Inquiry into the reputational impact on an individual being adversely named in an ICAC investigation

Additional questions for ICAC witnesses provided to the ICAC on 7 October 2020

Question proposed to the Chief Commissioner:

1. **How many complaints have been made to or referred to the ICAC for each year since the commencement of the ICAC in 1988 until present?**

   Although established in 1988 by the *Independent Commission Against Corruption Act 1988* (the ICAC Act), the Commission did not commence operations until March 1989. T**able A** sets out the number of complaints and reports of suspected corrupt conduct received by the Commission in the period from March 1989 to 30 June 2020.

Questions proposed to the Chief Commissioner and Mr Waldon:

These questions are regarding the two documents being Annexures "A" and "B" to Mr Richard Poole's submission [Submission 14].

2. **At the time the two documents were created, was the ICAC aware that legislation would be introduced into Parliament that, if enacted, would have the effect of preventing the proposed court orders being made?**

   The two documents referred to in this and following questions are:

   A. a letter dated 23 April 2015 from the Crown Solicitor's Office to Messrs Price, Hilliard, Batrouney and Morris concerning litigation involving the Commission and Messrs Travers Duncan, John McGuigan, Richard Poole, John Atkinson and John Kinghorn (**Document A** – copy attached); and
   B. a notice dated 6 May 2015 from the President of the Court of Appeal concerning a declaration proposed to be made in the matters of Duncan, McGuigan and Atkinson (**Document B** – copy attached).

   In responding to the question, it is helpful to set out relevant contextual information.

   In July 2013 the Commission published its Operation Jasper report *Investigation into the conduct of Ian Macdonald, Edward Obeid senior, Moses Obeid and others* (the Jasper Report).

   In the Jasper report the Commission made a number of factual findings concerning the conduct of Messrs Duncan, McGuigan, Poole, Atkinson and Kinghorn. The Commission found that they knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which they were investors, would be jeopardised. The Commission found that they therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement and took various steps

with the intention of deceiving relevant public officials or public authorities (see pages 148 – 153 of the Jasper report).

The Commission found that the conduct of each of Messrs Duncan, McGuigan, Poole, Atkinson and Kinghorn was corrupt conduct for the purpose of s 8(2) of the ICAC Act because their conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over that tenement or the official functions of any public official or public authority considering whether to grant a mining lease over the tenement and could also involve fraud and/or company violations. In each case, these the findings with respect to s 8(2) of the ICAC Act were based on the Commission's then interpretation of that section as including conduct of a person who was not a public official where such conduct could adversely affect, either directly or indirectly, the "efficacy" of the exercise of official functions.

For the purposes of s 9(1)(a) of the ICAC Act the Commission was satisfied that the conduct could constitute either a criminal offence of obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900* or an offence under s 184(1) of the *Corporations Act 2001*.

In October 2013, Messrs Duncan, McGuigan, Poole, Atkinson and Kinghorn commenced proceedings in the NSW Supreme Court seeking a declaration that the corrupt conduct findings made against them in the Commission's Operation Jasper report were wrong in law and a nullity.

On 29 July 2014, the Supreme Court made orders dismissing with costs the summonses filed by Messrs Duncan, McGuigan, Poole and Atkinson (see *Duncan & Ors v ICAC* [2014] NSWSC 1018).

The Supreme Court found however that the elements of s 184(1) of the *Corporations Act 2001* had not been satisfied on the basis that, even accepting the directors were "intentionally dishonest" in their dealings that did not occur in the exercise of any of their powers as directors, nor in the discharge of any of those duties (see [207]). As the finding of corrupt conduct against Mr Kinghorn rested on the Commission being satisfied that his conduct could constitute or involve an offence under s 184(1) of the *Corporations Act 2001* and not also under s 192E(1)(b) of the *Crimes Act 1900*, the Supreme Court made a declaration that the corrupt conduct finding made against him was not made according to law and was a nullity.

Messrs Duncan, McGuigan, Poole and Atkinson each filed a summons seeking leave to appeal. The Commission filed a summons seeking leave to appeal the decision concerning Mr Kinghorn on the basis that the Court had erred in its interpretation of s 184(1) of the *Corporations Act 2001*.

