REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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

At Jubilee Room, Parliament House, Sydney, on Wednesday 2 December 2020

The Committee met at 10:30.

PRESENT

Mrs Tanya Davies (Chair)

Legislative Assembly

Mr Justin Clancy
Mr Mark Coure
Mr Ron Hoenig
Ms Tania Mihailuk
Mr Jamie Parker
Mr Dugald Saunders
Mrs Wendy Tuckerman

Legislative Council

The Hon. Taylor Martin (Deputy Chair)
The Hon. Rod Roberts
The Hon. Adam Searle

The CHAIR: Welcome to the public hearing of the joint Committee on the Independent Commission Against Corruption. Today's hearing is for the Committee's inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations. Before we commence I acknowledge the traditional owners of the land, Gadigal people of the Eora nation. I pay my respects to Elders past and present and extend that respect to other Aboriginal and Torres Strait Islander people who are viewing the proceedings on the internet. Today we will hear from witnesses attending in person here at Parliament House. At the outset I thank the witnesses for making themselves available to appear today as I understand that this inquiry delves into sensitive issues and experiences for those involved. I remind everyone to turn their mobile phones to silent or switch them off. The Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines governing coverage of the proceedings are available. I now declare the hearing open.

JOHN ATKINSON, sworn and examined

The CHAIR: Do you have any questions regarding the procedural information?

Mr ATKINSON: No, I do not.

The CHAIR: Thank you for submitting your opening statement to Committee members, which we have yet to read as we have only just received it. The Committee has agreed that we will proceed straight to questioning given the limited time. Before we do, I remind you that the Committee is not able to reconsider the ICAC's findings, recommendations or other decisions. Committee members have read your submission and we appreciate your assistance in helping us to consider any possible recommendations arising from this inquiry. I also add that as chair, I must ensure that the proceedings we are about to commence adhere strictly to the terms of reference of this inquiry. I remind all Committee members that there is no debate across the table for this public hearing; it is simply a question and answer opportunity with the witness. I now open up the hearing for questions.

Mr JUSTIN CLANCY: On page 13 of your written submission, you write:

> … 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.

I am interested in how you feel that recommendation would improve the process.

Mr ATKINSON: I have quite a long history with the inspector's office and have experienced different inspectors. For instance, I felt Mr Levine suffered from a lack of resources. He had a desire to investigate and it was very difficult for him to formally investigate. I also feel the current inspector suffers from a lack of resources and I wonder whether the Act limits his investigative powers. There are a number of clear problems with him getting access to information in a timely way. Similar to a complainant getting access to information in a timely way in order to make a complaint. Complaints need to be evidence based, clearly, and you find that when you are asked questions by the inspector to answer—things that require evidence that you cannot access.

Fortunately, in our case, the Jasper inquiry has been subjected to significant subsequent litigation and discovery exercises in that litigation have yielded literally thousands of documents that were not made available by the ICAC at the relevant time. They have been very useful in informing the basis of complaints. My experience suggests that the powers of the inspector need to be broadened and more resources need to be given to the inspector's office in the hope that it is one tool that can be used in order to ensure the appropriate checks and balances on the ICAC's behaviour.

Mr RON HOENIG: Mr Atkinson, what is the value of an inspector's report? Other people have had findings of maladministration, for example, by previous inspectors. That does not clear someone's reputation, does it?

Mr ATKINSON: No, it does not clear anyone's reputation.

Mr RON HOENIG: Your submission is that it requires more than just a more powerful inspector, it requires some physical statement of exoneration, I take it?

Mr ATKINSON: Exactly.

Mr RON HOENIG: There are two issues. One I have found interesting, which I have not thought about before, was you made some observations about the validation Act that occurred virtually just before the orders setting aside the ICAC findings were made. You said:

> 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.

By that you are saying that everything the ICAC did in respect of Operation Jasper had been validated by the legislation but it did not actually empower them to conduct the investigation they conducted in respect of you.

Mr ATKINSON: That is correct. And, in fact, it leaves me and my colleagues in no-man's-land. The preamble to the validation Act—

[*Mobile phone ringing.*]

Mr ATKINSON: There is always one—and it happens to everybody.

The CHAIR: Mr Hoenig—Rocky!

Mr RON HOENIG: It was actually turned off. I do not know why it is ringing.

Ms TANIA MIHAILUK: It could be ICAC.

Mr ATKINSON: It could well be. Apparently they have been in this building recently.

Mr RON HOENIG: It is probably an ICAC warrant, listening to my phone.

Mr ATKINSON: It may well be. But the preamble to the Act clearly states that the Act was not designed and should not—

Mr RON HOENIG: Yes, I saw that.

Mr ATKINSON: It changed the decision of Cunneen.

Mr RON HOENIG: It is something I had not contemplated but I will now. More importantly, the issue that I have no concept about and have no understanding why it occurs appears on page 7 of your submission about reputational damage. And you understand that someone from some of our backgrounds would not have this concept. You say:

> 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.

No charges were brought against you?

Mr ATKINSON: No.

Mr RON HOENIG: One of the findings was set aside, and the validation Act has enacted another finding, but no courts made findings against you.

Mr ATKINSON: No.

Mr RON HOENIG: So how does all that operate in the world of business and the world of banking? Other people have told us, for example, that they have had their bank accounts cancelled, and they are only in the process of giving evidence. How does that work?

Mr ATKINSON: Absolutely correct. Mr Hoenig, most business is now conducted by—the first thing people do is look to Google to determine whether they are dealing with someone of good character. Companies do it, professional firms do it. And in my world of trying to start businesses and grow them, counterparts do it—and the first thing they see when they look up my name is "corruption", and that is a very heavy word. And it has had very significant impact on the capacity to build business. I am, in fact, very proud of the fact that, through the efforts of my wife's urgings, I have tried to keep my head above the parapet and have, in fact, struggled to keep business interests alive.

But for someone who was very fortunate to have once a very successful legal career and then a very successful business career, the damage is extensive. And I do not think it matters if you are successful or not successful, you just do not have the same opportunity. To give you a very practical example: I have been involved in a charity for 25 years. I was on the board of that charity. They struggled to get directors and officers insurance because of my corruption finding. That charity looks after tens and tens of thousands of mothers and children, and there I am having to get off that board because of a random corruption finding frankly that has no standing.

Mr RON HOENIG: So assuming Parliament did not rush through the validation Act and waited three or four days, the Court of Appeal would have made an order quashing the finding against you, but your name still would have appeared in Google if somebody would have googled your name?

Mr ATKINSON: That is correct. However, in those circumstances I would have worked assiduously to try and counter that with different commentary. There are mechanisms you can use to have positive media, and I would have tried to get positive media to at least counterbalance to a degree what was on Google. And, in fact, if I had had that corruption finding overturned—and if indeed ICAC did lobby for the enactment of the Validation Act, as I suspect—I would have at least been able to hold up a piece of paper to my counterparts, or whoever I am dealing with, saying, "No, I was not corrupt, and here is the explanation." But unfortunately that is not available to me.

The CHAIR: Colleagues, before I move to Mr Searle, could I please remind everyone that these proceedings and what is occurring is being broadcast. Everything that we say is being broadcast. I just wanted to remind everyone of that.

The Hon. ADAM SEARLE: Thank you, Mr Atkinson, for your evidence and for your opening submission. In relation to the point that Mr Hoenig raised, you attached some documents and you give some evidence that the Parliament was not made aware of the case that was being brought by yourself and others before

the Court of Appeal, and that the validation Act was passed by both Houses just a couple of days before the court was due to enter judgement. Just to make sure I understand correctly, ICAC had accepted the force of your and other people's legal arguments, that the findings of corruption could not be upheld under the law as it then stood in the wake of the Cunneen ruling, that is correct?

Mr ATKINSON: That is correct.

The Hon. ADAM SEARLE: And ICAC understood that those findings of corruption were therefore legally flawed and they accepted that they should be overturned by the Court of Appeal?

Mr ATKINSON: That is correct.

The Hon. ADAM SEARLE: And at that point they were offering no defence in relation to those findings?

Mr ATKINSON: That is correct.

The Hon. ADAM SEARLE: And were you told by ICAC or any other person that the Parliament was due to enact—or that legislation was to be brought before the Parliament to retrospectively validate the actions of ICAC?

Mr ATKINSON: No.

The Hon. ADAM SEARLE: How and when did you become aware of the validation legislation?

Mr ATKINSON: There was a newspaper article where former Commissioner Ipp was advocating for retrospective legislation. The morning after apparently the legislation was enacted, or assented to, in the wee hours of 6 May, I believe, there was a letter from the Crown Solicitor that my lawyers received mid-morning. But, Mr Searle, following your questioning of Mr Hall and Mr Waldon at the hearings that they attended recently, a Government Information (Public Access) Act [GIPAA] application—which I referenced in my opening statement—has been made to ICAC, asking a number of questions about that period from 1 January 2015 through to 30 January 2015 about their communications with either the Attorney General, the Premier's department or even the Supreme Court itself, to establish whether they played any role in lobbying for the enactment of the Validation Act. Getting to the bottom of that issue is very important, because—at least from the outside—it appears that Parliament may well have been misled, because I suspect that you and maybe others may have formed a different view if you knew those proceedings were on foot.

The Hon. ADAM SEARLE: Just speaking personally, I was a member of that parliament and I voted in favour of the legislation. Certainly I was not aware, and I do not know anybody else who was aware of the existence of that litigation, so I think that is a reasonable inference that you draw.

Mr ATKINSON: Interestingly, Mr Searle, you would be surprised—and again, I have referenced this in the opening statement, Madam Chair—that Mr Waldon's response to the GIPAA application has been—well, maybe it is not surprising—to reject it in its entirety.

The Hon. ROD ROBERTS: Not surprising.

Mr ATKINSON: Notwithstanding that the request—he has relied on an exemption that they have under the Act, but his reliance on the exemption goes to whether or not the information being sought relates to an investigation. Operation Jasper finished in 2013. The GIPAA application is for information between 1 January 2015 and 30 January 2015. The New South Wales Civil and Administrative Tribunal will no doubt determine what is right and who is right and who is wrong, and whether that information should be made public, but I would urge the members of this Committee to use their powers to demand that information.

The Hon. ADAM SEARLE: Are you able to provide to the Committee the correspondence you received back from the ICAC rejecting the application?

Mr ATKINSON: Certainly.

