ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

Submission of the Independent Commission Against Corruption

Review by the Committee on the ICAC of the of the Inspector of the ICAC's *Report pursuant to section* 77A Independent Commission Against Corruption Act 1988*, Operation Hale*

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Tab 2 Letter dated 3 December 2015 from the Inspector to the Commissioner responding to the letter of 2 December 2015.

Tab 3 Letter dated 14 May 2015 from the Inspector to the Commissioner requesting information about what action the Commission proposed to take with respect to Operation Hale.

Tab 4 Letter dated 15 May 2015 from the Commissioner to the Inspector responding to the Inspector's letter of 14 May 2015.

Tab 5 Letter dated 15 January 2016 from the Commissioner to the ICAC Inspector identifying errors in the *Report of the Inspector of the ICAC, pursuant to section 77A* Independent Commission Against Corruption Act 1988*, Operation Hale* and identifying relevant information.

Tab 6 Letter dated 3 February 2016 from the Inspector to the Commissioner responding to the Commissioner's letter of 15 January 2016 and enclosing two legal opinions of Messrs Blackburn SC and Kulevski.

Tab 7 Statements of the Commission officers who had served the notice to produce on Ms Margaret Cunneen on 30 July 2014.

Tab 8 Extracts taken from the full report of Ms Cunneen's iPhone regarding the matter investigated by the Commission and provided by the Commission to the Director of Public Prosecutions (DPP) with the material referred on 27 May 2015.

Introduction

1. This submission of the Independent Commission Against Corruption ("the Commission") is made for the purpose of the review of the *Report of the Inspector of the ICAC, pursuant to section 77A Independent Commission Against Corruption Act 1988, Operation Hale* ("the Report"), by the Committee on the ICAC ("the Committee").

2. In summary, the Commission's submission is that the Report is so fundamentally flawed that it cannot be relied upon and should be withdrawn. The Report is flawed because the Inspector of the ICAC ("the Inspector") failed to give proper consideration to material available to him and failed to afford the Commission and Commission officers procedural fairness.

3. The Report contains adverse findings that:

   (a) do not reveal the factual basis upon which they are made

   (b) are not reasonably open on the basis of all the material available to the Inspector

   (c) are not reasonably open if the Inspector had afforded Commission officers the opportunity to respond to them.

Denial of procedural fairness

4. It is a fundamental principle of Australian law that, absent a clear legislative intention to the contrary, decisionmakers must provide procedural fairness to those who may be affected by their decisions. This requires that a person who may be the subject of adverse findings is given notice of those potential findings and provided with a proper opportunity to put information and submissions to the decisionmaker before such findings are made. That opportunity encompasses the ability to put before the decisionmaker matters of significance to the fact-finding exercise, and to rebut or qualify by further information or submission adverse material from other sources that is before the decisionmaker. It also involves being informed of any potential adverse finding that is not obviously open on the material known to be available to the decisionmaker. This process helps ensure that the decisionmaker is made aware of all relevant material so that ultimate findings are accurate.

5. The Inspector had a duty to provide procedural fairness to Commission officers who could be adversely affected by the Report. He failed to do so.

6. The Commission has obtained counsel's advice confirming that the Inspector owed a duty of procedural fairness to those persons who could be adversely affected by the contents of the Report. The Inspector's denial of procedural fairness provides grounds for the ICAC Commissioner ("the Commissioner") and other affected Commission officers to commence judicial review proceedings.

7. The Report contains a number of adverse findings affecting the Commissioner and other officers of the Commission. These include:

   (a) It was unreasonable for the Commission to pursue the matter within its jurisdiction, as it was then understood (p 62). The first recommendation in the Report includes a finding that the Commission's failure to bring to bear, at the earliest opportunity, a "sensible consciousness of proportion" when determining to conduct a preliminary investigation in this matter was "unreasonable, unjust and oppressive in a serious way" (p 64).

(b) The relationship between the Commissioner and Ms Cunneen was "somewhat more than merely professional but both professional and personal for a period in excess of 25 years at the time that the ICAC became apprised of the information conveyed by the Commonwealth agency in 2014 (pp 60-61). It did not appear "that there was any consciousness of the potential for either the fact or the perception of conflict of interest in the Commission by reason of her not making a delegation under section 107(6)" of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") (p 61). Recommendation 2 includes a finding that the conflict of interest by reason of the relationship between the Commission and persons the subject of the investigation "was so stark" as to be "unreasonable, unjust and oppressive in a serious way" (p 64).

(c) The issuing by the Commissioner of section 22 notices to produce served on Ms Margaret Cunneen, Ms Sophia Tilley, and Messrs Gregory and Stephen Wyllie, requiring production "forthwith" amounted to "an abuse of power and serious maladministration" and was "contrary to law" (p 18 and Recommendation 3, p 64).

(d) The referral of material to the DPP for consideration of disciplinary proceedings against Ms Cunneen is described as "unreasonable, unjust and oppressive"(p 51).

(e) The media release issued on 27 May 2015 was "another example of unreasonable, unjust, oppressive maladministration on the part of the ICAC" and "an abuse of the powers reposed in [the Commission]" (pp 56-57 and 65).