On 15 April 2015, before the appeals could be heard, the High Court judgement in *ICAC v Cunneen* was delivered.

As the Commission then had no arguable basis to sustain its appeal in the Kinghorn proceedings the Commission consented to the dismissal of its summons seeking leave to appeal (see page 4 of Document A). The consent orders were filed on 28 April 2015. That brought an end to the Kinghorn proceedings. It is however relevant to note that in the subsequent decision of *Duncan v ICAC* [2016] NSWCA 143, the Court of Appeal disagreed with

the primary judge's interpretation of s 184(1) of the *Corporations Act 2001* and found that a deliberate failure to disclose relevant information in circumstances where there is a duty of disclosure and with full knowledge of the relevant facts could be seen to be "intentionally dishonest" for the purpose of that section. In these circumstances, had the Commission's appeal with respect to Mr Kinghorn proceeded, it is likely the appeal would have been successful.

As noted in Document A, although the Commission was prepared to consent to orders granting leave to Messrs Duncan, McGuigan, Atkinson and Poole to appeal, allowing their appeals, setting aside the primary judge's orders and declaring in their place that the corrupt findings against them were invalid, it was, for the reasons set out in Document A, necessary for their matters to be dealt with by a panel of three judges of the Court of Appeal.

The Commission was concerned that the High Court decision in *Cunneen* impacted upon a number of past investigations and two then current investigations, being operations Spicer (investigation into NSW liberal Party electoral funding for the 2011 State election campaign and other matters) and Credo (investigation into dealings between Australian Water Holdings Pty Ltd and Sydney Water and related matters), in both of which public inquiries had been conducted. The Commission was also concerned that the decision in *Cunneen* restricted the conduct that could be investigated by the Commission in the future.

It was public knowledge that the Commission wanted the NSW Government to amend the ICAC Act in light of the High Court decision in *Cunneen* and that such amendment should operate retrospectively.

On 20 April 2015, the Commission issued a public statement regarding the High Court decision in *Cunneen* in which the Commission advised that it had made a submission to the NSW Government to consider, as a matter of priority, amending s.8(2) of the ICAC Act to ensure the section could operate in accordance with what the Commission contended was its intended scope and that any such amendment operate retrospectively (**Document C** – copy attached).

The fact the Commission had made such a submission to the NSW Government was specifically brought to the attention of Messrs Duncan, McGuigan, Atkinson, Poole and Kinghorn on 23 April 2015 (see page 2 of Document A).

While the Commission hoped that the NSW Government would accept its submission and amend the ICAC Act, as at 23 April 2015 (the date of Document A), the Commission did not know what if any legislation might be introduced into Parliament in response to the High Court decision in *Cunneen* let alone how any such legislation might affect the orders proposed in Document A.

On 25 April 2015 the then Premier, the Hon Mike Baird, was reported in the Weekend Australian as being open to retrospective legislation that would overcome the judgement in *Cunneen* (**Document D** – copy attached).

Commission records indicate that on 27 April 2015 Commissioner Latham met with Premier Baird and was advised that the Premier's current intention was to introduce legislation into Parliament when Parliament resumed that would preserve past findings of corrupt conduct. The precise timing of when such legislation would be introduced into Parliament was not communicated to the Commission and the Commission was not provided with a draft of any legislation or given details of the content of the proposed legislation.

On 4 May 2015, the proceedings involving Messrs Duncan, McGuigan, Atkinson and Poole were adjourned for the purpose of constituting a bench of three judges of the NSW Court of Appeal to make orders to finalise the matters.

On 5 May 2015, the Department of Premier and Cabinet (DPC) provided the Commission with a "confidential consultation draft" of the Independent Commission Against Corruption Amendment (Validation) Bill 2015 (the Bill). The Commission was advised that the Government "may" introduce the Bill into Parliament as early as 6 May 2015 although the advice was that the timing had not been confirmed.

On 7 May 2015, the Commission was formally notified by DPC that the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (the Validation Act) was passed by both Houses, assented to, and came into force, on 6 May 2015.

