Submission No 5

REPUTATIONAL IMPACT ON AN INDIVIDUAL BEING ADVERSELY NAMED IN THE ICAC'S INVESTIGATIONS

Name: Mr John Atkinson

Date Received: 7 July 2020

7 July 2020

Inquiry: Reputational impact on an individual being adversely named in the ICAC's investigations

Submission to the ICAC Committee

On 8 May 2020 the Committee announced an inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations with the following terms of reference:

"That the Committee on the Independent Commission Against Corruption (ICAC) inquire into and report on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:
a. whether the existing safeguards and remedies, and how they are being used, are adequate, and
b. whether additional safeguards and remedies are needed, and
c. whether an exoneration protocol should be developed to deal with reputational impact, and
d. relevant practices in other jurisdictions, and
e. any other related matters."

This Submission addresses these matters.

My Facts - Overview

Having enjoyed a very successful career as an international lawyer in Hong Kong and New York I returned to Australia to start a business career almost 20 years ago.

Since returning, I co-founded a private equity firm; have started a number of businesses; and became Chief Executive Officer of an ASX200 company. More recently I have co-founded two technology companies, which I am delighted to say, have received international recognition as innovators in their respective fields (Distributed Healthcare and Financial Services). Through the various companies I have been involved with as Founder, Co-Founder, CEO, Chairman or Investor, I have been able to generate well over 1000 jobs something of which I am very proud.

All that said, I was one of the investors and a Board member of Cascade Coal Pty Ltd. In 2009 Cascade legitimately won a public tender granting it two coal exploration licences.

The **creation** of these licences became central to a conspiracy theory prosecuted by ICAC in an inquiry called Operation Jasper.

After a long and complex Inquiry, in June of 2013, former Commissioner Ipp incorrectly and unlawfully issued a finding of Corrupt Conduct against me and other directors of Cascade Coal.

It is important to note that Commissioner Ipp did not find that Cascade, or any of the directors or investors (including myself) was involved in corrupt conduct in relation to the **creation** or **grant** of the coal exploration licences awarded to Cascade Coal. Nor was there any suggestion of any illegal dealings with public officials.

For reasons only known to him, Commissioner Ipp misapprehended and misapplied the legal test for what constituted "corrupt conduct", and unlawfully went beyond his statutory remit to make his adverse findings against me (and the other Cascade directors).

Why Commissioner Ipp did this is bewildering.

The transaction for which I was found 'corrupt' never involved any public officials which, of course, is fundamental to ICAC's jurisdiction. It was a very typical and lawful transaction between two corporate entities.

On reflection, you can only assume that the Commissioner and his staff had a pre-determined view of the outcome they wanted from the Jasper Inquiry and organized it, including the selective use of facts, around that hypothesis.

But what remains very odd is that at some point during the Inquiry there must have been a realisation that the case theory being prosecuted by the Commission was clearly not supported by the facts. However, rather than acknowledge that position, a positive decision must have been taken by someone to press on regardless. Why?

Perhaps the public expectation so successfully fuelled by Counsel Assisting (you will recall his theatrical opening remarks referencing the Rum Rebellion) and his symbiotic relationship with the media, meant that there was no turning back.

Or, perhaps there was external pressure applied to the Commission that, irrespective of the facts, encouraged them to deliver a result that publicly justified the expropriation of Cascade's legitimately won licenses.

Who knows?

But whatever the reason, the fact that Commissioner Ipp presided over an Inquiry that was so fundamentally flawed both in law and fact is troubling. Particularly when viewed through the lens of the extraordinary interactions uncovered between the Commissioner and the Executive government of the day.

These interactions between Commissioner Ipp, Premier O'Farrell and members of his senior staff before during and after the Jasper Inquiry are disturbing. Many of these dealings are referenced in the attached annexures (particularly Annexure F). I urge the Committee to read the annexures carefully and form their own views as to what motivated Mr Ipp to behave as he did.

However, whatever the motivation, the impact on my colleagues and me has been profound. Our reputations have been irreparably destroyed and our lives deeply impacted as a consequence - with no recourse available to us to right the wrong.

You may recall that when Commissioner Ipp handed down his damning findings against me and my colleagues in mid 2013, the Sydney Morning Herald showed a picture of all of us depicted behind bars on the front page of the newspaper with the tagline 'Guilty". We had been successfully portrayed by ICAC as criminals even though, as time has shown, we did nothing wrong.

The truth is that my Cascade colleagues and me were road-kill in a politically charged inquiry that clearly served a purpose for someone. We may never know why Commissioner Ipp was prepared to stretch his statutory remit beyond the realms of the law but what is certain, that in so doing, he successfully destroyed my hard-won reputation in the process.

My Experience: There is No Recourse For an Innocent Victim of ICAC

Since that time, I have tested every available forum to clear my name.

Having discussed the matter with my wife and agreeing that our family's integrity had been taken from us and that our children's future opportunities may suffer as a result, we decided to spend a significant amount of our family's savings challenging Commissioner Ipp's findings through all legal means available to us.

As former lawyers, we were both surprised and devastated to discover that there was no legal process for a merits review of an ICAC finding. All that was available through the Courts was to challenge Commissioner Ipp's findings in the Supreme Court on Administrative Law grounds.

As you know, the law limits this process to only examining whether Commissioner Ipp had followed correct legal procedure in coming to his findings. No review of the relevant facts or merits of the findings is possible.

You may be surprised to learn that I was actually successful in these proceedings - just not successful enough.

The Supreme Court overturned one of my two corruption findings. In fact, the Chief Justice determined that both findings should have been overturned. However, unfortunately for me, his other two colleagues disagreed with him on one issue meaning that one adverse finding relating to a theoretical breach of directors duties remained. However, albeit a limited success, I was disappointed but not surprised that the media coverage of my 'success' went virtually unnoticed.

From there, I turned my attention to complaining to the Inspector of ICAC under s57B of the ICAC Act. Again, the Inspector has no ability to review the merits of a Commissioners findings but he can investigate whether an abuse of power has occurred by an officer of ICAC.

