OPENING STATEMENT TO JOINT PARLIAMENTARY COMMITTEE ON ICAC
John Nicholson SC

I welcome the opportunity to speak in support of my Report into and five Recommendations arising from Operation Vesta. But before I embark upon that task I must acknowledge and apologise for inadvertently misleading this Committee on an earlier occasion through my own negligence.

That occasion occurred during my first appearance before the Committee when I was critical of Commissioners using what I regarded as courtroom practices of calling for documents from witnesses in the course of a hearing in circumstances where I asserted, incorrectly as it turns out, there was no specified power in the ICAC Act for them so to do. I was wrong. I have since discovered there is a power given to Commissioners in s.35 (2) of the Act to require a person appearing at a compulsory conference or public inquiry to produce a document or thing. I had confined my search to earlier sections of the Act. I withdraw, without reservation, any imputation or suggestion of arbitrariness, overreach, or impropriety that may have been considered as attaching to that incorrect assertion.

It may be there is a second occasion, which if it has occurred, occurred in the Vesta Report authored by me. My own view is I have not mislead you – and I sincerely hope I have not. However, my successor, Mr Bruce McClintock S.C. claims my First Recommendation should fail because "It would be a mistake to change a provision whose meaning has been authoritatively determined by the Courts many years ago in circumstances were (sic – read where) both the Courts and the ICAC itself, as well as ordinary citizens, have acted upon the basis of that judicial construction. The most relevant authority is *Griener v Independent Commission Against Corruption."*

I do not accept the Inspector's assertion. My first Recommendation arises from a complaint in my Report, by me, of the "double could" test, which I discuss in some detail commencing on p.25 of my Report. I formed the focus of my first recommendation that sections 8 and 9 of the ICAC Act be amended by removing the verb "could" and replacing it

with words equivalent to those used by Coroners and/or magistrates when referring matters on for consideration by the DPP or for trial, as the case may be. If there is a provision "authoritatively determined" providing a judicial construction for the word "could" as it appears in s. 9, then my Vesta Report is misleading. However, I am of a view my complaint is not misleading – I am also of the view there is no "authoritatively determined" judicial construction for the word "could" or for the phrase "could constitute or involve" as it appears in s.9 (1) of the ICAC Act.

I still press the first Recommendation, although now perhaps more ardently, for reasons that are predicated upon the general theme I articulated in my Report, and others. – I will come to that in more detail shortly.

Before I do that I should inform you that my successor, Mr Bruce McClintock S.C. has been gracious enough to provide me with a copy of his August 23rd communication to the Committee Manager of the Parliamentary ICAC Committee. You will recall in this communication he provided his comments upon the five recommendations I have made. He took issue with four of the five – disputing the need for or wisdom of implementing four of my recommendations.

Notwithstanding his obvious expertise and his reputation, arising from his involvement in two relevant reports on the ICAC legislation, I stand by my recommendations. Although we both come to this task through different viewpoints, my sense is we both support an ICAC with having relevant extra ordinary powers bestowed on it for the purpose of investigating and exposing corrupt conduct. Without, I hope offending anyone I see the difference between us as being his desire to see the existing concept of ICAC facilitated and maintained, and I seek to move the existing paradigm to a position where there is a greater emphasis on a concept of the public interest that seeks to trespass as little as possible upon the right and interests of those who come in contact with the ICAC as "affected" persons or witnesses.

Apart from what I put in my Report, let me deal in some detail with Mr McClintock's arguments in respect of my first Recommendation. I do

that because of our different view – as I apprehend it – of the impact of the case he referred to in his comments forwarded to you.

You will recall by my first recommendation I sought to have sections 8 and 9 of the ICAC Act amended by removal of the "could" test from each section so that findings of corrupt conduct are available only in circumstances where it was reasonable for the Commission to expect a properly instructed reasonable tribunal of fact would come to a conclusion on admissible evidence that the opinion or finding of the Commission underpinning the corrupt conduct finding would be sustained.