3. **At the time these two documents were created, did the ICAC have any reason to believe the proposed court orders would not be made? If yes, what were those reasons and when did the ICAC become aware of them?**

As noted above, the proposed orders in the Kinghorn matter were made by way of consent orders filed on 28 April 2015.

At the time Document A was created (23 April 2015), while the Commission hoped that the NSW Government might amend the ICAC Act, it had no commitment from the Government as to whether or in what way the ICAC Act would be amended. As of 23 April 2015, being the date on which Document A was created, the Commission's position was as stated in that document and the Commission had no reason to believe the proposed orders would not be made.

As noted in response to Question 2 above, by the afternoon of 5 May 2015, the Commission was aware that the NSW Government intended to introduce an amending Bill into Parliament and was aware of the terms of the Bill. The Commission was also aware as of that date that if the Bill, in the form provided to the Commission, was passed by the Parliament then, once it became law, there would be a proper basis for the Commission not to consent to the orders previously proposed by the Commission in Document A with respect to Messrs Duncan, McGuigan, Atkinson and Poole.

Document B is dated 6 May 2015. Either during the course of that day or early the following day the Commission became aware that the Validation Act had been passed and received assent. As a result, the Commission's position had changed and there was then a proper basis for resisting any orders of the kind proposed in Document B with respect to Mesrs Duncan, McGuigan, Atkinson and Poole.

4. **When did the ICAC become aware that legislation would be introduced into Parliament that, if enacted, would have the effect of preventing the proposed court orders being made?**

See response to Question 2 above.

5. **When did the ICAC become aware of when the validation legislation would be introduced into Parliament?**

   See response to Question 2 above.

6. **When did the ICAC notify the other parties to the litigation of the timing of this legislation being introduced into Parliament?**

   Document A put Messrs Duncan, McGuigan, Atkinson, Poole and Kinghorn on notice that the Commission had made a submission to the NSW Government requesting it consider, as a matter of priority, amending s 8(2) of the ICAC Act with retrospective effect.

   Messrs Duncan, McGuigan, Atkinson and Poole were notified once the Commission was advised that the Validation Act had been passed and granted assent.

7. **When did the ICAC notify the Court of the timing of this legislation being introduced into Parliament?**

   The matters involving Messrs Duncan, McGuigan, Atkinson and Poole came on before the Court of Appeal on 8 May 2015. At that time the Court of Appeal was formally advised by the Commission's legal representatives that the Validation Act had been passed and received assent.

8. **Were the parties to this litigation the only persons and bodies with then-current litigation on foot to have ICAC findings set aside?**

   Of the parties referred to, Mr Kinghorn was the only person to have his finding of corrupt conduct declared a nullity (see *Duncan & Ors v ICAC* [2014] NSWSC 1018). None of the other parties, or any other party with litigation on foot during the relevant period, had any findings made by the Commission set aside.

9. **Was any other person affected by the validation legislation in the same way as the other parties to this proceeding? If yes, how many persons were so impacted?**

   On 30 April 2015, each of Andrew Poole, Craig Ransley and Michael Chester filed a summons in the NSW Supreme Court seeking declarations that the corrupt conduct findings made against them in the Commission's August 2013 Operation Acacia report were wrong in law and a nullity. These summonses were filed as a result of the High Court decision in *Cunneen.*

   Following enactment of the Validation Act, consent orders were filed in September 2015, discontinuing the proceedings involving Messrs Poole and Chester on the basis that each party bear its own costs. Mr Ransley did not respond to an invitation to agree to discontinue proceedings. On 28 September 2015, orders were made in the Supreme Court dismissing his summons with costs.

   The Validation Act amended the ICAC Act to validate anything done or purporting to have been done by the Commission prior to 15 April 2015 that would have been validly done if

corrupt conduct included conduct that adversely affects or could adversely affect the "efficacy" of the exercise of official functions.

Between 1989 and 2015 the Commission made over 1,200 findings of corrupt conduct affecting over 800 individuals. An analysis of those corrupt conduct findings undertaken in June 2015 for the Independent Panel on Review of the ICAC identified findings of corrupt conduct made against 128 people in 37 reports in circumstances where the conduct solely affected the "efficacy" of the exercise of public official functions. The effect of the Validation Act was to "validate" those corrupt conduct findings.

