

ICAC

INDEPENDENT
COMMISSION
AGAINST
CORRUPTION

**Report on an investigation into the conduct
of the Hon. Malcolm Jones MLC**

ICAC REPORT

JULY 2003



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INDEPENDENT COMMISSION AGAINST CORRUPTION

The Hon. Dr Meredith Burgmann MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. John Aquilina MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Madam President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988*, I am pleased to present the report of the Independent Commission Against Corruption into an investigation concerning the conduct of the Hon. Malcolm Jones MLC with regard to his use of certain additional entitlements provided under the Parliamentary Remuneration Act.

I presided at the hearings which were conducted for the purposes of this investigation and my findings, opinions and recommendations are contained in this report.

I draw your attention to the recommendation that the report be made public forthwith pursuant to section 78(2) of the Independent Commission Against Corruption Act.

Yours sincerely

A handwritten signature in cursive script that reads 'Irene Moss'.

Irene Moss AO
Commissioner

Contents

Executive summary	7	Chapter five – Preventing corrupt conduct with regard to additional entitlements	32
Chapter one – Introduction	8	5.1 Scope of review	32
1.1 Why was this investigation conducted?	8	5.2 The Parliamentary Remuneration Tribunal Determination and guidelines	32
1.2 How was this investigation conducted?	8	5.3 The administration of the Parliamentary Remuneration Tribunal Determination generally	32
1.3 The hearings	8	5.4 The administration of the Sydney Allowance	33
1.4 The outcome of the investigation	9	5.5 The administration of the Logistic Support Allocation	34
1.5 Section 78(2) recommendation	9	5.6 The administration of the Allowance with respect to Equipment, Services and Facilities	34
Chapter two – Additional entitlements: Guidelines for members, the code of conduct, corrupt conduct	10	5.7 Internal audit	35
2.1 Additional entitlements generally	10	Appendix 1 – The Commission’s role	36
2.2 Additional entitlements relevant to this investigation	11	Appendix 2 – Corrupt conduct defined and the relevant standard of proof	37
2.3 Additional entitlements and the code of conduct for Members of Parliament	12		
2.4 Additional entitlements and corrupt conduct: The ‘mental element’	13		
Chapter three – Mr Jones’s conduct with regard to his additional entitlements	14		
3.1 Mr Jones’s conduct with regard to his use of staff	14		
3.2 Mr Jones’s conduct with regard to his use of the Logistic Support Allocation	17		
3.3 Mr Jones’s conduct with regard to his claim for the Sydney Allowance	20		
3.4 False evidence by Mr Jones	27		
Chapter four – Formal findings	28		
4.1 Formal findings concerning Mr Jones’s conduct with regard to his use of staff	28		
4.2 Formal findings concerning Mr Jones’s conduct with regard to his use of the Logistic Support Allocation	29		
4.3 Formal findings concerning Mr Jones’s conduct with regard to his claim for the Sydney Allowance	30		
4.4 Section 74A(2) statement	30		

Executive summary

This report deals with an investigation by the Independent Commission Against Corruption into the conduct of the Hon. Malcolm Jones MLC with regard to his use of certain additional entitlements provided under the Parliamentary Remuneration Act.

Mr Jones was elected as a Member of the New South Wales Legislative Council, also referred to as the Upper House, in March 1999. Mr Jones is also the President of a political party known as the Outdoor Recreation Party, and is the sole elected representative of that party in the New South Wales Parliament.

Members of both Houses of the NSW Parliament are provided, under Part 3 of the *Parliamentary Remuneration Act 1989*, with entitlements that are additional to their basic remuneration or salary and are for ‘the purpose of facilitating the efficient performance of the parliamentary duties of members’.

These entitlements include, relevantly, a fully equipped and staffed office at Parliament House, a fixed allowance for stationery and postage costs (the Logistic Support Allocation) and a fixed compensation for expenses incurred by Members who reside in country areas (the Sydney Allowance).

The investigation focussed on allegations that Mr Jones had used certain of these entitlements for purposes not connected with his parliamentary duties, in particular for membership drives for eleven “micro” political parties unconnected with the Outdoor Recreation Party. A further allegation concerned Mr Jones’s ineligibility to claim the Sydney Allowance.

The investigation included both private and public hearings and evidence was taken from a number of witnesses, including Mr Jones, present and former parliamentary staff officers and Mr Ron Mathews, the Secretary of the Outdoor Recreation Party.

Investigation outcomes

This investigation found evidence that Mr Jones had knowingly misused additional entitlements provided under Part 3 of the Parliamentary Remuneration Act.

Findings are made in this report that Mr Jones engaged in conduct that was corrupt within the meaning of the ICAC Act in relation to his use of the entitlements described above.

In Chapter Four of this report a recommendation is made that the Director of Public Prosecutions

consider the prosecution of Mr Jones for breaches of sections 178BA or 178BB of the *Crimes Act 1900* (obtaining money by deception or false/misleading statements), the common law offence of breaching public trust, and a breach of section 87 of the ICAC Act (giving false evidence before the Commission).

In addition, I state my opinion that consideration be given to the expulsion of Mr Jones from the Upper House.

Additional recommendations are made in Chapter Five that the NSW Parliamentary administration implement its draft Sydney Allowance Guidelines as soon as possible; that documents of appointment for Members’ staff include specific reference to rules and conditions established by the Parliamentary Remuneration Tribunal; and that the Parliamentary administration consider further development of its internal audit program, including pro-active, random fraud detection audits of the use of Members’ auditable allowances.

Chapter one – Introduction

1.1 Why was this investigation conducted?

This is a report by the Independent Commission Against Corruption ('the ICAC' or 'the Commission') of an investigation conducted into allegations of misuse of certain parliamentary resources by The Hon. Malcolm Jones MLC. Mr Jones was elected as a Member of the New South Wales Legislative Council, also referred to as the Upper House, in March 1999. Mr Jones is also the President of a political party known as the Outdoor Recreation Party, and is the sole elected representative of that party in the New South Wales Parliament.

Members of both Houses are provided, under Part 3 of the *Parliamentary Remuneration Act 1989*, with entitlements that are additional to their basic remuneration or salary. These additional entitlements are provided, in the words of section 10(1)(a) of that Act, 'for the purpose of facilitating the efficient performance of the parliamentary duties of members', and include a fully equipped and staffed office at the Parliament House, a fixed allowance for stationery and postage costs, and a fixed compensation for expenses incurred by Members who reside in country areas (commonly known as the 'Sydney Allowance'). Additional entitlements, and in particular the fixed allowances, can amount to a significant sum. For instance, in 2002, the fixed amount payable annually under the Sydney Allowance was \$20,280.

It is paramount to the public interest that the conduct of Members of Parliament, as elected officials holding high public office, be of the highest standard of honesty and integrity. As has been previously stated by this Commission in its *First Report on an Investigation into Parliamentary and Electorate Travel* (April 1998):

Failure to live up to the standards expected by the community can bring the institution of Parliament, and the Members who constitute it, into disrepute and promote community cynicism about our democratic parliamentary system. Such failure also tends to undermine the mutual trust and confidence which should exist amongst the Members. (at p.1)

Mr Jones, as a Member of the Parliament of New South Wales, is a 'public official' for the purposes of the *Independent Commission Against Corruption Act 1988* ('the ICAC Act'). Accordingly, the ICAC's investigation was to determine if Mr Jones's conduct

in relation to certain of these additional entitlements might amount to corrupt conduct within the meaning of the ICAC Act.

1.2 How was this investigation conducted?

The investigation commenced as a preliminary inquiry, the purpose of which was to ascertain the veracity of allegations made against Mr Jones. As a first step, persons who were likely to have information relevant to the conduct alleged were interviewed. The ICAC used its power under section 22 of the ICAC Act to obtain relevant documentation (section 22 enables the ICAC to require the production of documents and other things). Notices were issued to the Clerk of the Parliaments and the New South Wales Electoral Commissioner, amongst others.

As the investigation progressed and evidence corroborative of the allegations was disclosed, I authorised the use of a further ICAC power under section 23 of the ICAC Act to enable ICAC officers to enter and inspect the parliamentary office of Mr Jones. Section 23 enables the ICAC to enter and inspect premises occupied or used by public authorities and/or public officials, in that capacity, and take copies of any document in or on the premises (subject to certain privileges which may be claimed under section 24 of the Act).

As a further evidence-gathering measure, I approved the making of applications to an authorised justice under the *Search Warrants Act 1985* for warrants authorising the searches of a home unit owned by Mr Jones in the Sydney suburb of Russell Lea, and of the headquarters of the Outdoor Recreation Party at Lane Cove. The warrants were granted and searches of these properties were duly conducted by ICAC officers, with assistance from NSW Police officers.

At this stage, in light of the evidence disclosed by the investigation, I authorised the conduct of hearings.

1.3 The hearings

Section 35 of the ICAC Act gives me the power to summons persons to appear before the ICAC and give evidence. Persons so summoned must give evidence under oath or affirmation and they must answer all questions honestly and truthfully. Giving false or misleading evidence is an offence under the ICAC Act.

Given the nature of the allegations, I determined that it was in the public interest to hold hearings. My purpose in doing so was to ascertain the facts with a view to establishing whether corrupt conduct had occurred. Mr Stephen Rushton SC assisted me as Counsel during the hearings.

