neil O'Connor, dated 02 December 1992; Stuart Taylor, dated 03 and 14 December 1992; Simon Stretton, dated 07 December 1992; Warren Hart, dated 09 December 1992; John Turner MP, dated 04 December 1992; Kevin Fennell, dated 09 December 1992; Oral Gould, dated 06 December 1992; and Judge Ducker, dated 02 December 1992.

Resolved on the motion of Mr Zammit, seconded by Mr Nagle:

1 That Mr Hogan be provided with a copy of Ms Sweeney's letter of 26 November 1992.

2 That the ORC's response to the Committee's report on the Operations Review Committee be discussed with the ORC on 05 February 1992.

3 That the letters from Mr Patrick Fair dated 01 December 1992; Mr Kevin Fennell, dated 09 December 1992; and from Mr Don Budge, Executive Director of the Northern Area Regional Organisation of Councils Inc (NAROC), forwarded by the Hon Wal Murray MP, be considered in the context of the Committee's Review of the ICAC Act.

4 That Mr Hazzard's correspondence be referred to the ICAC for comment and response with regard to the Metherell diaries.

5 That Mr O'Connor's letter be referred to the ICAC for comment and response.

6 That Mr Taylor's letters be referred to the ICAC for comment and response, and that information be sought from the ICAC on the access which third parties may or may not have to records held by the ICAC.

7 That further consideration of the Kyogle inquiry be deferred until the ICAC's response is received to Mr Norrish's letter.

8 That the Committee write to the ICAC concerning the handling of complaints, Simon Stretton's response to Patrick Fair's complaint and Deborah Sweeney's response to the specific questions arising from Mr Mitchell's complaint, in terms of the draft correspondence.

9 That Mr Tuckfield be provided with a copy of Ms Sweeney's letter of 04 December 1992.

10 That Judge Ducker and the Chief Judge of the District Court be provided with a copy of Ms Sweeney's letter of 11 December 1992, and asked whether they are satisfied with the ICAC's actions on the matter raised in Judge Ducker's letter.

The Chairman tabled a facsimile received from Mr Hatton which set out his views on the draft reports on Legal Representation and a Code of Conduct for MPs, and the Review of the ICAC Act.

Resolved on the motion of Mr Gay, seconded by Mr Nagle:

1 That further consideration of the draft report on Pecuniary Interest Provisions and a Code of Conduct for MPs be deferred until the new year.

2 That Mr Mutch be given until 12 February 1993 to put his concerns about the draft report in writing for circulation to the Committee.

The Committee then considered the draft report on Section 52 of the ICAC Act and the Cost of Legal Representation before the ICAC.

Motion put by Mr Zammit, seconded by Mr Nagle:

That the draft report be adopted as the Committee's report.

The Committee divided:

Ayes	Noes
Mr Kerr	Ms Burnswoods
Mr Gay	Mr Gaudry
Mr Mutch	
Mr Nagle	
Mr Turner	
Mr Zammit	

There was further discussion on the draft report and the process by which it would be considered.

Resolved on the motion of Mr Gay, seconded by Mr Mutch:

1 That consideration of the draft report paragraph by paragraph be deferred until the new year.

2 That Ms Burnswoods be given until 22 January 1993 to put her concerns about the draft report in writing for circulation to the Committee.

The Committee then considered the briefing note on the Review of the ICAC Act circulated by the Chairman.

The Committee determined its preliminary position on a number of key issues being considered in the review.

Resolved on the motion of Mr Gaudry, seconded by Mr Mutch:

That the Chairman circulate to Committee members a draft press release setting out the Committee's preliminary views for approval and release within the next few days.

The Committee adjourned at 11.50 am until 05 February 1993, at 9.00 am.

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Chairman

.....
Clerk

NO 38

FRIDAY 05 FEBRUARY 1993

AT PARLIAMENT, SYDNEY, AT 9.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Gaudry
	Mr Turner
	Mr Zammit

An apology was received from Mr Nagle.

The Committee noted the correspondence from: John Turner MP, dated 23 December 1992; Ian Glachan MP, dated 23 December 1992; Hon John Fahey MP, dated 23 December 1992; Alderman Vic Smith, dated 29 December 1992; Hon Wal Murray MP, dated 04 January 1993; R A Hancock, dated 14 December 1992 and 05 and 12 January 1993; Deborah Sweeney, dated 12 January 1993; Deborah Sweeney, dated 14 January 1993; Deborah Sweeney, dated 15 January 1993; Allen Janas, dated 19 January 1993; Mr Gary Camp, dated 20 January 1993; Hon Jan Burnswoods MLC, dated 22 January 1993; Evan Whitton, dated 20 January 1993; G A Crisp, dated 22 January 1993; John Turner MP, dated 27 January 1993; Val Bellamy, dated 29 January 1993; and Simon Stretton, dated 28 January 1993.

