



PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

Electorate Office
Room 2, Fourth Floor
Advance Bank
153 Hunter Street
Newcastle 2300

Tel: (049) 26 1126

24 June 1992

Mr David Blunt,
Project Officer,
Committee on the ICAC,
Independent Commission Against Corruption,
George Street,
REDFERN...2016.

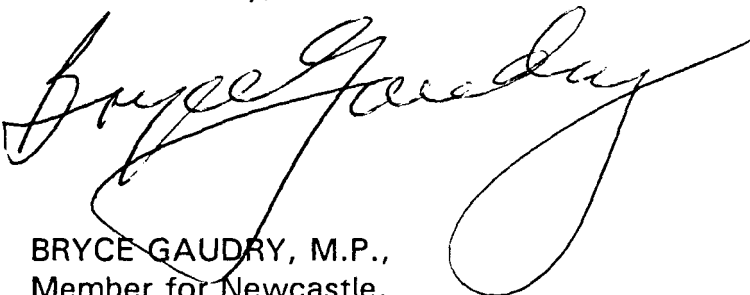
Dear Mr Blunt,

Please find enclosed a submission to the Committee forwarded to me by Mr Patrick Knight of [REDACTED], in relation to the ICAC investigation into roadworks in Kyogle Shire.

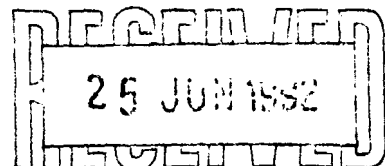
I would ask that this matter be placed before the next meeting of the Committee.

You will note that Mr Knight has requested that sections of his submission be kept confidential.

Yours faithfully,



BRYCE GAUDRY, M.P.,
Member for Newcastle.



Mr Bryce Gaudry, MP.,
Member for Newcastle,
4th Floor,
153 Hunter St,
Newcastle.

[REDACTED]
[REDACTED]
1 May 1992

Phone Home ([REDACTED])

Work ([REDACTED])

Dear Sir,

Re: The Independent Commission Against Corruption

During 1991 I was involved as an "affected person" in the ICAC investigation and hearing into roadworks in Kyogle Shire. The Commission released its report earlier this year.

I have held the position of Shire Engineer at Kyogle since 1983 and have held senior positions in local government in NSW since 1970. I consider that I have been held in high standing by both my peers and the community and that not once in my career, until the ICAC inquiry, has there been any question of my honesty and integrity.

In the end even ICAC Assistant Commissioner Collins came to the conclusion that I was honest, but, the public smear of being the subject of an ICAC investigation has damaged my reputation and career in a manner that can never be repaired.

I am very concerned with the manner in which the ICAC conducted itself in this investigation, particularly the following matters.

(a) There was an absence of the principles of natural justice.

"Affected persons" are not told what they are accused of, they cannot therefore properly present their side of the case in their defence and further the commission does not operate as an unbiased tribunal.

When the commission finally makes its report, adverse findings can be made against a person that can destroy their reputation, employment and standing in the community. This is totally unfair to a person who has been denied the means of properly defending themselves and unlike a criminal conviction, there is no means of appealing against a finding of the ICAC.

(b) As the hearings are held in public, the press has a field day in sensationally reporting any wild accusations that are made.

This reporting alone can irreparably damage an innocent persons reputation.

(c) The Commission appeared to me to be biased.

At the Kyogle hearing there seemed to be a presumption of guilt by the Assistant Commissioner conducting the hearing, and the whole thrust of the hearing seemed to be aimed at justifying his preconceived notion of what happened.

This action persisted throughout the hearing and the final report, notwithstanding that the evidence did not support many of the Commissioner's findings.

I consider that as a citizen I am entitled to expect that the ICAC act in a bona fide manner to find the truth, even when this may lead to a conclusion that an ICAC investigation has been misdirected and a waste of public money.

Instead I am left with the very strong impression that they are desperately trying to justify their own existence and notches on their gun are more important than truth and justice.

(d) Assistant Commissioner Collins conferred on himself the status of "expert witness" and made findings based on his own knowledge of professions in which he had no qualifications or experience.

Assistant Commissioner Collins made many remarks that were critical of the professional conduct of myself as a professional engineer. In this regard he did not hear any "expert witnesses" that were critical of my professional conduct, decision making or management procedures. He therefore relied entirely on his own knowledge of the engineering profession.

I believe his conduct in this regard to be improper. I mistakenly believed that the findings of ICAC hearings were to be based on evidence presented to such hearings, which could be tested by cross examination. Instead in the Kyogle report we have an Assistant Commissioner relying on his own, supposed expert knowledge of the engineering profession (in which he is unqualified), to reach conclusions that were damaging to my reputation.

It is my belief that if Collins had wished to make any findings or conclusions on my professional conduct then he should have called expert witness from my profession for their opinions and these opinions could have been tested by cross examination by my counsel.

(e) Ms Jan Daley the ICAC solicitor organist witnesses to attend the hearing at Kyogle and later at Sydney.

For reasons best known to herself, Ms Daley refused to cooperate with Council's solicitor and supply a timetable of when council employees would be needed to give evidence. As a result many council employees spent needless days (weeks) hanging around the court at great expense and waste to ratepayers.

Ms Daley may have considered some higher public interest was served by wasting the time of so many persons, however as well as the direct wages cost, the compulsory absence of council's executive staff meant that the organisation's normal management and decision making was paralyzed.

(f) In the Kyogle investigation, the matters that were dealt with were not matters of significant corruption by public officials. In fact not one council employee was recommended for prosecution.

It is my belief that the matters raised could have been efficiently and speedily dealt with by the council itself if the commission had only drawn the problems to council's notice and required council to deal with them.

Instead however the problems at the Bonalbo depot appear to have been deliberately kept from council's notice by the ICAC and their informers within council.

The result is that the ICAC have spent a rumored \$1,000,000 of taxpayers funds on an arguably unnecessary hearing.

