Submission No 14

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

Name: Mr Richard Poole

Date Received: 29 July 2020

Mr Richard Poole
[redacted]

29 July 2020

Mrs Tanya Davies MP
Chair
Committee of the Independent Commission Against Corruption (ICAC)

Submission - Inquiry into the Reputational impact on an individual being adversely named in the ICAC's investigations

This submission is in response to the Committee's inquiry into the reputational impact on an individual being adversely named in an ICAC investigation.

My name is Richard Poole, I am an individual who:

- has been falsely accused by ICAC.
- unjustly and incorrectly had an adverse finding made against me by Commissioner Ipp.
- had ICAC acknowledge that the ICAC findings against myself (and others) were a **nullity** (Refer Annexure A and B) .
- suffered further injustice when despite this acknowledgement:
    - ICAC rather than accepting and acknowledging its error and illegal findings, went on to lobby and arguably mislead the government and parliament to pass legislation retrospectively validating ICAC's illegal actions.
    - This ICAC legislation (the Validation Act) did not attempt to amend the High Court ruling, ("The Bill does not reverse the High Court decision", para 3 - Annexure C) and my actions then, and still to this day have never amounted to corrupt conduct as determined by the High Court of Australia, but validated the former actions of ICAC.
    - Rather than accept the High Court ruling and face their error the ICAC then hid behind this legislation and withdrew its then existing agreement to a consent order nullifying the findings. This was not a morally or legally sound position and was based on the retrospective validation of ICAC's original error not any actual wrong doing on my part.
    - In effect my fundamental right to obtain a Supreme Court order nullifying the incorrect finding and thereby enforcing the current law of the land and High Court ruling was blocked in an ICAC led blight on our parliamentary and court systems.
- Based on ICAC's flawed finding I was referred to the ACCC and had a case brought against me by the ACCC.

- was threatened by the ACCC with a 5 year ban from acting as a director and up to a $1m fine yet won the ACCC case convincingly and absolutely, both at first instance and unanimously on appeal brought by the ACCC. My evidence was fully accepted by the trial judge.
- Has waited 7 years before receiving an email note, advising the DPP would not be taking any action against me for allegations made by the ICAC in relation to legitimate commercial dealings which could incur a potential jail term of up to 10 years. This is a very serious matter and effectively stifles debate. Speaking out about the actions of ICAC is foolish and effectively impossible whilst such matters hang over your head.
- Has had his career totally derailed and put on hold for the last 7 years
- Has suffered opprobrium in public and private circles
- Still to this day must explain the incorrect ICAC finding in most business dealings
- Is a qualified lawyer
- Has no other charges against me
- Has built multiple significant companies including 2 from scratch to over $500m turnover
- Has employed hundreds of people
- Is a family man with 4 sons
- Is an innocent man

It is abundantly clear, that the fallout from an ICAC inquiry is enormous and ongoing. In effect a finding of corrupt conduct is a life sentence in the true sense, as it goes to a person's character and with the advent of search engines such as Google never goes away. If the reader exams their own thoughts, you are likely to find that despite my innocence you will, no doubt, be wary and concerned and not put as much weight on my submission because of the airing of false allegations by ICAC. This is despite the fact the adverse finding should be a nullity and the High Court ruling was effectively in my favour.

New articles feed off the old articles and the incorrect finding is repeated in perpetuity due to its sensational appeal and a near obligation to include a warning note that person X has had a run in with, or a finding made against them by ICAC. Guilt is pretty much assumed and there is a desperate need for an exoneration protocol for the innocent, or an overhaul of the ICAC procedures and standards required to make adverse findings so they are not made lightly and can be reviewed.

An ICAC finding does not contain any limitation and is at best a blunt instrument when used. Unlike a community service order or other penalties which can be served or paid the ICAC finding is open ended and when incorrectly made there is no appeal and no exoneration protocol to assist the innocent.

Our court system developed over hundreds of years has inbuilt into it an intrinsic acknowledgement that no body or person is perfect, and people make mistakes. We have an appeals system to allow for this with multiple tiers. The idea that the ICAC gets it right every time is farcical and has in our case been proved wrong. The fact that the standard of proof for ICAC is ill defined and the processes not as rigorous as our court system makes it a dangerous system indeed.

Existing safeguards and systems have absolutely failed in terms of assisting with any reputational impact or in terms of being able to query or turn a spotlight back onto the activities of the ICAC, particularly in the era of Commissioner Ipp when I was falsely accused. Despite a High Court ruling effectively clearing me and my other business associates and a letter from ICAC to this effect, the damage is done and there is no way to move the ICAC to acknowledge the issue and rectify its error.

I am fully supportive of and believe an exoneration protocol is necessary. I also ask that in addition, you consider and support an amendment to the Validation Act to allow people unjustly accused by the ICAC or with a finding against them, access to the courts to seek relevant orders including setting aside incorrect findings and applying the current law as per the High Court ruling.

Thank you for the opportunity to provide this submission.

Annexure A

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

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

The President

Court of Appeal
Supreme Court
Sydney

6 May 2015

Dear Legal Representatives,

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

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

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

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

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

Yours Faithfully,

[redacted]

The Hon Justice M Beazley

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

The Hon Justice M J Beazley AO
President, Court of Appeal, Supreme Court of New South Wales
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Annexure C

First print

New South Wales

Independent Commission Against Corruption Amendment (Validation) Bill 2015

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* to validate certain previous actions of the Independent Commission Against Corruption (*ICAC*) following the decision of the High Court in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

On 15 April 2015, the High Court decided in that case that the jurisdiction of ICAC in relation to corrupt conduct did not extend to specified criminal conduct of private persons or public officials (such as perverting the course of justice, fraud and election funding offences) that adversely affected the exercise of official functions by public officials unless there was some lack of probity in the exercise of official functions by public officials (that is, some lack of honesty or impartiality on the part of public officials in the exercise of their official functions)—it was not sufficient that the criminal conduct merely adversely affected the efficacy of the exercise of official functions (that is, it merely prevented public officials from properly exercising their official functions).

The Bill does not reverse the High Court decision, but validates action taken by ICAC before 15 April 2015 on the previous understanding that corrupt conduct extended to relevant criminal conduct that adversely affected in any way the exercise of official functions (and accordingly validates action taken by others in reliance on the action taken by ICAC). The Bill does not authorise the continuation of investigations or inquiries by ICAC that have been held by the High Court to exceed its jurisdiction, but enables ICAC to refer any such matter to other investigative or prosecuting authorities and to provide them with any evidence or information obtained by ICAC before 15 April 2015.