Submission No 29

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

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NSW PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION: -

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

SUBMISSION MADE BY:

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Executive Summary

On 6 August 1998, the Independent Commission Against Corruption ("the ICAC") commenced when the Parliament of New South Wales ("Parliament") passed the *Independent Commission Against Corruption* Act ("the ICAC Act").

The ICAC is a standing commission of inquiry charged with investigating public sector corruption. There is no place for political corruption in our society. In taking a strong stance against corruption the Parliament provided to the ICAC extraordinary powers.

Such powers defunct the civil rights and protections afforded to individuals within our criminal justice system. Enormous responsibility falls on those who hold such power. Stringent oversight is a necessity to minimise the potential damage that can flow from human fallibility.

Between 1990 and 2005, the ICAC Act was amended several times. Relevantly, this included the introduction of an Inspector to ensure greater accountability. In this 15 year period, the public maintained confidence in the work of the ICAC.

In November 2009, his Honour Judge David Ipp QC was appointed as Commissioner of the ICAC.

In October 2013, her Honour Judge Megan Latham SC was appointed as Commissioner of the ICAC.

During 2009 – 2014, several high-profile investigations were undertaken by the ICAC (hereinafter the "Ipp/Latham period"). This was a tumultuous period in the history of the ICAC.

Synonymous with the Ipp/Latham period was intense media interest in the investigations of the ICAC. Inexplicably, this included media reports naming individuals in foreshadowed investigations prior to any formal announcement from the ICAC.

There was a sense that the ICAC became a law unto itself which eroded the presumption of innocence for anyone accused of corrupt conduct. A culture of righteousness appears to have evolved. The cause requires a separate examination. One which is necessary to ensure that recent changes to the model have corrected this flaw.

During the Ipp/Latham period, the ICAC was plagued with a sentiment of disrepute which flowed from:

- allegations of improper leaks from within the ICAC to the media.
- combative and emotionally charged public inquiries.
- serious concerns that Counsel Assisting was making allegations of corrupt conduct "on the run" and without any proper and reasonable basis.

- concerns that individuals were unnecessarily treated unfairly, improperly, belittled, publicly humiliated, and suffered irreparable reputational damage.

- allegations of improper behaviour by Counsel Assisting.

- a record number of complaints made to the Inspector of the ICAC.

- video footage of Commissioner Latham noting the extraordinary powers of the ICAC which provided for a "free kick" against affected persons, whose legal representatives "could do nothing", and that this (cruel) treatment was akin to "pulling wings off a butterfly".

- the jurisdictional overreach observed by the High Court in the decision of *ICAC v Cunneen* [2015] HCA 14.

- the necessity to protect the ICAC from its own failings by introducing the *Independent Commission Against Corruption Amendment (Validation)* Act 2015.

- public animosity between the respective Inspector(s) of the ICAC and Commissioners Ipp and/or Latham.

- findings by the Inspector of the ICAC of improper behaviour and misconduct on the part of Counsel Assisting, Mr Geoffrey Watson SC.

The Parliament has recognised and acknowledged that the model required refinement to reduce the risk of overreach and poor behaviour. There was also significant public confusion to remedy.

As a result of this disturbing period, on 1 June 2016, the Parliamentary Committee on the ICAC ("the Committee") commenced an inquiry in relation to two reports of the Inspector of the ICAC. The Committee published its report on 27 October 2016.

On 23 November 2016, the Parliament assented to the *Independent Commission Against Corruption Amendment* Act 2016. This was an acknowledgment that the ICAC needed repair and permeated in significant structural and procedural changes in the ICAC model and how it functions.

This inquiry is a further acknowledgment that individuals were unfairly treated and have suffered significantly merely by being adversely named in an ICAC investigation.

I am such an individual.

I was an "affected person" as defined in s 74A (3) of the *ICAC* Act in the investigation known as Operation Credo. No findings of corrupt conduct were made against me. Yet I was

publicly humiliated and belittled. My reputation was severely damaged. I have suffered mentally, physically, and financially.

A pre-requisite to reputational rehabilitation is accountability. It is implored on this Committee to examine what caused the ICAC to apparently spiral out of control. Only then can the Committee be satisfied that proper safeguards and remedies are in place to ensure that the risk of any such further abusive behaviour is diminished.

Remarkably, not one officer of the ICAC has ever been held to public account for misbehaviour. The officers of the ICAC appear to exist in a vacuum void of misbehaviour. There has simply been no vigilant oversight. This lack of accountability appears to be at the heart of an institution that itself became untouchable.

A torch needs to be shone to examine how individuals such as myself could be accused of corrupt behaviour when none was ever found to exist. The gate to the public inquiry should never have been opened.

Officers of the ICAC and Counsel Assisting must operate in an environment where there are significant consequences to misbehaviour or abuse on their part. At the heart of this submission is ensuring that allegations of corruption are never again made with frivolity and recklessness.

And that the participants, namely officers of the ICAC and Counsel Assisting, responsible in the improper making of such allegations are held to account. Without such measures the risk remains that the sins of the past will be repeated. This would allow the horrific cruelling of the careers and lives of innocent individuals.

Exoneration Protocol

The Committee should consider the implementation of the following measures as part of and/or the development of an exoneration protocol:

(i) A public announcement made in Parliament, acknowledging and apologising to a category of individuals defined as "innocent individuals" who have been subjected to abuse and/or improper reputational damage from being adversely named in an ICAC investigation.