The Hon. ADAM SEARLE: Just moving on to a slightly different topic: You said that you had taken administrative law action in relation to a couple of the findings against you, and you were successful on one but not on the other, and on page 10 you talk about the eventual disclosure of exculpatory documents. The failure of ICAC to provide those documents—wasn't that an administrative legal error by the ICAC? The fair hearing rule that binds all administrative tribunals at common law requires a fair hearing, and that requires that they have regard to all the relevant material and do not have regard to irrelevant material, and Also that the affected persons have access to all the material. If you were not afforded proper access to all the relevant material, doesn't that constitute an administrative error?

Mr ATKINSON: It should, if you are aware of it at the time.

The Hon. ADAM SEARLE: Yes, okay.

Mr ATKINSON: But if people fail to provide information under discovery—as you would no doubt be aware—and years later information comes out that you knew would have been relevant that somehow did not make its way into those earlier proceedings, it is a problem. It is a significant problem for the complainant.

The Hon. ADAM SEARLE: Yes. If my recollection is correct, I think it was Mr Waldron in his evidence to this inquiry denied quite strongly that ICAC ever failed to disclose exculpatory material in any of its inquiries. Are you aware of that? How are we to resolve that difference of opinion or that difference in the evidence between, for example, yourself and the ICAC? I am not trying to put a huge burden on you, but is there a number of documents you can identify that you are now aware of that you were not aware of at the time that should have taken a reasonable decision-maker in a different direction on those findings against you?

Mr ATKINSON: Findings made against myself and my colleagues related to matters which were—our issue is extraordinary. There was an allegation of corruption between two parliamentarians and some years later we won a public tender over some coal licences and we won it legitimately, and there has never been any inference that that was not won legitimately. And then Commissioner Ipp, who ironically I was an article clerk for many years ago, had the terms of reference of that inquiry changed, I think, when his conspiracy theories were not prevailing mid-inquiry, which enabled the introduction of the public interest test which then he used to suggest that the actions that we took when we were trying to sell the asset into another company in a perfectly normal transaction some, again, two years on amounted to somehow corruption. Along the way—to try and answer your question—the exculpatory type of evidence that I was referring to are things like the key witness relied on by ICAC—we were not aware was a self-proclaimed drug addict, we were not aware—

The Hon. ADAM SEARLE: Just pause there. I think this person might be a witness in the current proceeding. Perhaps we should just skip over that.

Mr ATKINSON: Certainly. I will refrain. There was a number of that type of information that has come out in subsequent court proceedings which clearly should have been disclosed at the relevant time. I will be careful, Mr Searle. I appreciate what you are saying.

The Hon. ADAM SEARLE: That is okay. On page 11 in paragraph 3, you refer to a statement from Mr Hartcher about a conversation with Premier O'Farrell. How did you come to know about that statement?

Mr ATKINSON: It was sent to me.

The Hon. ADAM SEARLE: In what form?

Mr ATKINSON: By Mr Hartcher's lawyers, with his authority.

The Hon. ADAM SEARLE: And he sets out the matters that you set out in your material. Do you have a copy of that letter or that correspondence?

Mr ATKINSON: Yes, I do.

The Hon. ADAM SEARLE: Would you be prepared to provide it to this inquiry?

Mr ATKINSON: Certainly. It was sent to the directors of Cascade Coal.

The Hon. ADAM SEARLE: Thank you. If you could supply it to this inquiry, that would be—

Mr ATKINSON: Certainly.

The Hon. ADAM SEARLE: Good.

Mr RON HOENIG: I will ask this question obliquely because of the current proceedings. In regard to those current proceedings, it is effectively asserted by the State as part of their case that there was no wrongdoing on your part.

Mr ATKINSON: That is absolutely correct. In fact, it has been said a number of times by the Crown. I have had the benefit of reading some of those transcripts and it has been said a number of times that, in fact, there has been no wrongdoing at all by Cascade Coal, its directors or its shareholders.

The CHAIR: In your submission you do support the preparation of an exoneration protocol. From your perspective, how do you think that would work? What sort of triggers or thresholds do you think could be built into such a protocol?

Mr ATKINSON: It is a very difficult issue, and I appreciate the issue, particularly if the State does not want to go down the path of a merits review of ICAC proceedings.

Mr RON HOENIG: It is effectively a royal commission. To do a review of—

The CHAIR: Sorry, Mr Hoenig, could we just allow Mr Atkinson to finish?

Mr ATKINSON: I completely agree. Firstly, it is an expensive exercise, and secondly, you have got to balance, I guess, an individual's rights against costs at times. However, if it was me, I would probably do two things. I would just have a threshold cut-off date; the easiest thing to do would be to have a cut-off date. So if ICAC have done their investigations and have handed the matter over to the Director of Public Prosecutions [DPP] and that has been done appropriately and the DPP have not been able to form a view or bring a prosecution after a period of time, say 18 months or two years, a period of time, then I actually think the exoneration should be automatic. However, the better answer, I think, is, should ICAC actually be allowed to make corruption findings? Would it not be better if ICAC maintained its current powers, as an investigative body, handed over those materials to the DPP, the ICAC information gathering was done in private not in public, and the DPP then prosecuted or did not prosecute? If they did not prosecute, no one is corrupt. If they did prosecute and there is an actual criminal offence of corruption and corruption was found, then so be it. If corruption is not found, then the person is exonerated.

The CHAIR: You started to talk to Mr Hoenig's comment about factual and a merits review, which you also mentioned in your submission. Could you just expand on that briefly?

Mr ATKINSON: At the moment, there is no merits review. At the moment, all that happens is that ICAC does an investigation in public. If you are on the wrong end of that—or if they make an honest mistake, which is possible. However in my case I believe there was a blatant abuse of power. But, whatever the fact, a wrong can be done and if a wrong is done, then there is no ability at the moment for a merits review of that wrong. That has to change. If it cannot change by an appeal mechanism, and, again, I made the point in my opening statement that the great irony if you look at those that have submitted submissions against an exoneration protocol, many of those people have forged their reputations and, in fact, made their incomes through appearing before appeals. Whether sitting before or advocating before an appeal. But for some reason, they cannot distinguish between a criminal's right of an appeal and "someone who has innocently suffered at the hands of ICAC's" right to exoneration. It is a distinction that makes no sense.

The Hon. ADAM SEARLE: I have two things to ask. Are you aware that a finding by ICAC, including a finding of corruption, is not necessarily synonymous with any particular criminal offence? Many of the findings by ICAC are not necessarily of crimes.

Mr ATKINSON: Yes, I understand that.

The Hon. ADAM SEARLE: I understand there is a public policy debate about whether it should do that, but that is what it does do and was designed to do that. Are you aware of that?

Mr ATKINSON: Mmm.

The Hon. ADAM SEARLE: In relation to your particular matter, would there not be a solution if the date of the effect of the validation Act was just changed by a couple of days?

Mr ATKINSON: Yes, that would work or there are number of very minor tweaks to the Validation Act. If the State believes it is important because—You have to ask yourself the questions: What else is it protecting? What else happened? Why just do it in our circumstance?

The Hon. ADAM SEARLE: From answers to questions on notice from the ICAC, I think it was only your case that was the only outstanding matter.

Mr ATKINSON: That is extraordinary because it actually covers a lot more ills than that. I think you need to ask yourself the question: What else are they hiding?

Mr JAMIE PARKER: I know time is almost up, but I also wanted to recognise that in the Legislative Assembly when this was debated, only the Premier, the Leader of the Opposition, the member for Liverpool and I spoke on the validation Act. I was not aware of the arrangements that had been arrived at in regard to your matter. I make that very clear. My question is specifically about section 57B and the role of the inspector, rather than completely changing the way the ICAC operates. The inspector obviously has an important role. You have suggested a review, which is a positive suggestion. Are there any specific elements that you think should be proposed to section 57B that would broaden, strengthen or improve the role of the inspector?

Mr ATKINSON: Yes, I think the inspector should be obligated in each case to publish reports that they make because there is also an element here where the process is very opaque. What happens in practice is that when you make a complaint the first thing the inspector does is contact the ICAC and ask, "What do you think?" Actually, that is not fair—they clearly do not say "what do you think"; the inspector does a sound job. The inspector seeks information from them and presumably there is dialogue as to what the information is being sought for. Then there seems to be a ready acceptance of what they are told, as opposed to a degree of cynicism.

Remembering that the inspector is only one person with an assistant, it makes it very difficult for that inspector. And they are only part-time. The current inspector is a defamation lawyer. If the resources of the inspector's office were substantially increased so that curiosity could be afforded, as opposed to just acceptance of what they have been told, which appears from the complainant's perspective to be the case, that would go a long way to solving the problem. I also believe that, as I touched on, it is really important to the process that the opaqueness disappear and that the inspector's reports are published for all to see. You will have seen that one of my complaints was dismissed on the basis that I had no understanding of the law—

Mr JAMIE PARKER: Yes

Mr ATKINSON: —notwithstanding Mr Walker has given an opinion to the ICAC and to the Committee, I understand, that suggests the legal position that I understood: that the ICAC should be or is independent of the Executive arm of government, is in fact the case. The current inspector clearly does not believe that to be the case and dismissed the complaint on that basis.

The Hon. ADAM SEARLE: I think this is what is known as an evolving concept.

Mr ATKINSON: Perhaps it is.

Mr JAMIE PARKER: That is very generous.

The Hon. ADAM SEARLE: Technically, I think you are right—that it would have been regarded as an Executive agency. But, given its role in the modern era, views have changed. I certainly would give a lot of regard to Mr Walker's views.

The Hon. TAYLOR MARTIN: Mr Atkinson, I just wanted to rewind back. You mentioned that the terms of reference were changed through the investigation. Are you able to give us a bit more information from your perspective about how that came about?

Mr ATKINSON: Yes, certainly. I think it happened during the course of events when Mr McGuigan was giving evidence and was asked certain questions. It became apparent to the commissioner that, as I said, the conspiracy theory that was being prosecuted could not possibly get him to a position where he could issue adverse findings. More particularly, and arguably more sinister, was the fact that he could not deliver the result that he was looking to deliver to the State, which was a recommendation to expropriate the assets that we had won in a legitimate public tender.

So he wrote to the Premier and his chief of staff, and there is evidence all day long on this, directly asking for, effectively, a change in the terms of reference. Normally, the terms of reference can only be changed, as you are no doubt aware, with the acquiescence of the leaders of both the Legislative Assembly and the Legislative Council. He wrote to the Premier directly and two days later got a letter back from the Premier with exactly the same wording that he had written to the Premier. Then, the following day, he interrupted the hearing, feigned surprise and said, "I have to stop this hearing mid hearing because I have just received an urgent letter from the Premier." He then said, "Gee, the terms of reference have changed." That is effectively what happened but all that information could be furnished if you require.