8. There are other generally adverse findings and comments made in the Report.

9. Some findings are clearly made against the Commissioner. Some other findings are expressed to be against the Commission. However, given that the functions of the Commission are exercisable by the Commissioner (see section 4(3) of the ICAC Act) it is clear that these findings also relate to the Commissioner.

10. Some findings affect other Commission officers. For example, the findings concerning the "unlawful" service of the section 22 notice to produce on Ms Cunneen on 30 July 2014 may

be imputed to those Commission officers who attended upon Ms Cunneen to serve the notice. The adverse comments about the "farcical" execution of search warrants may be imputed to those Commission officers who undertook the execution of the warrant.

11. At no stage was the Commissioner or other Commission officers given any notice of potential adverse comments or findings under consideration by the Inspector. This is made clear in the Report where the Inspector notes that he had not spoken with the Commissioner "on any aspect of Operation Hale" (p 61) and "I have interviewed nobody from the ICAC" (p 4).

12. The impact of the findings on the reputation of the Commissioner and the Commission officers involved in the investigation is obvious.

13. This denial of procedural fairness is, to say the least, surprising given previous comments by the Inspector of the process he proposed to adopt. On 7 August 2015, during the course of the Committee's hearing on the review of the 2013-14 annual reports of the Commission and the Inspector, the Inspector gave the following evidence:

> ***Reverend the Hon. FRED NILE:*** *Have you sought an explanation from ICAC as to why they pursued Operation Hale, the Cunneen matter, so vigorously and what resources and expenditure were involved in that particular matter?*
>
> ***Mr LEVINE:*** *I would prefer not to answer that because I am still in the process of, firstly, examining the material that ICAC has been good enough to provide me. Secondly, I propose to get counsel's advice on certain aspects, including the telecommunications one; and, thirdly, once I have put my material together I will be in a better position to approach ICAC and say, 'What do you say about A, B, C and D?' But I have not worked out yet what precisely A, B, C and D are."*[1]

14. The Commissioner wrote to the Inspector on 2 December 2015 specifically raising the issue of procedural fairness. That letter noted:

[1] Transcript of hearing, 7 August 2014, p 8.

In the Australian newspaper of today's date, it is reported that you intend to furnish your report into Operation Hale to the Parliament on Friday 4 December 2015. Since your announcement of an audit into that investigation, the Commission has provided you with all the material that was within the Commission's power to provide. I note that there are no outstanding requests for information and the Commission has not been provided with any notice of adverse comments or findings in respect of its conduct of the investigation. You would, of course, appreciate that the Commission and Commission officers are entitled to procedural fairness by way of an opportunity to respond to any criticism in advance of finalisation of the report. Such an opportunity allows for the existence of any misgivings or doubts about the validity of the exercise of the Commission's powers to be re-evaluated, dispelled or confirmed, as the case may be.

15. A copy of this letter is provided as part of this submission (**Tab 1**).

16. The Inspector replied to the Commissioner's letter on 3 December 2015, but did not address the request for procedural fairness. A copy of the Inspector's response is included as part of this submission (**Tab 2**).

17. The Inspector's letter of 3 December 2015 refers to other correspondence (being a letter from the Inspector dated 14 May 2015) concerning a proposal for a "meeting" between the Inspector and the Commissioner. This proposal, however, does not concern an opportunity to be advised of, or to address, potential adverse findings. In his letter of 14 May 2015, the Inspector sought information from the Commissioner as to what action the Commissioner proposed to take with respect to Operation Hale in light of the passing of the *Independent Commission Against Corruption Amendment (Variation) Act 2015*, indicated he was minded to continue his investigation and that he would be happy to meet to discuss the matter. By letter of 15 May 2015, the Commission advised the Inspector that the Commission was still considering its course of action. It is clear from the correspondence that what was being mooted by the Inspector had nothing to do with any process to afford procedural fairness. A copy of this correspondence is included as part of this submission (**Tabs 3** and **4**).

18. The Report was made public on 4 December 2015. The Inspector did not provide the Commission or any Commission officer with notice of any adverse findings and did not provide the Commission with any notice as to when the Report was to be provided to Parliament.

19. On 15 January 2016, the Commissioner wrote to the Inspector concerning the Report. This letter identifies errors in the Report and sets out information the Commission would have provided to the Inspector had the Commission been afforded the opportunity to address proposed adverse findings. A copy of this letter is provided as part of this submission (**Tab 5**).

20. On 3 February 2016, the Commission received the Inspector's response to its letter of 15 January 2016. The Inspector's response fails to address the lack of procedural fairness or other specific matters in the Commissioner's letter going to the accuracy of the findings in the Report. A copy of this response is included as part of this submission (**Tab 6**).

Material available to the Inspector

21. The Commission submits that even on the material available to the Inspector, conclusions reached by him were not reasonably open.

22. The Commission will provide to the Committee a list[2] of the material provided to the Inspector on 14 November 2014 and a copy of the material subsequently provided to the Inspector by the Commission at the Inspector's request. The material provided to the ICAC Inspector is collectively referred to in this submission as "the Inspector Material".