I see many aspects of the ICAC performance at Kyogle as being contrary to the public interest, the principals of natural justice and the rights of individuals and therefore request that the ICAC Joint Parliamentary Committee:

- Fully investigate the conduct of the ICAC in relation to the Kyogle investigation and hearing.
- Identify the methods and procedures of the ICAC that are contrary to natural justice, the public interest and civil rights of individuals.
- Recommend necessary changes to the ICAC methods, procedures, personnel and legislation to overcome the above problems.

Enclosed with this letter is a copy of my report to Kyogle Shire Council of 27 February 1992, regarding the ICAC Kyogle report. Council has declined to pursue the matters I raised in the report critical of the performance of the ICAC, but, have said that I may do so myself. This report is included for the information of the Joint Committee, but, I request that it not be released to the public as I fear retaliation by the Commission. In this regard I enclose a letter from my legal advisor (David Heilpern of D.M. Jones and associates, Solicitors).

Yours faithfully

Patrick Knight

Our Ref: Mr. Heilpern
Your Ref: Mr. Knight

Date: 19th March, 1992

Mr. Patrick Knight,
C/- Kyogle Shire Council,
P.O. Box 11,
KYOGLÉ NSW 2474

Dear Patrick,

RE: ICAC

I refer to your request for me to peruse your confidential report no. 5/92 to the special meeting of the Council of the Shire of Kyogle held on Thursday 17th February, 1992.

I confirm you seek my advice as to:

1. Whether the statements contained in your report are in contempt of the Commission.
2. Whether the report should be made public.

I have enclosed for your information a copy of Sections 97 to 101 inclusive of the Independent Commission against Corruption Act 1988.

The key Sections as far as you are concerned are Section 98 (d), Section 98 (h), Section 99 (6).

Of particular concern are your criticisms as to the bias of the Commissioner and (in the letter you read to me to Bill Rixon) of Counsel assisting the Commission and Solicitor instructing Counsel assisting the Commission.

In considering whether your report is in contempt of the Commission I have taken the ultra cautious road. The reason for this is when you read Sections 99 and 100 the powers of the Commission regarding contempt are extreme and accordingly advice should be couched in the most cautious of terms.

There is no case law on what or would not be a reasonable excuse for contempt in these circumstances.

Accordingly I am bound to advise you that your comments insult the Commissioner and Legal Practitioners appointed to assist the Commission.

DAVID JONES
CONSULTANT

FRANK HANNIGAN
PRINCIPAL

DAVID HEILPERN
CONSULTANT

JULIE FERGUSON
ASSOCIATE EMPLOYEE

MELINDA CLARK
ASSOCIATE EMPLOYEE

BRANCH OFFICES: (066) 32 1688

WOODENBONG
42 McPherson Street

URBENVILLE
37 Urben Street

NIMBIN
70 Cullen Street

ALSO AT CASINO - 97 Barker Street - trading as "HANNIGANS"

Mr. Patrick Knight

19th March, 1992

Persons have been cited for contempt for saying that the ICAC is "McArthiest". David Solomon, Legal Writer for (interalia) the Australian Newspaper in an article regarding the ICAC wrote

"If I get a single fact wrong in this article it could mean that I would be liable to be dealt with for contempt of the Commission".

He further writes:

"If the Commission considers that I or anyone else who criticised it was in contempt it could certify the contempt to the Supreme Court. This certificate being prima facie evidence of its contents leaving the Supreme Court to decide on the penalty if thought appropriate after it has considered any other evidence which may be produced and if the court is satisfied that the person is guilty of contempt. While the matter was being put to and determined by the Supreme Court the ICAC Commission could issue its own warrant to have me thrown in jail. ICAC would not be liable if the subsequent Supreme Court action found that in fact no contempt had been committed.

As to whether a copy of your report should be sent in confidence to the Parliamentary Committee in respect of the ICAC again, to be absolutely cautious, one would have to advise you not to send such a report. On the other hand it would seem ridiculous that the Parliamentary Committee set up to oversee the functions of the ICAC Committee can not receive report without fear or favour in respect of persons viewpoints of the Commission.

Accordingly if you are to send such advice I suggest that it be headed "Absolutely Confidential and not to be published outside the Committee".

It is with a sense of shame as to the current state of our law that I write this letter, particularly as I share your views in respect of the comments you have made.

Yours faithfully,
D.M. JONES & ASSOCIATES

Per: [REDACTED]

Enclo (nil)

DC. DN.

d22r/p77-78
dmh.rc

SHIRE ENGINEER'S CONFIDENTIAL REPORT NO 5/92 TO THE SPECIAL MEETING OF THE COUNCIL OF THE SHIRE OF KYOGLE, HELD ON THURSDAY, FEBRUARY 27, 1992.

RE: ICAC "REPORT ON INVESTIGATION INTO ROAD WORKS IN THE SHIRE OF KYOGLE"

Preamble

This is a confidential report to my employer, made at the request of Council. I do consider however that the matters contained in this report are such that they should be made public as a matter of public interest. It is my intention however to firstly have my legal advisor check the contents of the report. I would ask Council therefore to keep the report confidential until it has been cleared by my legal advisor.

I also intend to make the contents of this report (when cleared) available to the Parliamentary Joint Committee on the Independent Commission Against Corruption as I believe the report reveals inappropriate conduct on the part of the ICAC team. It also draws attention to shortcomings and flaws in ICAC procedures and powers that need urgent action by Parliament.

1. General Comments

1.1 The Way the ICAC Conducts Investigations, Hearings and Reports

1.11 Absence of the Principals of Natural Justice and a Fair Hearing

The ICAC legislation gives the commission wide ranging powers to conduct investigations and hearings and produce reports to parliament. These powers enable ICAC to bypass the so called principals of natural justice and fair hearings, presumably to enable it to more effectively deal with the villains in the public service and elsewhere who are corruptly using their privileged positions for personal gain.