Meeting of the Committee on the ICAC
05 February 1993

Resolved on the motion of Mr Gaudry, seconded by Mr Gay:

That the correspondence be dealt with as follows:

1 That Mr Temby be reminded of his undertaking given at the hearing on 09 November 1992 that the Commission would provide the Committee with a considered response on the question of whether the ICAC should be made subject to the Public Sector Management Act;

2 That the ICAC be provided with a copy of the letter from the Hon Wal Murray MP on the Kyogle inquiry;

3 That the Committee write to the ICAC in terms of the draft letter concerning the question of the ICAC's jurisdiction with regard to Commonwealth matters, raised in the correspondence from Mr R A Hancock;

4 That Mr Neil O'Connor be provided with a copy of the ICAC's response to his complaint about the treatment of Mr Val Bellamy;

5 That Mr A W Mitchell be advised that the Committee has made inquiries concerning the personnel practices of the ICAC and is satisfied by the answers which it has received;

6 That Mr Brad Hazzard MP be provided with a copy of the ICAC's response to his complaint about the Metherell diaries;

7 That Mr Allan Janas be reminded of the provisions of s.64(2) of the ICAC Act;

8 That the Committee write to the Legal Aid Commission requesting a submission on the Inquiry into s.52 and Legal Representation;

9 That Mr Bellamy's letter about the arrangements for Roger Rogerson's appearance before the ICAC be referred to the Commission for comment and response; and

10 That Mr Patrick Fair be provided with a copy of the ICAC's response to his complaint about the Water Board inquiry.

11 That the Chairman write to Senator Tate to seek advice on the Commonwealth Government's initiatives against fraud and corruption, and jurisdictional issues between the Commonwealth and the States.

The Committee then discussed the procedures for dealing with unsolicited complaints about the ICAC to the Committee.

Resolved on the motion of Mr Gaudry, seconded by Mr Hatton:

That the Committee endorse the revised "Procedures for Dealing with Unsolicited Complaints" document.

The Committee discussed its position on the Operations Review Committee's response to the Committee's report on the ORC.

The Committee noted that the Draft Report on the visit to Brisbane on 02-03 November 1992, would be referred to the ICAC for comment and response.

The Committee then went into a public hearing concerning the Review of the ICAC Act.

The media and the public were admitted.

Timothy Frank Robertson, Member of the Australian Bar, was affirmed and examined.
Evidence concluded and the witness withdrew.

Pierre Mark Le Grand, Director of Official Misconduct Division of the Criminal Justice Commission of Queensland, on former oath, was examined.
Evidence concluded and the witness withdrew.

Andrew Arnold Tink, Member of the New South Wales Legislative Assembly, was sworn and examined.
Evidence concluded and the witness withdrew.

Gregory Eugene Smith, General Counsel Assisting the Independent Commission Against Corruption, was examined.
Evidence concluded and the witness withdrew.

The media and the public withdrew.

The Committee then held a brief deliberative meeting.

Meeting of the Committee on the ICAC
05 February 1993

The Committee adjourned to reconvene at the premises of the ICAC, 191 Cleveland Street, Redfern, for a meeting with the Operations Review Committee.

The Committee adjourned at 3.45 pm until Tuesday 09 March 1993, at 6.30 pm.

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Chairman

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Clerk

NO 39

THURSDAY 04 MARCH 1993

AT PARLIAMENT, SYDNEY, AT 9.30 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Kerr
The Hon S B Mutch	Mr Gaudry
	Mr Turner

Apologies were received from Mr Gay, Mr Hatton, Mr Nagle and Mr Zammit.

The Committee noted the correspondence from: Ian Temby QC, dated 22 December 1992; W G Alcock, dated 04 January and 01 February 1993; Tamworth City Council, dated 27 January 1993; Deborah Sweeney, dated 09 February 1993; Deborah Sweeney dated 10 February 1993; Deborah Sweeney, dated 10 February 1993; R A Hancock, dated 12 February 1992; Hon Stephen Mutch MLC, dated 12 February 1993; Valy Jadresko, dated 15 February 1993; Ian Temby QC, dated 17 February 1993; Tom Benjamin, dated 18 February 1993; Richard Hayes, dated 21 February 1993; Ian Temby QC, dated 23 February 1993; Deborah Sweeney, dated 24 February 1993; and Ken Davies MLA, dated 26 February 1993.