23. As the Committee is aware, section 64(2) in Part 7 of the ICAC Act provides:

    Nothing in this Part authorises the Joint Committee:

    (a) to investigate a matter relating to particular conduct; or

    (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or

    (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

24. The Commission is not providing the Inspector Material for the purpose of the Committee undertaking any of the matters set out in section 64(2) of the ICAC Act. The Commission, however, considers that it can and should make the Inspector Material available to the Committee for the purpose of assisting the Committee in its inquiry into the Report. Without that material it is not possible for the Committee to evaluate the Inspector's findings and recommendations.

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[2] The Commission is providing the Committee with a list only of the material provided to the Inspector on 14 November 2014 to avoid unnecessary duplication in the bundle. There is duplication because the Inspector has asked the Commission to provide the bulk of the material on two occasions. The material on the list that is not part of the bundle the Commission has provided to the Committee comprises a number of volumes of correspondence, plans and reports, draft and working documents. If required, the Commission is able to provide the Committee with any specific document listed.

The telecommunications interception information

25. The Commission has given consideration to whether it can lawfully provide to the Committee lawfully intercepted information ("the TI Material") disseminated to the Commission by the Australian Crime Commission (ACC) which is relevant to the assessment of the Report.

26. The ACC disseminated the TI Material to the Commission pursuant to section 68 of the *Telecommunications (Interception and Access) Act 1979* ("the TIA Act").

27. The TIA Act places stringent controls on the use and communication of intercepted information and interception warrant information.

28. Those controls meant that it was not lawful for the Commission to provide the TI Material to the Inspector. The Inspector accepted that this is the position at law.[3] The Commission understands, however, that the Inspector obtained the TI Material directly from the ACC and that it was therefore available to the Inspector when he was preparing the Report.

29. The Commission submits that it is relevant for the Committee to consider the TI Material as part of its deliberations on the reasonableness of the findings in the Report. The Commission considers that the TIA Act does allow provision of this material to the Committee in the circumstances of this hearing.

30. Section 74 of the TIA Act provides that a person may give lawfully intercepted information (and interception warrant information) in evidence in an "exempt proceeding".

31. An "exempt proceeding" is defined in section 5B(1)(f) of the TIA Act as "any other proceeding (not being a proceeding by way of a prosecution for an offence) in so far as it

[3] Page 27 and Appendix C of the Report.

relates to alleged misbehaviour, or alleged improper conduct, of an officer of the Commonwealth or of a State."

32. "Proceeding" is relevantly defined in section 5 of the TIA Act as:

(b) a proceeding or proposed proceeding, or a hearing or proposed hearing, before a tribunal in Australia, or before any other body, or authority or person in Australia having power to hear or examine evidence; or

(c) an examination or proposed examination by or before such a tribunal, body, authority or person.

33. As the Committee's hearing is before a body in Australia having power to hear or examine evidence, the Committee's hearing is likely to fall within the broad definition of a "proceeding" for the purpose of the TIA Act. A parliamentary committee has the power to summons persons before it to give evidence: see for example, section 4 of the *Parliamentary Evidence Act 1901* and Standing Order 208 (which provides that a committee has the power to send for and examine persons).

34. The Committee's hearing is an "exempt proceeding" as a proceeding that relates to alleged misbehaviour or alleged improper conduct of an officer of a state. This is because:

(a) the Commission has been advised that the Committee hearing is for the purpose of examining the Report and that although there are no terms of reference for the hearing, the Report itself will provide the parameters for the hearing.

(b) the Report contains findings affecting the Commissioner and Commission officers that involve alleged misbehaviour or improper conduct on the part of the Commissioner and those officers

(c) the Commissioner and officers of the Commission come within the definition of an "officer of the State" in section 6G of the TIA Act.

35. The Commission has obtained counsel's opinion that this provides a reasonable basis on which the Commission could provide the TI Material to the Committee. The Commission will tender to the Committee the TI Material.

The use of the material provided to the Committee

36. Nothing in section 64(2) of the ICAC Act prevents the Committee from considering the findings, recommendations, determinations or other decisions of the Inspector in relation to a particular investigation or complaint, provided the Committee does not otherwise engage in an investigation or reconsideration of the type prohibited by section 64(2), for example, an investigation or reconsideration of the merits of particular conduct or a decision of the Commission or of a Commission officer.

37. The Commission submits that the Committee is able to consider the findings and recommendations in the Report, provided it is limited to an assessment of the reasonableness of those findings and recommendations and for that purpose may have regard to:

(a) the information set out in the Report, (including information the Inspector was provided by Ms Cunneen)

(b) the Inspector Material, including information in that material the Inspector failed to consider or take into account

(c) the TI Material, the same information having been provided to the Inspector by the ACC

(d) information the Commission could have provided to the Inspector, had the Commission been afforded procedural fairness.

The nature of misconduct and maladministration

38. Misconduct in section 57B(1)(b) of the ICAC Act includes abuse of power and impropriety. At law, misconduct means "wrongful, improper or unlawful conduct, motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts."[4] It must be deliberate in character, not negligent or careless.

39. Maladministration is defined in the ICAC Act at section 57B(4) as conduct that involves action or inaction of a serious nature that is:

    (a) contrary to law, or

    (b) unreasonable, unjust or oppressive or improperly discriminatory, or

    (c) based wholly or partly on improper motives.