(ii) The announcement referred to in (i) above be published in each major print media, ie. The Australian, Daily Telegraph, Australian Financial Review, and Sydney Morning Herald.

(iii) All media reports and references relating to an innocent individual in an investigation of the ICAC investigation be expunged from electronic search engines.

(iv) Innocent individuals who lost a public appointment or position because he or she was adversely named in an ICAC investigation are to be placed on a priority list for merit based public re-appointment.

(v) The formation of an independent tribunal (or alternatively, amending the *ICAC* Act to enable the Supreme Court of NSW) to consider whether innocent individuals are entitled to compensation.

Further Considerations

The Committee should give serious consideration to recommending to Parliament that:

(i) an independent commission of inquiry (such as a Royal Commission) is held to investigate and examine the inadequate behaviour of the ICAC, its officers, and Counsel Assisting during the Ipp/Latham period to determine whether existing safeguards and remedies are adequate.

(ii) the *ICAC* Act is amended to give "affected persons" a "proper voice" during a public inquiry, or alternatively the investigation process must be held in private and only final reports made public.

(iii) the *ICAC* Act is amended to provide an affected person the opportunity to offer exculpatory evidence for consideration before a decision is made to conduct a public inquiry.

(iv) s 31B of the *ICAC* Act be amended to include a media protocol to ensure anonymity of an individual being investigated until such time as there is a formal announcement from the ICAC.

(v) the *ICAC* Act is amended to require the Inspector of the ICAC to investigate any pre-emptive media leaks such as a media publication naming an individual as part of an ICAC investigation prior to any formal announcement from the ICAC.

Finally, the Committee should ensure that this inquiry does not exacerbate the reputational damage already inflicted on innocent individuals. A non-consequential finding in an ICAC report should not be used as a foil against an innocent individual – who should never had suffered reputational damage in the first place.

Background

The extraordinary powers of the ICAC where recognised in the Second Reading Speech of the *ICAC* Act, wherein Premier Greiner, on 26 May 1988, stated:

"The final point I want to make by way of introduction concerns the question of civil liberties. This commission will have very formidable powers. It will effectively have coercive powers of a Royal Commission. Those are features of the legislation that I foreshadowed in the election campaign. There is an inevitable tension between the rights of individuals who are accused of wrongdoing and the rights of the community at large to fair and honest government".

The principal function of the ICAC is to investigate complaints of corrupt conduct affecting the probity of public authorities and officials.

The powers afforded to the ICAC including those undertaken at a public inquiry provide for a jurisdiction that is diametrically opposed to the democratic rights that would otherwise protect each citizen within the confines of our criminal justice system.

Example

Case A

Politician A is investigated by the NSW Police for an alleged assault. The investigation is conducted in private. At the conclusion of the investigation the Police determine that there is no evidence to support a charge. Politician A incurs no reputational damage.

Case B

Politician B is investigated by the ICAC for the alleged acceptance of a bribe. As part of the investigation the ICAC undertakes a public inquiry. The allegation is made public, and Politician B has no right of reply. The reputation of Politician B is significantly damaged notwithstanding no ultimate adverse finding by the ICAC.

There are two significant points of differentiation – the first, is that the ICAC is armed with the power of compulsion. This eradicates the right to remain silent of the accused individual who is referred to as an "affected person" as defined pursuant to s 74A (3) of the *ICAC* Act.

The second, lies in the power of the ICAC to hold a public inquiry. Relevantly, at a public inquiry:

- the investigation phase is continuing.
- an affected person is not permitted to respond to the opening address made by Counsel Assisting.

- the power of compulsion means that an affected person or a witness must answer questions rather than elect an otherwise democratic right of silence.

- the ability of a legal representative of an affected person to cross-examine a witness is severely diminished.

- the rules of evidence do not apply.

- findings of corruption are made pursuant to the civil not criminal burden of proof.

It is imperative that the Committee acknowledges that significant points of differentiation between the "inquisitorial" ICAC model and our "adversarial" criminal justice system provide considerable confusion within the community.

The academic explanation between the two systems often deployed in defence of the ICAC model does not avail the public confusion, nor afford any reputational protection to an individual adversely named in an ICAC investigation.

The public is accustomed to a police investigation being undertaken in private thus avoiding any unnecessary reputational damage – if the investigation fails to bear fruit worthy of a prosecution the matter ends, and the person's reputation remains intact.

If, however, an accused is charged of an offence, then the public lens is only activated in a Court of law. The investigation phase has concluded. The prosecutor must be satisfied that there is a proper and reasonable basis upon which to make and sustain any allegation against the accused.

Most importantly, there are conventions and principles which apply to how the media reports a criminal hearing. This safety net is non-existent in the current ICAC model.

During the Ipp/Latham period, an affected person appearing before the ICAC in a public inquiry would make the "walk of shame" towards an awaiting media scrum and bystanders who would hurl abuse. At that juncture there is both public humiliation and significant reputational damage.

The mental strain and distress are debilitating. For an innocent "affected person" it is pure torture. An incomprehensible mental public flogging that borders on the inhumane.

The inherent prejudice of the ICAC model is that the public lens is activated during the investigation phase via the public inquiry. The prejudice is amplified by the fact that the public only hears the ICAC narrative. The affected person has little if any active voice which is always subject to the discretion of the Commissioner.

Its beggar's belief to suggest that the human mind can remain open to an affected person's presumption of innocence in that environment.