Whilst this no doubt assists the ICAC in getting to the heart of the matter, on the down side, innocent persons caught up in the process are denied these basic civil rights. If they are the subject of an adverse finding, that does not involve prosecution, they have no right of appeal to a tribunal which does operate under these principals. This is most unfair as even murderers and rapists receive hearings where these principals apply and they have the right of appeal.

To compound the problems the ICAC holds most of its hearings in public with free access by the media. This enables the media to selectively report the most sensational accusations (sometimes based on mere hearsay evidence) and an innocent persons reputation may be irreparably damaged.

What then are these principals of natural justice and fair hearings.

SHIRE ENGINEER'S REPORT NO 5/92 - THURSDAY FEBRUARY 27 1992
SHIRE CLERKCHAIRPERSON

The principals of natural justice can be summarised as follows

- An individual should be heard properly by an unbiased tribunal
- A proper hearing includes the right to know evidence against the individual, the right to counsel and the right to have the notice of "charges" before the hearing
- The individual should be given the opportunity to present his side of the case before a decision is made which will affect his position and expectations in the community.

The requirements of a fair hearing are described in "Business Law of Australia", page 1063 "...This requires ..that a party be informed of the matters alleged against him; that a party has a chance to test the evidence of his opponent by cross examination and that a party should be able to present evidence not only in support of his own case but in reply to the case presented by the other side.....They include the proposition that a judge must give reasons for his decision and that he should only act on the evidence and arguments presented in the court and not on any information received from outside. One of the reasons for the second proposition is that it is only the evidence that is presented in court that is tested by cross-examination and it is only arguments presented in court that are dealt with by argument in reply."

The Kyogle inquiry was conducted in the absence of the principals of natural justice and a fair hearing.

- What then are the consequences? I see them as follows
- (a) Collins has made many findings based on a flawed justice procedure. I believe that as the system is flawed, Collins findings have no credibility.
 - (b) As a result of (a) the reputations of several, possibly innocent persons and their standing in the community have been damaged, perhaps irreparably.

1.12 The Failure of ICAC to Separate Powers and Responsibilities.

In the Kyogle hearing I understand Collins was involved in the the investigation, decision to have a full hearing and finally the production of the report.

To have one person so heavily involved in all these procedures opens the process to a conflict of interests. Collins was in effect investigator, prosecutor, judge and jury.

There are many sound reasons why in the normal court system these roles are separated. One is the matter of bias. If the person who is responsible for the investigation is also the "judge" there must be a strong motivation to produce findings that fit the line of investigation.

Further if the person in charge of the hearing was also the person who persuaded the Commission to spend a rumored \$1 million in proceeding with the hearing then there is strong motivation to produce a result.

I am not suggesting for a moment the Collins was influenced by these issues, I merely point out that the system ICAC runs is open to these conflicts of interest.

1.13 The Way ICAC Conducted the Hearing, Calling of Witnesses

It was left to Ms Jan Daley, ICAC's solicitor to organise witnesses to attend the hearing at Kyogle and later at Sydney.

For reasons best know to herself, Ms Daley refused to cooperate with Council's solicitor and supply a timetable of when council employees would be needed to give evidence. As a result many council employees spent needless days hanging around the court at great expense and waste to citizens and ratepayers. Attachment "A" to this report is a summary of the days spent by council staff in attending to the ICAC inquiry.

Ms Daley may have considered some higher public interest was served by wasting the time of so many persons, however as well as the direct wages cost, the compulsory absence of council's executive staff meant that normal management and decision making was paralyzed, the council organisation was a rudderless ship.

1.2 The Role of the Local Media

I was particularly disturbed by the role of the local media in reporting the ICAC hearing. The media selectively reported the most sensational and character damaging snippets of evidence that were given to the hearing and failed in many cases to report further evidence that either refuted the initial accusations or gave innocent answers for previous seemingly sinister incidents.

I would have expected a more responsible performance from the local media in dealing with the reputations of local citizens.

1.3 The Industrial Situation.

Council must now deal with Collins recommendations. As these recommendations include dismissal of council employees it becomes an industrial matter.

In industrial matters, council is bound by NSW industrial law and practices, relevant industrial awards and also Section 99 of the Local Government Act. See attachment "B" and "C"

It is my belief that as the ICAC system is fundamentally flawed in terms of natural justice and fair hearings that any council action based merely on ICAC recommendations will fail in the industrial arena.

I believe that any disciplinary action Council chooses to take must be based on Council itself following these principals of natural justice and fair hearing and making its own assessment of the employees actions.

2. Collin's Analysis - "Chapter 2. Wiangaree Deviation, and Standfield's Scraper Contract"

In general terms I find Collin's investigation, analysis and findings biased, not based on the evidence presented and seemingly based on some preconceived notion. Further to the last point, in my view, he did not objectively pursue the "truth", but, only investigated and sought witnesses or evidence that fitted in with this notion.

2.1 Problems with Main Road Grants

A large part of the problems with the scraper hire had their origins with the manner in which the DMR (RTA) administer their grants and in particular the manner in which they announce and then allocate funds to council.

Over the past 20 years I have been involved in administering DMR grants to council's in various parts of NSW. Apart from the quantum of funds, which has never been sufficient to even maintain our road assets, the next biggest problem has been the timing and manner of advising council's of the grants.

The DMR and NSW government have insisted on only ever announcing grants on a financial year basis. Then to make matters worse these announcements are generally made late, sometimes up to 5 months late. So the situation is that for a financial year starting 1 July, the grant announcement may not be made until November and then the council engineer must organise and carry out any major construction works in what's left of the year up until 30 June. If he fails to spend the grant funds then the unspent grant lapses Cl 29 "DMR General Conditions of Assistance to Councils" which states "...The balance of any grant not paid to a Council by 30th June will lapse except for flood damage grants which apply for a specific period not related to a financial year and maintenance funds which may be transferred from one year's grants to the next.", to further compound the problem the balance of the financial year left for construction works is often dominated by the summer/autumn wet season.