40. There is, accordingly, a measure of overlap between what constitutes "misconduct" and "maladministration" under section 57B of the ICAC Act. Both terms derive their meaning from the context in which they appear. That statutory context dictates that both misconduct and maladministration must be deliberate or wilful or, at the very least, recklessly indifferent. It is not sufficient if the action or inaction is careless or negligent. Negligence or carelessness would, however, be caught by section 57B(1)(a) of the ICAC Act.

41. As this submission has noted, the Report includes a number of findings that are in effect findings of misconduct and/or maladministration by officers of the Commission. These findings include those set out in paragraph 7 of this submission.

42. The Report specifically excludes the application of section 57B(4)(c) of the ICAC Act. In that regard the Report makes no finding that any person had an improper motive (p 62). Nonetheless, the findings in the Report can only be justified on the basis that the Inspector concluded that:

[4] Butterworths Concise Australian Legal Dictionary, 3rd ed.

(a) the decision to conduct an investigation was unreasonable, unjust and oppressive to the knowledge of the Commissioner and the relevant Commission officers who recommended that course of action, or they did so with reckless indifference in that respect

(b) upon the existence of facts assumed in the Report, the Commissioner, knowing the existence of those facts, failed to appropriately manage a conflict of interest or the apprehension of such a conflict, knowing that such a failure was unreasonable, unjust and oppressive

(c) the Commissioner issued the relevant Notices to Produce "forthwith" in the knowledge that it was unlawful to do so and an abuse of power, or at least with reckless indifference in that respect

(d) the Commissioner referred certain material to the DPP knowing that it was unreasonable, unjust or oppressive, or recklessly indifferent in that respect

(e) the Commission's release of the media statement on 27 May 2015 was a deliberate abuse of power and was done in the knowledge that it was unreasonable, unjust, oppressive, or with reckless indifference in that respect.

43. The Report does not in terms make any of these factual findings and does not refer to any part of the material to which the Inspector had access that might support (or detract from) such factual findings. It is clear from a consideration of that material that none of these factual findings are reasonably available.

44. Independently of the unavailability of the above findings, each of the findings of misconduct and/or maladministration is infected by error. These errors are dealt with in detail in the following submissions dealing with the Report recommendations.

Recommendation 1 – The decision to investigate

45. The Report recommends:

> *That the ICAC and its decision makers bring to bear, at the earliest time when it considers itself sufficiently apprised of appropriate information, a sensible consciousness of proportion when determining whether or not it should embark upon a preliminary investigation of material that has come to its attention by whatever means. By "sense of proportion", I am referring to a rational and balanced observation and decision making process with respect to the matter by itself, and in the context of the ambit of the statutory criteria, and the history of their application in relation to the investigation of conduct asserted to be "corrupt". The failure to do so would be (as it was here) unreasonable, unjust and oppressive in a serious way.*

46. The Commission submits that the inference in Recommendation 1, that the Commission did not have regard to the functions and objects of the Commission and relevant statutory criteria when determining what action it should take in connection with the information it received from the ACC on 2 July 2014, is not reasonably available on the basis of the material to which the Inspector had access. Further, the Inspector failed to consider relevant information that would have been available to him, had the Commission been afforded procedural fairness.

47. The Commission submits that the Report does not identify what the Commission is said to have taken into account when assessing the information it received, the criteria to which the Commission submitted that information and why the Commission was in error in taking into account and applying that criteria. The Report also does not identify irrelevant information that the Commission is said to have taken into account or irrelevant criteria the Commission is said to have applied. The Report does no more than substitute the Inspector's own assessment of the information received by the Commission, and on the

basis that the Commission's assessment is different, concludes that the Commission's assessment was "unreasonable, unjust and oppressive in a serious way".

48. The Report suggests that the Commission ought to apply a test to information it receives about corrupt conduct that involves a comparison exercise to determine whether the information falls within the range of matters the Commission has in the past investigated. To the extent that that type of comparison exercise was undertaken in the Report, the Commission submits that the exercise was flawed. The Report only considered investigations the Commission has conducted that involved a public inquiry and is not representative of the range of investigations the Commission actually undertakes.

49. Around 15 per cent of preliminary investigations the Commission undertakes involve a public inquiry. The limited investigations canvassed in the Report demonstrate a broad range and the difficulty in neatly categorising those matters. For example, one of the investigations canvassed, Operation Dewar (page 9), was an investigation of a single incident, involving an alleged summary offence, by a senior public official. The Commission submits that the opinion expressed in the Report that, "*Operation 'Hale' ... does not certainly, in the end, fall within the general range of matters outlined [in the report]*" is not in fact evident in the range of investigations canvassed in the Report and is unsupported.

50. Unlike the subjective evaluation process recommended in the Report, the actual assessment exercise the Commission undertakes in deciding what action it should take with respect to information it receives about alleged corrupt conduct is based on a range of criteria having regard to the functions and objects of the Commission. Some criteria are specifically required by the ICAC Act.

51. The decision to conduct a preliminary investigation is made having regard to the purpose of undertaking that kind of inquiry. The purpose of a preliminary investigation is to assist the Commission to discover or identify conduct that might be made the subject of a more complete investigation or decide whether to make particular conduct the subject of a more

complete investigation.[5] It is not possible to predict whether a preliminary investigation will expose other, or more serious or systemic corrupt conduct.