The academic supporters of this barbaric model assert that transparency dictates that an inquiry must be in public. Well if that is so, then the public has the right to hear both sides of the story and not just the pre-determined narrative of the ICAC and its Counsel Assisting. As a starting proposition this would mean that:

- affected persons should have the right to reply to the opening address of Counsel Assisting.

- affected persons should be allowed to cross-examine witnesses without putting forward his/her positive case.

- the rules of evidence should apply.

If the public inquiry is to remain as a component of the investigation phase, then the *ICAC* Act should be amended to provide an affected person with a proper voice. This should also reduce the risk of abusing the extraordinary powers afforded to the officers of the ICAC and Counsel Assisting.

The Ipp/Latham Period and Geoffrey Watson SC

The public inquiries held during the Ipp/Latham period wherein Mr Geoffrey Watson SC was Counsel Assisting were combative and emotionally charged.

There is a plethora of media articles that referred to these public hearings as "show trials", and ultimately Mr Watson SC earned himself the moniker of "Hollywood".

Many senior members of the NSW Bar where critical of the cavalier and reckless behaviour of Mr Watson SC. Many "affected persons" and witnesses felt that they were unfairly treated and not given a "fair go".

To the rational observer it was plain that Mr Watson SC categorised witnesses as either "black hats" or "white hats". It appeared impossible for a pre-classified "black hat" to become a "white hat". However, if faced with personal criticism or embarrassment, Mr Watson SC appeared nonchalant in his capacity to turn a "white hat" into a "black hat".

The irony of the following passage from Premier Greiner in the Second Reading Speech of the *ICAC* Act, should not be lost on the Committee:

"Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and that community confidence in the integrity of public administration is preserved and justified."

The starting point is to look at the salacious headlines caused by the opening addresses of Mr Watson SC as Counsel Assisting. Those comments are printed without challenge, nor is

there any permissible response from an affected person thus creating in the mind of the reader a fallacy of truth.

This Submission will focus on the investigation known as Operation Credo, and the significant reputational damage I suffered and the impact on my family.

Also relevant to this Submission is the joint investigation known as Operation Spicer. The ICAC held a joint public inquiry in relation to both the investigations known as Operations Credo and Spicer.

As a result of the failings which occurred during the Ipp/Latham period, the *ICAC* Act was recently amended to incorporate a (new) three Commissioner model under Chief Commissioner Peter Hall QC. Guidelines and protocols were also put in place in relation to the behaviour of Counsel Assisting.

Mr Hall QC, in his book entitled, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* states:

> "The position of counsel assisting has in a general sense been equated to that of a Crown Prosecutor in that it is his or her duty to perform his or her function in a fair and even-handed way ..... The comparison is valid in the sense that ultimately, a commission of inquiry is concerned to establish the truth of matters it investigates and hence care must be exercised in seeking evidence both for and against any working hypothesis and in providing a fair opportunity for those who may be the subject of adverse findings to be heard and deal with them. That of course does not limit the role of counsel assisting in the development of plans and strategies with commission investigators to flush out evidence on an issue." (emphasis added)

Mr Bruce McClintock SC, Inspector of the ICAC, in his report dated 19 December 2019, entitled, *Report pursuant to sections 57B (5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B (1) (d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act* (hereinafter "the McClintock Report"), stated in relation to the role of Counsel Assisting (generally):

> "26. It is important to note that counsel assisting behaves with moderation. As Salmon LJ said in discussing inquisitorial processes:
>
> *An opening statement will also assist the Press in reporting the proceedings. The statement should be an impartial summary of the investigation and avoid any comments likely to make sensational headlines. It should be emphasised that until the evidence has been heard it would be wrong to draw any conclusions.*

27. These remarks apply with force to counsel assisting's conduct in eliciting evidence at a public inquiry. While publicity and sensational headlines may be an inevitable accompaniment of many ICAC public inquiries, that should not be because of counsel assisting's behaviour but rather a result of the evidence elicited fairly and dispassionately.

28. Further, counsel assisting should carry out his duties or her duties with independence and bring his or her own judgment to bear on decisions as to the conduct of the investigation or inquiry, no doubt in consultation with the relevant Commissioner. See Bretherton v Kaye & Winneke [1971] VR 111, 125; Hall op.cit. p. 494. Crucially, counsel assisting should not be a mere mouthpiece for a body such as the Commission and should not be perceived by observers to be so. This is crucial because inevitably investigating bodies such as the Commission or Royal Commissions or the police force tend to want to conclude an investigation with a finding of guilt or a charge. It can be very hard at the end of, say, a year-long investigation to say that nothing happened or, in the case of the ICAC, there was no corrupt conduct. That is why counsel assisting's independence is important – counsel is the gatekeeper whose duty it is to assess the evidence and put or permit only submissions fairly based on it and, when appropriate, to say no adverse findings should be made. One final point concerning independence: there is a real risk of "capture" of counsel by the organisation for whom he is working, which increases the longer he or she works with it and the more enquiries he or she appears in." (emphasis added)

The McClintock Report makes several adverse findings in relation to the manner in which Mr Watson SC acted as Counsel Assisting in Operation Spicer.