The Hon. TAYLOR MARTIN: Yes, that would be handy.

Ms TANIA MIHAILUK: Mr Atkinson, you made a comment earlier that if the DPP cannot, within a two-year time frame commence their actions that the person should be exonerated if there is no corruption finding. What about in the event that the limitation periods, for example, have expired with respect to that particular corruption finding? You could not possibly suggest that the entire corruption finding be revoked.

Mr ATKINSON: I think that if it was me I would have that as my general rule but then I would have exceptions. If, for instance, the DPP had a good reason that something had not happened, they had not been able to prosecute or they were still doing the investigation, they could go to the courts and say that the declaration should not be given because—and they could answer the because. The judge could then decide whether those reasons were adequate.

The Hon. ADAM SEARLE: What about where no criminality is being alleged by the ICAC?

Mr ATKINSON: I accept that. What I was suggesting earlier when I was saying it goes into the hands of the Director, I think in an ideal world, corruption findings might—ICAC should have a standard burden of proof.

The Hon. ADAM SEARLE: Do you mean a higher burden of proof?

Mr ATKINSON: Corruption findings might be tiered so that there are civil corruption findings, small-time corruption findings and big-time systemic corruption findings. But you could have a tiered system, which I think would deal with that issue.

Ms TANIA MIHAILUK: The Act change has presumably made it the systemic—

Mr ATKINSON: It has made it systemic but—

Mr RON HOENIG: And serious.

Mr ATKINSON: Yes, and serious.

Ms TANIA MIHAILUK: That is right.

Mr RON HOENIG: The DPP cannot meet a timetable with the material given to it by the commission if the material is not in admissible form.

Mr ATKINSON: Yes.

Mr RON HOENIG: If you speak to someone like Cowdery, for example, who is now retired—I have seen this at the Crown prosecutors where there is some poor guy with a room full of material sifting through it to try to find admissible evidence. The same arises after inquests or royal commissions. Unless the commission provides admissible evidence to the DPP, there is no way that within a reasonable period of time they can come to that view.

Mr ATKINSON: So perhaps, Mr Hoenig, the answer goes to what I would think is ideal, and I know a few of my colleagues think is ideal, would be that ICAC plays a very important role but actually it just should be an investigative body for the DPP in these corruption matters. And its powers should be similar, it should not have public hearings, and then the information it gathers is given to the DPP. The DPP is the one charged with shining the light on corruption, not some separate body, but I accept the point.

The CHAIR: Thank you very much for appearing before the Committee today. The Committee may wish to send you additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply within two weeks to any further questions?

Mr ATKINSON: Absolutely, certainly, yes.

The CHAIR: The Committee also appreciate your opening statement, which has been circulated. We are yet to determine whether that will be made public or not, but are you happy for it to be made public, if we make that discernment?

Mr ATKINSON: I would be very pleased if it was.

(The witness withdrew.)

JOHN McGUIGAN, affirmed and examined

The CHAIR: I welcome our next witness. Thank you for appearing before the Committee today. Before we proceed, do you have any questions regarding the procedural information sent to you in relation to witnesses and the hearing process?

Mr McGUIGAN: No, I think that is all clear.

The CHAIR: We also appreciate your opening statement, which you have put in writing, and it has been circulated to the Committee members. The Committee may wish to publish this as part of your evidence, would you have any objection to that?

Mr McGUIGAN: None whatsoever.

The CHAIR: The Committee would like to proceed straight to questioning today. Before we do, I remind you that the Committee is not able to reconsider the ICAC's findings, recommendations or decisions. The Committee members have read your submission that you supplied to the Committee a couple of weeks ago. We appreciate your assistance today with helping us consider any possible recommendations arising from this inquiry.

The Hon. ADAM SEARLE: Just before we commence, I make a quick declaration: I think I have met Mr McGuigan on a couple of occasions. I think I have met his son also, but outside the context of this inquiry.

The CHAIR: Thank you, Mr Searle, duly noted.

The Hon. ADAM SEARLE: I do not think it affects my impartiality.

Mr JAMIE PARKER: I am particularly interested in the Validation Act. With the former witness, I also mentioned that I spoke to the Act in the Legislative Assembly when it was introduced, and it was quite a speedy undertaking because only four members spoke to that bill. I note that you are proposing that there should be a bill introduced to address the issues that you have raised in your submission. I invite you to maybe flesh that out a little more, and why you think a bill to address that would deal with the matters that particularly impacted on you and your colleagues.

Mr McGUIGAN: Yes, thank you. I guess by way of background—ICAC is necessarily a body invested with extremely broad powers. It has investigatory powers, which are broad and coercive. It undertakes the inquiry and it makes the determinations. When a body has such broad powers, it places upon it a very high standard to do a number of things. One, to operate with procedural fairness and undertake what it is charged to do—conduct an independent inquiry—and, importantly, to act within its powers. It is clear, and I think beyond any discussion or debate, that insofar as the findings that were made against myself and other colleagues of mine on the board of Cascade Coal, those findings were beyond power and were a nullity. In fact, ICAC made that admission. The president of the Court of Appeal, the now governor, provided orders that would give effect to such a position.

Those issues, to me, are of high relevance in relation to the operation of Parliament if it is going to take what is a pretty unusual step to introduce effectively ad hominem legislation, which is going to operate retrospectively to deny a pretty small class of person the ability to rely on the law of the land, as determined by the High Court. So I think we are faced here with an unusual situation, one where this legislation was rushed through in the middle of the night. The dates are maybe coincidental, but the full appeal court had determined to hand down its findings and quash the findings of ICAC on 8 May. Somewhere in the middle of the night on 6 May this bill was passed and, in my view, Parliament was not fully informed of matters which were relevant to its decision. I think Parliament technically was misled.

It may not, in the grand sweep of things, have made a difference to the determination that was made by Parliament, but frankly, in terms of the conduct of the process of Parliament and matters that should be put before it when considering legislation, I think this should have been put before it. And as a consequence, I think the proper course at this stage is to make an amendment to allow those affected parties—a small class, but personally I can tell you it is a tough burden to carry—to be able to now approach the Supreme Court and get those findings quashed.

The Hon. ADAM SEARLE: Just in relation to that, would a simple changing of the dates by a few days put you and the other people whose rights were retrospectively taken away back in the position you would have been?

Mr McGUIGAN: In the sense, Mr Searle, that the timing of the legislation and the timing—

The Hon. ADAM SEARLE: I think it was about two days.

Mr McGUIGAN: Totally.

The Hon. ADAM SEARLE: 6 May versus 8 May or something like that. Whatever the dates are—

Mr McGUIGAN: You are correct, it was 8 May or 6 May, and it is even more interesting—I think I provided in my material a quite detailed letter from the Solicitor General where they say, "Well, we agree with the quashing of these findings but you will need to go before a full bench of the Court of Appeal"—three judges.

The Hon. ADAM SEARLE: Just on that point, your annexure B actually has the short minutes of orders prepared by the then President of the Court of Appeal, Margaret Beazley, now the Governor of this State, essentially indicating the court's acceptance of those orders and willingness to enter them in on a given date. It is just simply be happenstance of the Act of Parliament that, as it were, stepped between these orders being put in place in a formal and legal way just by a couple of days.

Mr McGUIGAN: That is right.

The Hon. ADAM SEARLE: We have had evidence from the ICAC—I think I am remembering this correctly—that you and the others who were party to this litigation are the only parties affected by the Validation Act, at least to their knowledge. If the Validation Act was to be tweaked in the way that you have indicated, it is not like there would be dozens or hundreds of people who would rush forward with new claims. You are the only ones who were, as it were, on the cusp of having your rights vindicated at that point but for the Act of Parliament changing.

Mr McGUIGAN: Yes, that is correct, Mr Searle, and that is why I used the expression earlier that it looks to me very much as if this was very targeted legislation, and I think ICAC—if I understood comments that were made before this Committee in previous hearings—essentially admitted as much. They were, on the one hand, standing up before the Supreme Court and making various concessions and admissions and conceding that they had acted beyond power, and on the other hand, were apparently vigorously lobbying the Premier and other parties to bring in this targeted retrospective legislation. That was then presented to Parliament without informing them of those very facts. We have—as I think I mentioned in my opening comments that you have a copy of—sought, through a Freedom of Information application, to understand exactly what transpired. I guess it does not surprise me and it may not surprise others in this room that despite a very detailed request, ICAC has refused to date to provide that information.

Mr RON HOENIG: This issue of "beyond power" arises because of the High Court decision in Cunneen, does it not?

Mr McGUIGAN: Correct.

Mr RON HOENIG: That view that ICAC had until Cunneen is similar to the view that the Chief Justice had in the minority decision in Cunneen before the Court of Appeal, is it not? That was the Chief Justice's view; it is just he was in the minority.

Mr McGUIGAN: I think that is correct.

Mr RON HOENIG: The view ICAC has of its jurisdiction—and I think evidence has previously been given by previous commissioners to this Committee—is that that was always their understanding of what their power was. It was not until Cunneen that the court declared what in fact their jurisdiction was. That is right, is it not?

Mr McGUIGAN: No, that is right. I think the issue and the narrow matter in which it came before the High Court as to whether—as we know, the ICAC legislation is particularly directed at public officials; private citizens get involved if they—

Mr RON HOENIG: I understand the issue.

Mr McGUIGAN: You understand the process, but I think the points you raise are correct.

Mr RON HOENIG: What I am asking you is that we know about your matter and the issue in your matters because it has been subject to evidence and you were actually before the court and there was an exchange of correspondence between your solicitors and the Crown's solicitors and the Validation Act was rushed through. But if the Validation Act was wrongly enacted by the Parliament or enacted in error and Parliament decides that it should not apply, why should it only apply in the narrow circumstances of those impacted by your investigation? Why should it not apply to all of those persons that were also dealt with or may well have been dealt with in what has subsequently been found by the High Court in Cunneen to be beyond power?

Mr McGUIGAN: I would agree with your proposition, and if I have expressed it as only applying to the Cascade directors then that is not my intention. I do think, as a matter of practice, that the number of persons

to whom it would apply is very narrow, but I have not reviewed every possible circumstance where a finding has been made against a private citizen where they would say, "I fall within the interpretation given by the High Court in Cunneen and therefore I would like to approach the Supreme Court for a declaration." But I think it should be available to such persons if there are people in that position.