Hearings were initially conducted in private. At that stage I was satisfied that this was in the public interest, to ensure the integrity of the investigation and the reputations of those involved. After consideration of the importance of the matters involved in this investigation and the nature of the evidence that had been obtained, I determined that in the public interest a public hearing should be held.

The public hearing commenced on 21 January 2002. Evidence was taken in public session from the following witnesses:

- Mr Jones
- Ms A (a former parliamentary staff officer)
- Ms Natalie Shymko (a parliamentary staff officer)
- Ms Louise Talbot (a parliamentary staff officer)
- Mr Ron Mathews (the Secretary of the Outdoor Recreation Party)

I have made an order pursuant to section 112 of the ICAC Act that no information or visual likeness is to be published which could identify Ms A in relation to these proceedings. This order remains in force.

1.4 The outcome of the investigation

In this report I have expressed my findings that Mr Jones engaged in corrupt conduct in relation to his use of certain additional entitlements provided under the Parliamentary Remuneration Act. These findings, and my reasons for so finding, are set out in the body of this report.

In Chapter Four of this report I have recommended that the Director of Public Prosecutions consider the prosecution of Mr Jones for breaches of sections 178BA or 178BB of the *Crimes Act 1900* (obtaining money by deception or false/misleading statements), the common law offence of breaching public trust, and a breach of section 87 of the ICAC Act (giving false evidence before the Commission). In addition, I am of the opinion that consideration be given to the expulsion of Mr Jones from the Upper House.

1.5 Section 78(2) recommendation

Pursuant to section 78(2) of the ICAC Act, the ICAC recommends that this report be made public immediately. This recommendation allows either presiding officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

Chapter two – Additional entitlements: Guidelines for members, the code of conduct, corrupt conduct

2.1 Additional entitlements generally

As I have mentioned in Chapter One, Members of Parliament are provided with additional entitlements ‘for the purpose of facilitating the efficient performance of the parliamentary duties of members’. Of relevance to the present matter, each Member of Parliament is entitled to a ‘Logistic Support Allocation’ which is intended to cover the Member’s expenditure in the area of printing and stationery. In addition, Members are provided the services of one full-time, and in some circumstances, two full-time, staff officers to perform secretarial and/or research duties. Members who reside in country areas may claim what is known as the ‘Sydney Allowance’ to compensate them for any additional costs incurred when sessions of the Parliament and other parliamentary matters require their attendance in Sydney.

The quantum of these additional entitlements, together with terms and conditions attaching to their use, are matters for annual determination by the Parliamentary Remuneration Tribunal (‘the Tribunal’ or ‘the PRT’), a body established under, and empowered by, the Parliamentary Remuneration Act. In making its annual determinations the Tribunal is required, pursuant to section 10(1) of the Act, to give effect to two principles, namely, that:

- (a) *additional entitlements are to be provided for the purpose of facilitating the efficient performance of the parliamentary duties of members or recognised office holders, and*
- (b) *parliamentary duties of members and recognised office holders include participation in the activities of recognised political parties.*

The Parliamentary Remuneration Act defines, in section 3, the expression ‘parliamentary duties’ to mean:

... the duties that attach to the office of a Member or recognised office holder and includes the duties that a Member or recognised office holder is ordinarily expected to undertake, including participation in the activities of recognised political parties and includes any duties prescribed as being within the definition, but does not include any duties prescribed as being outside its definition.

The Tribunal’s annual determinations which are relevant to this investigation are those of 4 December 2000, 15 August 2001 and 31 May 2002. These determinations not only fix the quantum of the various additional benefits but, more significantly for the purposes of this investigation, also impose conditions on Members with regard to their use of, and/or claims to, the additional benefits. The relevant determinations do not, in their imposition of these conditions, differ significantly from one another and for the purposes of this chapter the use of the term ‘Determination’ is a reference to the determinations generally. Elsewhere in this report, the term refers to the relevant Determination, that is, the Determination in force at the time of the particular conduct under examination.

The Determination contains a number of general conditions (‘the General Conditions’) which apply to all additional entitlements, including staff. The General Conditions are to be found at pages 6 and 7 of the Determination. Relevantly, General Condition 9 provides:

Expenditure is only to be incurred in connection with the parliamentary duties of Members (and in this respect the Member should refer to the guidelines in this Determination).

The guidelines to which the Member is referred by General Condition 9 (‘the Guidelines’) reiterate, at page 2, that ‘every class of additional entitlement is provided pursuant to s.10(1)(a) of the Act for the purpose of facilitating the efficient performance of the parliamentary duties of Members’. In particular Guideline 1 provides as follows:

1.1 Additional entitlements are provided to facilitate the efficient performance of the following particular Parliamentary duties of Members as follows:

1.1.1 Activities undertaken in representing the interests of constituents, but excluding activities of a direct electioneering or political campaigning nature. [emphasis added]

Whilst participation in the activities of recognised political parties is conduct expressed by the Guidelines as being within ‘parliamentary duties’, Guideline 2 sets clear boundaries to such conduct, relevantly, as follows:

2.1 Parties registered under the Parliamentary Electorates and Elections Act 1912 and included in the register of parties maintained by the Electoral Commissioner, are to be treated as recognised political parties.

2.2 Additional entitlements should not be used to fund:

2.2.1 activities such as those associated with party membership drives;

2.2.2 Mail distribution for non electorate or non Parliamentary activities;

2.2.3 Costs associated with election campaigning for an individual Member; ... [emphasis added]

2.2 Additional entitlements relevant to this investigation

Office staff

Office staff are an ‘additional entitlement’ within the meaning of section 3 of the Parliamentary Remuneration Act, as a component of the ‘services, facilities and equipment’ provided to Members under section 10(3)(b) of that Act. Albeit that such staff are directly recruited by the relevant Member of Parliament, they are Crown employees appointed by the Speaker acting as an agent of the Crown (see *Stonham v Speaker of the Legislative Assembly of New South Wales* (No. 4) [2001] NSWIRComm 277.)

A Member’s entitlement to staff is dealt with at page 29 of the Determination, within that part of the Determination headed ‘Equipment, Services and Facilities’. Clause 5 at page 30 of the Determination is a condition particular to this part and provides that ‘each Member of the Legislative Council who is not a Minister and who is elected as a cross-bench Member shall be entitled to two staff members.’ Mr Jones, as a cross-bench Member, is entitled to two staff officers.

As mentioned, the General Conditions and Guidelines apply to the Member’s use of staff, who would be expected to assist the Member generally in the performance of parliamentary duties. Most usually,

such assistance would be the provision of secretarial services to the Member, acting as a personal assistant to the Member and conducting any research required by the Member so as to better inform the performance of parliamentary duties.

The Logistic Support Allocation

The Logistic Support Allocation is also an ‘additional entitlement’ within the meaning of section 3 of the Parliamentary Remuneration Act, as a component of the ‘additional allowances’ provided to Members under section 10(3)(a) of that Act.

The relevant General Conditions are 3, 5 and 9, which state:

3. *Each Member shall have, in addition to payments of the Electorate and Sydney Allowance, an account entitled the ‘Logistic Support Allocation’ which shall cover expenditure in the areas of transport (excepting for electorate to Sydney travel), communications, printing and stationery.*
5. *The funds in the Logistic Support Allocation shall only be used by the Member to carry out the purpose for which the allowance is established, but otherwise may, subject to these conditions, manage the funds as he/she thinks appropriate.*
9. *Expenditure is only to be incurred in connection with the Parliamentary duties of Members (and in this respect the Member should refer to the guidelines in this Determination).*

The purpose and operation of the Logistic Support Allocation is dealt with more fully at page 16 and following of the Determination. The allocation may be applied, amongst other things, for the purpose of mail distribution and postal delivery services, postage stamps, stationery costs and costs associated with photocopying and printing.

The provision of the Logistic Support Allocation is granted subject not only to the General Conditions and the Guidelines, but also to the more particular conditions (referred to as ‘general conditions’ in the Determination) set out at page 18 of the Determination. In particular, condition 3 (at page 18) provides as follows:

3. *Members may not use their Logistic Support Allocation to procure goods or services to be used for electioneering purposes or political campaigning.* [emphasis added]

A further set of conditions particular to the provision of the Logistic Support Allocation (referred to as 'particular conditions' in the Determination) are to be found at page 22 and following of the Determination. Of relevance are conditions 1 and 3 under the heading 'Printing and Stationery' on page 22 of the Determination. These conditions state:

1. *Members may only use the printing and stationery entitlement for Parliamentary duties.*
3. *A member may not use their printing and stationery allowances to procure goods or services to be used for electioneering purposes or political campaigning.* [emphasis added]

The Sydney Allowance

The Sydney Allowance is also an 'additional entitlement' within the meaning of section 3 of the Parliamentary Remuneration Act, as a component of the 'additional allowances' provided to Members under section 10(3)(a) of that Act.

The Guidelines and General Conditions relevant to the Sydney Allowance commence at page 9 of the Determination, and relevantly clause 2 provides as follows:

The Sydney Allowance is provided to members who reside in non-Metropolitan electorates to compensate for the additional costs including commercial accommodation, meals and incidental costs associated with staying in Sydney to attend sessions of Parliament, meetings of Parliamentary committees or other Parliamentary business.