One major argument against me is that there is already a provision whose meaning has been authoritatively determined by the Courts many years ago. Further, it is claimed Courts, ICAC and ordinary citizens have acted upon the basis of that judicial construction. Reliance was placed by the current Inspector upon *Griener's* case.

Coming then to the *Griener* case. As I read it, each of the three senior justices sitting as the Court of Appeal (the then Chief Justice Gleeson, Justice Mahoney and Justice Priestly) gave decisions in the case. Each took a different approach to resolving the Plaintiffs' application for relief. Justice Gleeson, I would argue, did not become involved in the meaning of the word "could" in S.9 (1) (a) or (c) of the ICAC Act. My analysis of the Chief Justice's approach was to take the wording of the section as it stood, and find for the Plaintiff's on the basis of legal flaws by the then Commissioner (Temby QC) – particularly in his failure to apply "objective standards" and in setting his own benchmark standard . As I read his judgment, he made no authoritative determination as to the significance of the word "could" or the phrase "could constitute or involve" found in s.9 . Toward the end of his judgment he noted three problems with the then Commissioner's approach:

> 1.failure to enunciate and apply objective stands to the facts of the case ---He approached the question as though the matter was to be determined by his [the Commissioner's] personal and subjective opinion thereby exceeding his jurisdiction;

2. The alternative ways the Commissioner formulated the test to be applied under s.9 (1)(c) in the circumstances of the case incorrectly stated the issue that arose for decision and avoided the problem that was central to that issue and
3. As I read it: that the Commissioner made a finding of fact that was not open on the evidence in respect of the material and nature of the Governor's prerogative to dismiss a Premier acting with or without the advice of the Legislative Council. Chief Justice Gleeson found for the Plaintiffs.

Justice Mahoney

Justice Mahoney was in the minority in that he would have dismissed the Plaintiffs' claim for relief.

Even so, he supported the proposition that when determining within in s.9 (1)(c) whether the corrupt conduct under s.8 "could constitute… reasonable grounds for dismissing … a public official" the Commission must apply objective standards. That, I argue, seemed to be a primary point of unanimity among the three justices.

Justice Mahoney's view was that the Commissioner's finding that the conduct of both the then Premier and Minister for the Environment involved partiality, and that finding was within the scope of his functions. Further that it was open to the Commissioner of find the conduct of both as constituting a breach of public trust. (Justice Gleeson had come to the same view in respect of the s.8 findings although found that the said breach was based upon the same partiality which was the other s.8 finding of the Commissioner).

The point of divergence between Justice Mahoney and Justice Priestly centres on the significance of the s.9 (1) "could". Justice Mahoney's position was "*The legislature has provided that conduct may satisfy s.9 not merely if it in fact constitutes reasonable grounds for dismissing the public official or even if it probably constitutes such grounds. Section 9 may be satisfied <u>if the conduct merely "could" constitute</u> such grounds….[F]or the Commission to conclude that the impugned conduct satisfies s.9 and accordingly that it is to be categorized as corrupt*

conduct, it is enough for it to conclude that, to paraphrase the statute, objectively it "could" constitute such grounds.

My argument is Justice Mahoney applied what I might call the Macquarie Dictionary definition of "could", requiring an objective assessment of the possibility raised by the facts, rather than formulate some "authoritative determination" of the provision "could constitute or involve".

Justice Mahoney ultimately came to a view that applying objective standards it was open to the Commissioner to make a finding in reliance upon s. 9 (1)(c) that the conduct of both Premier and Minister was corrupt conduct. He would have dismissed the Plaintiffs' application.

Justice Priestly
Justice Priestly held that on the facts as found by the Commissioner it was not open to him as a matter of law to conclude those facts amounted to corrupt conduct for the purposes of the Act. The flaw identified by Justice Priestly was that the Commissioner's finding was not based upon any standard of corrupt conduct established or recognised by law or defined by the Act – but rather one the Commissioner thought appropriate notwithstanding it had not been previously established or recognised. AS I understood Justice Gleeson's judgment, he was of the same view.