In paragraphs 29 – 40 of the McClintock Report, the following adverse finding are made in relation to the behaviour of Mr Watson SC:

(i) "I consider that Mr Watson's conduct as shown in the passage of evidence I have set out in [8] was inappropriate and unfair to the witness he was examining at the time and to Mr Gallacher. It must have been obvious that putting such a question to Mr Williams would inevitably have serious consequences for Mr Gallacher, specifically, that he would be required to stand aside or resign as a Minister. Yet, he was not present either in person or by counsel, had no notice of the allegation and no opportunity to answer it. See [54 – 62] below. This seems to me a serious lapse of procedural fairness. Further, whatever Mr Watson's subjective intention, any reasonable lay observer would have thought what occurred had elements of unfairness. The tone of the questions is sneering, contemptuous, verges on bullying and is inconsistent with the duty of fair conduct imposed on counsel assisting." (at paragraph 29)

(ii) ".... putting aside their unacceptably hectoring tone, must inevitably have given the appearance to a reasonable observer that Mr Watson's independence as counsel assisting had been compromised." (at paragraph 30)

(iii) "The same must also be said about Mr Watson's role in offering the inducement to Dr Cornwell. That should have been left to the Commission staff in consultation with the Commissioner as the time. I regard his involvement as inappropriate." (at paragraph 30)

(iv) "That said, it was a significant failure of process which damaged the public standing of the Commission and should not have happened." (at paragraph 33)

(v) "That question, despite Mr Watson's expression of regret, was reported on the Sydney Morning website within minutes of it occurring, under the headline: *Take a cab out to Malabar: ICAC witness Tim Koelma warned he could be jailed for lying.* The opening sentence of the article was: *A lunchtime visit to a Sydney jail was suggested to a key witness at a corruption inquiry as a reminder of the consequences of lying.* I regard this as a threat and an entirely inappropriate one. The passage and its reporting are not likely to have enhanced the reputation of the Commission for fair conduct of its public inquiries." (at paragraph 34)

(vi) "Sexualised references such as this are, in my view, inappropriate. They trivialise and debase what is a serious occasion when a witness' reputation and career may be at stake." (at paragraph 36)

(vii) "Of equal concern are the remarks which Mr Watson apparently made to an Australian Financial Review journalist and which were reported in that journal on 25 July 2014." (at paragraph 39)

(viii) "I am unable to see how Mr Watson's description of his purpose to "upset" the witness is consistent with his duties as counsel assisting. It is no part of his role to upset witnesses – many might think that approach would be less likely to get to the truth than permitting the witness to give evidence in a calm and rational manner, challenging him or her where appropriate. To the extent that he carried that purpose into action it was inappropriate and unfair." (at paragraph 40)

The behaviour of Mr Watson SC outlined above was poor.

In light of the ICAC's extraordinary powers the role of Counsel Assisting as an independent gatekeeper of the allegations that are to be made is of paramount importance.

In my opinion, Mr Watson SC failed to fulfil his obligations. Rather than take a considered and measured approach he behaved like a bull in a china store.

His reckless, and cavalier behaviour wreaked havoc on the lives on many innocent individuals who had spent considerable time and energy in building unblemished reputations.

The inappropriate behaviour of Mr Watson SC as Counsel Assisting during the ICAC Operation Credo investigation including up and until the release of the ICAC Report in August 2017 caused my family and I significant embarrassment, humiliation, distress, reputational damage, and financial loss.

The pain and suffering that I and others suffered at the hands of Mr Watson SC will never wane until such time as there is an examination into his behaviour and if warranted he is held to account for his gross misconduct.

It must not be lost on the Committee that Mr Watson SC was paid fees from the tax payers in the vicinity of millions of dollars.

The first step of reputation rehabilitation is accountability, and a bright light must be shone on his behaviour and the way he made and sustained serious allegations when there was no proper nor reasonable basis.

Operation Credo

Investigation phase

On 14 February 2014, I was compelled to attend a compulsory examination in the Operation Credo and Spicer investigations.

Mr Watson SC undertook the examination.

During that examination, serious allegations including that I may have been involved in fraud were put to me.

The allegations were made in an obtuse manner void of specificity.

Remarkably, I was not referred to a single document. I was not asked to answer a particularised allegation.

I denied all the generalised allegations.

During the compulsory examination, I referred to my extensive file which comprised some 30 lever arch folders of correspondence. At that time, the officers of the ICAC and Mr Watson SC had not seen my file. A review of that file would have proffered extensive exculpatory evidence.

At the conclusion of the compulsory examination Mr Watson SC informed me that the ICAC would serve a notice compelling me to produce my file. I complied with such notice.

Media Release – Public Inquiry

On 18 February 2014, the ICAC announced that it would be holding a public inquiry in Operations Credo and Spicer commencing on 17 March 2014.

My file was not produced to the ICAC prior to this announcement.

I could not help but feel that there was a predetermined narrative.

I find it impossible to accept that based on the compulsory examination I undertook and the fact that Mr Watson SC had not yet been privy to the contents of my file that it was possible for he to be satisfied that there was a proper and reasonable basis upon which to make those serious allegations public.

S 6 (2) of the *ICAC* Act (as amended in 2016) now provides the safeguard that a decision by the ICAC to conduct a public inquiry under s 31 must be authorised by the Chief Commissioner and at least one other Commissioner

The Committee should consider introducing one further safeguard, namely that any such decision must consider any exculpatory evidence provided to the ICAC from an affected person. The ICAC should particularise the allegations to the affected person who should then be afforded the opportunity to respond.

If such response is satisfactory to the ICAC then there are two significant benefits. The first is the protection of the reputation of the individual, and the second is the cost saving to the taxpayer of holding an expensive public inquiry.

If, however, the ICAC does not accept the response as exculpating the individual then the decision to conduct a public inquiry is made.

Operation Credo and Spicer – Directions Hearing

On 5 March 2014, the ICAC held a directions hearing before Commissioner Latham.