I hoped that my well-researched and detailed complaints regarding Commissioner Ipp's conduct in the Jasper Inquiry would result in the Inspector launching an investigation under s57D of the ICAC Act, which would result in me being able to wrench back some self-respect. Sadly, as I detail later in this Submission, my experience with this process has been highly unsatisfactory. In fact, as I show, it has revealed serious flaws in the complaints process under s57B of the ICAC Act. Accordingly, I am asking that the Committee also review this issue as part of its inquiry.

With no further options available to me, I recently appealed directly to the Chief Commissioner, pleading with him to right the wrongs of his predecessor and help me clear my name. Relevant details are outlined in this Submission. Two months since making this appeal, I am still awaiting a reply.

The truth is that there is no mechanism available at present for an innocent victim of ICAC to clear their name and win their reputation back.

Accordingly, I implore your Committee to change this completely unjust situation. An Exoneration Protocol is required. In addition, as outlined herein, I believe there are other recommendations the Committee should consider to right the wrongs of ICAC's past and minimise the chances of history repeating itself.

Relevant Background

As you are no doubt aware, in April of 2015 in the *Cunneen* case, the majority of the High Court determined that the expression "adversely affect" in section 8(2) of the ICAC Act addressed conduct that adversely affects or could adversely affect the probity of the exercise of an official function by a public official.

The High Court confirmed that ICAC's statutory remit was to investigate the conduct of third parties in connection with the discharge of official functions by

public officials. It held that ICAC's jurisdiction should always have been confined to where the third parties' conduct would give rise to (or could give rise to) wrongdoing or impropriety on the part of a public official in exercising their official functions in specified, limited circumstances.

The decision affirmed that ICAC's finding against my Cascade colleagues and me was unlawful. Our conduct was not and could not ever have constituted "corrupt conduct" under the ICAC Act if properly interpreted.

Following this decision, ICAC acknowledged this position. In a letter from the Crown Solicitor's Office dated 23 April 2015 (attached in Annexure A), they confirmed that the corruption findings were made unlawfully and agreed to a declaration that they should be made a nullity. In this regard, relevant orders were agreed and the Full Court approved the giving of effect to these orders.

However, in an action that remains a serious blight on the administration of justice in this State, immediately prior to the nullity orders being affirmed by the Court, legislation (in the form of the Independent Commission Against Corruption Amendment (Validation) Act 2015) was rushed through Parliament in the dead of night to retrospectively validate ICAC's unlawful actions of the past. As a consequence, ICAC withdrew its consent to the agreed orders and our unlawful corruption findings were 'validated'.

Importantly, when voting to pass the legislation, members of Parliament were not made aware of the fact that ICAC had agreed that the findings made against my Cascade colleagues and me should be made a nullity and had already consented to orders giving effect to that fact.

Even with the passing of the Validation Act our actions cannot be described as unlawful or capable of amounting to corrupt conduct. ICAC's actions have been validated. Ours have not been made unlawful they have simply been left as is.

As of today, if the ICAC conducted an investigation based on the same facts that led to our adverse findings, a finding of corrupt conduct could not possibly be made.

Since that time, there has been a full and complete investigation into Cascade's business dealings in a number of forums. In all cases, our conduct and actions have been found to be completely legal in all respects and simply commercial in nature.

In the recent ACCC matter involving Cascade and two of my associates, it was found in the first instance and confirmed by the Full Court of the Federal Court unanimously on appeal (brought by the ACCC) that the transactions were

commercial and appropriate. Absolutely no wrongdoing was found. Similarly, in the current Obeid and Macdonald conspiracy trial, the Crown has advised the Court on a number of occasions that there is absolutely no suggestion of any impropriety by Cascade and its directors myself included.

I encourage you to read a detailed account of all the relevant facts (attached in Annexure B). I think you will be both surprised and deeply concerned by what you read. Hopefully these facts encourage the Committee to recommend introducing an Exoneration Protocol for innocent victims of ICAC investigations.

However, I am asking the Committee to take its recommendations one step further.

As you will see from the detail provided in Annexure B, it is clear that the Validation Act was passed without Parliament being properly informed of all relevant facts.

It is worth noting that when introducing the Bill, it was made absolutely clear that the Validation Act was not enacted to reverse the High Court decision in *Cunneen*. In fact the reverse was true. The relevant Explanatory Note (paragraph 3) stated:

> *"The bill does not reverse the High Court decision"*

Like my Cascade colleagues, I am an innocent man yet carry a heavy burden and long shadow. Only recently was my innocence formally acknowledged.

On 26 March 2020, seven years after Commissioner Ipp handed down his findings, I, together with my Cascade colleagues, received emails confirming that the Department of Public Prosecutions would not take any action on the matters referred to them by the ICAC (attached as Annexure C) and that ICAC had accepted this advice. Despite our total belief in our innocence, it was a significant relief to have this silent but very serious threat, that hung over our heads for such a long period of time and caused so much angst for ourselves and our families, removed. Finally we had received formal confirmation of our innocence.

When viewed in the context of the details contained in the attached annexures, it is easy to reach a conclusion that there was a deliberate misapplication of the definition of "corrupt conduct" and a consequential overreach of statutory remit to achieve a pre-determined result.

But irrespective of whether the actions were deliberate or not, it is unarguable that Commissioner Ipp imposed a grave injustice on my associates, our respective families and me. We were not corrupt - just victims of a politically

charged inquiry.

Accordingly, I am seeking your assistance to help remedy this wrong.

Consequently, as part of the recommendations that flow from this inquiry, I urge the Committee to recommend that the Validation Act be amended (please see Annexure D for a suggested draft Bill in this regard) to enable innocent people to seek a Supreme Court order to set aside findings that do not comply or meet with the law of the land as established by the High Court ruling in *Cunneen*.

Reputations Do Matter

If you take ICAC at its word, they already acknowledge that being named in an ICAC inquiry definitely imputes reputations and are supportive of the introduction of an Exoneration Protocol regime to address this issue.

In circumstances like mine where the facts show that ICAC has wittingly or not, participated in a wrong, even its own published values demand that the organisation should both feel compelled and be compelled to right that wrong.

This attitude, espoused by ICAC's current leadership team, represents a marked departure from the views expressed by the ICAC leadership of the past.