2.2 Grant Announcement for Wiangaree Deviation

The NSW Minister for Roads Mr Pucellio announced around 1984 that the Wiangaree deviation would be done as an item in the bicentenary roads programme. This was a pleasant surprise for Council at the time as it was an unexpected announcement. In the next few years the DMR carried out design and plan preparation as well as seismic survey and report on material to be encountered in cuttings. As it was to be a bicentenary work council staff realised it would be an all in contract job and sought model contract specifications from the DMR on which to draft contract and tender documents.

As the years rolled on and the bicentenary year approached, the actual grant announcement never came and there were noises coming from the DMR that the NSW government had overcommitted the Bicentenary roads fund and that some promised projects would drop out.

In 1987 they eventually came clean and advised council that we had missed out on bicentenary funding and would now have to construct the job from annual construction grants.

This changed the nature of the job completely. The job was estimated to cost around \$1,400,000 and annual construction grants at that time were variable, but, around \$300,000 a year.

2.3 The Nature of the Job Changes

In 1985 the DMR issued a report titled "Wiangaree Deviation, Geological Investigation". On page 6 of that report it states "The above table shows that in order to achieve satisfactory ripping of most and probably nearly all the material in the cuttings, as large a machine as possible should be used - preferably greater than 55 tonnes in weight such as a D9L (59T), Komatsu 455A (70T) or Fiat - Allis 41-B (72T)."

It follows that if the material needs such a large dozer to rip the material then large open bowl scrapers would be needed to load and cart the material.

The above factors were no particular problem in the one large bicentennial grant context, but, were difficult problems in the piecemeal annual grant context.

In the annual grant context the job had to be broken into small chunks, the size of which, going on past performance of the DMR, we would not know until November of the financial year that it had to be spent.

It was difficult to know how to deal with hiring and firing of such large items of machinery in piecemeal job chunks, especially with the scrapers as there were none available locally and the establishment costs of just getting them to the job would be very significant for short term hire. The other complications were that as the late grant announcements generally dictated that the works would be done in the wet season, the payment of "B" rates for stand down in wet periods could also consume significant funds.

The proposed use of large dozers and scrapers with resultant large daily output of material also meant that it was likely that council's small ancillary plant, water carts, rollers, grader might also need supplementation with hired plant, further increasing the problems and risks of doing the work in small chunks.

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2.4 The Job Starts

Around November 1987 the 87/88 annual grant was announced at around \$270,000 enabling the job to start. This stage I had to pay for necessary preliminary works such as land acquisition, fencing, clearing, drainage pipe installation etc and the residual left for earthworks was estimated at \$173,630. Of this figure \$43,270 was estimated for excavating by scraper. This figure of \$43,270 allows for the hire of both scraper and push dozer.

As can be seen Stage I had a very small allowance for scraper hire and compounded the problems referred to in 2.3. relating to the problems of using large equipment on small job chunks.

The job had to proceed as soon as possible to ensure funds were spent by 30 June. When using openbowl scrapers with push dozers the items have to be matched in size. The scraper represented the most difficult problem as none were available locally, dozers were easier to procure locally even quite large ones.

2.5 Quotations Called for an Open Bowl Scraper.

It was decided therefore that an advertisement should be placed for hire of an openbowl scraper, for the sole reason to canvas the market outside the local area and that once chosen a matching push dozer could be hired locally without advertisement. As the estimated allowance for both scraper and push dozer in stage I was only \$43,270 there was no consideration given to calling formal tenders (required by Ordinance 23 for contracts estimated to cost \$50,000 or more).

The advertisement was placed in January 1988 closing 5 February.

2.6 Doubts About Suitability of Open Bowl Scraper

During the period of the advertisement preliminary works were done on the job site with council's own small dozer. These works included clearing, stripping of topsoil, construction of haul tracks, catch drains, pipe excavation and installation, and commencement of cutting excavation.

The message I started to get from the site was that the material being encountered was easy to handle with council's own small dozer and that the men on the site considered the excavation, at least for some depth, could be handled with a small elevating (self loading) scraper.

This information caused myself and Works Engineer (H. Grayson) to reconsider our approach to the job. The prospect of abandoning the DMR reports recommendation of heavy equipment and using a small elevating scraper would overcome many of the problems outlined in 2.3. A small elevating scraper could be teamed with council's own equipment, reduce the cost of transporting in large outside equipment and reduce the risk of stand down payments during wet weather consuming a significant portion of the available funds.

2.7 Scraper Selection

When quotations for the openbowl scraper closed, 5 February 1988, there was one for a conventional openbowl scraper, a 1970 Caterpillar 627 ("A" \$120/hr, "B"\$360/hr) and one for a dozer drawn Le-Torneau LS-15 ("A"\$90/hr, "B"\$30/hr). Non conforming quotations were also received for four elevating scrapers, excavators, dozers, loaders and dump trucks.

The one quote for a conventional open bowl scraper was for a 18 year old Cat 627. The earthworks operation consisting of dozer, grader, rollers and watercart would be dependent on the continuous output of the scraper. An 18 year old machine could not be relied on. It also had a very high "B" rate, rendering it high risk with wet weather standdowns.

The Le-Toneau was not at all suitable, tractor drawn scrapers are OK for dam sinking, but, not longer haul cut and fill roadworks.

Given the doubts on open bowl scraper suitability raised in 2.6 and the availability of quotes for elevating scrapers, the quotes for elevating scrapers were then considered.

In consultation with the Works Engineer, I decided to start the job with an elevating scraper teamed up with council's own ancillary plant (dozer, grader, water cart, rollers). If the material encountered did become harder and require the larger machinery referred to in the DMR report, then the fall back position was to quit the elevating scraper, hire a large dozer to rip and push the material and use council's loader and trucks to load and haul. The loader and truck technique would not be the most economical way to do the job, but, it was flexible, could be done using council equipment supplemented by only a hired large dozer and as such could be implemented with a short lead time. This was necessary as any such change would be perilously close to 30 June.

I had the choice of choosing an elevating scraper from the non conforming quotes, readvertising or choosing by telephone enquiries.