Members who reside in the more distant non-metropolitan electorates, and who are likely therefore to incur costs over and above those residing in less distant non-metropolitan electorates in attending to parliamentary business in Sydney, are accommodated by the Determination as follows:

For the purpose of this allowance non-Metropolitan electorates (electorate groups 2-8) have been divided into two categories based on distance from Sydney. Members whose principal place of residence is in either Category 1 or Category 2 electorates, as specified in Schedule 2, are eligible to receive the Sydney Allowance.

From 1 July 2002, the annual amount to which an Upper House Member resident in a Category 2 electorate (a category constituted by the more distant

non-metropolitan electorates) would have been entitled, subject to satisfaction of the conditions contained in the Determination, was \$20,280. An Upper House Member resident in a Category 1 electorate would have been entitled to an annual amount of \$15,210.

From 27 August 2001, Mr Jones has claimed the Sydney Allowance as a Category 2 electorate resident, entitling him to an annual amount of \$20,280. He elected to receive the allowance as a regular monthly payment at the annual allowance rate, rather than as a daily allowance calculated on actual overnight Sydney stays.

A number of accountability conditions particular to the Sydney Allowance are set out on page 11 of the Determination. Of particular relevance to this investigation are conditions 5 and 6, which are as follows:

5. *Members will need to maintain records which clearly document the occasions they stayed in Sydney in connection with their Parliamentary duties. Such documentation could include airline boarding passes for arrival and departure from Sydney or any other documentary evidence of having travelled and stayed in Sydney in connection with Parliamentary duties.*
6. *Members in receipt of the annual amount will be required to return to Parliament the unspent portion of the allowance for recredit of the Consolidated Fund.*

2.3 Additional entitlements and the code of conduct for Members of Parliament

On 26 May 1999, the Legislative Council adopted a Code of Conduct for Members. Whilst the Code presents as a clear confirmation of the Parliament's recognition of the standards necessary to high public office, its adoption was primarily for the purposes of section 9 of the ICAC Act (the operation of section 9 is set out in detail in Appendix 2 to this report).

The Code's provisions apply to Mr Jones. Their precise relevance to the conduct of Mr Jones lies in clause 4 of the Code, which states:

4. Use of Public Resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

As a matter of clear interpretation, the reference in the Code to ‘public resources’ must include the additional entitlements provided to Members under the Parliamentary Remuneration Act. The ‘guidelines’ referred to in clause 4 are the Guidelines discussed above.

2.4 Additional entitlements and corrupt conduct: The ‘mental element’

Corrupt conduct is defined in section 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both subsections (1) or (2) of section 8, and which is not excluded by section 9 of the ICAC Act. These matters are dealt with in more detail in Appendix 2 to this report, however at this point it is relevant to note that section 9(d) of the Act provides that corrupt conduct could constitute or involve

in the case of conduct of a Minister of the Crown or a Member of a House of Parliament, a substantial breach of an applicable code of conduct.

In determining whether or not conduct falls within section 8 of the ICAC Act, the ICAC is required to give consideration to the necessary mental element (see *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR12 at 134-5, 140, 144 per Gleeson CJ). Conduct may fall within the description ‘breach of trust’ according to the view taken of the precise acts done and the precise motives or knowledge with which they were done (*Greiner supra* at 155:160-162 per Mahoney JA) and it is therefore necessary for the ICAC to make a finding as to the mental element or state of mind of Mr Jones in relation to the conduct in question. It is clear that section 8(1) is directed at advertent and not inadvertent conduct.

Whilst the objective features of Mr Jones’s conduct must be established, the ICAC is required also to consider whether Mr Jones had an appreciation of the propriety or otherwise of his actions. A subjective element is involved in assessing his conduct in the light of what Mr Jones actually knew at the time, as distinct from what a reasonable person would have known or appreciated (see *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming* (1995) 3 WLR64 at 73).

Chapter three – Mr Jones’s conduct with regard to his additional entitlements

3.1 Mr Jones’s conduct with regard to his use of staff

The employment of Ms A

Mr Jones employed Ms A on 12 February 2001, as a secretary/research assistant. She ceased this employment on 4 February 2002. Ms A worked on a part-time basis for Mr Jones, for three days a week. She was not provided with any written material setting out the duties of her position, but was told by Mr Jones that she had been ‘employed to go out and collect signatures to set up particular parties’. Ms A performed this work almost exclusively and recollected these particular parties as being:

- The Reconciliation Party
- The Environment Party
- The Four Wheel Drive Party
- The Workers Party
- The Anglers Party
- The Stop the Greenies Party
- The Marijuana Freedom Party
- The Country Party
- The Free Education Party
- The Gun Owners Rights Party
- The Horse Riders Party

These parties present as examples of single issue, so-called ‘micro’ parties. If one may take a party’s name as indicative of its political platform, these parties cover a spectrum of divergent, even contrary, political and social agendas. They are without any apparent connection to either Mr Jones or the Outdoor Recreation Party. Mr Ron Mathews, the Secretary of the Outdoor Recreation Party, explained that the considerable assistance provided by the Outdoor Recreation Party to these micro parties in recruiting and registration was done in the apparently simple hope of gaining ‘some friends in Parliament, if some of these parties were successful.’

Initially, Mr Jones maintained that the activities of Ms A in this regard were connected to his parliamentary duties, which he broadly perceived as including ‘the encouragement of members of the public to exercise their democratic rights’. However, by the conclusion of his evidence Mr Jones had retreated from this position and conceded that his

employment of Ms A to assist in establishing the abovementioned micro parties was a breach of the Guidelines.

A knowing misuse of an additional entitlement?

A central issue to be resolved is whether or not Mr Jones knew during the time he employed Ms A that the manner in which he employed Ms A was a breach of the Guidelines. In this regard I do not consider Mr Jones’s evidence of his state of mind at the relevant time to be reliable. Mr Jones gave evidence in a manner which I consider was intended to evade the issues with which he was confronted.

Mr Jones initially took the position that Ms A was assisting him to discharge his parliamentary duties, as follows:

[Counsel Assisting the Commission] Q: Were you aware that parliamentary resources are provided to Members of Parliament for the purpose of them discharging their parliamentary duties?

[Mr Jones] A: Yes, sir.

Q: Is it your position that engaging Ms A to carry out recruitment of other minor parties was in the discharge of your parliamentary duties in some way?

A: I think it was, yes, sir.

Q: Would you mind explaining how?

A: The encouragement of members of the public to exercise their democratic rights I believe to be — I believe that if they request my help, then it would be part of my parliamentary duties to assist them. I don’t think there’s anything — I found nothing in — to contradict that.

Q: Well, aren’t there statements in the Determination to the effect that additional allowances won’t be used for electioneering purposes and the like?

A: With respect, sir, when you read out the — from the — whatever you read it out from, about the number of staff which are allocated to us, you said we were entitled to one staffer. Now, that’s not — that — that might be written down, but the reality is that if you are a member of a major party, you are allowed one staffer. If you are cross-bencher, you are allowed two staffers.

Q: Thank you?

A: Now, I don't see Miss A's role as being an extra resource.

Q: Well, that's a little peculiar isn't it, because she's an employee of the Crown and she's paid by the public purse. What is she, if she is not an extra resource?

A: Well, I don't see that her employment comes under the Logistics Support Allowance which — the Logistic Support Allowance to my knowledge are what the extra resources refer to.

This endeavour to justify his conduct was in due course abandoned by Mr Jones and ultimately he agreed that the Determination made it clear that staff were an 'additional entitlement' for the purposes of the Determination. When Mr Jones's attention was drawn to Guideline 1.1.1 and the exclusion of 'political campaigning' he gave the following evidence:

[Counsel Assisting the Commission]Q: You accepted a moment ago —

[Mr Jones]A: Yes.

Q: — that what Ms A was doing was of a political campaigning nature?

A: Yes.

Q: If that is so then your employment of Ms A, in the manner that you employed her, was in breach of the guidelines, was it not?

A: Yes, sir, as you've — as you've pointed out to me now, yes, sir.

Q: Do you accept as you sit there now that you should not have employed her in the way you did?

A: I — I accept that, sir.

Q: You say, do you, that you didn't know at the time?

A: Absolutely, this is the first time I've certainly — I don't know, it's the first time I've seen and read clause 5(iv) and looked at the guidelines.

Q: You told us yesterday you'd seen the guidelines in relation to the Sydney Allowance, surely you — you had to satisfy yourself before you made claims for various things —

A: Excuse me?

Q: — that they were authorised by the guidelines, did you not?

A: Pardon?

Q: Let's take stationery and the like, when you made claims for stationery costs and so on, didn't you satisfy yourself before making the claim that you were entitled to do it?

A: Not — not by using the Determination.'

I reject Mr Jones's claim of ignorance of the fact that staff could not be employed for the purpose of political campaigning, as an after-the-fact attempt to justify his conduct. I accept other evidence before the ICAC that Mr Jones was fully aware at the relevant time that his engagement of Ms A in political campaigning activities was wrongful. Ms A and two other staff officers working for Mr Jones at the relevant time, Ms Natalie Shymko and Ms Louise Talbot, gave evidence on this point. Their evidence is cogent and indicates that Mr Jones knowingly failed to heed warnings from those officers that his conduct was improper. In my opinion this evidence cannot reasonably be interpreted in any other way.