In an interview published on 1 August 2014 in the Sydney Morning Herald, former Commissioner Ipp made the following statement when discussing the issue of reputational damage caused by ICAC investigations and findings:

"…just name one person whose reputation has been unfairly trashed."

In response, I can certainly refute this claim and confirm that my colleagues at Cascade and myself have all definitely had our reputations 'unfairly trashed' as a consequence of our interactions with ICAC in Operation Jasper.

One click on Google reveals a barrage of otherwise defamatory assertions if not for the cover of the conspiracy theories publicly promoted by Counsel Assisting Watson and Commissioner Ipp in the Jasper Inquiry.

The resultant reputational damage has had serious consequences.

Job offers have been withdrawn. Insurers have failed to provide cover. Investment banks have refused to underwrite transactions. Banks have not provided loans. Relationships have suffered. In summary, the ability for my colleagues and myself to prosper, continue to build businesses and make a meaningful social contribution has been dramatically impacted by the 'unfair trashing' of our reputations.

As indicated, todays Chief Commissioner and the current Inspector have both publicly expressed a starkly different attitude to former Commissioner Ipp regarding ICAC's potential to cause unjust reputational damage.

In a recent ICAC Report, it was said that both the:

> *"Chief Commissioner and the Inspector agreed that the potential for reputational impact is serious, and expressed their willingness to consider current and potential remedies as part of their reporting."*

Hopefully this public acknowledgement from the Commissions current leadership team acknowledging that individuals can suffer serious reputational damage as a consequence of being wrongly named in an ICAC inquiry adds weight to the argument for the introduction of an Exoneration Protocol.

Request: Introduction of an Exoneration Protocol and the Amendment of the Validation Act

This entire unseemly episode has taken its toll on my family and me and equally on my colleagues.

My hard-won reputation has suffered irredeemably. With it, my family has had to endure the humiliation and stain of having a father publicly and forever labelled as corrupt. Even worse, the stress imposed on my family by Commissioner Ipp's unlawful findings, I am certain, contributed to the recent death of my wife.

Notwithstanding Commissioner Ipp's proclamations to his friends in the media that nobody's reputation is adversely affected by an ICAC finding, my experience has been the opposite.

The Committee and the new Chief Commissioner has worked hard to restore ICAC's image post the Ipp era.

Hearings are conducted appropriately with due regard to procedural fairness. Exculpatory evidence is made available to all parties. The media is no longer manipulated as an active accomplice to turn public opinion. Reputations seem to be better respected.

Because of this and the Chief Commissioners efforts to significantly improve procedural fairness in ICAC inquiries, I appealed to him directly for help.

To this end, I wrote to Mr Hall on 4 May 2020 (please see Annexure E). I am still awaiting a response. However, given the comments attributed to him in the recent ICAC Annual Report, I remain optimistic that he is working behind the

scenes to convince the Committee to recommend an Exoneration Protocol and, hopefully, the amendment of the Validation Act.

The Ipp era remains a serious blight on ICAC's reputation. Lobbying Parliament to introduce the retrospective Validation Act and effectively overturn the High Court's decision in *Cunneen* was wrong.

It was a ham fisted and misguided attempt to forever bury any criticism of ICAC's illegal behaviour. I am hoping your Committee agrees with this proposition and uses its powers and influence to remedy the situation.

I do not believe the public can have faith in ICAC as an institution until such time as the High Court's decision in *Cunneen* is appropriately observed and the Validation Act amended accordingly.

ICAC, of all government agencies, should have shown leadership in always acting beyond reproach and ensured that an appropriate legal and moral compass guided its officers at all times. Unfortunately, history suggests that, at times, ICAC has failed this test.

Where these standards have not been met, ICAC should be held to account and forced to acknowledge its errors.

For instance, ICAC certainly never should have been involved in misleading the Parliament or the Courts. It should not have used its influence to avoid or usurp the High Courts decision in *Cunneen* and deny citizens access to justice. Instead, its role should have been to acknowledge, observe and respect the High Courts decision. It is not too late to right this wrong.

Consequently, in the interests of both my reputation, my colleagues reputations, all innocent victims of the ICAC process and indeed, ICAC's own reputation and standing in the community, I am asking you to help to finally resolve these matters and agree to use your powers to recommend the implementation of an Exoneration Protocol and the amendment of the Validation Act.

Other Related Matters: Call for the Committee to Review the Current Regime under s57B of the ICAC Act regarding Complaints to the Inspector

I would also like to draw the Committee's attention to the role and functions of the Inspector under the ICAC Act, which I believe is relevant to your terms of reference in this Inquiry.

Under the current regime, there are only two obvious options open to an

innocent victim of ICAC to voice their concerns and attempt to offset some of the reputational damage caused by their experience with ICAC. They are:

- Judicial Review under Administrative Law; and
- Making a complaint to the Inspector of ICAC under s57B of the ICAC Act.

Critically, and unfortunately, neither option involves a merits review of the ICAC findings.

Both represent very difficult processes for a complainant.

The results show that the odds are heavily weighted against a complainant in either forum.

As regards complaints to the Inspector under s57B of the ICAC Act, the process demands that a complainant provide the Inspector with details of the relevant allegations in the hope that these materials persuade the Inspector to use his powers to investigate whether an abuse of power has occurred.

This is a difficult process in itself. Appropriately, complaints should be evidence based. However, for those that have suffered at ICAC hands like myself, the process of gathering the evidence to substantiate claims of abuse of power sufficient to convince the Inspector to investigate is an almost impossible task.

For example, most of the evidence required to prove my complaints about Commissioner Ipp in the Jasper Inquiry remained subject to suppression orders imposed by ICAC for years.

Unusually, in my situation, because of the various legal proceedings that followed the Jasper Inquiry, over the years ICAC has been forced by the Courts to eventually disclose thousand of exculpatory documents that had otherwise been buried. As a consequence, these documents ultimately became public and were therefore available to form the basis of allegations of an abuse of power but only years after the event.

Clearly it is a great shame for all involved that these documents were not made available by ICAC at the time of the Jasper Inquiry. Obviously these documents did not enhance the case theory that ICAC was prosecuting so, somehow, they were not disclosed. Clearly, failing to make these exculpatory documents available at the time to ensure that the Inquiry was conducted with procedural fairness is (and was) unacceptable.