52. The decision to conduct a preliminary investigation necessarily involves a value judgment. In exercising that judgment the Commission regards the protection of the public interest and the prevention of breaches of trust as paramount and, as far as is practicable, directs its attention to serious corrupt conduct or systemic corrupt conduct and takes into account the responsibility and roles of public authorities and public officials to prevent corrupt conduct.[6]

53. In assessing the information the Commission receives about corrupt conduct it is required by the ICAC Act to,[7] and does, take into account:

    (a) whether the subject matter of the investigation is trivial

    (b) whether the alleged conduct is too remote in time to justify an investigation

    (c) the apparent veracity of the information, and in the case where the information has come to the Commission as a complaint, whether the complaint was frivolous, vexatious or not made in good faith.

54. In assessing whether the conduct alleged is considered serious the Commission considers, for example, whether the conduct may involve the commission of a serious criminal offence, the role and seniority of the public official alleged to be involved, the relationship and impact the alleged conduct has on the integrity of that role and the value, benefit or detriment alleged to have flowed from the conduct.

55. The Commission may also consider:

    (a) competing or operational priorities

    (b) the level of resources, technical skill or powers required to deal with a matter

[5] Section 20A(2) of the ICAC Act.
[6] Section 12 and 12A of the ICAC Act.
[7] Section 20 of the ICAC Act.

(c) the likely existence of evidence or productive lines of inquiry to pursue the information

(d) the potential for the Commission to provide prevention advice on systemic issues

(e) whether the matter can be more appropriately dealt with by another authority

(f) whether the matter has already been considered and dealt with by another authority, and, if so, the outcome of that consideration.

56. The basis and the reasoning for the finding that the Commission's decision to conduct the investigation was "unreasonable, unjust and oppressive in a serious way", is not apparent from the text of the Report. The Report has not addressed, in any coherent way, the information the Commission possessed in relation to the matter and the statutory and other criteria the Commission actually took into account or, alternatively, failed to take into account, in determining to conduct the investigation.

57. The appropriate test is whether it was objectively reasonable to conduct the investigation, accepting that the matter was within the Commission's jurisdiction as it was then understood. The Report finding in this regard is inconsistent with the referral of the matter from a Commonwealth law enforcement agency on the basis that the Commission was the appropriate investigation agency, the inability of the Commission to refer the matter to another agency without offending against the TIA Act, and the "fundamental proposition" accepted in the Report that the commission of an offence against the administration of justice by a senior legal practitioner is a matter of great significance (p 54).

58. For the reasons outlined in the Commission's letter to the Inspector of 15 January 2016 (**Tab 5**), the Commission submits that the finding in the Report that the material in support of the allegation concerning Ms Cunneen was weak, unreliable, and lacking in cogency and credibility (p 62) is untenable having regard to the material that was available to the Inspector.

Recommendation 2 – Conflict of interest

59. The Report recommends that:

> *Operation "Hale" evidences a compelling need that from the outset of the ICAC's involvement in any matter, however referred to it, there be sensitivity to the fact of, or the danger of the perception of, a conflict of interest by reason of any relationship that may be exposed or is in fact self-evident, between the ICAC and the persons the subject of its attention. The situation here was and is so stark as to warrant the repetition of the closing sentence of [recommendation] (1).*

60. The community has a right to expect that all Commission officers perform their duties in a fair and unbiased way, and that decisions they make are not affected by self-interest, private affiliations or the likelihood of personal gain or loss. For this reason the Commission is sensitive to the perception of conflicts of interest in connection with any relationship between Commission officers and persons or interests that may be the subject of the Commission's attention.

61. The Commission submits that the inference in Recommendation 2, that in conducting an investigation into alleged conduct by Ms Cunneen it was not appropriately sensitive to this issue, is not reasonably available on the basis of the material the Inspector considered. The Commission submits that the conclusion in the Report that the Commissioner had an actual or perceived conflict of interest by reason of a close professional and personal relationship with Ms Cunneen for a period in excess of 25 years is based on erroneous facts and a failure to take into account relevant facts. These factual matters are dealt with in the Commissioner's letter to the Inspector of 15 January 2016 (**Tab 5**).

62. The Commission submits that the inference in the Report that the Commissioner was, or appeared to be, biased toward or against Ms Cunneen is unsupported and not reasonably available on the basis of the material that was available to the Inspector having regard to the nature of the "deliberative processes" undertaken by the Commissioner. The Report

does not identify the relevant legal test applied to such a finding and the Report otherwise applies an erroneous and subjective test, namely whether, *"a person in the position of Ms Cunneen would be concerned (and is concerned) that a person in the position of the Commissioner might be or appear to be biased or predisposed to bias one way or, to compensate, the other way vis-a-vis Ms Cunneen"* (p 61).

63. It has long been settled that the test for apprehended bias is objective. In that sense, it is not Ms Cunneen's concerns, or that of a person in the position of Ms Cunneen, that are material, but that of a lay, "fair-minded reasonable observer". The facts that are said to give rise to the alleged bias or apprehended bias must be clearly identified, and also how those facts logically and reasonably did cause, or might cause, a fair-minded reasonable observer to apprehend that the Commissioner would not undertake anything other than a neutral assessment of the particular determinations she was required to make in the course of the investigation.[8] The standard of proof to be applied to these questions is on the balance of probabilities, but there must be cogent evidence supporting the finding.[9] None of these matters are addressed in the Report.