10. Did the ICAC work with the government in the framing of the validation legislation?

The Commission was not involved in drafting the Bill.

11. What was the full involvement of the ICAC in the development of the scope and content of the validation legislation?

The Commission did not develop the scope and content of the validation legislation. That was a matter for the NSW Government. As noted in response to Question 2, the Commission made a submission to the NSW Government requesting the ICAC Act be amended and that such amendment operate retrospectively.

12. In relation to the current jurisdiction of the ICAC, do you agree that the current legislation in substance embodies "what Justice Gaegler had said" in the Cunneen matter? [See evidence of Mr McClintock, p53 about halfway down the page].

Mr McClintock gave the following evidence at page 53 of the transcript of the Committee's proceedings on 18 September 2020:

> *That was the basis upon which Mr Gleeson and I made the recommendations that ultimately became legislation in relation to — we basically adopted, with some modifications, what Justice Gageler had said. I can give you the reference. It was to pick up things about not so much what Ms Cunneen had done — It is subsection 2A of section 8 of the Act.*

The Commission agrees that s 8(2A) of the ICAC Act embodies in substance matters identified by Gageler J in *Cunneen*.

Section 8(2A) was inserted into the ICAC Act by the *Independent Commission Against Corruption Amendment Act 2015* (the 2015 Amendment Act). Section 8(2A) expanded the definition of "corrupt conduct" to conduct of any person (whether or not a public official) that impairs or that could impair, public confidence in public administration and which could involve any of the following matters:

a) collusive tendering,
b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
d) defrauding the public revenue,
e) fraudulently obtaining or retaining employment or appointment as a public official.

Section 8(2A) gave effect to Recommendation 1 in the 30 July 2015 report of the Independent Panel on Review of the ICAC (the Review Report).

Paragraphs 5.4.3 and 5.4.4 of the Review Report refer to the judgement of Gageler J in *Cunneen.* Reference is made to Gageler J noting that limiting s8(2) of the ICAC Act to conduct which affects the probity of the exercise of official functions would exclude from the scope of corrupt conduct fraud, such as widespread collusion among tenderers for government contracts and serious and systemic fraud in applications for licences, permits or clearances under statutes designed to protect health or safety or designed to facilitate the management and commercial exploitation of resources.

The Independent Panel noted that his examples are cases of serious fraud, for private gain, practised upon public administration, which have the potential to undermine its capacity to serve or protect the public interest. The Independent Panel considered this was something that could, and should, properly be regarded as corruption. That gave rise to Recommendation 1.

TABLE A – number of complaints and reports received by the Commission in the period from March 1989 to 30 June 2020

Financial Year	Complaints - section 10	Reports - section 11	Total
1989-90	916	175	1091
1990-91	761	2908	3669
1991-92	942	2962	3904
1992-93	1087	3951	5038
1993-94	642	6245	6887
1994-95	724	7125	7849
1995-96	990	9643	10633
1996-97	1190	5411	6601
1997-98	1168	1736	2904
1998-99	1091	1490	2581
1999-00	1000	1534	2534
2000-01	959	411	1370
2001-02	1014	394	1408
2002-03	1113	620	1733
2003-04	1527	677	2204
2004-05	1527	516	2043
2005-06	1329	495	1824
2006-07	1235	522	1757
2007-08	1655	579	2234
2008-09	1522	674	2196
2009-10	1555	586	2141
2010-11	1512	638	2150
2011-12	1403	812	2215
2012-13	1400	756	2156
2013-14	1700	674	2374
2014-15	1544	641	2185
2015-16	1093	605	1698
2016-17	1096	650	1746
2017-18	1264	646	1910
2018-19	1220	789	2009
2019-20	1037	728	1765
Total	**37216**	**55593**	**92809**

Annexure A

Crown Solicitor's Office

[redacted]

23 April 2015

[redacted]

By email

Dear all

Duncan v Independent Commission Against Corruption
McGuigan and Poole v Independent Commission Against Corruption
Cascade Coal and Ors v Independent Commission Against Corruption
Atkinson v Independent Commission Against Corruption
Independent Commission Against Corruption v Kinghorn

I refer to the High Court judgment in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 ("*Cunneen*") and to the correspondence that has been sent by the parties since the delivery of judgment regarding the implications of that judgment for the above proceedings.