Mr RON HOENIG: The Parliament enacted a number of reforms in 2017 to ICAC, requiring, for example, procedural fairness guidelines to apply to ensure in public hearings that those investigations, to which you refer and others, are not repeated. The New South Wales Bar Association amended its bar rules to strengthen the conduct of counsel assisting. New commissioners were appointed, including the Chief Commissioner—a very eminent person in that jurisdiction. The issues to which you refer and a number of other people complain about are all matters prior to that reform. They are all legacy issues.

Mr McGUIGAN: That is correct.

Mr RON HOENIG: Do we need to do something about the Commission's current operations or do we just need to provide for mechanisms of review for those—if I can use the Inspector's words—legacy issues?

Mr McGUIGAN: No, I understand your question. With respect to the legacy issues, I think—as you have outlined—we are talking about a relatively small class of person, but if you happen to be in that class, I can assure you it is a very uncomfortable and difficult place to be.

Mr RON HOENIG: There is something that we have no perception about. The inquiry involved some political figures—whose names we know and that I will not mention because there are ongoing proceedings—and those people were what most of the publicity was about. You were not the focus of the publicity, really, in those terms, but in any event, how did your involvement and the publicity associated with your involvement impact upon you? Did it impact upon your business? Did it impact upon your dealing with banks or insurance companies? Does it impact on how you go about your business?

Mr McGUIGAN: Yes. The only thing I beg to differ on slightly is that the publicity was obviously directed primarily at the political figures, but we were targeted and denigrated by—particularly one media outlet—*The Sydney Morning Herald*, even though we had nothing to do with the specific focus of ICAC—the focus on the award of the licence. Anyone that looked at it, including ICAC, said the conduct of Cascade and its directors was appropriate; there was no reprimand whatsoever given in that respect. Four Federal Court judges and others have looked at it so closely that you could not believe and it has been viewed as a normal commercial transaction. We were in the zone but the damage is pervasive and it continues. I have provided some brief details of my background and, until the time of ICAC, I had a highly reputable business career and played a role in the community that I was proud of. It impacted on family and on children in all sorts of ways but, if you are fortunate enough to have a supportive situation, you move through that. But from a business viewpoint, seven years on it is still a factor.

I have a business where I invest in and develop companies that have activities both within and outside Australia. Raising capital and dealing in countries such as the United States where they could look and see that finding, you are persona non grata. It impacts your ability to interact with banks, so it is an ongoing issue. What happened and what has happened in my case is that the world you operate in narrows somewhat because there are people who know and trust you for who you are, and you get on with life and you get on with business. But I can assure the Committee that the reason we are here and stressing these things is because this is not a flash in the pan; it is a life sentence. Those handing down the determinations need to do it with the utmost seriousness. As a community we need to ensure that the right checks and balances are in place.

Mr JUSTIN CLANCY: Just following on from Mr Hoenig's comments alluding to the legacy issues versus the more contemporary structure of the ICAC, in point five of your submission—Policy issues and improvements—you list a number of improvements. I want to draw you to your comment that the ICAC inquiries should be private. Could you elaborate on that a little bit further, please?

Mr McGUIGAN: Yes. I guess the adage and the support for public inquiries—what is the phrase? "Sunlight is the best disinfectant." But with the sunlight comes a lot of damage to the people who are appearing. My view is that, as in a number of other places—as I understand the Commonwealth is proposing to introduce—the basis should be that the inquiries are held in private. In other words, the investigatory inquiry process should be held in private. There may be circumstances where the public interest considerations are so significant that it warrants a public inquiry. I understand that. In those circumstances one needs to put in place appropriate checks and balances. There are now three commissioners and I think they should agree, and that it should be at the sanction of a judge of the Supreme Court. The damage and the way that it was used is now history, but I did have occasion before coming here today to look at some of the media that transpired back in 2012 and 2013, and it was horrendous. It was the twenty-first century equivalent, I think, of being “put in the stocks in the town square.”

People who knew and trusted you stood clear. One of the few benefits, of course, was that I did not have to be in any way discriminatory in terms of business or social invitations because they were much fewer.

Ms TANIA MIHAILUK: Thank you for addressing us here in public today.

Mr McGUIGAN: I am very grateful for the opportunity and, as I have endeavoured to make the point in those comments that I circulated to the Committee, I genuinely believe that the work of this Committee is important, not only to the individuals but also in the broader context. Thank you for being prepared to spend time on this issue and not just say that it is a legacy issue and sweep it under the carpet and move on.

The CHAIR: Thank you for appearing before the Committee. The Committee may wish to send you additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply within two weeks to any further questions?

Mr McGUIGAN: Yes, no problem.

(The witness withdrew.)

RICHARD POOLE, sworn and examined

The CHAIR: Thank you very much for appearing before the Committee today. Before we proceed, do you have any questions regarding the procedural information sent to you in relation to witnesses and the hearing process?

Mr POOLE: No, I am fine, thank you.

The CHAIR: Thank you for your written opening statement, which has been provided to Committee members. The Committee may wish to publish this as part of your evidence. Would you have any objection to that?

Mr POOLE: None whatsoever.

The CHAIR: The Committee will proceed straight to questions today. Before we do so, I remind you that the Committee is not able to reconsider the ICAC's findings, recommendations or other decisions. Committee members have read your submission, which you provided a few weeks ago, and we appreciate your assistance today with helping us to consider any possible recommendations arising from this inquiry.

Mr POOLE: Thank you.

Mr JAMIE PARKER: We have had similar submissions.

Mr POOLE: Yes, I am sure.

Mr JAMIE PARKER: We have heard other witnesses that have been involved in these issues. The personal impact on people is something we are always interested to understand. I know that is something that we have been asked before. Maybe you could just outline to us—because your document talks a lot about potential solutions and resolutions, and other people have proposed the same options. Maybe you could tell us a little bit about what the impact was from your perspective?

Mr POOLE: Look, I think it is dramatic and disastrous. It is something I would not wish on my worst enemy. It has totally underestimated the effect of this. I have four boys—

The CHAIR: It is okay, you can take a moment.

Mr POOLE: The effect on family, particularly when you have younger kids, so I have—at the time my boys were all at school. Fundamentally, they had to walk into school and they would be asked, "Is your dad going to jail?" "Your dad's a crook. Your dad's a thief." Clearly a High Court decision showed that is not actually true—but you had to walk in there, know who you were, week on, week out, four sessions a week, talk to people, stand by, explain every single time—"No, we didn't do anything wrong." At the end of the day I understand that people do not know, so people have to make a decision. So you have *The Sydney Morning Herald* on the front page just destroying your reputation. I built a business, Australian Power and Gas, to close to $500 million. I built a corporate advisory firm, where we were advising on $1.5 billion transactions, running 10 or 12—I think 20 guys. I was running probably 12 guys at the time—all gone. The only way I survived this is that—I had a business in the US, which I focused on for the last seven years. Today I am picking myself back up, but I had to work and go all the way through the Australian Competition and Consumer Commission [ACCC] issue.

At all times you have hanging over your head that you have been referred to the DPP for answering a due diligence question which, by the way, I said "to the best of my knowledge", but I will not go into the detail and—I do not expect you to reconsider it, and the potential for that charge was a 10-year jail sentence. If you imagine living your life in fear of ICAC and in fear of the DPP making that decision, you cannot speak out. You have to be extremely careful, and you are in a very fragile position. It was not until, I want to say six months ago—the day will be exact, three months ago, six months ago, but it was sometime seven years or so after the actual finding was handed down—these events happened 10 years ago. You are talking about somebody who employed people, built businesses being—totally destroyed. When you go to apply—for example, in the US we applied for a right to run an EFTPOS machine. "Cannot give it to you because of Mr Poole." When you turn up to customs, you are concerned whether you will be allowed in the US because you have got a corrupt conduct finding, which goes to character, which goes to fraud.

The absolute weight of a finding by ICAC is unbelievable. So it is something that I just do not think—and I have recommended in here that you cannot use this as a hammer, like it is used. We have to change how we deal with this thing for everyone's sake. For people who appear in front of it—we have moved past what ICAC was created for. We now have an ability to collect evidence, to manage stuff—and I do not know if ICAC actually needs the coercive powers they have, but let's not even go there. I certainly am recommending it should be held in private and we should actually elevate what we do with ICAC, we should codify the issue of corrupt conduct

and we should say there are levels of corrupt conduct—like stealing, like a whole range of other things. So in the US terminology, a misdemeanour versus an indictable offence, et cetera. You can manage that. You can set the standard of proof beyond reasonable doubt, or whether it is on the balance of probabilities, depending on the size and the nature of the offence.

This idea that "corrupt conduct", or one size fits all, is absolutely flawed. The idea that corruption can exist in today's society and needs to be entirely separated like this, I think it is wrong. The truth is we should not have two systems of justice, I should not have been put through what I was put through because ICAC overstepped the mark—let's be generous about it—and actually we should go back to our 100-year-old system whereby we properly codify and establish what we as a community and we as a State want to get done, and what we really want to do is stamp out corruption. So let's start to talk about it.

If you actually steal the milk from the local council fridge—well, that is not corruption, but let's just say that is an example—all the way through to you steal a car. Whatever boundaries need to be set up, that is what should happen, and it should be codified. ICAC should be doing—as I have suggested in here—its investigations, referring it to the DPP and the DPP enforces them. You would see multiple more cases, corruption would be in the front and centre and we would not be suffering where innocent people are having their careers crushed and their family's lives turned upside down. And people who do not even get a charge—they just have allegations in ICAC and they—have to resign. Their careers are trashed. Ten, 20-year careers—30-year careers.

John McGuigan, probably the most successful lawyer in Australia, got to be the chairman of the largest legal firm in the world from Australia. I do not know where he lived, but let's just go with it was down where the St George is. Think about the achievement— he was crushed. "We do not believe you, Mr McGuigan, we want to believe this guy over here." It is absolutely and totally wrong. No "beyond reasonable doubt", no "balance of probabilities"—you cannot treat people like that. It is going out of control. It is not fair to politicians. I imagine you guys are frightened to see people. Seriously, nobody wants to see me. None of you people want to see me. I have got an ICAC charge against me. You cannot even be having a discussion with me. I am trying to reset a biomass generator, and I know that I cannot really have a direct discussion with people about it. It is a significant project. It is going to employ hundreds of people. I cannot do it. Why? I have got an ICAC thing. So ignoring all that, these are the issues for this Committee, and you asked me—and I apologise for the emotion.