Mr Todd Alexis SC with Mr Rohan Hardcastle of Counsel, with leave, appeared on my behalf.

During the directions hearing, Mr Alexis SC raised the necessity for precision in relation to serious allegation of fraud that was being made against me.

In response to the matter raised by Mr Alexis SC, Mr Watson SC stated:

> "I agree that in the current form it's too broad, so we will do something about that."

Notwithstanding that comment and a formal request from lawyers for such precision no further specificity was provided.

Operation Credo – Public Inquiry

On 17 March 2014, the public inquiry in Operation Credo commenced.

I recall making the "walk of shame" along Castlereagh Street to the ICAC hearing room. As I approached, I was met by a significant media scrum. I will never forget the words of a bystander who yelled out:

"Don't worry Nick, suicide is an option".

Subsequently, I and my parents received death threats.

It is difficult to comprehend how the ICAC as an institution of the State was able to invoke such callous public sentiment.

Mr Watson SC made his opening address.

In so far, as it related to me, that address was highly inflammatory, emotive, sarcastic, belittling, and sensationalised.

Those comments were reported extensively throughout the print, radio, and television media in Australia. It caused significant embarrassment, humiliation, and reputational damage to myself, my family, and my friends.

Throughout the public inquiry, my legal representatives attempted to explain that the allegations of fraud had no proper basis. These attempts were cast aside.

On 1 April 2014, the following exchange took place, during the Operation Credo public inquiry, between Mr Watson SC, the Commissioner, Mr Anthony Bannon SC (acting for Mr Arthur Sinodinos), and Mr Todd Alexis SC:

> MR BANNON: Yes, the only point I was going to make is statements have been made in the past that Sydney Water was made to pay for one, Mr Sinodinos' directors fees. What these documents show is that statement is not true and never was. Two, that Sydney Water was made to pay Liberal Party donations, that statement is demonstrated by these documents to be not true and never was, That's we want the benefit of that public statement.
>
> THE COMMISSIONER: Well look, what findings we make in relation to that has to wait until the end of the inquiry and as I said you'll get a chance to make submissions that you want to make. But I just want move it along.
>
> MR BANNON: Sure
>
> MR ALEXIS: Well Commissioner, if Counsel Assisting wants to withdraw what was said in opening about expenses that were charged to RH3 ---
>
> MR WATSON: I was absolutely right ---

MR ALEXIS: --- then ---

MR WATSON: --- if for example ---

MR ALEXIS: --- perhaps I could finish my submission.

MR WATSON: --- you look at the, no. No. We've heard enough. Don't drag it out.

THE COMISSIONER: Well, I think the answer, Mr Alexis, is that Counsel Assisting is not going to withdraw it.

MR ALEXIS: Well then I'll have to proceed. [T1066.17 – 1067.4]

.....

MR ALEXIS: --- I do need to be very clear about this. When Counsel Assisting introduced C47 yesterday he said, and this is something he often says, "This doesn't purport to be a complete record but it contains," the material that can be described as indicating fraudulent claims for expenses. Now, if Counsel Assisting is relying upon the content of Exhibit C47 to make good that allegation and nothing else, then I am completely content to cross-examine on the content of C47.

MR WATSON: Well, we are, I thought I said that yesterday.

THE COMMISSIONER: Well, I think, I think that's where you need to move to then, Mr Alexis.

MR ALEXIS: Well, I am clear then, Commissioner, that ---"

MR WATSON: Well, I just that, yes.

MR ALEXIS: Well, maybe once ---

MR WATSON: I'll write it in blood in a moment if you need it.

MR ALEXIS: Perhaps I could just finish my submission, Commissioner, and then Mr Watson can respond. With all respect to what's occurred here we need to be very clear as to whether or not allegations within paragraph 1 of the scope and purpose of the inquiry related to the content of C47 only and whether all the allegations that have been made, not only in the opening of this inquiry but also allegations that have been put to various witnesses so far are withdrawn and not relied upon to make good paragraph 1 of the scope and purpose of the inquiry. If that's the position then I'm happy to accommodate my remaining questions of Mr Chadban to those

documents within C47 to which I expect he'll some knowledge but unless that's made unequivocally clear ---

MR WATSON: I'm not going to respond to that but I will tell ---

MR ALEXIS: Perhaps I can finish, Mr Watson. Unless that's made unequivocally clear ---

MR WATSON: He's just dragged on. I mean (not transcribable) go on.

MR ALEXIS: --- and with great respect I need to continue with cross-examination and with respect it hasn't been made crystal clear because every time I've asked for the point to be made clear or for the allegation to be withdrawn it expressly has not been.

THE COMMISSIONER: Well, your submission goes a bit further than what you said a moment ago, Mr Alexis. Your submission invites Counsel Assisting to withdraw every allegation that's made outside what is represented within C47 that's been put in the course of this inquiry. I don't understand that that's something that Counsel Assisting can realistically do without identifying each and every allegation that you say is outside the scope of C47 but anyway can we move on? Mr Watson, do you want to respond?

MR WATSON: Yes, I do. What I would say is this, is that we've said, and this is to try and save time, is that we'd only rely the frauds proved in C47, then that's allied to C52, C53, C54, and there's also the $633,000 which is the mystery sum taken by Australian Water Holdings from accounts the past which nobody can seem to explain. So there are those things and my learned friend could rely on those, I'm certainly not withdrawing one word of what I've said, as a matter of fact it seems all to be coming quite vividly true. [T1069.25 – 1070.42]

.....