Evidence of Ms Natalie Shymko

Ms Natalie Shymko had been employed by Mr Jones full-time as a secretary/research assistant since 1999. Early in the period of Ms A's engagement Ms Shymko expressed her concern to Mr Jones in relation to the impropriety of his conduct. She gave the following evidence:

[Counsel Assisting the Commission]Q: Did you ever have a discussion with Mr Jones in relation to the fact that Ms A appeared to be doing party work outside the office?

[Ms Shymko]A: Yes.

Q: Did you express some view as to whether that was improper of her?

A: Yes.

Q: What did you say to him and what did he say to you?

A: Just said that Ms A shouldn't — shouldn't be out there, well, it's not right that she's out there recruiting people and I don't even know what he said, I don't think he even answered me.

Q: Can I ask you this. As I understand it, Miss A was employed during the period 12 February 2001 through to 4 February 2002. Was it early on in her engagement that you raised the subject matter with him?

A: Yes.

Ms Shymko was not cross-examined in relation to this aspect of her evidence. Mr Jones did not contend that her evidence was untrue or that she had a motive to lie. I find Ms Shymko to be a careful and truthful witness and I accept her evidence.

Evidence of Ms Louise Talbot

Ms Louise Talbot was employed as a part-time secretary/research assistant to Mr Jones from March 2000 until January 2002. She gave the following evidence:

[Counsel Assisting the Commission]Q: Did you, at a point of time, have any discussion with Mr Jones about the propriety of involving a staff member in a recruitment drive for other minor parties?

[Ms Talbot]A: Yes. When Ms A was hired a friend of mine had gone for the job that Ms A got and I thought my friend was better qualified for the parliamentary role and duties and then — but Malcolm said Ms A had — Ms A — I'd heard that Ms A had done this sort of stuff before and that he — it was more important for her to go out and get members for these parties rather than have someone in the office doing the parliamentary stuff and I told him I didn't agree with that.

Q: And what did he say to you when you told him that you didn't agree with him?

A: He said, I think — he said, 'You've got to take risks'.

Again, Mr Jones did not contend that Ms Talbot's evidence was untrue or that she had a motive to lie. I accept Ms Talbot as a truthful witness. Her evidence demonstrates that Mr Jones recognised that his conduct was improper and was nevertheless prepared to take the risk of his conduct being exposed.

Evidence of Ms A

Ms A's evidence in relation to this matter has two aspects. First, she gave evidence to the effect that Mr Jones had informed her at the time of her employment that she was not supposed to be doing the work which she subsequently performed.

Secondly, upon the termination of her employment on 4 February 2002, which coincided with media coverage concerning Mr Jones, Mr Jones suggested to her that if there was an inquiry into his conduct, she should return to her family in New Zealand.

As to the first aspect, Ms A gave the following evidence:

[Counsel Assisting the Commission]Q: Did Mr Jones ever discuss with you any parliamentary guidelines which might apply to the sort of work that he was involving you in?

[Ms A]A: Yes.

Q: Can you recall approximately when such discussion occurred?

A: When he interviewed me he said that they weren't supposed to do party work.

Q: Did he say anything else?

A: He said that it was difficult to sort of distinguish between — sometimes difficult to distinguish between what was party and what was parliamentary work.

Q: Did he say anything to the effect that you would be doing parliamentary work?

A: Yes.

Q: Did he indicate to you in any way that you would also be doing party work?

A: Yes.

Q: Did he say anything to you — and I'll come to the details of it in a moment — did he say anything to you at all indicating to you that involving you in the doing of party work would involve him in a breach of certain guidelines? That's a long question. Do you want me to put it again?

A: No. He didn't outline the guidelines.

Q: Did he say anything to you to the effect that he should not be doing party work?

A: Yes. He — he said, 'We're not supposed to do party work'.

Q: But it's fair to say, is it not, that what you were doing was precisely party work?

A: Yes.

As to the second aspect, Ms A gave the following evidence:

[Counsel Assisting the Commission]Q: Did he say anything to you which would indicate why it was ended at that time?

[Ms A] A: Yes.

Q: What did he say?

A: There — there had been some media coverage of — surrounding Mr Jones and he thought it was best for my employment to be terminated at that stage.

Q: Now, did he say anything to you about what you should do if there was any inquiry into his conduct?

A: He said, he would like me to return to New Zealand. He said, 'If there was an inquiry'. No dates were discussed.

Q: 'If there was an inquiry you were to return to New Zealand', is that right?

A: Yes.

I accept Ms A as a truthful witness. I consider it appropriate to take into account that there was no contention by Mr Jones that Ms A's evidence was untrue. I accept her evidence as the clearest demonstration that Mr Jones recognised that his conduct was improper. Mr Jones's suggestion that Ms A return to New Zealand is not susceptible of any reasonable interpretation other than as an endeavour to place Ms A beyond the reach of an inquiry. I reject the explanation put forward by Mr Jones that he proffered this as advice to Ms A out of concern for her welfare.

I am satisfied to the requisite standard that in early 2001 Mr Jones was put on clear notice that his conduct in using Miss A for the purpose of recruiting members of other minor parties was improper, and I am satisfied that Mr Jones was fully aware of the impropriety of that conduct at the relevant time.

3.2 Mr Jones's conduct with regard to his use of the Logistic Support Allocation

The use of parliamentary resources for micro party recruitment drives

Between August 2001 and March 2002, in preparation for the elections to be held in March 2003, a recruitment drive for the micro parties which

I have mentioned earlier was conducted from premises at Lane Cove owned by the Secretary of the Outdoor Recreation Party, Mr Ron Mathews, and his wife. Such activity was intended to achieve registration of the parties in sufficient time for them to contest the upcoming election. Ms A had been, in her capacity as a parliamentary staff officer, directed by Mr Jones to assist in this activity and during this time Ms A would attend the Lane Cove premises to assist in forwarding correspondence to existing and potential members of the micro parties.

This protracted drive required substantial resources of stationery and postage and some 33,481 postal items were processed at a cost calculated to be \$15,401.05. Whilst the cost appears to have been initially borne by Mr and Mrs Mathews, they were reimbursed by Mr Jones, who was himself reimbursed by the Parliament, via drawings made upon his Logistic Support Allocation.

In evidence before the ICAC is a printout of an electronic ledger kept by Mrs Mathews on a computer at her Lane Cove home. The ledger meticulously records costs incurred by Mr and Mrs Mathews during the recruitment drive, and costs subsequently reimbursed to them by Mr Jones. In evidence are related applications for reimbursement made by Mr Jones upon his Logistic Support Allocation. Mr Jones now acknowledges that amounts were wrongly claimed for reimbursement of Mr and Mrs Mathews. On 11 December 2002, Mr Jones repaid to the Parliament the sum of \$17,336.64, his calculation of the amount wrongfully drawn from his Logistic Support Allocation, as explained by Mr Jones in his letter to the Parliament of 11 December 2002.

A knowing misuse of an additional entitlement?

Again, a central issue to be resolved is whether or not Mr Jones knew during the time he employed his Logistic Support Allocation for use in micro party recruitment drives that this was a breach of the Guidelines. In this regard I similarly do not consider Mr Jones's evidence of his state of mind at the relevant time to be reliable, for the same reasons I have evinced above.

I reject Mr Jones's claim of ignorance of the fact that the Logistic Support Allocation could not be employed for the purpose of political campaigning, as an after-the-fact attempt to justify his conduct. I accept other evidence before the ICAC that Mr Jones was fully aware at the relevant time that his use of the

Logistic Support Allocation to fund recruitment drives for the micro parties was wrongful conduct. This evidence is that of Ms Natalie Shymko, together with evidence that Mr Jones failed at the relevant time to make to the Parliament a full and proper disclosure of the nature of the expenditure to which his claims related.

Evidence of Ms Natalie Shymko

Ms Shymko clearly expressed the view to Mr Jones that his use of parliamentary stationery and the like was improper. Her evidence in this regard was as follows:

[Counsel Assisting the Commission] Q: Would it be fair to say that individually there were thousands of items of stationery that, as you understood it, were taken from Parliament stores and ended up in Australia Post?

[Ms Shymko]A: Yes.

Q: ... as a consequence of these campaigns to obtain membership by these minor parties?

A: Yes.

Q: Did that cause you some concern?

A: Yes.

Q: Do you think it was quite improper to use Parliament property in this way?

A: I thought it was inappropriate.

Q: Yes, and did you have some discussion with Mr Jones about that?

A: Yes.

Q: Can you tell us to the best of your recollection what you said and what he said to you?

A: I said to Malcolm, 'This stationery isn't being used — it's being — if it's — isn't being used appropriately and it's being used for other parties, so it's not really appropriate that you use parliamentary resources in this way.'

Q: What did he say to you?

A: He said it'd be okay.

Q: It'd be...?

A: It'd be okay. He said not — for me not to worry about that.

Q: Do you recall approximately when that conversation occurred?

A: Last year some time. I don't know. Early last year, I don't know exactly.

Q: Let me put it another way. It was a fact, was it not, that this use of parliamentary stationery occurred on a number of occasions?