Justice Priestly. on the meaning of "could" in s. 9 (1) said this:
It seems to me that by far the most likely meaning of "could", so far as this example is concerned is "would, if the facts were found proved at a trial". If that is right then the same meaning would fit the other possibilities equally well, and I can see nothing requiring any different construction of "could" in connection with those possibilities.

Towards the end of his judgment, Justice Priestly made this observation:
Putting it in another way, it is my opinion that in s.9 (1) (a) cases the definition of ss 7, 8 and 9 work together with the empowering subs (3) of s (13) to give the Commissioner power to say: ***I find facts (a) to (n); they constitute corrupt conduct within s. 8; if accepted by a relevant tribunal as proved beyond reasonable doubt they would constitute a particular***

criminal offence; therefore the conduct is corrupt conduct for the purposes of the Act.

Justice Priestly went on to deal with a formula of words for s.9 (1) (b) and (c) situations predicated upon much the same formula but modified to take account of the terms of each of the subsections. He summed up his approach by saying: *What I have said can be put in short by saying "could" means "would, if proved."*

The first point to be made of a review of the approach of the Court of Appeal to the significance of the "could" test in s. 9 is to note that it appears that Justice Priestly was in the minority. His judgment on this issue received no support from Chief Justice Gleeson. Indeed, as noted above, Justice Gleeson's approach was to accept the language of s.9 as it stood. It was Justice Gleeson's approach that the facts as found by the Commissioner would not have satisfied the "could" test viewed objectively, without the need to go beyond the everyday understanding of "could" as used in s.9.

Justice Mahoney also appears to have accepted the significance of "could" in section 9 as carrying a meaning that equated to its ordinary usage. It was only Justice Priestly who opted for the "could " means "would if proved" option.

In those circumstances my argument is the meaning of "could" in section 9 (1) (a) or (b) or (c) has not been "authoritatively" determined by the Courts. Indeed, at least two of the three judges (Gleeson CJ and Priestly JA) appear to have recognised that like a chameleon it changes it meaning, because of context, between s 9(1) (a) and 9 (1)(b) and 9 (1)(c).

It can also be noted that the headnote appearing in the authorised report of *Griener's* case makes no mention of any holding by the Court of an authoritative meaning of either the s. 8 test for corrupt conduct or the s.9 filter "could constitute or involve".

One further point can be made about Justice Priestly's formulation in respect of any s.9 (1)(a) based finding of corrupt conduct. Justice Priestly

would allow for a finding of corrupt conduct on facts (a) to (n) if those facts were accepted by a relevant tribunal as proving beyond reasonable doubt a known offence." Frankly, that is the appropriate test for the laying of a charge. A Magistrate before referring a charged matter, or a Coroner investigating a given matter, must have reached a position where he or she has formed an opinion that there are reasonable prospects facts (a) to (n) are capable of satisfying a jury beyond reasonable doubt. If Justice Priestly's formulation is the "authoritative determination" relied upon by the ICAC – those facts (a) to (n) would not have reached a standard above that relied upon by police when laying a charge. In such circumstances it should not be allowed to carry the label of "corrupt conduct".

The second point made by Mr McClintock is that the ICAC as well as ordinary citizens have acted upon the basis of an established judicial construction of corrupt conduct. Let me seek to answer that argument.

Thus far I have sought to establish there is no "authoritative" determination by the Courts – at least based on *Griener's* case. By contrast when a Magistrate or Coroner comes to a point where he finds a prima facie case, or "a known person has a case to answer" as the case may be, each has a prescribed formula of words for referring the matter to the DPP. This is a matter I addressed in paragraph 102 of my Report.

If there is an "authoritatively determined" provision, that provision was not specifically referred to in the Commission's report, leaving open the very real question of whether or not it was relied upon in the Commission's Operation Vesta s.9 (1) (a) and (b) and (c) determinations. Nor, as best I remember since I read them, was any such reference to an "authoritative" determination of what constitutes corrupt conduct made by Counsel Assisting in the submissions he produced to the Commission and various parties.

There is a strong case for arguing that a universal standard of likelihood of criminal prosecution should apply to referral of matters to the Director of Public Prosecutions, namely referral should only occur in circumstances where the likelihood of an actual prosecution for a

criminal offence is a reasonable prospect. If that standard cannot be reached on the available admissible evidence, referral to some other authority (e.g. a relevant police force) for further investigation should be an option.