[8] See for example: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337*; Isbester v Knox city Council* (2015) 89 ALJR 609 *and Duncan v Ipp* (2013) 304 ALR 359 as cited most recently in *McCloy v Latham* [2015] NSWSC 1879.
[9] See Dixon CJ, Williams, Webb and Fullagar JJ in *R v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116 as cited in McLoy v Latham [2015] NSWSC 1879 at paragraph 46: *"The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons."*

Recommendation 3 – The "unlawful" notices to produce

64. The Report recommends that:

> *As should be abundantly clear, the ICAC should take exquisite care in the exercise of its powers to issue and serve "Notices to Produce". It is the view of this Inspectorate that a "Notice to Produce" forthwith is contrary to law. If something is required immediately the mechanism is a Search Warrant lawfully issued and lawfully executed. The resulting offence to privacy considerations is obvious.*

65. The Commission is concerned to ensure that any of its coercive processes, including notices to produce issued under section 22 of the ICAC Act, are only utilised on the basis of legally-sound documentation and relevant and accurate information. In all cases, there is consideration as to whether or not a coercive power needs to be exercised having regard to the principle that such powers should be exercised with restraint and with an awareness of their effect on the work and lives of individuals and companies who must comply with them.

66. The Commission submits that the inference in Recommendation 3 that it did not take the required standard of care when considering the issue, and actually exercising power under section 22 of the ICAC Act in connection with the production of Ms Cunneen's mobile telephones on 30 July 2014, is unsupported and not reasonably available on the basis of the material that was available to the Inspector. In so finding, the Inspector did not take into account relevant facts, circumstances and considerations pertaining to the Commission's decision to issue and exercise the section 22 power to require production of the mobile telephones. Some of the relevant facts, circumstances and considerations the Inspector failed to take into account are set out on page 9 of the Commissioner's letter to the Inspector of 15 January 2016 (**Tab 5**).

67. The Commission also submits that the finding in the Report that the notice to produce issued by the Commissioner to require the production of Ms Cunneen's telephones

"forthwith" was contrary to law, is erroneous and is contrary to the decision in *Egglishaw v Australian Crime Commission* [2010] FCAFC 82. This concern is outlined at page 4 of the Commissioner's letter to the Inspector of 15 January 2016 (**Tab 5**).

68. The basis for the finding in the Report that the issue of the section 22 notice was unlawful is also contrary to the joint opinion of Messrs Blackburn SC and Kulevski (see at paragraphs 17 and 29). The joint opinion was provided to the Inspector on or about 22 October 2015 and is included as the "second joint opinion" in Tab 6 of these submissions. It was made available to the Commission by the Inspector on 3 February 2016. The Commission notes that pages 21 to 26 of the opinion appear not to have been included in the document. The Commission has been informed by the Inspector that the opinion in that form was provided to the Committee on 6 January 2016 at the request of the Chair.

69. In the Report, the Inspector has quoted counsels' opinion on the question as to whether the "seizure" of Ms Cunneen's telephones at her home on 30 July 2014 under a section 22 notice was lawful. That question in the Report is answered, "No, the seizure was unlawful" (page 17). This quote is accurately transposed from counsel's opinion into the Report. However, counsel's answer in the opinion was not in fact a response to the question presented in the Report. Counsel's opinion does not support the finding in the Report, namely, that the section 22 notice requiring production "forthwith" was unlawfully *issued* (page 18). Counsels' actual opinion on this particular question was that, *"...on the state of the authorities, a notice pursuant to sec 22 of the ICAC Act may require production "forthwith" if production is compelled in otherwise lawful circumstances."*(second joint opinion, paragraph17).

70. The joint counsels did advise the Inspector that the section 22 notice was unlawfully *executed* on the basis that the notice did not authorise entry onto premises and seizure of property without the owner's consent. However, their conclusion about this matter must be read subject to the qualification made clear in the advice:

"... [W]e note that we have no information about what occurred on the evening (sic) of 31 July 2014 (sic) at the home of Ms Cunneen, other than the officers of the ICAC arrived with the notice and ultimately left with the iPhone and Nokia with Ms Cunneen asserting her privilege of self-incrimination. We do not know, for instance, whether and to what extent any consent was given to the ICAC officers to remain on the premises, what was said by the (sic) any of the persons present, and whether any objection was made about the Notice." (second joint opinion, paragraph 35)[10]

71. The joint counsels then proceeded to provide their advice on the erroneous assumption that Commission officers entered into Ms Cunneen's premises on 30 July 2014 without her consent, that no consent was given to remain on the premises and that the telephones were "seized" from Ms Cunneen by the Commission officers.