A: Yes.

Q: Is it fair to say that as soon as you became aware of what was happening you raised the subject with Mr Jones?

A: Yes.

Q: To your observation the practice of using stationery in that way continued after your conversation?

A: Yes.

I find that the evidence given on this point by Ms Natalie Shymko is cogent and cannot be reasonably interpreted as anything other than an unheeded warning to Mr Jones that his conduct was improper. I consider it relevant to take into account that Ms Shymko's evidence on this point was not challenged, other than as to its suggested classification by Mr Jones as an 'informal comment' rather than a 'warning of impropriety'.

An absence of full and proper disclosure by Mr Jones

I find it corroborative of Mr Jones's knowledge of his wrongful conduct at the relevant time that he failed to make any properly descriptive disclosure of the purpose for which his claims on the Logistic Support Allocation were being made. A number of the claims, certified by Mr Jones as being: '... for Parliamentary business and complied with the conditions of the PRT Determination dated 15 August 2001', bear the description 'constituent mail out' as an explanation of the purchase or service supplied. I do not accept Mr Jones's explanation of his use of this description, given during his evidence as follows:

[Counsel Assisting the Commission]Q: Do you regard the expression, 'Constituent mail out' as being an accurate description of what the cost really was?

[Mr Jones]A: Yes.

Q: Are you serious?

A: Well, we've had this question before. Everybody in New South Wales is a constituent of a member of the Legislative Council.

Q: Wouldn't it have been more accurate to say, 'Recruitment drive for the Reconciliation Party'?

A: It might have been more accurate to say that but I wasn't always absolutely sure of — sorry, did you say the Outdoor Recreation Party?

Q: The Reconciliation Party?

A: I may not have known that it was for that specific category of people or whether it was confined to that category of people or may have been for more than those — that category of person. But all of those people all come under the heading of constituents.

Q: Weren't you under an obligation then to work out just what the payment was for, surely?

A: The payment was for postage.

Q: In relation to what you knew to be a recruitment drive for other minor parties, not the actual Recreation Party?

A: Which I believed to be part of my parliamentary duties.

Q: Do you accept that the application form in its current form has the potential to mislead?

A: No.

Q: Are you seriously suggesting that a financial controller of the House would have been able to work out, from this, what it was that you were using the public moneys for?

A: Yes, for a constituent mail out, it was postage.

Q: Do you accept that on no occasion, when you signed these documents, did you disclose precisely what it was that the money was being spent on? Do you accept that?

A: No, I don't accept that.

Q: Do you accept that nowhere in these documents did you disclose that the money was being spent on a recruitment drive for these various minor parties?

A: I accept that.

Q: Can I suggest to you that the reason for that is that you're intending to deceive the Parliament of New

South Wales in relation to what the money had been spent on?

A: No, sir.

I am satisfied that Mr Jones knew at the relevant time that these claims did not comply with the Determination and I do not accept as credible his claim that he was unaware at the relevant time that his conduct was in breach of the Determination. In this regard, the following evidence given by Mr Jones is significant:

[Counsel Assisting the Commission]Q: You then go on to say, 'You certify that the details recorded in this claim are true and correct'?

[Mr Jones]A: Yes.

Q: Finally you certified, 'That the above claim was for Parliamentary business and complies with the conditions of the PRT determination, dated 15 August 2001'. Now that was nothing short of a bold-faced lie, was it?

A: No, sir, it wasn't a lie. It was a mistake.

Q: Let me tell you that there are hundreds and hundreds of mistakes here?

A: Yes, because...

Q: How could you possibly, you might explain, consistent with your duties as a member of Parliament...

A: Yes.

Q: ...certify day in and day out that these claims were for parliamentary business and they complied with the conditions of the PRT determination dated a certain date if that wasn't the truth?

A: Because my — as I've said, the — as I've said previously, I haven't read the Determination in its entirety. I had an idea of what was in it which was — has been proven to be erroneous and that I've signed these documents with that belief.

Q: All right, well, let's deal with it in stages. The claims did not concern parliamentary business, did they?

A: It — my understanding of it was, yes, they were.

Q: Are we to take it on your evidence that you didn't know one way or the other whether a claim complied with the conditions of the Parliamentary Review Tribunal Determination of 15 August 2001?

A: My understanding at the time was that it did.

Q: How could you have that understanding if you hadn't read it?

A: Well, I had an idea of what was in it.

Q: How did you gain that idea?

A: Because I'd read some of it.

On a number of occasions throughout his evidence Mr Jones advanced the contention that he had read parts of the Determination. I do not accept as likely that in the circumstances Mr Jones would simply have failed to read those parts of the Determination which prohibited the use of parliamentary resources for certain activities, no matter how busily engaged he was in the day-to-day activities of the House.

I am satisfied to the requisite standard that the various applications by Mr Jones for reimbursement from his Logistic Support Allocation were intended by Mr Jones to mislead and that Mr Jones was at all times aware that his conduct involved a misuse of his Logistic Support Allocation.

3.3 Mr Jones's conduct with regard to his claim for the Sydney Allowance

Mr Jones's claim to the Sydney Allowance

From 27 August 2001, Mr Jones has claimed the Sydney Allowance as a Category 2 electorate resident. He elected to receive the Allowance as a regular monthly payment at the annual allowance rate, rather than as a daily allowance calculated on actual overnight Sydney stays. In the year that followed Mr Jones's election the Allowance as an annual sum was \$19,680 per annum. The amount paid to Mr Jones for the period 20 July 2001 to 30 June 2002 inclusive was \$18,674.84. From 1 July 2002, the annual amount to which Mr Jones would have been entitled, subject to satisfaction of the conditions contained in the Determination, was \$20,280. The amount actually received by Mr Jones since 1 July 2002 is not in evidence.

There is no dispute that, from early 1999 until mid 2001, Mr Jones's principal place of residence was Unit 31, 63A Barnstaple Road, Russell Lea, which is a suburb of Sydney close to Five Dock. Mr Jones then owned, and at the time of the hearings continued to own, this apartment. However, on 18 July 2001, Mr Jones changed his electoral role details with the Electoral Commissioner from the Russell Lea address to 'Lot 10, Main Road 181 Broke' claiming, for electoral roll purposes, that this address was his residential address. Mr Jones gave evidence that he settled on the description of the address as 'Lot 10, Main Road 181 Broke' after consultation with officers of the Electoral Commission. Mr Jones's evidence in this regard was as follows:

[Counsel Assisting the Commission] Q: When you filled out your change of electoral enrolment form ...?

[Mr Jones] A: Yes.

Q: ... how was it that you came up with the description, Lot 10, Main Road, 181, Broke, 2330?

A: The — my recollection is — that was the address given to me by the Electoral Office for that property because they couldn't identify where I was saying I was moving to, because there — there's property lots.

Q: You're suggesting that somebody within the Electoral Office told you that the property that you were talking about was in fact Lot 10 Main Road, 181, Broke?

A: Yes.

Q: Did you see how they were able to come up with that description?

A: Well, I — I — I used the term, Payne's Crossing, and they couldn't identify that on the map, in terms of their electoral — however they do it.

Q: They don't do anything, do they, all they want is an address within a particular district?

A: No, well I — I wanted to be accurate about it and I spoke to them.

On the same day, that is 18 July 2001, Mr Jones advised the Legislative Council in writing that he would be changing his address from his Russell Lea residence to 'Lot 10, Main Road 181 Broke'.

On 27 August 2001 Mr Jones lodged an application with the Financial Controller of the NSW Parliament, claiming the Sydney Allowance on the

basis that his principal place of residence was 'Lot 10, Main Road 181 Broke'. Broke is a locality within a Category 2 electorate for the purposes of the Sydney Allowance.

On 4 December 2002, Mr Jones lodged a further application form in relation to the Sydney Allowance, claiming on that form that his principal place of residence was 'Lot 10, Great North Road, Paynes Crossing'. There is some dispute as to whether 'Lot 10, Main Road 181 Broke' refers to the same property as 'Lot 10, Great North Road, Paynes Crossing', and the timing of this change, coming as it did so soon after the ICAC had executed a number of search warrants and conducted an inspection of Mr Jones's parliamentary office, raises issues to which I will return later in this report. For the present, it may simply be noted that Paynes Crossing is also located within a Category 2 electorate for the purposes of the Sydney Allowance.

As mentioned, from 4 December 2002, Mr Jones has asserted as his principal place of residence, Lot 10, Great North Road, Paynes Crossing. Mr Jones further asserts that this property is the same property as that which he previously referred to as Lot 10, Main Road 181 Broke. In any event, there is no dispute that Mr Jones has no legal interest in that which he claims as his principal place of residence, and that the Paynes Crossing property is owned by a company known as LOA Pty Ltd, the directors and shareholders of which are a Peter and Juliet Rodowicz. The Rodowicz are personal friends of Mr Jones.

Mr Jones in his evidence before this Commission claimed that he spent a 'majority of weekends' at the property of Mr and Mrs Rodowicz, albeit that he spent 'most of the time' in Sydney. Mr Jones gave an explanation, in private hearing, of his grounds for claiming the Rodowicz property as his principal place of residence, thus:

[Counsel Assisting the Commission] Q: What features of your stays in Lot 10 Great North Road, do you say, give it the characteristics of a principal place of residence?