As it was now February, there were prospects of delays due to the wet season and/or encountering harder material, I decided the the job should proceed as soon as possible to minimize risk of underspending the grant by 30 June.

I therefore decided to choose from the non conforming quotes for elevating scrapers and chose the quote for a 1980, John Deere 762 submitted by H. J. Standfield.

I did not consider it necessary to readvertise because I had delegated authority from council to hire necessary plant, stage I of the job was not large and there was the prospect that the harder material predicted by the DMR report could prematurely curtail the use of an elevating scraper. I did not consider it wise to readvertise because the resultant delay increased the risk of not completing the job by 30 June and losing part of the 1987/88 grant funds.

I therefore accepted the quotation of H.J. Standfield for the JD 762, being the lowest priced suitable elevating scraper, and advised him by letter dated 10 february 1988. I advised the President Clr Lovell verbally shortly afterwards and I reported the decision to the finance committee meeting of council held 15 February 1988 and requested council's endorsement of my actions.

2.8 The Meeting of 15 February 1988.

Collins asserts the opinion that I mislead Council at that meeting by saying that there was no quotation for an open bowl scraper. In this regard he relies on the minutes of the meeting drafted by Mr Thew the Shire Clerk which state "... The Shire Engineer advised that the Department of main Roads had specified an open bowl scraper for this job, however, following the receipt of quotations it was apparent that one was not available and that the work could be handled by an elevating scraper....."

In evidence in the witness box I offered the explanation " Well I think the most likely one is that when these minutes are prepared they tend to precis the conversation at the time, and with all due respect to my colleague the shire clerk, his knowledge of the technicalities of these pieces of equipment is not perfect, and in his precisng of what I said, he may have written it down in such a way that he misconstrued what I in fact did say."

There was evidence that discussion on the scraper matter lasted from 20 to 30 minutes, yet less than a page of discussion is shown in the minutes. The discussion therefore was not written word for word and in any situation where discussion is condensed by the minute writer there is the possibility of error.

There is no logical reason why I would have said "that one (an open bowl scraper) was not available" as there was one conventional type open bowl scraper listed in my report (the Cat 627) and a quick reference to a machinery manual would have revealed its type.

It may have been that I could have said there was no "suitable" open bowl scraper, indeed this was the case as I believed.

Collins seems to go to extraordinary lengths to support his claim that I mislead Council. In his analysis he dismisses the evidence of councilors Johnston, Lovell and Lazaredes in order to maintain this "finding"

I therefore include as attachments "D", "E" and "F" the statements of ex councilors Johnston, Lovell and Lazaredes who were present at this meeting.

Clr Johnston in part 7 of her statement says "I do not believe that the Shire Engineer in any way mislead Council in relation to this matter"

Clr Lovell, then President says in part 7 of his statement "I believed that quotes had been received for scrapers of both open-bowl and elevating type.."

Clr Lazaredes says in part 3 of his statement " I remember the Shire Engineer saying that one of the open-bowl scrapers which had been the subject of the quote was not suitable for the job..."

I find it very disturbing that Collins had these statements available to him which clearly show that I did not say "that one (an open bowl scraper) was not available". That he went to extraordinary lengths to dismiss my evidence, that he ignored the evidence of three councilors and failed to even call them to the witness stand to verify their statements. Further he failed to recall the Shire Clerk to examine whether the possibility of error in precisising that I suggested was likely.

I consider Collins should withdraw his finding that I mislead Council and issue me with a public apology.

On another matter of detail, I had already acted in accordance with my delegated authority to hire Standfield's machine before the meeting of 15 February, as Council's agent I had therefore already bound Council. The motion passed at that meeting was to endorse the propriety of my actions only. It had no bearing on the hire of the scraper itself. I can therefore find no reason why there was any pecuniary interest on the part of Clr Bob Standfield on that occasion.

Collins also asserts on page 21 that I informed Council to the effect that council could do nothing about the scraper hire as Standfield had already purchased it.

I believe Collins made an error in this finding and that he should withdraw it.

I had no knowledge of what H.J. Standfield's arrangements were to purchase the scraper and did not make this alleged statement. It is my belief, and that of others at the meeting, that this statement was in fact made by Clr Davies.

Clr Lovell in part 9 of his statement and Clr Johnston in part 4 of her statement say that I did not make this statement to council. Clr Johnston says she believed it was Clr Davies who made the statement.

I believe this to be another example of where Collins refuses to believe me or the evidence because it does not conform to his preconceived notion of what happened.

2.9 Stage I Proceeds

The scraper of H.J. Standfield was delivered to the job around late February 1988. The earthworks proceeded and the combination of elevating scraper and small dozer worked well on the material encountered at that time. For the rest of stage I (up until 30 June 1988) the job progressed reasonably well. The major problem I recall was that a slip, identified on the plans as requiring removal, proved much more extensive than anticipated, this resulted in perhaps an additional 10,000 cu m of material being required to be removed to waste, mostly by excavator and trucks.

The harder material suggested by the DMR report as needing large dozer to rip did not occur during this period.

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2.10 The 1988/89 Grant

In stark contrast to main road grant announcements made either before or since, the funds for 1988/89 were announced in the late June/July period.

As the works were proceeding well, the equipment was kept on the job and earthworks kept proceeding.

It was pointed out to me by Collins that I should have then readvertised for a scraper. Perhaps he is right, however at the time we were still expecting to hit the hard material that was foreseen by the DMR report and faced the ever present prospect of having to stand down the elevating scraper, reassess the job and bring larger equipment onto the site. Faced with this uncertainty Standfield's scraper was kept on site on a weekly hire basis. There was no deliberate attempt to bypass the provisions of Ordinance 23.

As it was, harder material was encountered late in 1988 and Standfield's scraper stood down. Most of this harder material was not rippable and was later drilled, blasted and crushed.