72. On 24 November 2014, the Commission provided the Inspector with the statements of the Commission officers who had served the notices to produce on Ms Cunneen and Mr Greg Wyllie on 30 July 2014. Those statements are provided with this submission (**Tab 7**). Those statements provide evidence that:

    (a) Ms Cunneen had in fact consented to the Commission officers entering her home.
    (b) Ms Cunneen knew at the time she gave that consent that the Commission officers were there to serve a notice on her relevant to a Commission investigation and were asking for permission to enter in order to serve that notice.
    (c) The reason for the Commission officers being present at Ms Cunneen's home was again fully explained to her after the officers had entered her home and at no time did Ms Cunneen request they leave. (In fact, shortly after the Commission officers had explained the reason for their visit and requested she produce her telephones, Ms Cunneen asked the Commission officers whether they would like a cup of tea with her.)
    (d) At no time when Ms Cunneen's partner was at the premises did he request that the Commission officers leave the premises.

[10] See also paragraph 69.

(e) No search of the premises was undertaken by the Commission officers and they did not move to any location of the premises other than that which they were invited to go by Ms Cunneen or her partner.

(f) Ms Cunneen and her partner themselves located the telephones and produced the telephones to the Commission officers under the notice.

(g) During the time the Commission officers were present in Ms Cunneen's home, Ms Cunneen made numerous telephone calls for the purpose of seeking legal advice, did in fact obtain legal advice and, as a result, both Ms Cunneen and her partner claimed privileges in relation to the production of the telephones.

(h) Ms Cunneen had the opportunity, and was in fact assisted by the Commission officers, to consider for herself the relevant provisions of the ICAC Act pertaining to the service of section 22 notices.

73. All of these facts were relevant to the lawfulness of the service of the section 22 notices and in respect of which the Inspector sought advice from the joint counsels. The advice reveals that none of this information was provided to the joint counsels by the Inspector. The Inspector has admitted in the Report that he read the advice. In reading the advice the Inspector would have read that the opinion of the joint counsels was qualified as indicated in paragraph 35 of the advice. The Inspector did not disclose this qualification in the Report or distinguish between the issue and the service of a notice to produce.

74. The Commission submits that the Inspector's findings in relation to the lawfulness of the section 22 notice failed to take into account the relevant facts set out in the statements of the Commission officers who executed the section 22 notices. The Inspector did not disclose any information or fact in the Report, including any statement made by Ms Cunneen or any other witness, that was inconsistent with or that contradicted the facts set out in the statements of the Commission officers. In support of the finding of unlawfulness, the Inspector relied upon "facts", namely the assumptions relied upon by the joint counsels, for which there was no evidence.

75. In the Report, the Inspector describes the Commission's execution of the search warrant on Ms Cunneen's premises on 7 August 2014 as a "farce" (page 1, 14 and 18). The joint counsels were instructed by the Inspector to advise him whether the execution of the warrant was a "sham and an attempt by the ICAC to retrospectively legitimise an unlawful seizure of the iPhone on 31 July 2014." (Second joint opinion, paragraph 44). The joint counsels were also instructed to consider, "... the peculiar nature of the execution of the Warrant in that the iPhone 'was brought onto the premises by the very persons executing the warrant...'" (second joint opinion, paragraph 44).

76. As to the second question, the joint counsels noted the facts in *Egglishaw v ACC* and commented that they "show the not terribly unusual nor necessarily objectionable situation whereby officials seek to lawfully seize what they know, suspect or fear may have been earlier seized unlawfully". The Commission submits that the opinion of the joint counsels provided no support, on this basis, upon which the Inspector could describe the execution of the warrant by Commission officers on 7 August 2014 as a "farce" or a "sham".

77. In relation to the first question, the joint counsels noted:

> *"...[T]here are other reasons why a government official may wish to seize something pursuant to a search warrant even if she or he believes an earlier seizure by other means was lawful. One significant example is that, under the ICAC Act, seizure pursuant to a search warrant would displace the privilege against self-incrimination."*

78. It is clear from their advice that the Inspector had provided the joint counsels with a copy of the Commission's application for the search warrant under which Ms Cunneen's iPhone was seized. It is clear from the advice that the joint counsels knew that the reason they had noted as a possible reason for the search warrant being sought (that is, to overcome the privilege claim), was in fact the reason given in the search warrant application for seeking the warrant. The joint counsels also noted that they had no knowledge that any person at the Commission had formed an opinion that the execution of the earlier section 22 notice was unlawful (second joint opinion, paragraphs 45 and 63). However, the joint counsels, at

paragraph 47 of their advice, state they "*proceeded on the instructed assumption that the officers of the ICAC were attempting to retrospectively legitimise earlier unlawful conduct.*" (emphasis added).

79. Once the "instructed assumption" is displaced, the opinion based on that assumption falls away. There was no evidence that could justify that assumption, or that (alleged) knowledge of earlier unlawful conduct was dishonestly omitted from the search warrant application by the Commission officer who made it.

Recommendation 4 – The referral of material to the DPP

80. The Report recommends that:

> *Referrals to other agencies under s.53 or otherwise must be fully documented as must, especially, a meeting such as that which took place on 19th May in this matter between the Commissioner and the Director of Public Prosecutions. This is vital in the event that a complaint is made, or the Commissioner on his (sic) own initiative, is compelled to require records of so critical and delicate an event. This warrants consideration of legislative amendment – compare s.90(2) of the* Police Integrity Commission Act *1996.*

81. The Commission's primary submissions in relation to the Inspector's finding that the referral of material to the DPP for consideration of disciplinary proceedings against Ms Cunneen was "unreasonable, unjust and oppressive" are set out on pages 5 and 6 of the Commissioner's letter to the Inspector of 15 January 2016 (**Tab 5**).