[Mr Jones] A: Sir, with the absence of never seeing a definition of what a principal place of residence is, it would, I assume to be that it is the place where I want to spend my leisure time.'

Mr Jones claimed that he lived in a shed located on the Rodowicz property. The arrangement was not formally documented, there was no written lease or

licence and he paid no rent, howsoever described, to the Rodowicz in return for his accommodation. It is not in dispute that a property owned by Mr Jones in Wollombi is not a property claimed, at the time of the hearing, by Mr Jones as his principal place of residence. At the present time this property would appear to contain no residential dwellings.

Determining principal place of residence

As I have mentioned, the Determination does not define 'principal place of residence', although it is clear that, at common law, a person possessing the necessary capacity may acquire by choice a principal place of residence. Such acquisition may be demonstrated by a combination of residence in that place and an intention to remain there (*factum* and *animus*). Whilst it is necessary that the person commences physically to live in that place, duration need not be lengthy.

In this regard, a determination of an individual's intention, whilst involving an examination of subjective elements, must necessarily be tested by reference to the objective facts. In an analogous determination in *Parker Pen (Aust) Pty Ltd v Export Development Grants Board* (1983) 46 ALR 612, Lockhart J (as he then was) said:

There is, of course, a difference between the essential elements in the notion of purpose and the means whereby purpose is ascertained. Purpose may be gleaned either from subjective or objective elements or, more usually, both. A person may say what his purpose is, but the objective facts may cast doubt upon the credibility or reliability of his statement. It is for the Tribunal of fact to consider all the circumstances and conclude whether the requisite purpose has been established. Objective facts are usually more reliable than mere protestations of purpose, intent or state of mind, which, although susceptible of testing in cross-examination, are intrinsically impenetrable and inscrutable. (at p.621).

A broad and commonsense approach must be taken to this question, which is one of fact and degree.

A knowing misuse of an additional entitlement?

A central issue to be resolved is whether or not Mr Jones knew at the relevant time that his conduct in claiming the Sydney Allowance was in breach of the Guidelines. In this regard, I again do not consider Mr Jones's evidence of his state of mind at the relevant

time to be reliable, for the same reasons I have evinced previously. I accept other evidence before the ICAC that Mr Jones was fully aware at the relevant time that the Rodowicz property was not his principal place of residence, and that his claim for the Sydney Allowance was wrongful conduct.

It is relevant for the Commission to have regard to the following facts and circumstances in making this finding:

Evidence of Ms Natalie Shymko

I find it significant that Mr Jones never made mention of his principal place of residence as being other than Russell Lea to his full-time secretary/research assistant, Ms Natalie Shymko. Ms Shymko appeared to have been under the impression that Mr Jones was claiming the Sydney Allowance on the basis that in January 2002, well after he had in fact commenced to claim the Sydney Allowance, he had purchased the property known as Lot 62 Wollombi Road, Wollombi. Ms Shymko gave the following evidence:

[Counsel Assisting the Commission] Q: Well, is it your understanding as an employee of the Parliament of New South Wales, that the Sydney Allowance in substance is paid to country members who reside in the country, but have to stay in Sydney for parliamentary business?

[Ms Shymko] A: That's correct but Mr Jones said to me that he was moving to the country, and then just staying in Sydney, well, that would be his principal place of address, so ...

Q: This is the property at Wollombi you went to?

A: Yes.

Q: That he would be moving to the country?

A: Yes.

Q: And that would be his principal place of address?

A: It's my understanding.

Q: But of course he hasn't moved there yet, has he?

A: No.

Q: Did he ever suggest to you that his principal place of address was on a property owned by a Mr and Mrs Rodowicz?

A: I know he's stayed there — I don't know ...

Q: He's never suggested to you has he, that that was his principal place of address?

A: No, no.

Q: As you understood it, at all times, since his election, his principal place of address was at Russell Lea in Sydney, or Five Dock in Sydney?

A: Yes.

It is clear from the evidence that even when Mr Jones attended the area during the relevant period he did not always stay at the Rodowicz property. For instance, Ms Shymko gave the following evidence concerning a trip with Mr Jones to his Wollombi property:

[Counsel Assisting the Commission] Q: You said that at some stage you had seen Mr Jones's property at Wollombi?

[Ms Shymko] A: M'mm m'mm.

Q: Did you stay overnight in the area at all?

A: Yes.

Q: Where did you stay?

A: Somewhere in Raymond Terrace.

Q: And for how long did you stay in the area?

A: One night.

Q: And was it the case that — did you drive yourself or did Mr Jones drive you?

A: He drove me.

Q: And he drove you back?

A: Yes he did.

Q: Do you recall roughly when this was?

A: I'm not — a few months ago.

Evidence of Mr Ron Mathews

When Mr Ron Mathews accompanied Mr Jones to the Rodowicz property on one or two occasions during the relevant period, Mr Jones stayed at Mr Mathews' property at Laguna, south of Wollombi. In this regard Mr Mathews gave the following evidence:

[Counsel Assisting the Commission] Q: Are you aware of where Mr Jones resides?

[Mr Mathews]A: I've not actually discussed it with him. When he's in Sydney I think he resides at Russell Lea.

Q: Yes?

A: But at weekends he's often at Wollombi.

Q: Is it your understanding that he has a property at Wollombi?

A: Yes.

Q: Is it your understanding that he is intending to build a house on that property?

A: It is my understanding, yes, yes. Plans of the house have been — in conversation from time to time.

Q: He's never suggested to you, though, has he, that he resides with a Mr and Mrs Rodowicz, Paynes Crossing?

A: I've been to that property with Mr Jones on at least one or two occasions.

Q: You may have been there, but he's never suggested to you, has he, that that's a residence of his?

A: I've not discussed his residence with him.

Q: When you visited that property, the Rodowicz' property on the one or two occasions, did you stay there?

A: No, I didn't.

Q: Did he stay there?

A: No, he was staying at my place at that time.

Q: And your place was where?

A: Laguna which is just south of Wollombi.

Q: And when was this?

A: I don't recall, a couple of years ago, maybe.

Q: Did you drive him there?

A: I don't think I did, no. I think we were travelling separately.

Stays at the Aussie Rest Motel in Cessnock

On a number of occasions when in the general area of his claimed principal place of residence, Mr Jones stayed at an establishment known as the Aussie Rest Motel, which is situated in Cessnock. Mr Jones's evidence in this regard is as follows:

[Counsel Assisting the Commission] Q: I better be very specific about this. You didn't stay at the Rodowiczs' property on the majority of weekends did you?

[Mr Jones]A: No, if I didn't — if I didn't stay there I — I would have visited there.

Q: Often you stayed, did you not, in a motel in Cessnock?

A: Only — I only stayed in a motel in Cessnock two or three times.

Q: Why did you do that if you had some arrangement with the Rodowiczs that you could stay on their property?

A: Because they may have been entertaining — because they are people who seek to entertain, or for other reasons which I can't think about at the moment.

Mr Jones eventually conceded that on five occasions during the relevant period he had stayed at the Aussie Rest Motel.

Representations by Mr Jones to third parties

Mr Jones continued throughout the relevant period to represent to third parties that his 'residence' was his Russell Lea address. In relation to records held by the Roads and Traffic Authority, Mr Jones consistently provided the Russell Lea address as his residential address. In relation to an application for mortgage finance signed by Mr Jones on 18 October 2001 (an application which concerned proposed finance for the purchase of his property at Wollombi) Mr Jones provided the Russell Lea address as his residential address. In other respects Mr Jones had provided, as his residential telephone number, the number of a telephone connected to the Russell Lea address. In this regard Mr Jones gave the following evidence:

[Counsel Assisting the Commission] Q: You see the reference to your residential address being at Five Dock. The reference to your postal address being Crows Nest. The reference to your Five Dock home telephone number and the like. Would you agree it certainly creates the impression in this form that your place of residence, indeed your only place of residence, was Sydney?

[Mr Jones]A: I — I — I agree with that. I agree with what you say, but I can't see its relevance.

Later, Mr Jones gave the following evidence:

[Counsel Assisting the Commission]Q: Can I put this to you, seeing it is your document and you've certified it, do you accept that the reader of that document would be entitled to assume that your principal place of residence was at Five Dock or Russell Lea, Sydney?

[Mr Jones]A: An assumption of a principal place of residence in — in common terminology, yes.

I find that these representations are inconsistent with a belief on Mr Jones's part that the Rodowicz property was his principal place of residence.

The change from Lot 10, Main Road 181, Broke to Lot 10, Great North Road, Paynes Crossing

As mentioned, when first applying for the Sydney Allowance on 27 August 2001, Mr Jones gave the address of his principal place of residence as being Lot 10 Main Road 181 Broke 2350 NSW. On 4 December 2002, some two days after ICAC officers executed search warrants on the Russell Lea and Lane Cove premises and entered and inspected the parliamentary office of Mr Jones, Mr Jones lodged a further application form claiming his principal place of residence as Lot 10, Great North Road, Paynes Crossing.

Mr Jones was unable to offer any credible explanation as to the need for the change or its timing. Initially Mr Jones gave the following evidence:

[Counsel Assisting the Commission]Q: I ask you again ...