The failure to release critical exculpatory documents for all parties to view during the Jasper Inquiry remains a serious blight on the Commissions reputation. If these documents had been made available at the appropriate time,

the findings in the Jasper Inquiry *should* have been very different.

That said, the eventual release of these documents in the last few years has enabled me to provide the Inspector with documentary evidence that prima facie substantiated the allegations I was making in my complaint. Again, I urge you to read the documents referenced in the attached annexures particularly Annexure F. The statements made support the view that there was direct Executive interference in what was supposed to be an independent inquiry. Unfortunately, not even these documents could persuade the Inspector to use his powers to investigate the matters raised.

Instead, the Inspector summarily dismissed my complaint surprisingly opting not to review any of the evidence provided in reaching this conclusion.

The evidence I raised with the Inspector included an explosive statement from a member of the Cabinet, Mr Christopher Hartcher, recalling conversations he had with Premier O'Farrell a year prior to the start of the Jasper Inquiry which strongly supports the premise that there was active collusion between Commissioner Ipp and former Premier O'Farrell that undermined any notion of procedural fairness being accorded in the Jasper Inquiry. Numerous other interactions between Commissioner Ipp and Premier O'Farrell and members of his Department (referenced in Annexure F) further support this possibility.

Unfortunately, none of the revelations provided in my complaint evidencing extraordinary exchanges between the Executive arm of government and Commissioner Ipp before, during and after the Jasper Inquiry could persuade the Inspector to even review the evidence, let alone have him agree to investigate the matter in accordance with his powers under s57D of the ICAC Act.

Instead, the Inspector chose to summarily dismiss the complaint. In so doing he primarily relied on the argument that collusion about an Inquiry between an ICAC Commissioner and a Premier or members of the Premiers Department cannot amount to an abuse of power because the ICAC ***is*** part of the Executive arm of Government. The Inspector stated:

> "*The assertion Mr Atkinson makes in support of this second proposition is wrong as a matter of law. This can be seen from the fallacious proposition he [Atkinson] makes that 'the ICAC is not part of the executive arm of government.' It is."*

This position is at complete odds with the recent statement of the law provided by Mr Bret Walker QC who was asked by ICAC to opine on ICAC's legal relationship with the Executive. He concluded definitively that, at law, ICAC was ***not*** part of the Executive arm of government.

Clearly the view of the Inspector and that of Mr Walker are hard to reconcile.

When this obvious disparity was brought to the Inspectors attention, the Inspector opted not to address the issue directly. Instead he changed tack and justified his decision to dismiss my complaint by relegating the extraordinary communications between Commissioner Ipp and the Executive arm of government that took place before, during and after the Jasper Inquiry as nothing out of the ordinary. He likened them to communications that typically occur between the Commissioner of Police and the Premier from time to time. He said:

> *"It is no different from, say, the Commissioner of Police bringing a matter of concern to the attention of the Premier and is in no way of itself reprehensible, or liable to criticism."*

A very curious analogy given the fact that the communications I reference between Commissioner Ipp and Premier O'Farrell and senior members of his staff, could hardly be compared with simply *" bringing a matter of concern to the attention of the Premier"*.

These interactions were not one off. They occurred before, during and after the Jasper Inquiry and went to the heart of how the Inquiry was conducted and the findings that resulted.

The numerous interactions that the Inspector brushed off as perfectly reasonable, resulted in five people being **unlawfully** found to be corrupt; hundreds of millions of dollars of property assets being expropriated by government; and unprecedented retrospective legislation being rushed through Parliament to validate ICAC's unlawful actions.

Surely, that in itself elevated the communications beyond mundane status.

In this respect, the Inspectors reluctance to review the evidence provided seems very peculiar. In justifying this decision, he advised:

> *"I decided not to review this evidence because it could not rationally lead to a finding that the Commissioner or the ICAC had engaged "in abuse of power, impropriety or misconduct" or "maladministration", the only matters with which I can deal under the functions by section 57B of the ICAC Act."*

Perhaps the Inspectors decision was influenced by what he sees as a limitation on his investigatory powers imposed by the ICAC Act. I have attached all relevant materials (refer Annexures F and G) so that your Committee can determine whether the Inspector was right or wrong in adopting this approach.

Of course, the Inspector has the right to make determinations. That is his job.

That said, it would seem fundamental to the principles of procedural fairness that in so doing the Inspector should be obligated to show a requisite amount of curiosity about the relevant allegations made and cannot dismiss a complaint summarily without taking the evidence into account.

Given that complaining to the Inspector is currently one of only two options available for an aggrieved victim of ICAC to be heard, the issue of the extent of an Inspectors powers and how those powers get exercised should be relevant to the Committee's terms of reference in this inquiry.

In my view, the current complaints process is completely unsatisfactory. The process is far too opaque.

For instance, after having my complaint summarily dismissed, I again wrote to the Inspector requesting that he publish the complaint detailed herein to Parliament so that it would became part of the public record. He declined responding that he may opt to make reference to the fact of my complaint and his dismissal thereof in ICAC's next Annual Report but would not publish the complaint in full, nor his response.

This is approach negates accountability and ensures that any public scrutiny of the Office of Inspector is minimised.

It is simply not good enough.

To ensure that the overview function of the Inspector truly acts as a deterrent to abuses of power by ICAC officers, the system would be substantially improved if Parliament chose to amend the Inspector's statutory remit to obligate the Inspector to thoroughly investigate all complaints. If there are currently legislative limitations on this role being effective then this issue needs to be reviewed and changes recommended to enhance the Inspectors investigatory powers.

Surely, the system would benefit from imposing statutory backed investigatory process requirements on the Inspector and force the Inspector to apply that process to each complaint made.

Further, the Inspector should be duty bound at law to publish all complaints and the Inspectors detailed analysis thereof so that the review system is transparent and the resultant decisions subjected to public scrutiny.

Hopefully the Committee agrees with my views and sees fit to make recommendations along these lines to improve the complaints process under

s57B of the ICAC Act and the Inspectors obligations in respect thereof.

Conclusion

For the reasons stated in this Submission, I strongly urge the Committee to recommend the implementation of a fair and reasonable Exoneration Protocol.