Mrs WENDY TUCKERMAN: There is no need to apologise.

The CHAIR: We understand that this is difficult.

Mr POOLE: I just think the system was wrong. And, unfortunately, as we know, where there is no room to review or a decision cannot be reviewed, then it opens yourself up for people making mistakes and an abuse of that power. I do not mean that in a negative way, I just mean it is something that people get used to and they can act with impunity. So the system has to come into a process whereby it is subject to our rights of appeal and it is subject to various things. Continuing on with what we do will create more people like me. This society has lost seven to eight years of my life where I could have contributed significantly more, without a doubt. I built a business in the US that turns over $500 million and employs 400 people, and I had to do that standing one back. I stood one back for seven or eight years. It is only now that I am starting to walk out, and I am starting to walk out now because that process takes so long, because it took so long for the DPP to finally say, "No, I am not going to bring an action against you."

You talk about effects. Just two or three weeks ago, I am talking to a fund manager in the US about raising $50 million—gone quiet. Why? ICAC—done. "We have seen your corrupt conduct charge. Thank you, we do not want to talk to you anymore." Happens all the time. If you think about character issues, any licence that I want to apply for, whether that be an electricity licence or a generation licence, whether I want to be a director on an ASX company in an IPO, they ask me about my character. What am I meant to say? So, for example, this charge—not charge, this finding of an administrative body that does not matter so much, am I meant to tell that to people now? How long do I go on having to say I had a corrupt conduct finding against me? Am I meant to say that forever? John McGuigan said it is a life sentence—it is truly a life sentence.

Mr DUGALD SAUNDERS: You paint a really bleak picture, and I definitely feel for what you are saying today. Thank you. On an exoneration protocol, and we have heard a few people talk about that as well, is that, in a fair dinkum sense, going to help with what you have been through? If there was a protocol, how would it look like to make a difference?

Mr POOLE: There are a couple of categories of people. Without a doubt, what really annoys me is the High Court has said that, under the terms of how you define corrupt conduct under the High Court, we were never guilty of corrupt conduct—not yesterday, today, forever. Through pure machinations of the times—and let us be honest, the times were where you could not stand up against ICAC in any sense or form—the Validation Act

slipped through. It did not allow anybody to actually just go, "You know what? I want to enforce my High Court rights. I am a citizen here. I am being denied any ability to go and say, 'You know what? I am innocent.'" And actually, if ICAC had any moral turpitude, it would actually stand up and say, "You know what? It is wrong and we will agree and support that." That is not happening either. If you think about the commission and what the commission does and what a whole range of people—and you have had a whole lot of submissions many of those submissions have a vested interest in perpetrating ICAC or perpetrating what is going on with ICAC. Nobody is doing this with great malice; it is not like that. Everyone is trying to do their best and do their job; I understand that. I am just saying the long-term effects of it.

For me, I am just asking for the whole Validation Act thing to just say, "Look, just give me my rights so I can go down to the Supreme Court and ask." And if they say no, they say no, but I can tell you they will not say no, they cannot say no because of the High Court. Right now, the High Court says I am innocent. I have a charge over my head. How do I manage that? That is one category of people and—just so you are clear—I think this should apply to anybody who has that. You cannot differentiate. It is not about one hearing or the other hearing; at the end of the day, it should be anybody. It is not going to be a lot of money. They are going to turn up down there and say, "You know what? I do not fit the definition." Yes. No. It is a day hearing at most and there is 10 or 20 people. It might be 50 people; it does not matter. It is absolutely entirely wrong that any citizen—any Australian—should be denied their right to natural justice and right to the rule of law and right to appear in court. It is entirely wrong, so that in my opinion just absolutely needs to fixed.

In terms of an exoneration protocol, you guys are caught between a rock and a hard place, and I get it. ICAC sits around and says, "Yes, well, you know, we make these allegations and we cannot actually prove things and the burden of proof is different and we do not know where it is", and therefore, how do you actually ever say, "I should be exonerated"? The first port of call, which I am recommending to you, is we need to start by saying, "Okay, there is a standard that needs to be fixed. It is not a 'could be doing this'. It ends up saying 'on the balance of probabilities or beyond reasonable doubt you are charged with the following thing'; you did it or you did not do it".

I am saying on a go-forward basis, absolutely, there will be no need for an exoneration protocol. If you adopt the suggestion I am saying to you, where you have private hearings, you have codified problems around corrupt conduct and corrupt conduct is dealt with in a series of sub-tiers or strata, if you like, in terms of seriousness of effect and charges, it will go bang, "investigation by ICAC; refer to the DPP; DPP says yes you have got enough evidence, we are going ahead." The concept that we will not find enough evidence nowadays is rubbish. Trust me, I have been through ICAC, they use all of that stuff against you anyway. It all turned up in my ACCC action.

In this day and age, it was not where it was when ICAC was first formed, so there has been a move, and it is time that we as a society elevated corrupt conduct to what it truly is, which is an offence. It is not an administrative slap on the wrist, "I am really sorry I cannot get you." That is not good enough; that is an excuse. It needs to be an offence, it needs to be defined and that exoneration protocol disappears. You then sit back and have an issue and you say, "What do I do with my other guys? What about all these other guys who have had allegations against them that actually are not right or could not be right?" The truth is we need a grandfathering position or a transition position where we actually say, "You know what? We are going to let you go down." My suggestion is that if there has not been an action brought by the DPP, or whoever, after two years, three years, four years, five years—pick your number but probably two years is sufficient for somebody to be wearing the opprobrium of the actual finding then—they can go down to the Supreme Court.

At this point you are bumping into a little problem where you start to talk about cost, but you go down to the Supreme Court and say, "I want this set aside. I want this declared a nullity" or whatever the terminology is and there is much greater and stronger legal minds in here than me who can say, "Okay, we want it made invalid or disappeared or whatever or expunged or whatever that is." But ICAC should have the right to say, "You know what? We do not want that." Okay, well, now you have to prove that allegation on the balance of probabilities or beyond reasonable doubt, depending on the allegation. And you know what we are going to do as a transitional provision? We are going to let that set by submissions and the judge can decide what standard of proof we require. Because, obviously, depending on what you are accused of and where it is—whether it is an allegation made in the open hearing or whether it is actually a finding—it may be different.

I am not sitting here with three days of work making this work, but with proper drafting and where you are, you can make that work. That then gives everyone a fair chance to walk down and have a hearing. It is not going to be a long hearing and it is going to all be sorted out. By combining those two events you stop the whole need for an exoneration protocol. This idea—and I think John called it "in the stocks"—I regard as, I feel like a witch and I have got the pitchforks coming after me. That is how you feel when ICAC is against you. You have got to realise, you get in a lift, people really want to spit on you; it is just unbelievable. That whole witch and

pitchfork thing, it is not appropriate. You are either guilty or you are not guilty; we are going to prove you are or not. We spend hundreds of millions of dollars on the whole basis that—you know the old saying and I know it is not quite true—you are better to let 100 criminals go to save one innocent; we do not take that view here. It is entirely the opposite and it is entirely wrong. It is unfair on politicians, it is unfair on bureaucrats and it is unfair on the public; it is not how it should be.

There needs to be a crystal clear application of what should happen, a crystal clear understanding of what you can and cannot do and then it moves off into the DPP. The argument is, "Hang on. ICAC is going to make the decision. It is going to go to the DPP. Parliament or somebody is going to influence the DPP and they are not going to bring actions." Seriously? That is highly unlikely to happen but I am suggesting that if that is of great concern, give ICAC a right to appeal to or go and talk to a Supreme Court judge about a DPP decision that he disagrees with. Straight away, you have got an outlet; the whole thing is done. The structure of the program then works; it means we would have, in my view, a very sophisticated structure for dealing with corrupt conduct. Society does not appreciate corrupt conduct; it should be an offence. Sorry, that was very long-winded and terrible, probably.

The Hon. ADAM SEARLE: Just on that point, though, Mr Poole, ICAC does have a standard of proof; it is meant to be on the balance of probabilities. It is supposed to apply that standard and always has been intended to. But in relation to what you just said, not all of the findings by ICAC are about criminal activity. Findings by ICAC, even findings of corruption, are not necessarily the same as a finding about a specific criminal offense being committed. I think on your formulation, ICAC's role would be very seriously reduced in terms of what it could do—if it could only make findings of criminal wrongdoing.

Mr POOLE: I am not suggesting criminal wrongdoing. You lay out your wrongdoings—whether it is civil, criminal or civil penalties. We know the ACCC Act; you either fall on the civil side or the criminal side—whatever and wherever. The point is, what those Acts are and where they fall should be defined because there is different levels of seriousness of corrupt conduct, clearly.

The Hon. ADAM SEARLE: But even where ICAC does not make findings of corruption, it often makes adverse findings about people. Having read some of these reports, they are pretty clear about the criticisms they make of people, so there is not a lot of mystery there.

Mr POOLE: If you make an adverse finding about someone, though—yes, but I am trying to solve the problem of me.

The Hon. ADAM SEARLE: Let us just come to that. Your annexures A and B: You were one of those in a small cohort of persons who, in the wake of the Cunneen ruling, made applications to the Supreme Court to have findings against you by ICAC set aside.

Mr POOLE: Yes.

The Hon. ADAM SEARLE: In those matters, ICAC agreed that, on the basis of the Cunneen ruling, its findings could not be sustained. Is that correct?

Mr POOLE: Yes.

The Hon. ADAM SEARLE: And the court essentially agreed to enter those orders by consent. Is that correct?

Mr POOLE: Yes.

The Hon. ADAM SEARLE: But before the court was able to do that, Parliament enacted the validation legislation to retrospectively validate.

Mr POOLE: Correct.

The Hon. ADAM SEARLE: And it was that Act of the Parliament that took your crystallised legal rights away from you two days before they were about to be given.

Mr POOLE: Yes. Can I just make a slight and important distinction?

The Hon. ADAM SEARLE: Yes.

Mr POOLE: What the Parliament did was validated the Acts of ICAC. What they did not do was amend the definition of "corrupt conduct" to make what I did "corrupt conduct". ICAC's Acts were validated—so, absolutely, cannot go and get compensation, cannot go and do anything against ICAC, and ICAC does not need to do anything because they say, "We are clear." That does not change the fact that under the High Court rules—under the law of the land—I am innocent of corrupt conduct.

The Hon. ADAM SEARLE: Why could you not have approached the Supreme Court then and get a declaration to that effect?