[Mr Jones]A: Yes.

Q: ...what was it that caused you to change your address on that particular day, namely 4 December 2002?

A: I don't know.

And later:

[Counsel Assisting the Commission]Q: Can you suggest any credible reason, apart from the ones that I've advanced to you, why, on 4 December 2002, you took it upon yourself to lodge another application form with the updated address of Lot 10, Great North Road, Paynes Crossing? You told us that it was because there was a query from the Council. That can't be right because that didn't come until the day after.

[Mr Jones]A: Maybe I got the date wrong. I don't know.

Q: Is there any...

A: I don't know.

Q: ...explanation apart from fraud that you want to advance to the Commission?

A: It's not a question of fraud. It's a question of a mistake on the actual — the actual name of a property. It is exactly the same property.

Mr Jones's attention was also drawn to the terms of his letter dated 11 December 2002 to the Acting Clerk of the Legislative Council, which was in response to a letter from the Acting Clerk to Mr Jones dated 5 December 2002. The Acting Clerk's letter was clearly sent to Mr Jones in response to the fact that on 4 December 2002 he had lodged an application form for the Sydney Allowance wherein his address changed from 'Lot 10, Main Road 181 Broke' to 'Lot 10, Great North Road Paynes Crossing'. In relation to his letter explaining the discrepancy Mr Jones gave the following evidence:

[Counsel Assisting the Commission]Q: Why were you telling the Acting Clerk that the area is in a somewhat isolated area, and does not have a regular postal system, if that wasn't true?

[Mr Jones]A: Because the — I don't think — I don't think it's untrue, because the — the — as I understand it, right now, the post isn't delivered on a daily basis.

Q: Right, you then go on and say, 'when I moved there the Electoral Office identified the property as Main Road 181 Broke'?

A: Yes.

Q: Now is that a truthful statement?

A: I — I understand it to be, yes.

Q: You then say, 'this is very confusing as everyone knows the road as Great North Road, and its nearest identifiable location is Paynes Crossing'?

A: Yes, sir.

Q: Now, who were the 'everyone', you're referring there, who were confused by the identification of the property by the Main Road address?

A: In the area, when seeking directions, people refer to the Great North Road, it's on the map, it says, 'Main Road 181', and Telstra have called the same road 'Wollombi Road'.

Q: M'mm?

A: Local people have — they — the local people who have lived there a long time, I — they are not aware of this term, 'Main Road 181', as I understand it. I can't really speak for them, but that's the inference they've given me.

Q: Are you suggesting then that you had made the change on 4 December, because of that confusion?

A: Yes.

Q: You weren't confused were you, you knew exactly what the situation was?

A: Well the — the...

Q: Is that right, you weren't confused?

A: I — I wasn't confused but the — the address as being Broke, was clearly wrong. It is Paynes Crossing.

Q: Look, the reason you advance is that 'this is very confusing as everyone knows the road', et cetera, et cetera. If you weren't confused and if the Rodowiczs weren't confused, why was there any need to change it at all because Telstra or some other party might have been confused? They were never going to see the document you had lodged with the New South Wales Parliament, were they?

A: That — that never occurred to me, that they would be looking at documents with the New South Wales Parliament.

Q: Precisely, so why did you change it?

A: For the sake of accuracy.

This evidence does not sit with Mr Jones's earlier evidence that he had settled on the address 'Lot 10, Main Road 181 Broke' for the purposes of claiming the Sydney Allowance, as the description suggested to him by the Electoral Commission, by reason that he 'wanted to be accurate about it'.

In Mr Jones's evidence in relation to this change, and in the circumstance of the timing of that change, I find no rational reason for Mr Jones to seek to change the address on 4 December 2002, other than that put to him by Counsel Assisting the Commission, namely that he was concerned that the false nature of his

claim for the Sydney Allowance would be disclosed by this investigation. I find Mr Jones's evidence in this regard to be corroborative of his knowledge that, at the relevant time, he knew that he was not entitled to claim the Sydney Allowance.

Evidence of Mr Jones

Although Mr Jones claimed not to have read the Determination in its entirety he agreed that he had read that part of it which related specifically to the Sydney Allowance. In particular, he recognised that entitlement to the Sydney Allowance was dependant upon having a principal place of residence outside the Sydney metropolitan area. In this regard he gave the following evidence:

[Counsel Assisting the Commission] Q: In relation to the second paragraph you recognised, did you not, that the only basis upon which a Member could have any entitlement to the Sydney Allowance was if his principal place of residence was in one of the categories listed?

[Mr Jones] A: Yes, sir.

Mr Jones said that he understood that the ordinary and natural meaning of the word 'principal' to be 'primary', and conceded that the Paynes Crossing address was not his 'primary' residence. In this regard he gave the following evidence:

[Counsel Assisting the Commission] Q: Do you accept the proposition that the Paynes Crossing address cannot by any stretch of the imagination be called or described as your primary residence?

[Mr Jones] A: No, it wouldn't be called my primary residence.'

Mr Jones knew that the purpose of the Sydney Allowance was to provide compensation for additional costs incurred whilst living in Sydney, and in this regard he gave the following evidence:

[Counsel Assisting the Commission] Q: Now going back to the first paragraph you understood, did you not, that the purpose of the Sydney Allowance was to compensate for additional costs associated with living in Sydney?

[Mr Jones] A: Yes, sir.

Finally, Mr Jones was aware that the Allowance was not a windfall pursuant to which Members could profit, and in this regard he gave the following evidence:

[Counsel Assisting the Commission] Q: ... As you understood the basis of your entitlement, you were entitled to an amount...

[Mr Jones]A: Yes.

Q: ...to compensate you...

A: Yes.

Q: ...for the additional costs you had incurred in coming to Sydney and attending to Parliamentary business?

A: Yes.

Q: As I said in my opening this morning you were well aware, were you not, that the Allowance was not a windfall pursuant to which Members could profit?

A: Correct.

In these circumstances I reject both Mr Jones's claim that he had not read Condition 7 of the Determination and was unaware that any unspent Allowance had to be returned to the Consolidated Fund for recrediting.

Additional material provided by Mr Jones

After the conclusion of the hearings Mr Jones provided to the ICAC a series of photographs and other material which he contended, firstly, was supportive of his contention that Lot 10, Main Road 181 Broke and Lot 10, Great North Road, Paynes Crossing, refer to the same property and, secondly, was supportive of his claim that the Rodowicz property is his principal place of residence. Although volunteered by Mr Jones and the subject of neither oath nor examination, I have admitted this material as evidence before me pursuant to the provisions of section 17 of the ICAC Act, to enable its consideration in this report.

With regard to the first matter, Mr Jones has provided both photographs and maps concerning the names used in relation to the road which links Wollombi and Cessnock. Whilst this road is classified by the Roads and Traffic Authority as a regional road and is numbered '181', it is clearly known by different names along its entire length, depending on the locality through which it is passing. Given this, I acknowledge

the difficulty that might be encountered in settling an address for a property in this area using the local names by which this road is known and, in this regard, I find it entirely explicable that the Electoral Commissioner might, according to Mr Jones's evidence, prefer the description 'Main Road 181'. This does not, in my view, suggest a reason for Mr Jones' change of that address on 4 December 2002, to 'Lot 10, Great North Road, Paynes Crossing', nor does it explain the timing of that change.

In regard to the second, I have carefully examined several photographs provided by Mr Jones, which he claims depict his accommodation on the Rodowicz property. The accommodation that is the subject of these photographs presents as being an unlined sheet metal outbuilding which contains, in one part of that outbuilding, a small collection of furniture (some lounge chairs and a dining table). In the close vicinity of this miscellany of furniture is a small kitchen bench. A small, lidless, top-loading washing machine sits next to the kitchen bench, its power lead lying, unplugged, on a bare concrete floor, suggestive perhaps of its state of disrepair. Thick dust covers a log fire stove, apart from what appears to be a small area of recent disturbance to that dust, the whole however being suggestive of a long period of disuse. The bathroom is depicted as containing a small shower enclosure, toilet and hand basin, the whole being devoid of the personal toiletry items one might reasonably expect in the bathroom of an accommodation which serves as a principal place of residence; not even a toothbrush is evident in the photograph of what is claimed to be Mr Jones's bathroom. The bedroom contains a steel frame bed with a bare mattress thereon. The bed rests on a bare floor, and this area is similarly devoid of any of the personal items which one might reasonably expect to see in the bedroom of an accommodation which serves as a principal place of residence.

I find that these photographs provide no support for Mr Jones's contention that this accommodation constitutes his principal place of residence.

Mr Jones has also provided photographs and other material supportive of ongoing clearing and preparation of his Wollombi property. Whilst I acknowledge that Mr Jones is clearly preparing this property for future residential use, I do not find anything in this material supportive of his claim that the Rodowicz property is his principal place of residence.

I find as a fact that Mr Jones's principal place of residence was his property at Russell Lea. I also find that Mr Jones knew at the relevant time that he was not entitled to the Sydney Allowance.

3.4 False evidence by Mr Jones

A statement of belief or an opinion can amount to perjury at common law (*R v Schlesinger* (1847) 10 QB 670). There is no reason in principle why a false or misleading statement of belief cannot also be the subject of a charge pursuant to section 87 of the ICAC Act.