I maintain that the recommendation in the DMR report "...that in order to achieve satisfactory ripping of most and probably nearly all the material in the cuttings, as large a machine as possible should be used - preferably greater than 55 tonnes in weight such as a D9L (59T), Komatsu 455A (70T) or Fiat - Allis 41-B (72T)." was misleading and was a significant factor in my approach to the job.

Collins refuses to accept this point and I believe uses his own knowledge of civil engineering to dismiss my arguments. In this regard I believe he has acted in error. It is one of the principals of a fair hearing that findings should be based on evidence placed before the hearing itself. Collins is not a qualified civil engineer and he called no other qualified "expert witness" to refute my evidence given as a qualified civil engineer. I believe therefore that it was not open to him to dismiss my evidence.

2.11 Summary, Wianqaree Deviation and the Scraper Hire

2.111 The Job

The job was estimated at \$1,410,690 and was completed for \$1,202,987. Attachment "G" is the final certificate of expenditure for the job.

The engineers of the Department of Main Roads have complemented me on a difficult job that was well done.

I believe that most of the "problems" with this job were due entirely to the way in which the Department of Main Roads (now Roads and Traffic Authority) and the NSW government administer main road construction grants to councils. By dealing out grants in piecemeal fashion so that jobs can never be properly planned and prepared and by announcing grants many months late so that time constraints are magnified into a major problem.

I believe that this type of administration was totally inappropriate for the Wiangaree Deviation and that the RTA and the NSW government should have a long hard look at methods of improving this very unsatisfactory situation.

2.112 Harry Grayson's Actions

During this whole job Harry Grayson was my Works Engineer and it was his responsibility to ensure that the works were carried out in an effective and efficient manner. He was also my principal advisor on many technical and operational problems that arose during the job.

I have nothing but the highest regard and respect about the way he attended to his duties on this job which were carried out in a thoroughly competent and proper manner.

2.113 My Own Actions

I believe that I always acted in the best interests of Council and the efficient execution of the job. The quality of the job and its completion under budget testify to its efficient execution.

This was achieved despite the serious deficiencies in the way the DMR and NSW government administered the construction grant.

I totally reject Collin's findings that I was gravely deficient or made significant mistakes.

I also reject his findings or opinion that I exceeded my authority or in any way mislead council.

I point to the fact that on March 15, 1988 the Council of the day endorsed my actions.

I therefore also totally reject his opinion on page 75 that I should be admonished.

2.114 Why the Hearing?

It always seemed extraordinary to me that the scraper hire matter warranted such a highpowered, costly investigation and hearing by the ICAC, when, at least to me, there were sound, logical and proper reasons for all my actions. Late in 1990 I gave what I considered to be a full explanation of the matter to the ICAC and thought that that would end the matter.

It seems obvious to me now that the ICAC did not believe me and must have been convinced that there was some sort of improper relationship between me and Murphy Standfield.

The allmost belligerent conduct of Collins towards me in the witness box and his attempts to break me down have convinced me that this must have been the case.

I can only presume that the persons who made initial complaints to the ICAC, must have suggested this possibility and that the ICAC were sufficiently convinced to proceed with their high powered action.

Whilst I have little regard for either Collins, his conduct or findings in this whole episode, I was much relieved nevertheless when he stated in his report "However I have not the slightest doubt that there was no sinister reason for any of his unwise actions".

3. The Bonalbo Depot Incidents.

3.1 General.

The ICAC gathered evidence which suggests poor and improper administration of the Bonalbo depot activities. This is a matter of great concern to myself as the senior officer of council responsible for operations at Bonalbo.

Since the end of the hearing, administration of Bonalbo has been scrutinized and many changes to procedures have been implemented. There have been a number of changes to procedures for authorizing private works and hire of outside plant, time sheet supervision has been improved, and the function of works engineer has been upgraded to now be the responsibility of the Deputy Engineer.

The main area that has not been attended to has been the appointment of a permanent Bonalbo Overseer. This has been left in abeyance pending council consideration of the ICAC report. Since July 1991, four temporary overseers have been used to supervise Bonalbo. This instability has not assisted the management and supervision of council works and its quick resolution is imperative.

3.2 How the Problem Was Dealt With.

The evidence suggests that council employee Oral Gould and Councilors Smith and Missingham contacted the ICAC in the second half of 1990 regarding their concerns at the Bonalbo depot. It appears that a deliberate decision was taken to conceal the problems from council's President or executive staff and this denied them the chance to deal with the problems.

I find Gould's conduct extraordinary. It appears he in effect spied on his fellow workers for many years, keeping a diary of day to day incidents involving shire works. At no time did he attempt to convey his concerns to myself, the President, the Works Engineer or the Shire Clerk. This is despite the fact that at council christmas parties and picnic days Gould mostly takes the opportunity to speak personally to these people.

He did give evidence that he spoke to relieving overseer Bob Graham in 1988 when he relieved Lex Moss for a few weeks. He further said words to the affect that Graham was downgraded after that time.

I suppose the suggestion was that Bob had talked to higher authority and they had punished him for his efforts. This then gave Gould the excuse to conceal any matters from council's executive as they could not be trusted and were part of some conspiracy with Moss.

The flaw with this scenario is that Bob Graham was in effect downgraded in 1987, when Charlie Clark was placed over him as relieving overseer at Kyogle. It therefore had nothing to do with what happened in 1988.

It is now history that the concerns were successfully concealed by ICAC, Smith and Gould and that matters were allowed to run their course until the ICAC hearing in July 1991.

The results are that the ICAC has spent a rumored \$1 Million of taxpayers funds in running their investigation, Council has spent over \$80,000 on legal expenses (other parties such as RTA and other affected persons have probably spent a similar amount on legal fees) and the whole incident has had a dreadfully destructive affect on council staff morale and operations.

If the ICAC, involved councilors or Gould had only informed the Shire President of the problems, it may well be that the problems could have been speedily and effectively dealt with by council itself and the above costs avoided.

3.3 Gould's Evidence

Most of the Commissions findings relating to the Bonalbo area are based on Gould's evidence, and on his diaries and reconstructed early diary. I have great difficulty in placing any weight on Gould's evidence where it is not corroborate by others.