There is a strong case for arguing that a consistency in legislative approach provides a best outcome for investigative tribunals (by which I mean Magistrates, Coroners and the ICAC) in the use of an established formula of words appropriate for each tribunal to use when referring matters to prosecution.

There is also a strong case for arguing that there should be a universal standard relied upon for referrals for prosecution by investigative agencies, predicated upon reasonable prospects of conviction of a known offence on the known facts.

There is also merit in Justice Priestly's concept of a separate but similarly expressed and importantly appropriate formula of words in respect of s.9 (1) (a) and (b) and (c) findings – thereby providing some level of consistency in approach within the section 9 categories.

The Inspector's comments assert "ordinary citizens" have acted upon the basis of the purported judicial construction he advocates exists. Can I draw attention to a number of comments made by the Court of Appeal justices in *Griener's* case, which might challenge any assumption ordinary citizens understood the nuances of s.8 and s.9 of the ICAC Act:

- The ICAC Act contains a definition of corrupt conduct which is both wide and, in a number of respects unclear" – Gleeson CJ
- For example where an alleged criminal offence is involved, a determination that a person *has* engaged in corrupt conduct is necessarily based upon a finding that the conduct of the person *could* constitute a criminal offence. In the pubic perception, the <u>conditional</u> nature of the premise upon which it is based, could easily be obscured by the <u>unconditiona</u>l form of such a conclusion. Ibid.
- [T]he description of the conduct of Mr Greiner and Mr Moore as "corrupt" is not a description which, in the ordinary and proper use

of language, would be applied to it. What was done was done by them openly; in the belief that it involved no breach of the law; and upon the advice of the Departmental Head of the Premiers Department that that was so… It would ordinarily and apart from the Act be wrong to describe that conduct as "corrupt". Insofar as injustice has been caused by the Commission's report, it is because the description of the conduct as "corrupt" is to this extent misleading. (Mahoney JA)

- Insofar as there is injustice of this kind, it cannot be remedied by a formal order of the court. The Commission has reported that the conduct is "corrupt conduct" because, in the circumstances, the act requires that it do so. Ibid
- The investigatory function of the Commission is easy to misunderstand. The Commission's procedures and the publicity the Act authorises to be given to them can easily lead to its pronouncements being confused with those of the courts. However the difference is fundamental… Priestly JA
- The confusion that can be created was well-illustrated in the present case. The Commissioner's report was published on 19 June 1992. Later that day I saw a newspaper placards, and soon afterwards headlines, saying "Greiner corrupt". Those words were a natural enough summary of the report, but all the same oversimplified the true position to the point of inaccuracy. That fault was not all that of the newspapers, but flowed at least in part from the Act, both for reasons already touched on and others I come now come to. Ibid.

Another argument against my First Recommendation is that amendment of the "could" tests in section 8 and 9 "*would deprive the ICAC of much of its investigative power because such power is based on the definition of "corrupt conduct".* This argument by Mr McClintock also touches my third Recommendation, where I seek to distinguish between criminal based corrupt conduct and untoward conduct that qualifies as only disciplinary or termination material.

The first answer to that is the ICAC is there to expose "serious corrupt conduct" and "systemic corrupt conduct". A fair overview of the history

of ICAC public hearing investigations is the remarkable number of petty matters it has been involved in. Over the same period true serious corrupt conduct and systemic corrupt conduct has been unmasked and exposed by investigative journalists found in masthead newspapers and investigative TV programs. There may be some debate as to who has been the more effective.

There may also be some debate as to whether the ICAC Act definition of of "corrupt conduct" being as wide as it currently is, bears some responsibility for the current level of petty matters being dealt with by way of public inquiry. My argument is Operation Vesta is an example of a non-serious partiality issue using valuable public resources where no financial loss, detriment, or impost of any other nature was experienced by any public authority.

In respect of my other Recommendations I rely generally upon arguments advanced in my report.