Mr POOLE: I just do not think we would achieve that. I do not have the money to do that and I do not have the ability to do that. Would the Supreme Court even hear that application?

The Hon. ADAM SEARLE: I do not know about that, but in relation to your particular matter—and we have heard evidence from others in a similar boat—an alternative approach would be to change the dates in which the validation Act is effective.

Mr POOLE: If you do that, that is going to come down to not only when the validation Act is effective, but they talk about it being in effect from 15 April 2015. That is not going to change my ability to go to the Supreme Court and get that action because the date has passed. The event which was due to happen cannot happen because obviously the date has passed. We did not get the order granted. The order was drafted, was ready to be granted, would have been granted on the Friday and on the Wednesday night the legislation went through.

The Hon. ADAM SEARLE: Correct. But as we understand it—maybe my understanding is incomplete—the only thing preventing the court orders being entered into on 8 May was the Act of Parliament.

Mr POOLE: The validation Act, correct.

The Hon. ADAM SEARLE: So if the time frame of its application was changed, that would put you back in the position you and others were in on the sixth.

Mr POOLE: I would have to take advice. But I appreciate where you are trying to go—I understand it. My concern would be that I cannot go back on the eighth and go to the Supreme Court and get the order issued because that was 2015.

The Hon. ADAM SEARLE: I understand your concern.

Mr RON HOENIG: Had Parliament waited a week to pass the validation Act, would you have had a determination quashing the finding against you?

Mr POOLE: Correct.

Mr RON HOENIG: Would that have restored your reputation?

Mr POOLE: It would have gone a long way towards it because you are then able to send a "it has been quashed". Whereas, at the moment, I have to have this explanation we are having here about a differentiation between a validation Act that validates the actions of the ICAC as different to this thing from the High Court and the current legal position is that our actions were not corrupt conduct. So I still have a finding against me.

Mr JAMIE PARKER: So you would have the piece of paper?

Mr POOLE: Yes, I would have a piece of paper to send over to say that it was declared invalid. As of today I have to send a thick pack.

Mr RON HOENIG: You are still in a situation where you were waiting seven years for the DPP to decide whether or not to prosecute you criminally on indictment?

Mr POOLE: Yes, I would still be in that position. But in terms of some of the commercial aspects at least I could send that out. I would still have the other thing over my head. But that is why I am strongly recommending to the Committee that the offence or issue of corrupt conduct become codified—an offence of whichever standard. I understand it is not all necessarily criminal but it could be whatever it is and that become part of our legal system so that it is very clear: I run through my case, I get beyond reasonable doubt that I was a naughty boy, I get six months of community service or I do whatever. Say, I was charged with corrupt conduct A, B, C, D and E and different types and what that was. And then if it is not, I get five years. The other advantage in that is that it, in a sense, it starts to encapsulate what I did wrong and how much I deserve to suffer and for how long; whereas, at the moment, this is a never-ending story. As I said, every time you go to apply for insurance or any business operation you are asked about it.

The CHAIR: Thank you for appearing before the Committee, Mr Poole. We appreciate your honesty and openness in your witness statements. The Committee may wish to send you additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply within two weeks to any further questions?

Mr POOLE: Absolutely. Thank you for your time and I apologise if I was a bit emotional.

The CHAIR: There is no need to apologise.

Mr JAMIE PARKER: That is why you are here: to give us your feedback.

(The witness withdrew.)

(Short adjournment)

NICHOLAS Di GIROLAMO, sworn and examined

The CHAIR: Thank you for appearing before the Committee today. Before we proceed, do you have any questions regarding the procedural information sent to you in relation to witnesses and the hearing process?

Mr Di GIROLAMO: I do not.

The CHAIR: Thank you for providing a written opening statement, which has been provided to Committee members. The Committee may wish to publish this as part of your evidence. Would you have any objection to that?

Mr Di GIROLAMO: I do not.

The CHAIR: The Committee will proceed straight to questioning. Before we do so, I remind you that the Committee is not able to reconsider the ICAC's findings, recommendations or other decisions. Committee members have read your submission, which you provided a couple of weeks ago. We appreciate your assistance today with helping us with any possible recommendations arising from this inquiry. I declare the hearing open for questioning.

The Hon. ADAM SEARLE: Mr Di Girolamo, you are here in your own capacity, but are you also here in your capacity representing Mr Bart Bassett, Mr Christopher Spence and name suppressed?

Mr Di GIROLAMO: I am not.

The Hon. ADAM SEARLE: Really? Is that right, Madam Chair? Can we not ask him questions about that submission?

The CHAIR: Submission 29 that he provided?

The Hon. ADAM SEARLE: Submission 28. Submission 29 is in relation to Mr Di Girolamo himself and submission 28 is in relation to those other three former MPs.

The CHAIR: Mr Di Girolamo, I understood, made a submission in his own right, under his own name—

Mr Di GIROLAMO: That is correct.

The CHAIR: —and is appearing before the Committee in that respect.

The Hon. ADAM SEARLE: Okay, we will take that first bit and I might return to the second bit. Mr Di Girolamo, your submission claims that you were treated unfairly and that you have suffered significantly by being adversely named by the ICAC.

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: In your submission you go through a lot of the detail. In relation to Operation Credo, you conclude that you were unequivocally cleared of all allegations of wrongdoing. Is that correct?

Mr Di GIROLAMO: Correct.

The Hon. ADAM SEARLE: But is it not the case that in Operation Credo page 134 of the ICAC report referenced its earlier report on Operation Spicer that you were party to an arrangement with Mr Koelma whereby you made irregular payments through Australian Water Holdings to Eightbyfive and those payments were ostensibly for one purpose but were, in truth, a political donation?

Mr Di GIROLAMO: That was a finding, yes.

The Hon. ADAM SEARLE: That was the finding in Credo, as well.

Mr Di GIROLAMO: It was referenced in Credo that it was the finding in Spicer. I do not cavil with that.

The Hon. ADAM SEARLE: That is right. So when you go to Operation Spicer on page 18 it talks about the arrangement and page 19 talks about the fact that:

> Mr Hartcher was a party to an arrangement with Nicholas Di Girolamo … whereby Mr Di Girolamo made regular payments … ostensibly for the provision of services by Eightbyfive to Australian Water Holdings but were in fact political donations made to assist Mr Hartcher.

Do you recall that?

Mr Di GIROLAMO: I do.

The Hon. ADAM SEARLE: And that was a finding?

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: It goes on in different places and concludes—I will come back to the issue of Mr Bassett, perhaps.

Mr Di GIROLAMO: Sure.

The Hon. ADAM SEARLE: But in relation to chapter 18 of Operation Spicer, it goes into a fair bit of detail about that arrangement, does it not?

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: In fact, it finds that "Most, if not all, of the services Eightbyfive agreed to provide" to Australian Water Holdings—I think you were then the chairman of the board or the CEO?

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: —were, "well beyond Mr Koelma's skills and experience." Essentially, the finding was that it was not a genuine commercial arrangement; it was essentially a device to assist Mr Hartcher politically.

Mr Di GIROLAMO: That was the finding. I may cavil with the finding.

The Hon. ADAM SEARLE: I understand that.

Mr Di GIROLAMO: And I may cavil strenuously with it.

The Hon. ADAM SEARLE: The finding was that you were party to that arrangement.

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: And again, when you chart through all the pages that follow—the nub of it is at page 19—you made a submission, for example, about there being no prohibited donor and no caps in place. Nevertheless, the ICAC still found that there was a disclosure requirement and that this arrangement that you were party to was designed to avoid that disclosure arrangement.

Mr Di GIROLAMO: That was the finding, correct.

The Hon. ADAM SEARLE: So you were not found corrupt but you were found to have been essentially party to an arrangement to get around the electoral laws of New South Wales. Is that correct?

Mr Di GIROLAMO: In Operation Spicer, correct.

The Hon. ADAM SEARLE: You may cavil with those findings but those findings were made and they have not been set aside. You have not sought judicial review of those findings in the Supreme Court?

Mr Di GIROLAMO: I have not.

The CHAIR: Mr Searle, do you have a question?

The Hon. ADAM SEARLE: Those were questions. I was just establishing the baseline of facts. You say your reputation has been trashed and you have been treated unfairly, but yet you were legally represented in those proceedings and ICAC has made findings. How do you say that is unfair?

Mr Di GIROLAMO: The simplest way to address that is that those findings in Operation Spicer were, in essence, a bit like getting a parking ticket when in Operation Credo I had been accused of murder. I do not think that those findings in Operation Spicer would have led to the reputational damage that I suffered as a result of the unsubstantiated, callous and sinister allegations that were made against me in Operation Credo.

The Hon. ADAM SEARLE: But in your submission to us you make a big play of how you were cleared in Operation Credo, but you make no mention of Operation Spicer or the findings against you.

Mr Di GIROLAMO: For that reason that I just gave. I do not think that there would have been consequential damage that I suffered as a result of that finding, and it is much easier to explain that that finding, if I had needed to, was inconsistent with advice that the Solicitor General has given, as I understand it, to Parliament in relation to that finding.

The Hon. ADAM SEARLE: Putting that to one side, people are charged with crimes every day of the week. They are put on trial, they are acquitted and their reputations have still been impacted. People in connection

with deformation matters, even when they succeed, you never quite remove the cloud, no matter what the verdict. You are in no different position to any of those other categories of persons, are you? You were not actually charged with a crime.

Mr Di GIROLAMO: No, I am in a much, much worse position because, Mr Searle, if I had been investigated by the NSW Police Force, that investigation would have been done privately, and at the end of that investigation there would have been no charge and there would have been no public trial.

The Hon. ADAM SEARLE: But, again, in Operation Credo there were significant matters raised that were thoroughly investigated. Yes, you are caught up in it, but the ICAC report in Credo seems to have treated you, in my view, reasonably fairly in the sense that it goes through all of the evidence and then makes all of the findings.

Mr Di GIROLAMO: I am happy with the report. I am happy with the outcome; I do not cavil with that. If I was to highlight in my submission what my real concern is, what the crux of my issue is, it is the fact that the damage that was done was in two arenas. The first was that it was in the public domain for almost 12 months that I was going to be involved in a graft investigation by the ICAC. That was in the public domain. That is the first problem I have. The second problem I have is that I believe that I can establish that if counsel assisting had done a proper job prior to the public announcement, those allegations would never have been made. That is the issue that I have, sir, because as soon as the allegations have been made, as soon as you do that walk of shame, your life is forever changed.