The purpose of this letter is to set out the Commission's position on the following two issues:

- the effect of *Cunneen* on the five proceedings listed above; and
- the appropriate process for now resolving or otherwise dealing with each of the five proceedings.

Beyond addressing these matters, I do not propose to respond in detail to the various criticisms of the Commission that have been made in recent correspondence from the parties. I observe, however, that it has been necessary for the Commission to give careful consideration to the substantive and procedural implications of *Cunneen*, which differ as

between the different proceedings, as explained in more detail below. The Commission does not accept the suggestion that it has delayed unduly in responding to *Cunneen*, let alone the suggestion that it has done so for an improper purpose.

Effect of *Cunneen*

In *Cunneen*, a majority of the High Court concluded that, in order for conduct to "adversely affect" the exercise of official functions within the meaning of s. 8(2) of the *Independent Commission Against Corruption Act 1988* ("*ICAC Act*"), it must adversely affect the "probity" of the exercise of those official functions: at [3]. On the majority's construction, the "probity" of the exercise of those official functions is only adversely affected where the exercise of official functions constitutes or involves conduct falling within s. 8(1)(b) (the dishonest or partial exercise of functions) or s. 8(1)(c) (a breach of public trust) or s. 8(1)(d) (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): see, for example, *Cunneen* at [42], [46], [55], [62].

As announced publicly on 20 April 2015, the Commission has made a submission to the NSW Government to consider, as a matter of priority, amending s. 8(2) with retrospective effect. Of course, the law as declared by the High Court in *Cunneen* stands unless and until it is amended by appropriate legislation.

Based on the law as it currently stands, the Commission's position is that the following findings made by it in its report Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others, dated July 2013, were beyond power:

- that Mr Travers Duncan engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject of the Duncan proceedings);
- that Mr John Kinghorn engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject the Kinghorn proceedings);
- that Mr John McGuigan engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject of the McGuigan proceedings);
- that Mr Richard Poole engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is also the subject of the McGuigan proceedings); and
- that Mr John Atkinson engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject of the Atkinson proceedings).

Accordingly, based on the law as it currently stands, the Commission would consent to orders:

- granting leave to appeal in the Duncan, McGuigan and Atkinson proceedings, allowing the appeals, setting aside the primary judge's orders in those proceedings and, in place of those orders, declaring the corrupt conduct findings against Messrs Duncan, McGuigan, Poole and Atkinson invalid. The issue of costs should be dealt with separately, as addressed below;
- dismissing the summons seeking leave to appeal in the Kinghorn proceedings, with costs.

The Cascade Coal proceedings are in a different category. The Commission's position is that *Cunneen* has no relevant impact on the validity of the recommendations, and any alleged findings, made in its report Operations Jasper and Acacia – addressing outstanding questions, dated December 2013 (which are the subject of the Cascade Coal proceedings). The Commission continues to oppose the orders sought in those proceedings.

Next steps

Duncan, McGuigan and Atkinson proceedings

The fact that the parties consent to orders in the above terms is not, on its own, sufficient for the Court of Appeal to make those orders. The Court of Appeal must be satisfied that it is appropriate to allow the appeals (which requires it to be satisfied that there was error on the part of the primary judge: see *Young v King* [2013] NSWCA 364). The Court of Appeal must also be satisfied that it is appropriate to issue declaratory relief: see *KJD York Management Services Pty Ltd v City of Sydney Council* [2006] NSWLEC 218 at [19]-[22]. While those should prove to be relatively straightforward matters, it is clear that the Court of Appeal must, in addition to receiving the parties' proposed short minutes of order, receive some evidence and short submissions on the effect of *Cunneen* on the relevant findings against Messrs Duncan, McGuigan, Poole and Atkinson.