Meeting of the Committee on the ICAC
04 March 1993

Resolved on the motion of Mr Turner, seconded by Ms Burnswoods:

That the correspondence be dealt with as follows:

1 That the Chairman write to Mr Temby in the terms of the draft response in regard to his comments on 09 November 1992 regarding the Project Officer's conference paper ensuring the matter is put to rest.

2 That Mr Alcock's correspondence be referred to the ICAC with a request for a full report on the matters raised.

3 That the letter from the Tamworth City Council be considered in the context of the Review of the ICAC Act (chapter 8).

4 That the issues raised by the ICAC in Ms Sweeney's letter of 09 February 1993 be addressed in the procedures for dealing with unsolicited complaints following discussion at an officer level with the ICAC.

5 That Mr Bellamy be provided with a copy of the ICAC's response to his complaint about the ICAC's handling of Mr Roger Rogerson.

6 That Mr Hancock be provided with a copy of the ICAC's response to his complaint concerning the ICAC's jurisdiction to investigate "Commonwealth matters".

7 That the letter from the Hon Stephen Mutch MLC be considered in the context of deliberations on the draft report on Pecuniary Interest Provisions and a Code of Conduct for MPs.

8 That the Chairman write to the Premier forwarding a copy of Mr Temby's letter concerning the Public Sector Management Act, asking whether he has any comments and whether would like to pursue this matter any further.

9 That Mr Tink be provided with a copy of Mr Temby's response to issues raised in his evidence on 05 February 1993 and be asked whether he wishes to take the matter any further.

10 That the correspondence from Mr Tom Benjamin, and Mr Richard Hayes, be referred to the ICAC for comment and response.

Meeting of the Committee on the ICAC
05 February 1993

11 That the ICAC's comments concerning the Committee's draft report on its visit to Brisbane contained in Mr Temby's be addressed by amendments to the draft report.

12 That the Gloucester Shire Council be provided with a copy of the ICAC's response to their complaint concerning the distribution of ICAC Reports.

The Committee discussed the recent visit to the Operations Review Committee (ORC).

The Project Officer was asked to prepare a briefing note on the procedures for the appointment of members of the ORC and remuneration for members of the ORC.

The Committee adjourned at 9.55 am until Tuesday 09 March 1993, at 6.30 pm.

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Chairman

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Clerk

TUESDAY 09 MARCH 1993

AT PARLIAMENT, SYDNEY, AT 6.40 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon S B Mutch	Mr Hatton
	Mr Kerr
	Mr Turner
	Mr Zammit

Apologies were received from Mr Gay and Mr Nagle

The Committee noted the correspondence from: Ms Deborah Sweeney, dated 02 March 1993; Mr Tom Benjamin, dated 18 February 1993; and Mr Andrew Tink MP, dated 05 March 1993.

Resolved on the motion of Mr Mutch, seconded by Ms Burnswoods:

1 That Mr Taylor be sent a copy of Ms Sweeney's response to his complaint; and

2 That Mr Tink be asked to specify the action which he wants the Committee to take on his complaint.

The Committee noted the late submissions to the Review of the ICAC Act received from Mr Hilton Jones and Mr Justice Clarke and agreed that these should be forwarded to the ICAC. Mr Hatton advised the Committee that Mr Jones works for him on a voluntary basis but that the submission from Mr Jones represented Mr Jones' views.

The Committee deliberated on the draft report on the Review of the ICAC Act.

The draft report, as circulated, was taken as read.

Introduction read and agreed to.

Chapter One read.

Further consideration of chapter one deferred until 26 March 1993.

Meeting of the Committee on the ICAC
09 March 1993

Chapters Two and Three read.

The Committee requested that the Chairman circulate draft conclusions to chapters two and three.

Chapter Four read and amended.

Draft section 4.3 deleted.

Chapter Four, as amended, agreed to.

Chapter Five read and amended.

Section 5b.6 amended.

Chapter Five, as amended, agreed to.

Chapter Six read and amended.

Section 6.6 amended.

Chapter Six, as amended, agreed to.

Chapter Seven read and agreed to.
Chapter Eight read and agreed to.
Chapter Nine read and agreed to.
Chapter Ten read and agreed to.

The Committee considered draft questions on notice for the public hearing with Mr Temby on 26 March 1993.

The Committee adjourned at 7.40 pm until Friday 26 March 1993, at 10.00 am.

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Chairman

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Clerk

FRIDAY 26 MARCH 1993

AT PARLIAMENT HOUSE, SYDNEY AT 10 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon S B Mutch	Mr Kerr
	Mr Nagle
	Mr Turner
	Mr Zammit

Apologies were received from Mr Gay and Mr Hatton.