MR ALEXIS: Sorry, Commissioner, but I just need to make this submission. Counsel Assisting opened this inquiry in emotional and provocative terms. It now appears that the particular allegations concerning Liberal Party donations and the like are no longer the subject of those allegations concerning inappropriate expenses claimed by RH3 against Sydney Water. We have gone to the trouble, and significant expense I might add, to actually obtain the documents underlying each of the MBT certificates from month to month during Mr Di Girolamo's tenure at AWH from early 20007 through until the end of the RH3 project. We understand that this material has been available to the Commission for some months.

THE COMMISSIONER: Well, I don't know that you should assume that, Mr Alexis, because I know that there were quite a lot of records that were in the custody of Australian Water Holdings that we didn't appear to get in response to notices that were initially served.
MR ALEXS: But ---

THE COMMISSIONER: But I don't think there's any point in all us going over that.

MR ALEXIS: No I understand, but Commissioner, I hope you do really appreciate that when provocative and emotional statements are made by Counsel Assisting it is necessary when those statements are published and reputations are inevitably destroyed, to deal with this. And it is a little extraordinary, this being day ---

MR WATSON: Well let's just clear it up for you.

MR ALEXIS --- day 14 ---

MR WATSON: I stand by everything I said.

MR ALEXIS: --- of the inquiry.

MR WATSON: And if it comes down on my head so be it. But can I ask we get, and ask some relevant questions of this witness. I'm not backing off one inch. [T.1072.28 – 1073.19]

By 1 April 2014, it was clear that the allegation of fraud could no longer be maintained. Yet when the opportunity arose for the allegation to be withdrawn Mr Watson SC refused.

Mr Watson SC shut down and ignored two senior members of the NSW Bar who were ethically bound to only make such a submission for the allegations to be withdrawn on reasonable and proper grounds.

At the heart of this allegation was the interpretation of the legal contract between AWH and Sydney Water.

Never once did Mr Watson SC ask me to explain my interpretation.

Never once, did Mr Watson SC acknowledge that my interpretation was consistent with the legal opinion that AWH had received from Messrs Bret Walker SC and Andrew Lockhart SC.

On 15 April 2014, Mr Watson SC examined me at the public inquiry. Mr Watson SC endeavoured to belittle, bully, and humiliate me by calling me:

"an old fashioned shyster, fraudster"

And

"a bare faced liar".

Those reckless comments were published on the front page of the Sydney Morning Herald the following day.

On 16 April 2014, Mr Watson SC continued with his reckless examination culminating in the resignation of then Premier Barry O'Farrell. There was never any allegation of impropriety on the part of Premier – yet Mr Watson SC was able to reset the course of political history in NSW.

Post Public Inquiry Media

On 25 July 2014, the Australian Financial Review Magazine published an article by Mr Geoffrey Winestock entitled, "The Fighter".

A picture can paint a thousand words. The photograph on the next page taken by Mr Nic Waker was published as part of "The Fighter" article. It shows Mr Watson SC in a boxing ring.

This photograph, in my opinion, depicts all that went wrong at the ICAC during Operation Credo and Spicer.

In the photograph, Mr Watson SC is sitting alone in the ring. There is no opponent. That depicts exactly what transpired during the public inquiry. It was not a fair fight.

The "affected person" was simply not allowed to step into the ring and defend themself.

Personally, it felt like I was part of a dog and pony show at a concocted circus which was allowed to continue notwithstanding the rational protestations of senior members of the NSW Bar representing "affected persons".

A short time after the public inquiry I was devasted to learn that a journalist from the ABC's Four Corners program was endeavouring to ascertain the name of the School that my young daughters attended as part of an exposé on the Operation Credo public inquiry.

Four Corners proceeded with the story – and fortunately did not make any reference to my children. However, the fact that the story was aired prior to a final report is disturbing.

The Ipp/Latham period appeared to be a time when certain sections of the media accepted the one-sided narrative from the ICAC without challenge. The appetite for salacity appeared unquenchable.