There is also a question as to whether orders in the above terms can be made by a single Judge of Appeal or whether they must be made by three judges. In the Commission's view, the orders must be made by three judges (even if they are made with the consent of the parties). In particular, the granting of declaratory relief does not fall within the power conferred on a single Judge of Appeal by s. 46(1)(a) of the *Supreme Court Act 1970*. That is because the granting of declaratory relief involves an exercise in evaluation and discretion on the part of the Court: see *Shafron v ASIC* [2012] NSWCA 255.

Accordingly, the Commission's position is that the Duncan, McGuigan and Atkinson proceedings cannot be finally disposed of at the next directions hearing on 4 May 2015, or at an earlier time, unless there are three judges available to deal with the matter. Given it is certain that there are three judges available on the current hearing dates of 15-17 June 2015 (which it will be necessary to preserve for the Cascade Coal proceedings, as discussed below), one option is for the matter to be dealt with at the commencement of that hearing with the opportunity to file short written submissions beforehand on the appropriateness of the orders sought. However, if the Court is able to convene three judges to deal with the matter at an earlier time, the Commission would not oppose that course provided, again, that there is the opportunity to file short written submissions beforehand.

In respect of costs, the Commission suggests that the following costs orders be made:

1. In respect of the costs of the proceedings before McDougall J, each party to bear their own costs.

2. In respect of the appeal proceedings, each party to bear their own costs up to the date on which the applicant in each proceeding filed its amended summons relying on the *Cunneen* decision and/or the reasoning in the *Cunneen* decision; the Commission to pay each applicant's costs from that date as agreed or assessed.

The Commission suggests that any dispute regarding what costs orders are most appropriate can be dealt with on the papers.

Kinghorn proceedings

The position differs in relation to the Kinghorn proceedings. As noted above, based on the law as it currently stands, the Commission would consent to orders dismissing the summons seeking leave to appeal with costs, as per the proposed short minutes forwarded to me on 16 April 2015. A single Judge of Appeal has the power to make such an order under s. 46(1)(c) of the *Supreme Court Act 1970*. Such an order could be made by a Judge of Appeal at the next directions hearing on 4 May 2015.

Cascade Coal proceedings

As noted above, the Commission's view is that *Cunneen* does not affect the validity of the recommendations and alleged findings that are the subject of the Cascade Coal proceedings. On that basis, and on the assumption that the applicants in that matter wish to maintain the appeal, it will be necessary to preserve at least some of the hearing dates of 15-17 June 2015 for the purpose of dealing with those proceedings.

Directions on 4 May 2015

The President of the Court of Appeal has listed all five proceedings on 4 May 2015 "to ascertain the position of all parties to the various appeals". At that directions hearing the Commission intends to explain its position, as outlined in this letter, on the effect of *Cunneen* and how the five proceedings should be dealt with.

Yours faithfully

[redacted]

Annexure B

The President
Court of Appeal
Supreme Court
Sydney

6 May 2015

Dear Legal Representatives,

Re:
2014/00239426 - Travers William Duncan v Independent Commission Against Corruption
2014/00249038 - John Vern McGuigan v Independent Commission Against Corruption
2014/00319803 - John Charles Atkinson v Independent Commission Against Corruption

The Court constituted in this matter is the Chief Justice, the President and Justice Basten.
The Court has had the opportunity of considering the submissions of the parties and the draft short minutes of order provided by the parties.
Subject to any further submissions the parties may wish to make, the Court is presently minded to make a declaration in the following form in each matter:

> Set aside the orders of the Supreme Court of New South Wales in proceedings 2013/325031 dated 29 July 2014 insofar as they concern [insert name] and, in place thereof, declare that the Independent Commission against Corruption had no jurisdiction to determine, as recorded in the report entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others* ' dated July 2013 that [insert name] had engaged in corrupt conduct within the meaning of s 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW).

As this form of declaration is different from the orders proposed by the parties in each matter, the Court considers it appropriate that there be an opportunity for the parties to address the proposed form of declaration indicated above. The parties may also wish to address the court on the timing of the making of the final orders.

Accordingly, the matter is to be listed at 9.15 am on Friday 8 May 2015. It is anticipated that the matter will not extend beyond one hour. It will not be necessary for counsel to robe.