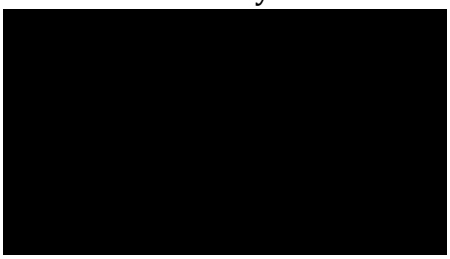
I also urge you to recommend the amendment of the Validation act to finally facilitate the proper application of the law in accordance with the High Courts ruling in *Cunneen*.

Further, I would hope that the Committee also recommends that there be a general review of how complaints under s57B of the ICAC Act should be dealt with and the Inspectors powers and obligations in relation thereto be amended to ensure that a complainants issues are properly and transparently dealt with.

Thank you for taking the time to consider this matter.

I look forward to the release of your recommendations.

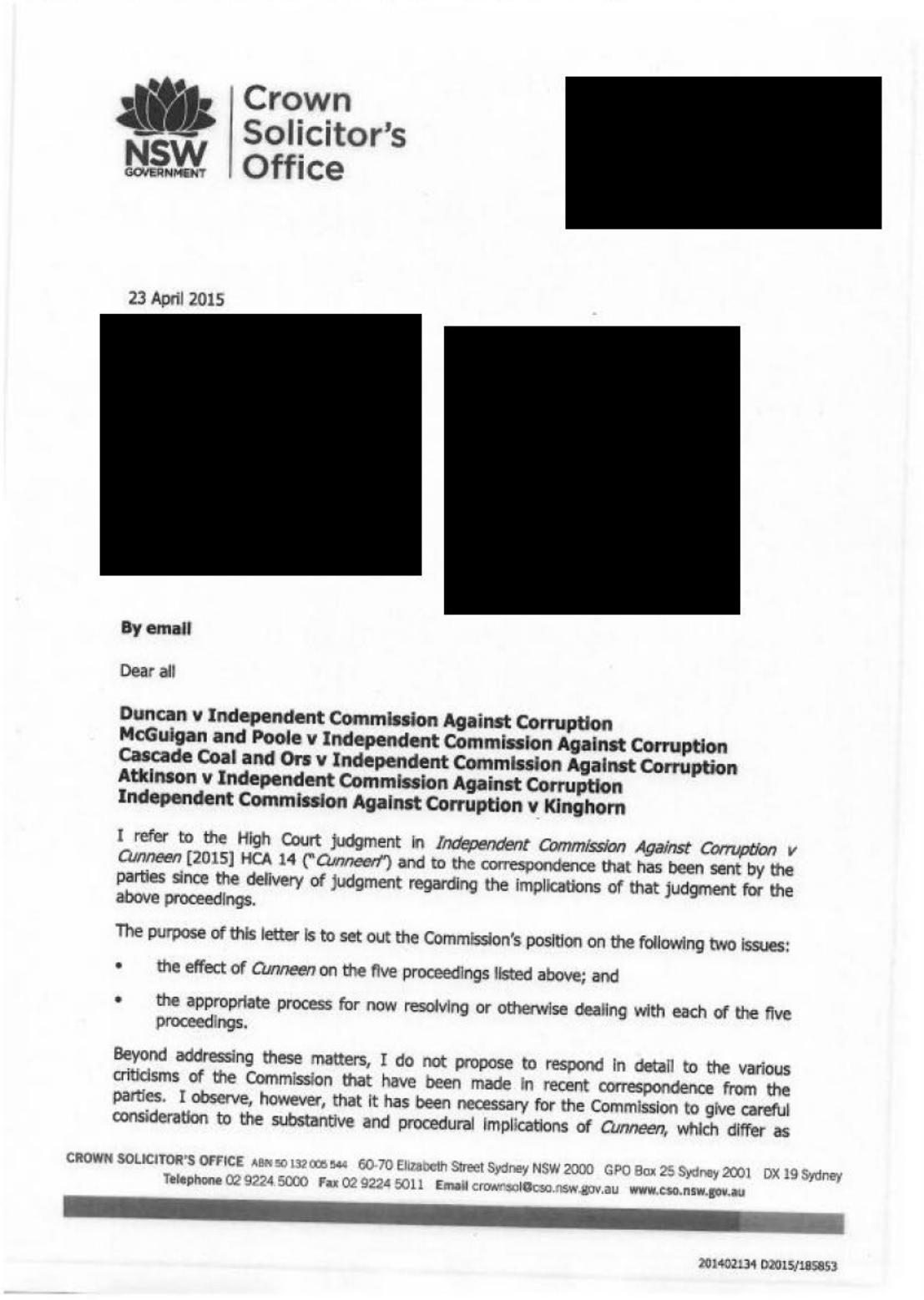
Yours Sincerely



John Atkinson

Annexure A

Letter from the Crown Solicitor dated 23 April 2015



NSW GOVERNMENT | Crown Solicitor's Office

[redacted]

23 April 2015

[redacted]

[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

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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.

[redacted]

Annexure B

Facts

Relevant Background

In 2012 and 2013, Commissioner Ipp, conducted the Operation Jasper Inquiry into the grant of Exploration Licences to subsidiaries of Cascade.

In a report issued in July 2013, Commissioner Ipp made a number of findings of corrupt conduct against me and colleagues of mine in Cascade Coal. These findings focused on commercial events that happened over a year after the **grant** of the exploration licence that Cascade legitimately won in a public tender process.

It is important to clarify that Commissioner Ipp's findings against us had nothing to do with events that occurred around the **creation or grant** of the Mt Penny Mining Tenement which was the original focus of the Inquiry.

Instead, Commissioner Ipp chose to adopt an unlawful definition of the term "corrupt conduct' to declare me and my Cascade colleagues corrupt. In this regard, he unilaterally re-defined the term "corrupt conduct" for his own purposes to enable him to find us 'corrupt' for a supposed breach of director duties and for supposedly committing a fraud on the people of New South Wales. Neither allegation lasted any proper legal scrutiny or the test of time.

However, notwithstanding their illegitimacy, these allegations certainly served a purpose for Commissioner Ipp and the Executive.