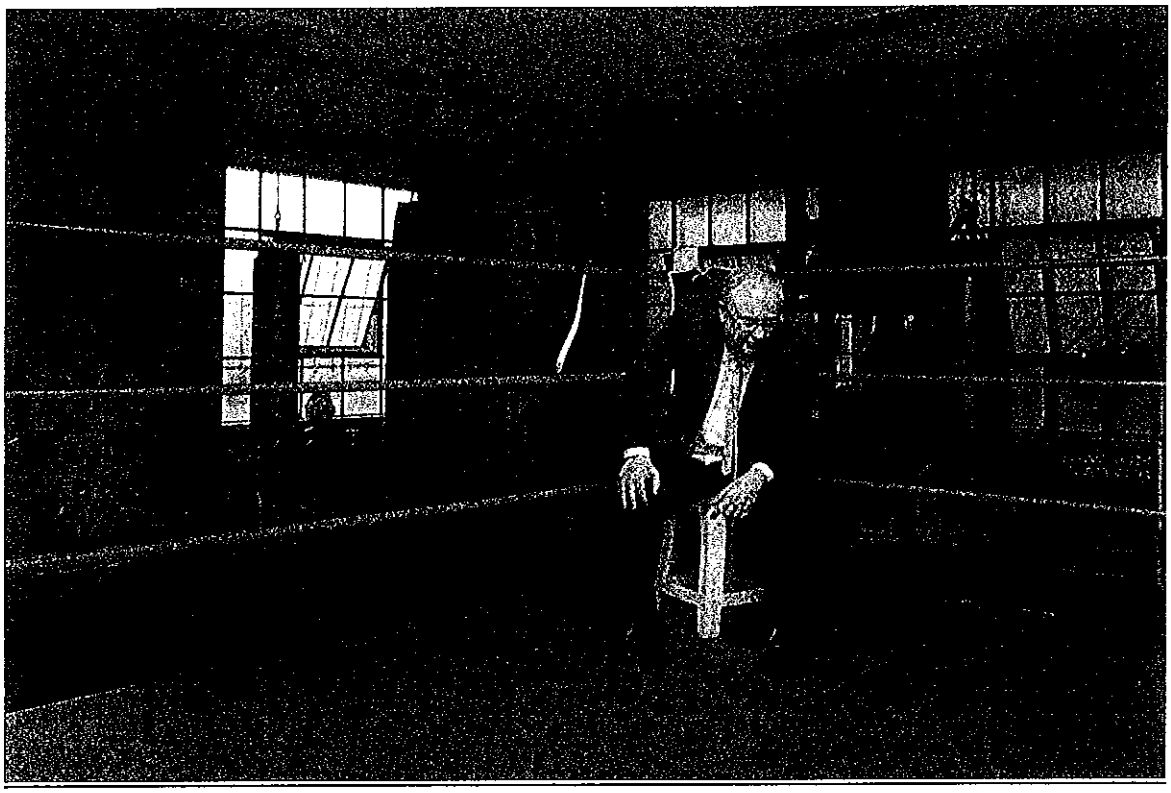


Photo by Nic Walker

Published in the Australian Financial Review Magazine 25 July 2014

Operation Credo - Report

In August 2017, the ICAC published its Report into the Operation Credo investigation ("the ICAC Report").

The ICAC Report unequivocally cleared me of all the allegations of wrongdoing.

Reputational Damage

As at the date of admission as a Solicitor, I commenced practising law at Colin Biggers and Paisley, Lawyers ("CBP").

Whilst at CBP, I held the following positions:

(i) Solicitor - 1993.

(ii) Associate - 1997.

(iii) Partner - 1999.

(iv) Managing Partner - 2005.

As at February 2014, I had held the following senior positions:

- Managing Partner of CBP.
- Chairman of the Italian Chamber of Commerce in Sydney.
- Chairman/Director of the Wests Tigers Rugby League Football Club.
- Director of State Water (NSW State-Owned Corporation).
- Director of the European Australian Business Council.
- Committee member of the Advisory Board to the Dean of the Faculty of Science, University of New South Wales.
- Chief Executive Officer of Australian Water Holdings.

Prior to any suggestion that I may be involved in an ICAC investigation, I enjoyed a professional reputation of high standing amongst the legal fraternity, business community, and the political sphere.

On 18 February 2014, the ICAC announced that a public inquiry would be held in the investigation known as Operation Credo.

As a result of that ICAC media release, my reputation was completely trashed.

Within an hour of the media release I received a telephone call from the Treasurer's office seeking my resignation from the Board of State Water.

After the opening address of Mr Watson SC as Counsel Assisting, my then employer concerned about the possibility of any reputational knock-on impact asked me to resign.

My extensive business and political network evaporated.

The mental anguish and distress were excruciating.

Observing the impact on my children, family, and friends was torturous.

It is difficult to fathom how this could be happening when you know you are innocent of any wrongdoing, yet I had no voice. I had no avenue to be heard from the ICAC prior to the allegations being made public.

If I had been given the opportunity to respond to the concerns of the ICAC then it would have been clear that the allegations could not be sustained.

Unfortunately, the deck appeared to be completely stacked.

The damage to my reputation has been significant and continues every time someone Googles my name.

I sat in a corporate and political wilderness for well over three (3) years.

To this day, I still struggle with the damage a simple search of my name causes me and my family.

It is commercially debilitating.

As an innocent person, I believe that I am entitled to have my reputation restored.

Discussion Paper

As set out in the discussion paper, the Committee is undertaking an inquiry on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:

- whether the existing safeguards and remedies, and how they are being used, are adequate, and

- whether additional safeguards and remedies are needed, and

- whether an exoneration protocol should be developed to deal with reputational impact, and

- relevant practices in other jurisdictions, and

- any other relevant matters.

Safeguards and remedies

The Ipp/Latham period exposed the fact that there was little (if any) actual safeguards to an individual's reputation when adversely named in the ICAC's investigation.

To the contrary, there was an apparent pro-active endeavour to trash reputations.

There are currently **no** statutory remedies to compensate an individual found not to have undertaken an act of corruption yet suffered significant reputational damage because of being named adversely in an ICAC investigation.

There was no safeguard prior to the allegation being made.

There is currently no adverse ramification to the failed accuser – who in my case fell hopelessly short of the mark.

The Committee should consider introducing a preliminary safeguard wherein prior to the allegation being made public:

(i) the "affected person" is informed of the allegation and provided with proper particulars of the allegation.

(ii) the "affected person" should be provided with a reasonable opportunity to respond to the allegation.

(iii) if the ICAC is not satisfied that the response extinguishes the allegation then the investigation is maintained.

The proposed remedies are set out in the section below – Exoneration Protocol. Part of that proposed protocol is accountability which should act as a deterrent and provide for an important safeguard.

Exoneration Protocol For An Innocent Individual

An exoneration protocol is required to provide reputational rehabilitation to an individual who has suffered significant damage caused merely by being adversely named in an ICAC investigation.