I was personally involved in an incident reported on pages 72 and 73 of Collin's report. In the witness stand Gould made accusations that were particularly damaging to me. However under cross examination he refuted most of the accusations and contradicted his earlier evidence. I believe that this incident demonstrated his unreliability and I further believe that his behaviour is very much influenced by an enduring conflict of personality with Lex Moss.

3.4 Specific Incidents At Bonalbo

3.41 Page 53 "Timber Proves Profitable for Earl Moss"

My understanding of this incident was that Earl Moss was engaged by Lex Moss to clear overhanging limbs from Main Rd 150 which were a danger to traffic and not infrequently, fell during windy weather causing expensive after hours removal.

I further understood that in exchange for the clearing of the offending trees Earl Moss was to have timber rights to these trees.

When advised of this incident, sometime after the event, I understood it to be a limited work and that council had done well by eliminating a hazard at no cost.

The hearing evidence suggests that it was a far larger incident than previously thought and that timber to the value of \$17,000 was involved.

I recommend that Council further investigate this incident to ascertain it's true extent, any outstanding money due to council, and actions of those involved.

3.42 Page 55 "Work at Elder's Property Morpeth Park"

This is a case of Gould's evidence being believed rather than Lex Moss.

I recommend that Lex Moss be asked to explain this incident to Council.

3.43 Page 55 "Private Work Booked out to Bean Ck Falls Rd"

Collins has made an error in this incident. Merv Russell gave evidence that "work on a private road was recorded as work on Bean Ck Rd". Russell however did not give any indication in his evidence of where this supposed private road was or on what date it allegedly had works carried out. There are a number of council roads in the Bean Ck Falls area which are poorly defined and look like private roads. As Collins did not make the effort to ascertain where the "private road" was, its status cannot be checked.

Collins should therefore withdraw his finding in this matter as having no basis in fact.

3.44 Page 55 "Theresa Ck Rd"

This is a another case of Gould's evidence being believed rather than Lex Moss.

I recommend that Lex Moss be asked to explain this incident to Council.

3.45 Page 56 "Work on Doug Maslen's Private Road"

I recommend Lex Moss be asked to explain this incident to Council.

3.46 Page 56 "Installation of Pipes for Peter Hetherington"

Lex Moss gave evidence that the shifting of the entrance was done partly to minimise damage to council services. As such he contends that Council was partly responsible for the cost of the new entrance.

It appears Wayne Albert did the job and was paid wages directly, but, no plant hire was paid to Council. On the face of it this was a breach of normal council procedures, but, I fail to see that the evidence to date warrants a finding of corrupt conduct on either Moss's or Albert's part.

As council procedures were not followed however I recommend that Lex Moss and Wayne Albert be asked to explain this incident to council.

3.47 Page 57 "Work on Yabbra Rd Near Old Bonalbo"

This is a case of Gould's evidence being believed rather than Lex Moss.

I recommend that Lex Moss be asked to explain this incident to Council.

3.48 Page 57 "Excavation for Col James"

This is a case where employee Col James engaged employee Ted Wearden for unauthorised use of council's backhoe for private purposes. Both employees admitted they were involved in the incident, and James paid Wearden with a carton of beer.

James defence was that he was told by Lex Moss to "fix Wearden up".

Collins then makes the remarkable finding that this was "another case of corrupt conduct by Lex Moss".

One thing that is clear is that there was a breach of discipline by James and Wearden as they have admitted the actions. It is also clear that these employees would have a strong motive to suggest Moss put them up to it.

Moss in his evidence says he did not recall anything about the incident.

I find Collins suggestion of corrupt conduct by Moss to be not substantiated by the evidence and I find Collins' silence about the conduct of Wearden and James to be remarkable. Collins appears to base his findings not on the evidence, but, on how cooperative witnesses were with the ICAC.

I recommend that Col James and Ted Wearden be asked to explain this incident to Council.

3.49. Page 58 "Work on Old Lawrence Rd"

In this incident there is evidence from Gould that Lex Moss directed employees to falsify timesheets by charging works done on Old Lawrence Rd to main road job numbers. The location of the employees at the time was corroborated by other employees apart from Gould.

I recommend that Lex Moss be asked to explain this incident to Council.

3.410 Page 59 "Work on O'Connor's Private Road"

Works were carried out on Rodger's Rd (Council Rd) and the road reserve beyond the council maintained length. This latter work was private work for O'Connor. Evidence was given that Moss directed employees to book some of the shire road work to main roads and book some of the private work to shire roads.

Lex Moss denied directing employees to charge shire work to main roads. He did admit however to being somewhat sloppy in his apportioning of time to the various works.

I recommend that Lex Moss be asked to explain this incident to Council.

3.411 Page 60 "Delivery of Gravel onto Stephen Bird and Alteration of Little's Timesheet"

The explanation of Lex Moss regarding his reasons for delivering gravel free of charge to Bird do not seem totally unreasonable, providing it can be backed by factual evidence of favours Bird did for Council.

From time to time council plant is parked on private property, water may be drawn from private property or a landowner may assist in some other way. In the past this type of help and cooperation has been favorably viewed by council as assisting in making the ratepayers dollar go further on road maintenance. Likewise the odd load of gravel for compensation to a landowner for his troubles does not seem terribly sinister, provided it is done in good faith and neither council or the landowner are disadvantaged.

To abandon this type of cooperation with landowners would seem to me to be a backward step, however I concede that it must be closely monitored to see that it does not get out of control or develop into corrupt activities.

I recommend that Lex Moss be asked to explain this incident to Council.

3.412 Page 61 "Delivery of Gravel to Duffv's Access Rd"

This incident has been dealt with by the court and charges dismissed.

3.413 Page 62 "Work on the Spillway at Anthony Harvey's Property"

This appears to be a deviation from council's authorised procedures for private work by Lex Moss.

I recommend that Lex Moss be asked to explain this incident to Council.