These unlawful findings were central to Commissioner Ipp's recommendations to the NSW Parliament that the Mt Penny and Glendon Brook exploration licences, held by subsidiaries of Cascade Coal, be cancelled by legislation. The Premier welcomed these recommendations.

Consequently, in January 2014, the NSW Parliament implemented Commissioner Ipp's recommendations and cancelled the relevant mining tenements pursuant to the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 (NSW) (The Cancellation Act).

Legitimacy of the Corruption Findings

Since that time, in numerous legal forums where Commissioner Ipp's views of relevant events have been examined, both ICAC and the NSW Solicitor General have formally acknowledged that Cascade won its licences legitimately in a public tender and that there was no suggestion of any corrupt conduct or involvement by Cascade's directors in that process.

By example, the position was affirmed in *Cascade Coal Pty Limited & Ors v the State of NSW* 120151 HCA 13 where the Solicitor General for NSW, Mr Sexton SC, stated at 179.3508 - 3511:

> "In *fact, the ICAC did not make findings of corrupt conduct against any of the licence holders in these proceedings. There was a finding of corrupt conduct made against one of the plaintiffs - against Mr Duncan - but that did not relate to the grant of one of the licences."*

As time has elapsed and thousands upon thousands of exculpatory documents have been released, it has now become obvious that Commissioner Ipp erred in making corruption findings against my Cascade colleagues and me.

In every forum where the facts that were used to support Commissioner Ipp's corruption findings have been analysed, Judges and commentators have concluded that there was no wrongdoing by any of the Cascade directors, including myself.

We did not breach any fiduciary duties as directors nor did we commit a fraud on the people of New South wales as Commissioner Ipp found. Putting aside the fact that he had no legal basis to make these findings in the first place (as *Cunneen* proved), time has shown that his findings were a complete fabrication designed to justify a set of events where the conspiracy theories ICAC held clearly failed to match the facts.

In addition, important exculpatory statements taken at the relevant time by ICAC but only released years after the Inquiry detailing the evidence from other critical witnesses from the Department of Primary Industries clearly support the fact that no wrongdoing was done by my associates or myself.

In hindsight it is clear that the doctrine of procedural fairness and the reputations of those who represented ICAC at the relevant time would have been better served if ICAC had disclosed exculpatory evidence contemporaneously with its Inquiry. For us it meant we were forced to fight in the dark. We knew that what was being alleged against us was untrue but the 'inconvenient facts'

that would help establish our innocence were either ignored or deliberately hidden from our view.

An analysis of the transcripts in the Jasper Inquiry will reveal that Commissioner Ipp would only allow objections by our Counsel if there were "a positive alternate case to put". Mere objection on the basis that an allegation against us was baseless and not supported by fact was not enough for Commissioner Ipp. For some reason, our burden was beyond reasonable. A standard that would be extremely difficult to meet in normal circumstances where the rules of evidence apply but made impossible in our situation where clear exculpatory evidence was deliberately kept from us and the public.

Even the notoriously difficult Judicial Review process, where merits are 'out of bounds' and only due process can be examined, proved that Commissioner Ipp's findings against us were made at a stretch and tenuous at best.

These proceedings resulted in both the Court of first instance and then the Appeal Court led by the Chief Justice actually overturning each of Commissioner Ipp's two corruption findings against me.

Justice McDougall originally overturned the corruption finding related to my alleged breach of a fiduciary duty as a director. This decision was subsequently overturned by the majority on Appeal with two Judges finding that Commissioner Ipp was entitled at law to make any finding he deemed appropriate, with the Chief Justice deciding otherwise.

However, in that same judgment, again with the support of the Chief Justice, the majority of the Appeal Court concluded that Commissioner Ipp's finding that I had somehow committed a fraud on the people of New South Wales was unsoundly based, thereby rejecting Justice McDougall's original decision to uphold that aspect of Commissioner Ipp's findings and determine that this finding should be overturned.

More recent evidence of the lack of evidentiary support and substance to Commissioner Ipp's corruption theories was seen in the decisions of the Federal Court in *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd,* where both on first review and then on appeal, the Court debunked every possible claim that originated with Commissioner Ipp's findings. The numerous Judges involved in this extensive examination of the facts completely exonerated Cascade, and the two directors charged by the ACCC on all charges that emanated from former Commissioner Ipp's recommendations while admonishing the ACCC in the process.

[redacted]

[redacted]

But perhaps the most meaningful confirmation that there was no wrongdoing done by me or my Cascade colleagues was contained in recent correspondence from the ICAC, who informed my Solicitors that:

> *"…. the Commission received advice from the DPP that there is insufficient evidence to commence criminal proceedings against your client and that the Chief Commissioner had accepted that advice."*

Albeit seven years on, after having my life and reputation destroyed in the process, it was still satisfying to finally receive this admission.

High Court Determination - Cunneen **Decision**

The facts set out above also need to be viewed in the context that the adverse findings made by Commissioner Ipp against me and my Cascade colleagues in Operation Jasper were ultimately accepted to be unlawful.

As you are no doubt aware, subsequent to the issue of the above ICAC reports, numerous challenges were made to the NSW Supreme Court and the High Court with respect to the scope and powers of ICAC particularly with respect to the extent of ICAC's powers in relation to private citizens as opposed to public officials.

This culminated in the decision of the High Court in ICAC v Cunneen (2015) (*Cunneen*) which held that, insofar as private citizens are concerned, in order for the conduct of a private citizen to constitute corrupt conduct it must affect the probity of the exercise of official functions by a public official. ICAC's systemic actions at that time were determined to be beyond power - an extraordinary admonishment by the High Court of a division of the NSW Government's Executive arm.

It is a matter of record that, in relation to the ICAC findings against my Cascade colleagues and me, not only did our conduct not affect the probity of any public official but there was never any contact whatsoever with a public official.

ICAC's Actions Following *Cunneen*

In considering my Submission, it is important to bring to your attention the extraordinary actions of ICAC immediately following *Cunneen*. It is a key element of the argument that I hope persuades you to recommend overturning the Validation Act or create an exoneration protocol.

As a consequence of the *Cunneen* decision, it was agreed by the Crown Solicitor's Office (on behalf of ICAC) that the ICAC findings against the Cascade directors exceeded ICAC's statutory powers.