82. The Commission submits that the statement in the Report, *"[w]hat I would regard as the stark unfairness of nine years of the private affairs of Ms Cunneen and those of her friends (whether journalists or not) being placed before the DPP to fish out for what turns out to be apparently six minnows ..."* (p 50) is without any substance.

83. As the Commission has stated in its letter to the Inspector of 15 January 2016 (**Tab 5**), the foundational "fact" underpinning the above statement is wholly lacking. There was no material referred to the DPP that pre-dated 19 December 2011, contrary to claims in the Report that the Commission forwarded material from "Ms Cunneen's mobile telephone going back to 2005" to the DPP (p 3) . Also, the DPP did not have to *"fish out"* the relevant text messages for himself. The DPP was provided with extracts from the full report of Ms Cuneen's iPhone to assist his assessment. The Commission provided the DPP with eight extracts relating to four journalists as well as three extracts that dealt solely with text messages Ms Cunneen sent and received in relation to the accident in which Ms Tilley was involved on 31 May 2014. A copy of the three extracts that relate to the accident on 31 May

2014 (subject to the redaction of the private telephone number of the sending and receiving parties) is provided with these submissions (**Tab 8**).

84. The Commission asks the Committee to note the finding in the Report that it was open to lawfully refer the matter to the DPP on 27 May 2015 (p 50).

85. The Commission submits that, to the extent Recommendation 4 suggests that an amendment is required to the ICAC Act to ensure referrals under section 53 of the ICAC Act are fully documented, such an amendment is unnecessary. Commission referrals under section 53 of the ICAC Act are necessarily in writing, as was the case with the Commission's referral of material to the DPP on 27 May 2015. The purpose of the requirement to consult an agency prior to the referral of information under section 53 of the ICAC Act is to ensure the agency does not have any concerns or a reason not to accept the referral. Where there are no concerns or reasons not to accept the referral, the prior communication on the matter may simply be referred to in the letter of referral, as was the case in this instance.

86. The Commission submits that an amendment to the ICAC Act in the terms of section 90(2) of the *Police Integrity Commission Act 1996*, which would require the terms of a referral under section 53 of the ICAC Act to be in writing, is currently implied by the more extensive regime set out in sections 53 to 55 of the ICAC Act.

Recommendation 5 – The media release of 27 May 2015

87. The Report recommends that:

> *As to Media Releases, it should by now be obvious that great care and discretion be exercised in the composition of the document, the consideration of the purpose of its release, and the potential effect of its release. The Media Release of 27th of May 2015, in my opinion, as I have stated, was so disproportionate to the merits of the whole enterprise as to amount to an unwarranted indictment of the people involved, an abuse of an undoubted power to keep the public informed, as to warrant the most trenchant of criticism. It was, especially in the absence of any adverse findings, particularly unreasonable, unjust and oppressive. Nothing like this must happen again.*

88. The Commission relies upon the submissions in relation to the findings in the Report concerning the media release of 27 May 2015 that are set out on pages 6 and 7 of Commissioner's letter to the Inspector of 15 January 2016 (**Tab 5**).

89. The Commission asks the Committee to note the finding in the Report that is consistent with the opinion the Inspector obtained from the joint counsels, namely that the Commission did not breach the ICAC Act in publishing the media release on 27 May 2015.

90. The Commission submits that the finding in the Report that the media release fell *"just ... short of an assertion of guilt"* and that it was an *"indictment"* ignores the use of the terms, "allegation" and "alleged conduct" throughout the media release. The Commission submits that the proper test to be applied to the issue is whether the contents of the release are objectively unreasonable, unjust or oppressive. "Oppressive" in this statutory context also means unjust or unfair. The Report does not identify in what respect the media release is objectively false or misleading, such that it might qualify as unreasonable and unjust.

91. The Inspector expresses an opinion in the Report that the Commission should have said in the media release only that it had referred "criminal matters" to the DPP (p 53). However, the nature of the matter the Commission investigated was already in the public domain.

92. The Commission submits that the finding concerning the Commission's media release is also inconsistent with the statement in the Report at page 34 that the Commission has an obligation "to keep the public informed of the steps it proposed to take, of the views being held, of being transparent and accountable". In those circumstances the finding of an abuse of power also falls away.

Publication of the material provided to the Committee

93. The Commission submits that it is in the public interest that the Committee publish this submission and included documents at **Tabs 1** to **8**, provided in support of this submission. The Commission also submits that it is in the public interest that the Committee (subject to the redaction of personal telephone numbers of the calling and receiving parties) publish the transcripts and audio of the intercepts included in the TI Material that the Commission will tender in the hearing. In each case this is because:

(a) it is in direct response to the Report which has itself been made public

(b) it includes information that should have been taken into account had the Commission and Commission officers been afforded procedural fairness

(c) it undermines the basis for adverse findings made in the Report

(d) it addresses speculative, false and at times fanciful public commentary to which the Commission and its officers have been unfairly subjected and to which the Commission was unable to lawfully respond

(e) the failure to do so will continue to unfairly damage and undermine public confidence in the Commission and its ability to effectively carry out its functions.