Yours Faithfully,

[redacted]

The Hon Justice M Beazley

[redacted]

[redacted]

Document C

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

PUBLIC STATEMENT

Monday 20 April 2015

Public statement regarding *ICAC v Cunneen*

The decision in this matter about the scope of section 8(2) of the *Independent Commission Against Corruption Act 1988* by the majority of the High Court of Australia adopted a construction of the section that had never previously been argued or accepted since the ICAC's inception.

The narrow construction given to section 8(2) by the Court will substantially damage the Commission's ability to carry out its corruption investigation and corruption prevention functions.

The decision means that the Commission will be unable to investigate or report on several current operations, and will severely restrict its ability to report on Operations Spicer and Credo.

It has the potential to involve the State of NSW and the Commission in costly and protracted litigation involving persons who have been the subject of corrupt conduct findings based on investigations conducted under section 8(2), and will affect current litigation involving such findings.

It also has the potential to call into question the prosecutions and convictions of persons where evidence against them was obtained during Commission investigations based on section 8(2).

In the Commission's view, the narrow construction adopted by the majority in the High Court is contrary to the legislative intention evidenced by the second reading speech when the ICAC Act was first introduced, the analysis of the section in the report of the McClintock review of the ICAC Act and the ordinary meaning of the words used in the section.

In the circumstances, the Commission has made a submission to the NSW Government to consider, as a matter of priority, amending section 8(2) to ensure that the section can operate in accordance with its intended scope and making any such amendment retrospective.

The Commission will be making no further comment on this matter at this time.

Contact: Nicole Thomas, 02 8281 5799 / 0417 467 801

Document D

isentia

Weekend Australian, Australia
25 Apr 2015, by Mark Coultan

General News, page 7 - Size: 234.00 cm²
National - Circulation: 227,486 (S)

ID 398920259 BRIEF 1NSW-ICAC

Corrupt won't get away with it: Baird

EXCLUSIVE

MARK COULTAN
NSW POLITICAL CORRESPONDENT

NSW Premier Mike Baird says people found corrupt by ICAC should not get away with it because of the High Court decision that restricted its powers.

Mr Baird said he was open to retrospective legislation that would overcome the judgment.

"I am open to what is required to ensure that those who have been found corrupt don't get away with it," he said.

The Independent Commission Against Corruption this week said it would drop its defence of corruption findings against businessmen involved with Cascade Coal, which paid Eddie Obeid $30 million for a coal lease over his family's farm, and then disguised the Obeids' involvement in the deal.

Asked if he was concerned about people having their corruption findings overturned, Mr Baird said: "Of course it concerns me, and of course it's not fair ... Anyone who thinks they can get away with corrupt activity in this state, well, they are wrong.

ICAC has made a submission to the government to amend its legislation to overcome the judgment, saying the ruling meant it would be unable to investigate or report on several current operations, and would severely restrict its ability to report on completed investigations into Australian Water Holdings and illegal donations to Liberal candidates.

It also claimed the judgment had the potential to involve the state in costly litigation as people tried to overturn corrupt findings, would endanger prosecutions, and was against the intent of parliament when it passed the ICAC Act.

Last week, the High Court ruled ICAC had no jurisdiction to investigate NSW Deputy Crown Prosecutor Margaret Cunneen, accused of counselling her son's girlfriend to fake chest pains to avoid a police breath test

The architect of ICAC, Gary Sturgess says he would be "disturbed" by any such retrospective revision of the legislation.

"(Former NSW premier Nick) Greiner and I have argued the Cuneen decision is not just a word game by lawyers," he writes in *The Weekend Australian* today.

"The High Court has interpreted section 8 to mean what we intended it to mean when we drafted that section a quarter of a century ago. ICAC's decision to abandon the corruption findings against some of the businessmen caught up in the Obeid case does not change that.

"They might be a rather unpleasant group of individuals. They might even have broken some law. But unless they have conspired to corrupt some public official, it is not the responsibility of a body charged with fighting public corruption.

"ICAC is proposing a fundamental change to its terms of reference. It is arguing that it should be transformed into a different sort of organisation, and if that is to happen, it should be the subject of extensive public debate."

The High Court decision has ramifications for a series of private individuals who have been found guilty of corrupt conduct in the past for "adversely influencing" public officials.

GARY STURGESS P27