On 23 April 2015, the NSW Solicitor General wrote to us acknowledging this fact formally acknowledging that, in my case and those of my Cascade colleagues, Commissioner Ipp and ICAC had unlawfully misapprehended and misapplied the legal test for what constituted corrupt conduct.

As a result, consent orders were agreed between the Crown Solicitor's Office (on behalf of ICAC) and myself and my Cascade colleagues to overturn the ICAC findings against us.

Subsequently, the NSW Supreme Court accepted this position and it was agreed that the Court would meet on 8 May 2015 to formally overturn the corruption findings.

On 6 May 2015, two days before the NSW Supreme Court were scheduled to formally meet to set aside the findings against me and my Cascade colleagues, the NSW Parliament passed the Independent Commission Against Corruption Amendment (Validation) Act 2015 (The Validation Act).

This ad hominem legislation operated retrospectively to validate the ICAC findings of corrupt conduct, which were made beyond power and without jurisdiction as the law was at the time of the impugned conduct and at the time of the findings by ICAC.

In effect, The Validation Act retrospectively validated all previous ICAC findings and actions. Although denied at the time, the effect of the legislation was to retrospectively overrule the High Court decision in *Cunneen*.

We now know that inexcusably, ICAC and the Executive failed to inform Parliament about a number of crucial matters resulting in Parliament being misled at the time of its enactment of the Cancellation Act, the Validation Act and related amendments to the Mining Act. In particular, it has now become apparent that in passing the Validation Act, Parliamentarians were not made aware that ICAC had acted unlawfully in the context of the Cascade directors and had already consented to their corruption findings being overturned by the NSW

Supreme Court.

This very important omission was publically confirmed by Dr Peter Phelps, former Member of the Legislative Council, who advised Parliament that he had grave concerns that the NSW Parliament was misled in regard to the enactment of the Cancellation Act, the Validation Act and related amendments to the Mining Act on the basis of misinformation, deliberate deception and even possible gross maladministration by the ICAC. He said:

> *"What we have here appears to me to be gross maladministration by ICAC. Even more importantly, I believe we may have been misled by the then Premier into introducing and passing three bills that have expropriated a property right completely unjustifiably."*

Dr Phelp's views on the wrongful expropriation of valuable property rights is one thing, but the enactment of the retrospective Validation Act, designed to estop any legal challenge of my right to have wrongful corruption findings overturned, is a shocking manipulation of this State's legal processes.

As Mr Chris Merritt stated in his article entitled "Federal ICAC: Hard Lessons From State Wrongs" published in The Australian, dated 3 May 2019:

> *"The Validation Act neutralised the legal rights of the victims of ICAC's unlawful actions and prevented them obtaining declarations based on the High Court's ruling."*

Mr Merritt continued:

> *"To placate this agency and save its blushes, the parliament of NSW put itself on the wrong side of the rule of law. It will remain there until the Validation Act is repealed and the normal law, as expounded by the High Court, again prevails."*

Concerns Arising From ICAC's Actions

What is important and what needs to be understood, in terms of the ventilation of this matter, is that the recitation of the events surrounding the notification of the consent orders prepared as between my Cascade colleagues and me and the Crown Solicitors Office acknowledgment that ICAC wanted legislation to be enacted has a farcical quality to it. Particularly when viewed in the context that when the Court was convened, the parties indicated to the Court that the matter was effectively to be undertaken and at the very same time ICAC and those that had presided over its unlawful actions was actively lobbying the Executive to put

forward a Bill that would effectively render nugatory the consent orders that the Court was being asked to make.

As you will note from the correspondence attached, the Crown Solicitor's Office confirmed that ICAC was actively lobbying the Government to overturn the High Court and "restore" the definition of "corrupt conduct" back to a position that meant its historical actions could be legally justified with retrospective effect.

Others also actively engaged in this lobbying initiative. On 27 April 2015 former Commissioner Ipp wrote an article published in The Sydney Morning Herald entitled "Why ICAC Powers To Investigate Corruption Must Be Restored". In that article he publicly derided the High Courts decision and aggressively advocated for retrospective validation of ICAC's unlawful activities. In complete defiance of the High Court's decision in *Cunneen*, he demanded, "…that Premier Mike Baird and the government restore ICAC's powers."

In contrast, at the same time as significant pressure was being applied to the Executive to introduce the Validation Act, ICAC's representative Geoffrey Watson was in the Supreme Court consenting to orders overturning corruption findings against myself and my colleagues and telling the then President of the Court, Hon. Justice Beazley:

> *".....that submissions had already been filed and that ICAC was happy for the matter to be dealt with as soon as convenient to the Court."*

This is not a light matter.

Citizens of this State do not normally have any reason to doubt that the invocation responsibility of the Court's jurisdiction would be undertaken in a manner that would neither garner respect, nor solemn consideration, from those legal officers acting on behalf of the Government who allowed the matter to get to the stage it reached. Particularly when those legal officers knew full well that while the Court was being given one representation, they were in effect ensuring that the invocation of the Court's jurisdiction would be rendered impotent by reason of the enactment of the legislation.

What then occurs is that in the Parliament, initially in the Legislative Assembly on 6 May 2015, the Premier in the Second Reading Speech of the Bill in respect of the ICAC Act made no mention of the fact that the Court had been instructed that both the Government and/or ICAC had consented to have the corruption findings overturned.

Equally, it would seem from Dr Phelp's communications that no parliamentary group (i.e. the rump of the Liberal party, the Opposition, the Greens or other parties within the Lower House) were in any way alerted, or if they were, they did not disclose to the House or the Legislative Council that ICAC had consented to the overturning of the corruption findings and had asked the Supreme Court to act accordingly.

Critically, what all this means is effectively this: ICAC agrees to declarations to be undertaken in chambers as a matter of form, and more importantly as consent orders. ICAC at the same time knew that legislation had been requested by them which would render nugatory any attempt to move the Court in the event that that Court would be moved in a time frame that might be before the enactment of the legislation, but was silent in terms of its legal representatives communicating to the Court the legislative developments that were to hand.