The Hon. ADAM SEARLE: But you are not suggesting that ICAC should do its work in secret rather than in public, are you? That is one of the key points about ICAC: It does what it does in public. That was always one of its intentions when it was established.

Mr Di GIROLAMO: I understand that, and I am all for transparency, which means, though, that it needs to do its work properly and prudently. That is the issue that I have. If you do the work properly, I say—you do not have to accept this—the allegations would not have been made because, at the end of the day, on a number of occasions in that report, it is no evidence of the allegation. Where I am troubled is, how was the allegation ever made to start with?

The Hon. ADAM SEARLE: I read the report again last night and, in fact, many of the findings are that the commission is not dissatisfied on the evidence. I think there might have been some occasions where there is no evidence, but by and large the evidence does not satisfy them of this proposition or that proposition. So I think that your characterisation is not quite correct.

Mr Di GIROLAMO: I disagree.

The Hon. ADAM SEARLE: We will table a copy of the report and we will go through it. But, nevertheless, essentially your complaint is one of the way in which the job was done, not the outcome. Is that correct?

Mr Di GIROLAMO: Yes. I think that is right.

The Hon. ADAM SEARLE: Again, people are fallible. Whether it is the mainstream legal system, Parliament or otherwise, systems are only as good as the people operating them. ICAC is now under different management. A number of the systemic issues that have been identified, such as ensuring exculpatory evidence is provided or natural justice is adhered to, have been addressed going forward. No more needs to be done beyond that?

Mr Di GIROLAMO: I know that scope one is safeguards and remedies, and I know that a lot of change has occurred. It appears that the ICAC is behaving in a different manner. If you are posing that question to me, my concern would be that I do not know that you can be satisfied that all the safeguards and the remedies that have been implemented are sufficient, unless you really shone a torch on what happened during that tragic period.

The Hon. ADAM SEARLE: But again, many people are charged, put on trial, acquitted, people appear before ICAC, sometimes they are subject to allegations, other times not. Sometimes they are found not to have done anything blameworthy, other times they are adversely named. It is just part of the process, is it not? You were not treated particularly differently or worse than a whole host of people who were also the subject of allegations, notwithstanding the—

Mr Di GIROLAMO: I think I was treated appallingly, unfortunately.

The Hon. ADAM SEARLE: The point is your complaint was the attention and the media coverage. That is not something that the ICAC necessarily had control over.

Mr Di GIROLAMO: Well, I think it does have control over leaks. I do not think that can just be—it seems, unfortunately, to continue to be swept under the carpet. It is, like—"Well, they would leak or they may not leak, but we do not know and there is not much we can do about it." I do not think—in a democratic society, where fairness is at the heart of our democracy—that should be allowed. In relation to potentially another safeguard—one would be around the media leaks, and the other one that I think I have touched upon in that submission is in relation to making sure that you have done the proper work before you make the public allegations. That is where I say that I have been treated grossly unfairly, because I do not know that there is anyone that sits in my category.

The Hon. ADAM SEARLE: That is in Credo, but in Spicer there were findings made against you in the sense that you were part of essentially an arrangement to evade the electoral laws. You do not cavil with that?

Mr Di GIROLAMO: And they are not corruption findings, so I accept that.

The Hon. ADAM SEARLE: I accept that. ICAC can make findings of corruption, it can make other adverse comment—

Mr Di GIROLAMO: Absolutely.

The Hon. ADAM SEARLE: —and those findings you have not sought to disturb.

Mr Di GIROLAMO: No, I do not need to disturb them, at the end of the day.

The Hon. ADAM SEARLE: I understand. Madam Chair, Mr Di Girolamo has also made submissions on behalf of Mr Bart Bassett and Mr Christopher Spence. I would like to ask the witness in relation to those submissions. Is that not available to me at this present time?

The Hon. TAYLOR MARTIN: It is up to the witness, I would have thought.

The CHAIR: I understood that we were asking questions of Mr Di Girolamo in relation to his submission number 29.

Mr Di GIROLAMO: That is correct.

The Hon. ADAM SEARLE: We were taking evidence from Mr Di Girolamo. I was not of the understanding that it was limited to submission 28. I seek to ask questions in relation to submission 29, or, in fact, I can just ask him questions in relation to other documents such as Operation Spicer.

The CHAIR: Hold that thought. I just want to make sure we follow—we will just have a quick deliberative.

[*The Committee deliberated.*]

The CHAIR: Mr Di Girolamo, the Hon. Adam Searle would like to ask you questions on the submission you made on behalf of other individuals, not your personal submission.

Mr Di GIROLAMO: That puts me in a difficult position, Madam Chair.

The Hon. ADAM SEARLE: How so?

Mr Di GIROLAMO: That document was prepared by me as a solicitor.

The Hon. ADAM SEARLE: Yes.

Mr Di GIROLAMO: I do not have instructions in relation to answering questions on their behalf in relation to that submission. If you want to put questions to me, I am happy to take them on notice if you like, but that puts me in a difficult situation. I came here today on the basis that I was invited to give evidence based on my personal experience and based on my submission, and under no other pretence. If you want to put questions to me on notice, I am happy to try and get some instructions and get back to you, sir.

The Hon. ADAM SEARLE: Just on that, Mr Di Girolamo, you have also made a submission to us on behalf of other persons, particularly Mr Bassett and Mr Spence.

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: You did so presumably on instructions.

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: And within that narrow envelope is where I want to ask you some questions.

Mrs WENDY TUCKERMAN: I do not think they are controversial.

The Hon. ADAM SEARLE: I am not asking you to go beyond anything that you have already been instructed in, and, in fact, I may not even need to go specifically to your submission. Why don't I just ask you some questions and we see how we go?

Mr Di GIROLAMO: Sure. I am not trying in any way to be difficult. It does cause me some problems, though.

The CHAIR: So you are aware of what you are entitled to do in this hearing, you can refuse to answer but this Committee will also ask if we can forward you questions after this hearing and ask if you are prepared to receive further questions, so there is also that avenue as well if you wanted to seek instructions from those clients.

The Hon. ADAM SEARLE: You made submissions on behalf of Mr Bassett and Mr Spence and, like yourself, your essential submission was that they were harshly dealt with or unfairly dealt with. Is that correct?

Mr Di GIROLAMO: That is their submission, yes.

The Hon. ADAM SEARLE: In relation to the Operation Spicer report, one of the findings was that Mr Bassett, when he was the Liberal Party candidate for the seat of Londonderry, solicited a political donation from Buildev—a prohibited property developer—and that he was aware at the time he solicited the political donation that Buildev was a property developer and knew it was not able to make a political donation. Are you aware that that is the finding in Operation Spicer?

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: You are aware—as far as I am aware—that Mr Bassett has not sought to challenge or impugn that decision.

Mr Di GIROLAMO: I would have to get instructions on that.

The Hon. ADAM SEARLE: Okay, that is fine. In relation to Mr Spence, there was a finding by the ICAC in Operation Spicer that Eightbyfive was used to receive and channel political donations for the benefit of Mr Hartcher and Mr Spence and others. Are you aware that that is a finding and in contravention of the electoral laws?

Mr Di GIROLAMO: I will take your word for that.

The Hon. ADAM SEARLE: And are you aware that a finding of Operation Spicer was that Mr Spence was part of an arrangement, essentially, to get around the electoral laws of New South Wales?

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: Are you aware that a finding was that Mr Spence and others were involved in this arrangement?

Mr Di GIROLAMO: Yes.

The Hon. ADAM SEARLE: As far as you are aware, has Mr Spence sought to impugn or challenge these findings?

Mr Di GIROLAMO: Again, I would have to seek instructions.

The Hon. ADAM SEARLE: I am happy for you to seek instructions on both accounts and report back. In relation to those two matters involving those two persons, albeit there was no finding of corruption against them, nevertheless there was clear findings by the ICAC that they knowingly entered into arrangements to get around the electoral laws—to put it colloquially. It is also a matter of record that by the time these facts became public knowledge, the period in which any prosecution could have been brought under the electoral funding and disclosure legislation had passed. There was no chance of there being any prosecutions, so these matters were brought to light by the ICAC. How do you say that those two persons have been treated in a way that was unfair given those findings that they were members of Parliament and they were found to have rorted the electoral laws?

Mr Di GIROLAMO: I would give you the same answer that I gave in relation to myself, and that is that I do not think that finding fits squarely with the Solicitor General's opinion in relation to that finding, which I understand—

The Hon. ADAM SEARLE: But it was not a finding of corruption. These were adverse findings of fact.

Mr Di GIROLAMO: No, the Solicitor General has said that the entities in the scope and purpose of that allegation were not property developers. If they were not property developers, the finding is unsound.

The Hon. ADAM SEARLE: First of all, I think in your submission you say that was Crown Solicitor's advice given to the electoral commission. You cite it but you do not produce it. Do you have a copy?

Mr Di GIROLAMO: I can produce a copy.

The Hon. ADAM SEARLE: If you could, but nevertheless that is a—

Mr Di GIROLAMO: Sorry, I apologise, I thought that was something that had already been in the public domain.

The Hon. ADAM SEARLE: No, I am not being critical, but nevertheless that is one lawyer's opinion. The ICAC, headed up by other lawyers, just had a different opinion.

Mr Di GIROLAMO: Like you and I do as lawyers.

The Hon. ADAM SEARLE: Correct. So the only way to really test that is to go to court. Is that correct?

Mr Di GIROLAMO: Sorry?

The Hon. ADAM SEARLE: The only way to test that is to go to court.

Mr Di GIROLAMO: Yes, and based on that opinion, it would not have gone to court.

The Hon. ADAM SEARLE: Well, we will never know—

Mr Di GIROLAMO: It just would not have, and I think you know that.

The Hon. ADAM SEARLE: Firstly, we will never know because by the time it came to light, there was no chance of a prosecution under the law because the time period had passed; so we will never know that. Secondly, if you are correct in your supposition, then your two clients could have gone to the Supreme Court and sought a declaration, and it is your evidence that as far as you know—and I am happy for you to take this on notice—that neither of them sought to do so.

Mr Di GIROLAMO: That is right, but at the same time Mr Searle, going to the Supreme Court: money, time, effort—all those things.

The Hon. ADAM SEARLE: I understand that, but you have come here on your own behalf and on behalf of two of your clients saying—

Mr Di GIROLAMO: On my own behalf. You have asked me to—

The Hon. ADAM SEARLE: But you have said that reputations have been damaged adversely and unfairly, notwithstanding these pretty important adverse findings. I would have thought, given that peoples reputations are matters serious to them, that if there was an avenue of challenge, they would have taken it. If what you say is right, they could have done so but they have not.