3.414 Page 63 "The Hire of Earl Moss's Bulldozer"

Collins makes no adverse finding, but, appears unconvinced.

Work in Medhurst's pit is extremely dangerous as gravel is won by pushing over a sheer quarry face some tens of metres high. Loss of traction and braking at the end of a push would result in the death of the operator. Council's dozer had poor tracks and the use of another machine was essential for safety reasons.

3.415 Pages 64 - 70 Other Incidents

Collins makes no adverse findings on these remaining incidents, so I will not comment further at this stage

3.416 Page 72 "Conversations between Gould and Moss and Gould and Knight"

I have already touched on this incident in 3.3. After cross examination Gould refuted most of his earlier evidence and admitted that I told him to cooperate fully with ICAC.

Collins however insists on making a passing shot at me by saying "Nevertheless, I have reservations about the way in which Knight handled the matter and about his lack of any thorough attempt to come to grips with what lay behind Gould's complaint."

I believe I handled this interview in a sympathetic, helpful and constructive manner.

I do not know what Collins refers to as Gould's "complaint". Gould was very distressed and disturbed at this interview, fearing for his job, the existence of the Bonalbo depot and harassment by an unnamed person (not a shire employee) who came into his house uninvited at night. I did what I could to calm him down and assure him his job was not at risk. There was little else I could do as I left the country the next week on four months long service leave. I could do very little about his unnamed visitor as this occurred outside working hours at his own home.

3.5 Bonalbo Depot Personnel, Recommendations.

3.51 Lex Moss

Collins offers the opinion that consideration be given to the dismissal of Lex Moss.

I do not consider this recommendation justifiable for the following reasons

(a) There was no evidence given at any stage of the hearing that anything Lex Moss did was for any personal gain.

(b) Lex Moss has given 22 years of dedicated service to council. In all of my dealings with him over the past 8 years, he has had council's and the local residents' and ratepayers' interests at heart. He has worked tirelessly on many occasions, after hours and at weekends during flood and other emergencies to keep council's road network open.

To further support his employment record, I include as Attachment "H" a statement by his immediate supervisor over the past eight years, former Works Engineer, Harry Grayson.

(c) There are incidents referred to in sections 3.41, 3.42, 3.44, 3.45, 3.46, 3.47, 3.49, 3.410, 3.411 and 3.413 of my report where I recommend that Lex Moss be asked to explain these incidents to council. I believe that due to the defects of the ICAC process and its denial of natural justice that no action be taken against Moss until he has had a chance to address council on these specific incidents.

(d) The ICAC hearing has done irreparable harm to Moss' reputation, standing in the community, self esteem and morale. It has caused both he and his family immense trauma and cost him over \$20,000 already in legal fees. He has already suffered much for his alleged wrongdoings and to dismiss him at this stage of his career, with only 4 years to possible retirement, would be a punishment far in excess of his alleged crimes.

(e) There is some evidence and Moss' own admissions that in the administration of his duties he was sometimes sloppy and at times disregarded councils policies and procedures regarding private works and timesheets. This being the case I consider it would be inappropriate to reinstate him to his former position of overseer. I would consider that it would be appropriate to confirm his demotion to ganger and that his salary be adjusted to that of ganger from the next pay period.

3.52 Wayne Albert

Collins offers the opinion that consideration be given to the dismissal of wayne albert.

I do not consider this recommendation justifiable for the following reasons

(a) The only incident in which there was an adverse finding against Albert was Page 57-57 "Installation of Pipes for Peter Hetherington". In my comments in 3.46 I agree that the correct procedures for private works were not followed, but, Albert did do legitimate work that he was entitled to be paid for. There is also a suggestion that the works were authorised by his overseer Lex Moss.

(b) Wayne Albert created a bad impression on Collins in the witness box, but, Collins conclusion "that Albert engaged in dishonest activities" is not even based on the selective evidence or findings used by Collins himself elsewhere in the report. In the absence of such evidence I consider that Collins should withdraw his conclusion as it is an unwarranted slur on Albert's character.

(c) Albert was not legally represented at the ICAC hearing. He was at the mercy of Collins and Maxwell and could in no way defend himself against these legal professionals.

3.53 Col James and Ted Wearden

By their own admission these employees were involved in the unlawful use of and personal payment for council equipment.

In stark contrast to the Albert case however, Collins chooses to ignore this transgression of council procedures and recommends no disciplinary action. This favorable finding seems to be related to the cooperation these two employees gave in supplying adverse evidence against Moss. I personally find Collins conduct in this regard to be very distasteful and most unfair.

All employees owe the same duty to council to not misuse council equipment for personal gain. That they may have given the ICAC cooperation should have no bearing on their relationship with their employer and in no way lessens their responsibilities.

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4. The Future of the ICAC

. There is no doubt that there is a need in all societies for a mechanism to ensure that public officials do not engage in corrupt conduct for their own personal gain.

The NSW government has sought to achieve this goal by setting up the ICAC.

Unfortunately in its haste to set up this watchdog authority the government has created a body that has extraordinary powers and if not wisely exercised these powers can be abused and result in the loss of civil rights and reputation for persons innocently caught up in their investigations.

I believe that there were many problems with the way the ICAC conducted its Kyogle Shire investigation. But one must move forward and learn from the mistakes of the past.

Kyogle Shire has made organisational and procedural changes to ensure the problems revealed in its road works administration do not reoccur.

I believe that ICAC's conduct in this investigation also require investigation to ensure the problems they created do not reoccur in future investigations.

I therefore RECOMMEND that Council invite the Parliamentary Joint Committee on the Independent Commission Against Corruption, to

- (a) Fully investigate the conduct of the ICAC in relation to the Kyogle investigation and hearing.
- (b) Identify the methods and procedures of ICAC that are contrary to natural justice and the public interest.
- (c) Recommend necessary changes to the ICAC methods, procedures, personnel and legislation to overcome problems identified in (b).


 (P.V. KNIGHT)
SHIRE ENGINEER