In so doing, ICAC acted in the most callous fashion that could be considered simply for this reason: that to allow a court to be moved and have counsel and attorneys indicate to that court that the orders would be made, and knowing full well that legislation was imminent and would possibly be pushed through the Parliament as it ultimately came to be, their silence or more importantly their failure to disclose
and allowing the Court and the parties to believe that the matter would go forward is at the very least a blight on the administration of justice.

This is compounded when one reads the letter sent to the legal representatives by her Honour Justice Beazley, which was copied to the Chief Justice and Mr Justice Basten, who were the constituent members of the Court to be constituted. In her letter of 6 May, her Honour says:

> *"Dear Legal Representatives,*
>
> *Re: … McGuigan 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 section 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 9.15am 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,

The Hon. Justice Beazley

c.c. The Hon. T. F. Bathurst, Chief Justice of New South Wales, The Hon. Justice J. Basten"

Extraordinarily, the next development was a letter from the Crown Solicitor's Office to the legal representatives of the parties attaching a draft letter to be sent to the President's Associate at 2.00pm 7 May 2015 which effectively attached a copy of the *Independent Commission Against Corruption Amendment (Validation) Act 2015*, noting the Act received assent on 6 May 2015 and to commence on the date of assent.

Accordingly, in that scenario and against that context, the following matters can, I think, be confidently taken as settled:

(i) ICAC may have requested, but was certainly aware, that consideration was being given to legislation to negate the effect of the *Cunneen* decision.

(ii) Despite this knowledge, ICAC then gave instructions to the Crown Solicitor's Office and effectively enjoined in the procuration of consent orders which were to be made by the Court of Appeal, subject to the Court of Appeal amending those orders of its own

volition after draft orders were submitted by the parties, and that those draft orders would be made in chambers on 8 May 2015.

(iii) The advent of the legislation was notified by the parties to the Court of Appeal and the Registry, prompting Beazley P to write on 6 May 2015 with the amended declaration which would be made in chambers by the Court constituted as advised on 8 May 2015.

(iv) The conduct of the legal representatives for ICAC, not only in court on 4 May 2015 but prior thereto, to allow the parties to be positively lulled into believing that the orders would be made, that it would be not a wasted exercise let alone considered otiose to engage and invoke the Court's jurisdiction by consent, knowing, as I infer, that the legislation was in place, had been drafted and would inevitably be passed by both Houses and assented to on the same day, i.e. 6 May 2015.

ICAC is presumed to act responsibly as a 'model litigant', and whilst decisions of the High Court are to be respected, it was patently obvious that ICAC was not prepared to abide by what had been undone as a consequence of its failure to act within its jurisdictional limits as found by the High Court and their findings on the elements required to constitute corrupt conduct.

Even if it did not initiate the legislation, ICAC was at a minimum complicit in having the Bill presented to Parliament - legislation specifically designed to rectify all of the problems that had occurred by reason of its failure to act in accordance with its jurisdictional constraints and the rightful definition of corrupt conduct as determined by the High Court in *Cunneen*.

Annexure C

Confirmation from ICAC

From: [redacted]
Sent: Thursday, 26 March 2020 10:39 AM
To: [redacted]
Subject: Operation Jasper - Mr John Atkinson [SEC UNCLASSIFIED]

Dear [redacted]

I refer to your client, Mr John Atkinson, and to Operation Jasper, an investigation conducted by the Independent Commission Against Corruption ("the Commission").

The Commission's report in Operation Jasper, published in July 2013 ("the Report"), included a statement under s 74A(2) of the *Independent Commission Against Corruption Act 1988* to the effect that the Commission was of the opinion that consideration should be given to obtaining the advice of the NSW Director of Public Prosecutions (DPP) with respect to the prosecution of your client for a specified criminal offence.

Following publication of the Report, the Commission referred a brief of evidence in respect of your client to the DPP.

On 24 March 2020, the Commission received advice from the DPP that there is insufficient evidence to commence criminal proceedings against your client. The Chief Commissioner of the Commission, the Hon Peter Hall QC, has accepted that advice.

[redacted]

Annexure D

Suggested Amendment to the Independent Commission Against Corruption Amendment (Validation) Act 2015 No 1

The 2015 Act retrospectively validated the actions and findings of all ICAC inquires which would, or may, have been nullified by the ruling in the High Court case *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

The outcome of this amending Bill should be this: that private citizens in the Jasper and Arcacia Inquiries who:

(a) were subject to findings of 'corrupt conduct' in an ICAC report, prior to the *ICAC* (*Validation) Act*, and
(b) had not adversely affected the probity of the exercise of official functions by public officials,

shall be able to challenge, on the basis of the *Cunneen* decision, the findings of 'corrupt conduct' made against them by the ICAC.

It is not intended that this amendment should invalidate any action of the ICAC during its investigation. Instead, the amending Bill simply enables private citizens, who were subject to adverse finings, to rely upon the *Cunneen* decision to seek a court declaration to nullify a finding of 'corrupt conduct' made against them, where their actions did not affect the probity of the exercise of official functions by public officials.

Section 35 is the relevant section of Part 13; the core principle is that the High Court determined that the jurisdiction of ICAC only extended to those offences listed in ss.8(2)(a)-(y) of the *ICAC Act* which could adversely affect the probity of the exercise of official functions by public officials in one of the ways described in ss.8(1)(b)-(d), and no further.

Proposed Draft Bill:

1. Name of Act
This Act is *the Independent Commission Against Corruption Amendment (Nullification of Findings) Act 2020*

2. Commencement
This Act commences on the date of assent to this Act.

3. Amendment of Independent Commission Against Corruption Act 1998 No 35
Schedule 4 Savings, transitional and other provisions

Insert after clause 35

35A Nullification of findings of corrupt conduct

(1) The Supreme Court may, on application by a person (other than a public official) against whom a finding of corrupt conduct has been made by the Commission in a report arising out of proceedings known as Operation Jasper and Operation Arcacia, make an order nullifying that finding if the Court is satisfied that the conduct of the person that gave rise to the finding did not adversely affect the probity of the exercise of official functions.

(2) This clause has effect despite any provision to the contrary in this Part.

Please note that the ICAC Committee has not published pages from this submission from here onwards. Annexure E to G, which is pages 32 to 61 of the submission, have been redacted and not published.