Mr Di GIROLAMO: For the reason that I think the major allegation was found to be unsubstantiated.

The Hon. ADAM SEARLE: Well, it was not.

Mr Di GIROLAMO: It comes back to the same point that I made earlier. I think I have answered this question now on three occasions.

The Hon. ADAM SEARLE: The ICAC found that it was substantiated.

The CHAIR: I think it is important that we do not debate the issue. It is question and answer, please. Mr Di Girolamo, we have heard previous witnesses early this morning talk about how the passing of the validation Act by this Parliament happened very swiftly. I think we have heard comments from witnesses here who were in Parliament at the time, including myself, that they were not aware of matters in relation to a number of persons of interest in ICAC proceedings who were about to have their findings made a nullity. Except, the validation Act came into effect and prohibited that from taking its full course in the courts. Has the assent of the validation Act had any impact on yourself seeking to redress the impact of your experience in ICAC?

Mr Di GIROLAMO: Madam Chair, the validation Act, had it not been enacted, I think the short answer for my personal self, without traversing some of the evidence that may have come before me today, is that I think some of the scope of the Operation Credo investigation would have been overreach; it would have been out. Then as a consequence there may have been some form of other legal avenues that could have been open to me which that validation Act closed.

The CHAIR: You made a recommendation that an independent tribunal or the Supreme Court could consider whether individuals are entitled to some form of compensation in relation to their experience through ICAC. Could you elaborate on that a little bit further?

Mr Di GIROLAMO: Sure. If you walk in my shoes for a day, the experience is horrific. For six years I lived in purgatory. I say all substantial allegations against me are gone, and to this day the Google search remains and it is very hard to get on with your life. The financial impediments, the job and employment spheres all get reduced. I was asked to resign from a board position—State-owned corporation board—on the day that the public announcement was made. I never got a phone call back when I was cleared saying, "Would you like to come back?" So I think something needs to happen, but it is just not about compensation, it is also about accountability, and I think that is one of the things that an exoneration protocol will help. Because if those who have got their hands squarely on the levers of these extraordinary powers know that there is going to be some accountability, they then may well use those powers with great care, and perhaps greater care than what I went through.

So in terms of a tribunal, I think there are two aspects to it. One is there may well be a finite class of people that have been mistreated—I heard the word "legacy" people—that this Chamber can categorise—can be satisfied with a category of people who perhaps were mistreated. And then if they say, "Go through that gate," then a tribunal can be set up for recompense to have some form of rehabilitation from a reputational perspective, and thereafter in terms of some form of restoration and compensation for the pain and suffering they went through.

Mr RON HOENIG: For the 5½ years I have been a member of this Committee, we have heard successive people complaining about media leaks. Those leaks are denied, having come from the commission, despite continued questioning. Is there a course of conduct or a type of investigation that can be undertaken in respect to that? Or are leaks just the product of most public sector organisations?

Mr Di GIROLAMO: The second aspect of your question is probably right, leaks unfortunately are—but given the importance of this to people's livelihoods, one of the things I say in my submission is there needs to be an amendment to the Act that actually looks at media protocols and media leaks so that you have got some form of accountability. But I see no reason why the inspector of the ICAC could not hold an inquiry specifically into media leaks, maybe it would just take a period of time. Because the problem is with the media leaks is you are wounded before you get there. And if the publisher who writes—whether it is Mr Di Girolamo or Mrs McGillicuddy—is going to be involved in an ICAC investigation, that publisher must be satisfied that that is right. So the source somehow must be sanctioned from someone within the ICAC. That is the only conclusion that I can draw. But what we do not have is—or we have not had in the past—is someone from the ICAC coming out and saying, "Well, that is not right," or, "We have carried out an investigation and we have now found that unfortunately X, Y or Z have leaked this." Perhaps that is what needs to happen: some form of inquiry by the inspector.

Mr RON HOENIG: You made some reference in your opening statement to counsel assisting's opening, asserting in the fourth last paragraph that he failed to fulfil his obligations and ascertain whether there was any proper basis to make the corruption allegations that were made against you and they simply should not have been made. Was there evidence called during Operation Credo in relation to those allegations and it simply did not reach the appropriate threshold? Or was the opening made and no evidence called?

Mr Di GIROLAMO: The opening was made. It was clear that when the evidence was then called during the course of the inquiry, it had not been considered properly. So that as the evidence fell out, it was clear that there was nothing to see here.

Mr RON HOENIG: You say in the submission further on—and of course that is why we are having this inquiry—that from the time of that opening, the Treasurer sought your resignation from the board of State water, and you were also required to resign as a board member from the University of New South Wales faculty of science advisory board?

Mr Di GIROLAMO: That is correct.

Mr RON HOENIG: So that happened right after counsel's opening?

Mr Di GIROLAMO: In the opening I say that happened on the day that the public announcement was made of a public hearing. On the day after opening address my employer rang me, given the severity of the allegations, and asked me not to come back to work. What I have touched on there in relation to that savage opening was that when that occurs, you actually do not even have the right to reply. The one-sided narrative is published the next day, because your barrister cannot get up and say, "Those allegations are denied, and we deny it because of X, Y and Z facts." And what was even worse was during the course of that inquiry, my barrister, Todd Alexis, SC, and another pre-eminent silk in Mr Tony Bannon, on a number of occasions said to Mr Watson, "You need to withdraw the allegations," and they were never withdrawn—he just refused.

Mr RON HOENIG: Arising from a variety of matters that the inspector referred to as "legacy" matters, there have been some substantial amendments to the ICAC Act, where there is a requirement of procedural fairness that did not exist beforehand and new commissioners appointed. Anecdotally, we are hearing from senior members of the bar that the same sort of complaints that existed almost overwhelmingly from senior members of the bar during the time you underwent your various investigations no longer seem to occur. That seems to be confirmed by the inspector. Is there anything more that Parliament needs to do? And should it confine its considerations simply to those "legacy" issues and whether or not some intervention is required?

Mr Di GIROLAMO: In relation to the first part of your question, I would point to—if you wanted to have and inquiry into what went wrong, and then you might find out whether all the safeguards and remedies that were undertaken in 2016-17 are correct, that would be one way to do it. But assuming you did not want to do that, I would point to two things. First, the media leaks and tightening that up as best as this Parliament can, and the second—and I think I have referred to an amendment to the Act—is to ensure that the allegations are squarely put to the affected person prior to the decision being made to hold a public inquiry. Now, some would say that may well get rid of the gotcha moment, but is that what we are really after in our society? The gotcha moment?

Are we not here to find whether or not there were acts of corruption? If you want to get the right balance, if you want to continue to hold the public inquiries and if you want to get rid of corruption properly, put all of the allegations squarely to the affected person. If that affected person can satisfy the commission that there is nothing to see, it stops. But having been afforded that opportunity, if the affected person cannot, then you can roll into the next phase, which is the public hearing. Some might say that the new model does that firsthand. I did not see that. Unfortunately, I saw the complete opposite. It would be those two things that you could look at in terms of tightening safeguards and remedies. Sorry, can you repeat the second part of your question?

Mr RON HOENIG: Whether or not those issues that you complain about have been remedied with ICAC's current structure, with the application of procedural fairness and with the Bar Association tightening up its rules to ensure that the way counsel assisting conduct themselves—at least, I know of one of those matters that you were involved with, Spicer, where the inspector found in certain areas counsel assisting conducted themselves improperly, if I could use that expression. Those issues have been tightened up by the Bar Association, procedures have been tightened up by ICAC, procedural fairness guidelines have been implemented and counsel are not complaining like they used to.

Mr Di GIROLAMO: Sorry, yes. There are two issues. Then you referred to the legacy problem. Yes, my answer was to those two issues in relation to safeguards and remedies. In relation to the legacy, there needs to be some work done to rectify the sins of the past, which I would add and I would hope has the significant dual purpose of ensuring accountability. Once you ensure accountability, the risk of this happening again is hopefully dramatically minimised.

The Hon. TAYLOR MARTIN: Picking up on your point about rectifying the sins of the past, I will pick up on a question made earlier by my colleague Mr Adam Searle, who asserted that you could simply go to the Supreme Court. I am happy to be wrong; I am not a lawyer, but is it not the case that courts do not have the capacity or authority to revisit or overturn ICAC's findings unless, such was the case in Cunneen, they overstep their jurisdiction?

Mr Di GIROLAMO: The answer to your question is, yes. Would you like me to expand?

The Hon. TAYLOR MARTIN: Yes, please.

Mr Di GIROLAMO: There are probably two significant issues that I pointed to in my opening that have in essence created a culture of infallibility. The statutory oversight that the body has is twofold. One is an inspector, which for the first two decades of this body's life was part-time, with a fairly limited, if any, staff and which did little work, so to speak. The second oversight is the Supreme Court of New South Wales. There, the only review that is open is one that involves jurisdictional error. The debate and the matters that Mr Searle eloquently put to me would not be resolved by the Supreme Court unless one of us could actually point to some form of jurisdictional error, because there is no merits based review. Factually, the ICAC could go on a tangent of its own—I am not saying that it would, but it could—and unless I could demonstrate jurisdictional error the Supreme Court could not overturn those findings.

The Hon. TAYLOR MARTIN: And you do not get your day in court.

Mr Di GIROLAMO: Mr Martin, that might be going a little bit too far, but I would say your day in court is limited and inhibited.

The Hon. ADAM SEARLE: The issue of whether someone was or was not a property developer, given the findings in that ICAC inquiry, would have been a jurisdictional fact, though, would it not? Could it not be a fact going to jurisdiction?

Mr Di GIROLAMO: No, I do not think so at all, because it is squarely a matter of fact.

The Hon. ADAM SEARLE: You will never know.

Mr Di GIROLAMO: That is something that would probably be sorted out by the constitutional lawyer, that issue.

The CHAIR: Thank you very much for appearing before the Committee today. The Committee may wish to send you some additional questions in writing, the replies to which will form part of your evidence and will be made public. Would you be happy to provide a written reply to any questions the Committee may send you within two weeks?

Mr Di GIROLAMO: Yes.

The CHAIR: Thank you very much, Mr Di Girolamo. That concludes our public hearing. I place on record my thanks to the witnesses who appeared today. In addition, I thank Committee members, Committee staff, Hansard and the facilities team for their assistance in the preparation for and in the conduct of the hearing today.

(The witness withdrew.)

The Committee adjourned at 12:57.