

# **Inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations**

**Opening Statement – Richard Poole 11.30 am 2 December 2020**

Honourable Parliamentary Members of the Committee,

Thank you for taking the time to look at this matter.

For the purposes of brevity, I propose to take my submission as read and only provide an aide-mémoire.

In summary, in my case, ICAC under Commissioner Ipp, were over-zealous in their pursuits and got it severely wrong, (indeed have admitted they got it wrong), in so doing they caused tremendous lasting and untold ongoing damage to me and my associates respective family's well-being and to our respective careers.

I am supported in stating that ICAC got it wrong by:

- the High Court determination in Cunneen, as to what constitutes corrupt conduct;
- by admission and agreement in writing from ICAC that the findings should be declared invalid; and
- by proposed Supreme Court orders amended and confirmed by the court made up of the Chief Justice, the President of the Supreme Court and one other senior member of the Court.

Despite ICAC admitting and agreeing that the finding against me was wrongly made and should be declared invalid, ICAC did not actually accept the ruling of the High Court of Australia and move to rectify wrongs, as you might expect from a guardian against corruption with high moral and ethical standing, but in fact, put the government in an unenviable position, by asking and actively lobbying for retrospective legislation to rectify their egregious error.

This is practically unheard of.

It is made worse as at the same time as lobbying the government, ICAC were in the Supreme Court, representing that they had accepted the High Court of Australia's determination in Cunneen and consented to the findings against me and others being overturned. This lack of disclosure of dual purpose goes to the heart of many ICAC investigations and was arguably a breach of their duty as officers of the court and certainly not how a model litigant would be expected to act.

It appears likely that the government was put under pressure, was rushed and agreed to the legislation without members fully understanding or being fully briefed on the admissions of ICAC and the representations being made by ICAC to the Supreme Court.

Certainly, many parliamentarians were unaware of the full picture. In the event, the result of the lobbying was the hastily drafted Validation Act. It was stated in the preamble that this Act was not to change the High Court determination.

In fact, the Explanatory Note to the Bill clearly states "The Bill does not reverse the High Court decision, but validates action taken by ICAC.....". The Act effectively validated the incorrect and illegal actions of ICAC. There was no change to the definition of what amounts to corrupt conduct as set by the High Court of Australia yet ICAC withdrew its consent to the proposed order overturning my corruption finding.

Consequently, to this day I remain innocent of any corrupt conduct in accordance with the High Court findings yet still have a finding of corrupt conduct over my head. To illustrate the point, if as at today, I repeated my actions and was involved in exactly the same events the subject of the ICAC's inquiry, there would be no finding of corrupt conduct and there could not be one. I have always been innocent of corrupt conduct both under the law of the land yesterday and today.

With the greatest respect to those who argue a finding of corrupt conduct by ICAC is just the finding of an administrative body, they are failing to appreciate the status and weight put on a corrupt conduct finding made by a state sanctioned Independent Commission against Corruption.

To this day (9 years later) the effects are an ongoing issue as they go to character and have to be explained consistently in nearly all new relationships, whether business based or social. In terms of business they include some affects you may not have thought of, such as the ability to raise funds for projects in the capital markets, licence style applications including good character tests, anything that includes a character test, access to banking payment gateways, listing applications to the ASX, insurances and pretty much any form of business association or contract involving participation in a joint endeavour.

It is unlikely that I will get an opportunity to make any commentary on much to do with ICAC ever again, so after 10 years of living and breathing ICAC issues, it is with the greatest respect I would like to make a few hopefully pertinent observations that may stimulate some debate and enable me to seek an order from the Supreme Court formally invalidating the finding made against me.

**1) I formally request that the Committee consider and support an appropriate amendment to the Validation Act to enable anyone who has had a finding made against them by ICAC, in contravention of the definition of corrupt conduct as defined by the High Court of Australia, to seek an order from the Supreme Court declaring the finding invalid.**

**2) I am fully supportive of an exoneration protocol. I set out below a brief overview of my thoughts on how an exoneration protocol should be dealt with.**

### **Going forward**

Given the serious nature of a finding of corrupt conduct, I believe that it is now beyond time to recognise the seriousness of the offence, that one size offence does not fit all, and to work to improve how we as a society meet community expectations both of enforcement and a just system whilst dealing with the scourge of corrupt conduct.

#### **i) Legislation**

- Corrupt Conduct should be elevated and not be a finding of an administrative body.
- We as a society need to be clear about what is not acceptable behaviour and enshrine the current developments of what is and what is not corrupt conduct into law and subject to our well-developed judicial system.
- Corrupt Conduct should be defined where possible in more detail than the current category style, broken into levels or types of corrupt conduct to allow for various tiers of seriousness and made as a set of distinct offences with different attached penalties. Whether that is a fine, community service, a jail term or something in between (civil penalties, criminal penalties etc).
- Standards of proof required should be clear and well understood ie balance of probabilities or beyond reasonable doubt.
- By creating a range of offences and penalties, it will assist with successful prosecutions.

- By placing the legislation within the judiciary, we maintain the check and balances of our legal system (with appropriate appeal rights) without creating a parallel system of justice and prescribed penalties will apply to fit.

## ii) Investigation and Enforcement

- ICAC should be maintained and maintain its unique coercive powers to investigate allegations of corruption.
- It should do this as an independent body and make recommendations as to prosecutions for the corrupt conduct offences to the DPP.
- As a protection against political influence, a process could be established whereby ICAC has the right to request a review by the Supreme Court on decisions not to prosecute with suitable safeguards for identities.
- The creation of tiered offences means there will be a higher chance of successful prosecution, more trials and corrupt conduct trials will attract sufficient attention to the issue of corruption.
- Given the above it then makes sense, that as a step in the process, ICAC can and should conduct its investigations in private. This ensures that unproven allegations do not have a reputational effect. Public servants and politicians will only have to fear ICAC if they have genuinely done something wrong and not suffer from a public airing of many private details.
- ICAC should be encouraged to collect evidence in a manner that is capable of being utilised in a court. With the modern infiltration of electronic devices into today's world blended with ICACs other powers and tiered offences, prosecutions should flow accordingly.
- By structuring corrupt conduct charges in this way, we sharpen the blunt mallet approach, formalise the range of offences, recognise that all corrupt actions are not the same, make prosecution easier and penalties can adjust to fit the seriousness of the offence.
- Holding hearings in private ensures that a referral to the ICAC does not terminate a person's career or negatively affect their community standing unless and until sufficient evidence is gathered for a prosecution and in the normal course that prosecution proceeds
- As ICAC retains its investigatory powers it still has the same ability to sniff out and stamp out corruption as lower tiered offences will be easier to prove.

## Transition Arrangement

Whilst we move to the above system, in relation to previous findings or allegations, given the very severe effects of an ICAC finding or allegation, I would recommend that if no formal action has been commenced within 2 years by the DPP, then affected persons should have the right to apply to the Supreme Court for an order seeking that they be immediately exonerated.

ICAC can consent or should be required to prove any allegation to a minimum level of on the balance of probabilities and higher if required by the court. The court should set the standard of proof required following submissions.

I also wish to state that I would benefit from the recommendations above and declare my interest.

Thankyou

Richard Poole