The Committee then went into a public hearing concerning the Independent Commission Against Corruption.

The media and public were admitted.

Ian Douglas Temby, Commissioner of the Independent Commission Against Corruption, on his former oath, was examined.
Paul Anthony Seshold, Executive Director of the Independent Commission Against Corruption, was sworn and examined.

Evidence concluded and the witnesses withdrew.

The meeting was then closed to the media and the public and the Committee deliberated.

The Minutes of the meeting held on 09 March 1993, as circulated, were confirmed.

The Committee noted correspondence from Deborah Sweeney, dated 10 March 1993; Ann Reed, dated 15 march 1993, Deborah Sweeney, dated 16 march 1993; Dr F D Marengo, dated 16 March 1993; Ian Temby QC, dated 19 march 1993; and Mr Andrew Tink MP, dated 23 March 1993.

Resolved on the motion of Mr Nagle, seconded by Mr Gaudry:

1 That Mr Hancock be provided with a copy of Ms Sweeney's response to his complaint;

2 That Mr Benjamin and Mr Hayes be provided with a copy of Ms Sweeney's response to their complaint;

3 That Mr Marengo's letter be referred to the ICAC for comment and response;

4 That Mr Temby be given an opportunity to respond more fully to the late submission from Mr Justice Clarke; and

5 That Mr Tink's be referred to the ICAC for comment and response.

The Committee deliberated on the procedures for dealing with unsolicited complaints.

The Committee endorsed the procedures as amended.

The Committee then deliberated on the draft report on the Visit to Brisbane.

Resolved on the motion of Mr Mutch, seconded by Mr Nagle:

That the draft report on the Visit to Brisbane, as amended, be the report of the Committee.

The Committee then deliberated on the draft report on the Review of the ICAC Act.

The Committee noted advice from the Crown Solicitor concerning the Committee's proposals for amendments to the definition of corrupt conduct.

Further consideration of chapter one deferred.

Draft conclusions to chapters two and three read.

Further consideration of chapters two and three deferred.

The Committee adjourned at 12.50 pm until 3.00 pm on Monday 19 April 1993.

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Chairman

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Clerk

MONDAY 19 APRIL 1993

AT PARLIAMENT HOUSE, SYDNEY AT 3 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon D J Gay	Mr Hatton
The Hon S B Mutch	Mr Kerr
	Mr Nagle
	Mr Turner
	Mr Zammit

In Attendance

Ms Ronda Miller (Clerk to Committee)
Ms Grace Penrose (Assistant Committee Officer)

The Committee went into a public hearing concerning the Review of the ICAC Act.

The media and public were admitted.

The Hon Athol Moffitt, QC, CMG, retired, on former oath, was examined.
Evidence concluded and the witness withdrew.

Timothy Frank Robertson, Member of the Australian Bar, on former oath, was examined.
Evidence concluded and the witness withdrew.

The meeting was then closed to the media and the public and the Committee deliberated.

The Minutes of the meeting held on 26 March 1993, as circulated, were confirmed.

Meeting of the Committee on the ICAC
19 April 1993

The Committee noted correspondence from Ray McRae, dated 25 March 1993; R G Humphrey, dated 29 March 1993; Terry Murphy, dated 31 March 1993; Ian Temby QC, dated 01 April 1993; R A Hancock, dated 02 April 1993; Deborah Sweeney, dated 05 April 1993; Beverley Duffy, dated 06 April 1993; Jim Young and Greg Woods QC, dated 29 March 1993; Ian Temby QC, dated 07 April 1993; A W Mitchell, dated 05 April 1993; Richard Hayes, dated 13 April 1993; Paul Seshold, dated 13 April 1993; and CENTROC, dated 12 March 1993.

Resolved on the motion of Mr Gay, seconded by Ms Burnswoods:

1 That the letters from Mr Humphrey, Mr Temby, and CENTROC be considered in the context of the Committee's Review of the ICAC Act.

2 That the letter from Terry Murphy be considered in the context of the Committee's draft report on s.52 and Legal Representation.

3 That letters from Mr Hayes, Mr McRae, Ms Duffy, Mr Young and Dr Woods be referred to the ICAC for comment and response.

4 That copies of Mr Hancock and Mr Mitchell's correspondence be provided to the ICAC for information only.

5 That Mr Tink and Dr Marengo be provided with copies of the ICAC's response to their complaints.

The Committee adjourned at 4.17 pm until 6.30 pm Tuesday 11 May 1993.

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Chairman

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Clerk

TUESDAY 11 MAY 1993

AT PARLIAMENT HOUSE, SYDNEY AT 6.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Gaudry
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Nagle
	Mr Zammit
	Mr Turner

Also in attendance: David Blunt, Project Officer.