The Committee should consider implementing an exoneration protocol which applies to an innocent individual. The innocent individual should be defined to include either:

(i) an affected person who had no corruption finding made against him or her at the conclusion of an investigation; or

(ii) an affected person who had a corruption finding made against him or her and either:

(a) the DPP concludes that no prosecution ought to be brought; or

(b) the DPP has not commenced a prosecution within 12 months of the ICAC making the corruption finding; or

(iii) a person who has been found to have given false evidence pursuant to s 87 of the *ICAC* Act and either:

(a) the DPP concludes that no prosecution ought to be brought; or

(b) the DPP has not commenced a prosecution within 12 months of the ICAC making the corruption finding.

Any other findings made by the ICAC which may be considered adverse towards an individual, such as to the individual's credibility, should be considered non-consequential and have no impact on a person being declared an innocent individual. To put simply, if the primary (and serious) allegation of corruption had not been made then the individual would not have been exposed to any other non-consequential finding.

There must be a mechanism to enable an innocent individual to have his or her reputation restored. The "Google search" can make it extremely difficult for an innocent individual to restart a career. Human nature is such that an employer faced with two potential candidates will employ the person that does not have a reference to an ICAC investigation when you Google his or her name.

The first step in reputational rehabilitation is acknowledgement that the individual was unfairly treated. The sense of communal reacceptance requires an acknowledgement and apology for the wrongdoing and the suffering incurred by the innocent individual.

The second step involves the right of the innocent individual to have the past forgotten. The media articles that currently continue to prejudice and limit the employment opportunities of the innocent individual need to be expunged from electronic search engines.

The third step is for the community to see that the innocent individual has been reaccepted. A former member of Parliament who has resigned due to being adversely named in an ICAC investigation cannot be reinstated. However, he or she should be able to serve in the public sector again. Likewise, an individual who was forced to resign from a public sector appointment should be reinstated to a similar role.

The final step involves accountability and where warranted compensation. Without accountability there is no control mechanism to ensure the integrity of an organisation. There can be no reason why the ICAC should be immune from providing compensation as a result of its misbehaviour. Many innocent individuals have faced significant financial loss and hardship. This would also act as a strong deterrent against misbehaviour.

The Committee should consider the implementation of an exoneration protocol for the innocent individual which incorporates the following characteristics:

(i) A public announcement in Parliament, acknowledging and apologising to an innocent individual who has been subjected to abuse and/or improper reputational damage from being adversely named in an ICAC investigation.

(ii) The announcement referred to in (i) above be published in each major print media, ie. The Australian, Daily Telegraph, Australian Financial Review, and Sydney Morning Herald.

(iii) All reports and references relating to an innocent individual and an investigation by the ICAC investigation be expunged from electronic search engines.

(iv) Innocent individuals who lost a public appointment because of being adversely named in an ICAC investigation are to be placed on a priority list for merit based public appointments.

(v) The formation of an independent tribunal (or alternatively, amending the *ICAC* Act to enable the Supreme Court of NSW) to consider whether an innocent individual (who falls within the exoneration category) is entitled to compensation.

Other Relevant Matters

The Committee must also recognise the severe impact that an ICAC investigation has on the family of an affected person.

My parents, Cathy and Frank Di Girolamo instilled in their family the core values of integrity and honesty. They are pillars of the Italian (and broader) community in the Five Dock/Drummoyne area where they have resided as a married couple for over 50 years.

On 19 September 2013, their world was turned upside down with the death of my sister, Eliana. She was 39 years old. She had followed her mother's footsteps and embarked on a teaching career.

At the time she passed away, Eliana was the Deputy Principal of Abbotsford Public School – a position her mother had also held during the course of her career.

Unfortunately, by this time the media articles stating that I was involved in an ICAC investigation had commenced. That relentless media scrutiny robbed my parents the opportunity to have unfettered time with Eliana during her final months.

The far reaching effects of those reckless headlines are still mentioned today by my family even though almost 8 years have passed.

There have been numerous complaints about ICAC leaks – but no action appears to be taken. Your reputation is immediately tarnished as soon as you are mentioned as being part of an ICAC investigation.

Until such time as a formal announcement is made an individual should have the right to anonymity.

These pre-emptive leaks must stop.

The Committee should consider amending the *ICAC* Act to include:

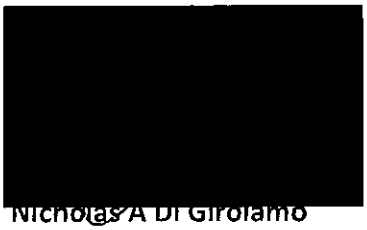
(i) a media protocol that would enforce anonymity of an individual who may be part of an investigation until such time as a formal announcement is made by the ICAC; and

(ii) a requirement that the Inspector of the ICAC must investigate any pre-emptive media leaks.

In order to ensure that the current safeguards are adequate the Committee should consider making a recommendation that an independent commission of inquiry (such as a Royal Commission) is held to investigate and examine the inadequate behaviour of the ICAC, its officers, and Counsel Assisting during the Ipp/Latham period.

Finally, the Committee should consider amending the *ICAC* Act to give "affected persons" a "proper voice" during a public inquiry. The public has the right to hear both sides of the

story. Without this there is a lack of transparency. Rather, providing an "affected person" with a proper voice should focus the institution to act with accountability. Alternatively, the investigation process must be held in private, and only the final report made public.



Nicholas A Di Girolamo