An apology was received from Mr Hatton.

The Minutes of the meeting held on 19 April 1993, as circulated, were confirmed.

The Committee deliberated on the Review of the ICAC Act.

Resolved on the motion of Mr Nagle, seconded by Mr Zammit:

That the Committee consider the draft report on the Review of the ICAC Act at its meeting on 18 May 1993 and that draft questions to be referred to the Law Reform Commission on the primary facts and appeals issues be circulated on Thursday 13 May 1993.

The Committee noted correspondence from:

Deborah Sweeney, dated 16 April 1993; Mr Justice Clarke, dated 16 April 1993; Michael Photios MP, dated 20 April 1993; Andrew Tink MP, dated 21 April 1993; Ian Temby QC, dated 21 April 1993; Simon Stretton, dated 21 April 1993; Mr Justice Clarke, dated 23 April 1993; Deborah Sweeney, dated 30 April 1993; Deborah Sweeney, dated 30 April 1993; Deborah Sweeney, dated 04 May 1993; Deborah Sweeney, dated 04 May 1993; Superintendent R S Adams, dated 04 May 1993; Deborah Sweeney, dated 07 May 1993; and Deborah Sweeney, dated 06 May 1993.

Meeting of the Committee on the ICAC
11 May 1993

Resolved on the motion of Mr Gay, seconded by Mr Nagle:

1 That Mr Pinkerton and Mr Alcock be provided with a copy of the ICAC's response to their complaint;

2 That the letter from Mr Photios be referred to the ICAC for comment and response;

3 That the Minutes of Evidence and exchange of correspondence on the matter raised by Mr Tink be tabled in Parliament;

4 That Mr Hayes be provided with a copy of the ICAC's response to his complaint and advised that the Committee considers the matter closed;

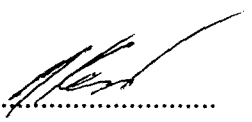
5 That the correspondence on the primary facts issue be tabled in Parliament;

6 That Mrs McRae be provided with a copy of the ICAC's response to her complaint;

7 That Ms Duffy be provided with a copy of the ICAC's response to her complaint; and

8 That, in reply to the ICAC's response to the complaint from Mr Young and Dr Woods QC, the Committee seek advice on the effect in practice of the various Bar rules referred to in the complaint.

The Committee adjourned at 7.00 pm until 6.30 pm on Tuesday 18 May 1993.



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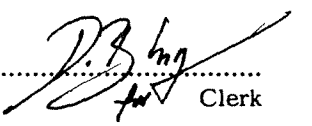
Chairman



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Clerk

TUESDAY 18 MAY 1993

AT PARLIAMENT HOUSE, SYDNEY AT 6.30 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon J C Burnswoods	Mr Hatton
The Hon D J Gay	Mr Gaudry
	Mr Kerr
	Mr Nagle
	Mr Zammit

Also in attendance: David Blunt, (Project Officer); Ronda Miller (Clerk Assistant - Committees)

Apologies were received from Mr Mutch and Mr Turner.

The Minutes of the meeting held on 11 May 1993, as circulated, were confirmed.

The Committee deliberated on the Review of the ICAC Act.

Draft Questions to be referred to the Law Reform Commission read and amended.
Question 1.1 amended.
Draft Questions, as amended, agreed to.

Introduction read and amended.
Section i.2 amended.
Introduction, as amended, agreed to.

Chapter One read and amended.
New Section 1.6 inserted
Original draft section 1.6 amended.
Chapter One, as amended, agreed to.

Meeting of the Committee on the ICAC
18 May 1993

Chapter Two read and amended.
Section 2.4 amended.
New section 2.6 inserted.
Original draft section 2.6 amended.
Chapter Two, as amended, agreed to.

Chapter Three read and amended
Section 3.b.3 amended.
Chapter Three, as amended, agreed to.

Chapter Eleven read and amended
Section 11.4 amended
Chapter Eleven, as amended, agreed to.

Resolved on the motion of Mr Gay, seconded by Mr Gaudry:

1 That the Report, as amended, be adopted and tabled by the Chairman as the Committee's report.

2 That the Chairman and Project Officer be authorised to correct minor grammatical and typographical errors.

The Committee then deliberated briefly on the draft report on Section 52 and Legal Representation.

Further consideration of that report was deferred until the next meeting. The Project Officer was asked to obtain from the ICAC an update on the figures for different categories of persons who have appeared as witnesses before the ICAC.

The Committee adjourned until 6.30 pm on Tuesday 25 May 1993.

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Chairman

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Clerk