I have come to the conclusion that Mr. Jones's statement concerning his belief, understanding or opinion as to the meaning of the expression 'principal place of residence' was false.

On 16 December 2002, in a private hearing, Mr Jones gave the following evidence:

[Counsel Assisting the Commission]Q: What features of your stays in Lot 10 Great North Road, do you say, give it the characteristics of a principal place of residence?

[Mr Jones]A: Sir, with the absence of never seeing a definition of what a principal place of residence is, it would, I assume to be that it is the place where I want to spend my leisure time.

Q: Where you want to spend your leisure time rather than where in fact you spend most of your time, is that what you say?

A: Okay, no, not – no, where I spend most of my time. Most of my leisure time is spent in and around the village of Wollombi and Paynes Crossing.

In the public hearing, Mr Jones gave the following evidence:

[Counsel Assisting the Commission] Q: When I asked you questions on 16 December 2002, at PT9 I asked you this question and I referred to it in opening this morning. What features of your stays in Lot 10, Great North do you say give it the characteristics of a principal place of residence. And you said, sir, 'with the absence of never seeing a definition of what a principal place of residence is it would, I assume to be, that is a place where I want to spend my leisure time'. Now is that an answer which you adhere to today as you sit in the witness box?

[Mr Jones] A: I'd like to add to it if I may.

Q: Is it an answer that you adhere to today?

A: Yes, sir.

Q: Do you really believe that a principal place of residence is that place where you want to spend your leisure time?

A: Yes, sir. I have complied with the requirement ...

No endeavour was made by Mr Jones in examination by his Counsel to further qualify this assertion.

That Mr. Jones was not genuinely of the opinion that the expression 'principal place of residence' was that place '... where I want to spend my leisure time' is corroborated by other evidence given by Mr Jones. In particular, Mr Jones subsequently acknowledged that the ordinary and natural meaning of the word 'principal' was 'primary'. It is common ground that his 'primary' place of residence was at all material times the apartment located at Russell Lea.

Chapter four — Formal findings

It is now convenient to summarise the relevant findings that I have made. I have already dealt with the facts in some detail and expressed a number of conclusions in relation to matters material to the investigation earlier in this report. These may need to be referred to in order to expand upon the summarised findings below and to understand the background, detail and evidence relevant to such summary of findings.

4.1 Formal findings concerning Mr Jones's conduct with regard to his use of staff

Findings of Fact

I am satisfied to the requisite standard that each of the conversations referred to by Ms Shymko, Ms Talbot and Ms A occurred. The significance of these conversations is that Mr Jones was informed of the impropriety of this conduct at the relevant time and that, in relation to his conversation with Ms A at the time of her employment, Mr Jones expressed a proper understanding of the existence of a distinction between political campaigning and parliamentary duties, and of the prohibition against the use of parliamentary resources for political campaigning as expressed in the Guidelines.

In summary, I am satisfied that Mr Jones knew at the relevant time that his conduct in this regard was wrongful.

Finding of Corrupt Conduct

Breach of public trust

Breach of public trust is both an aspect of the law relating to misconduct in public office and potentially a criminal offence under the common law. As was pointed out in *R v Llewellyn-Jones* (1968) 1 QB429 and *R v Dytham* (1979) 1 QB725 at 727 an element of wilfulness needs to be present for the commission of the offence. Mere inadvertence will not be sufficient and if negligence is to be relied upon it must be culpable in the sense that it is without reasonable excuse or justification. The concept of wilfulness involves knowledge.

Examination of the case law leads to the conclusion that breach of public trust involves bad faith. If what is done in carrying out an office is done honestly and in good faith, there can be no breach of public trust. Fraud clearly falls within the concept of bad

faith. Honesty and good faith negate breach of public trust as that term is used in the Act. Further, honesty and good faith are inconsistent with corrupt conduct within the meaning of the Act (*Greiner v The Independent Commission Against Corruption* (1992) 28 NSWLR 125, at 134-135 per Gleeson CJ). This distinction has always been acknowledged by the common law. In *King v Borron* (1820) 106 ER721 at 722 it was held that where a criminal information is applied for against a Magistrate for misbehaviour as a public official:

The question for the Court is not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive or from mistake or error. In the former case, alone, they have become the objects of punishment.

Corrupt Conduct

I am satisfied to the required standard that Mr Jones's use of Ms A substantially for the purpose of recruitment drives for the abovementioned micro parties involved a breach of public trust within the meaning of section 8(1)(c) of the ICAC Act. Accordingly, the conduct in question was corrupt conduct for the purposes of section 8 of the ICAC Act.

Section 9 of the ICAC Act limits a finding of corrupt conduct to conduct which could also constitute or involve *inter alia* a criminal offence, a disciplinary offence or reasonable grounds for dismissing, dispensing with the services or otherwise terminating the services of a public official and in the case of a Member of Parliament, a substantial breach of an applicable code of conduct: cf *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

I am satisfied to the required standard that the limitations imposed by section 9 of the ICAC Act have been satisfied in that such conduct could constitute or involve the commission of a criminal offence, namely the common law offence of breach of public trust, and so satisfy section 9(1)(a) of the ICAC Act.

I am of the opinion that clause 4 of the Code of Conduct for Members expressly proscribes the conduct matter the subject of this aspect of the investigation. I am satisfied that Mr Jones's conduct could constitute or involve a breach of the applicable

Code of Conduct and so satisfy section 9(1)(d) of the ICAC Act. The relevant Guidelines which apply to public resources in the form of additional entitlements are those issued by the Parliamentary Remuneration Tribunal in its Determinations from time to time. In my opinion, it is not open in the circumstances to suggest that the breach by Mr Jones of the Code of Conduct was anything other than ‘substantial’. Mr Jones wrongfully used a staff member for the duration of her period of employment. Accordingly, I find that, in the alternative, such conduct could constitute or involve a substantial breach of clause 4 of the Code of Conduct.

I find that by the conduct summarised above, Mr Jones engaged in corrupt conduct within the meaning of the ICAC Act.

4.2 Formal findings concerning Mr Jones’s conduct with regard to his use of the Logistic Support Allocation

Findings of Fact

I am satisfied to the requisite standard that the conversation referred to by Ms Shymko occurred. I find that Mr Jones was informed of the impropriety of this conduct at the relevant time and that Mr Jones had a proper understanding that this conduct was proscribed by the Guidelines. I find that Mr Jones knowingly omitted to make a full and proper disclosure to the Parliament with regard to his use of the Logistic Support Allocation at the relevant time. In summary, I am satisfied that Mr Jones knew at the relevant time that his conduct in this regard was wrongful.

Finding of Corrupt Conduct

I am satisfied to the required standard that Mr Jones’s misuse of parliamentary resources in the form of stationery and the cost of postage involved a breach of public trust within the meaning of section 8(1)(c) of the ICAC Act. Accordingly, the conduct in question was corrupt conduct for the purposes of section 8 of the ICAC Act.

I am of the opinion that the statements made by Mr Jones in his applications for reimbursement, that is, his statements that the details recorded in the claims were true and correct and that the claims were for parliamentary business and complied with the conditions of the Determination of 15 August 2001,

were false and were knowingly false. Accordingly, I am satisfied to the required standard that the requirements of section 9(1)(a) of the ICAC Act, as outlined above, are satisfied in that such conduct could constitute or involve the commission of criminal offences, namely the common law offence of breach of public trust or, alternatively, offences against section 178BA or s.178BB of the Crimes Act 1900. In this regard, the Crimes Act provides as follows:

Whosoever by any deception dishonestly obtains for himself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years’ (section 178BA); and ‘Whoever with intent to obtain for himself or another person any money or valuable thing or any financial advantage of any kind whatsoever makes or publishes or concurs in making or publishing any statement (whether or not in writing) which he knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or false or misleading in a material particular shall be liable to imprisonment for 5 years. (section 178BB).

The deception elemental to section 178BA is a deception by words or conduct either as to fact or as to law (section 178BA[2]). Deception is the intentional inducing in another of a state of mind which the person practising the deception knows does not accord with the fact (*Corporate Affairs Commission v Papoulis* (1989) 20 NSWLR503 at 506; *Welham v Director of Public Prosecutions* (1961) AC173; *Director of Public Prosecutions v Stonehouse* (1978) AC55). The deception which is practised and must operate on the mind of the person to whom it is directed must be the effective cause of obtaining the money or financial advantage in question.

The expression ‘financial advantage’ in section 178BA should be given its plain meaning without any narrow construction being placed upon it (see *R v Walsh* (1990) 52 A Crim R 80 at 81). To fall within these words it is sufficient if the person practising the deception obtains credit or time to pay (see *Mathews v Fountain* (1982) VR 1045).

I am also of the opinion that clause 4 of the Code of Conduct for Members expressly proscribes the conduct dealt with in this instance. I am satisfied that Mr Jones’s conduct could constitute or involve a breach of the applicable Code of Conduct and that

the breaches by Mr Jones of the Code of Conduct were 'substantial', so satisfying section 9(1)(d) of the ICAC Act. Mr Jones through his claims for reimbursement wrongfully received many thousands of dollars from the public purse. Accordingly, I find that, in the alternative, such conduct could constitute or involve a substantial breach of clause 4 of the Code of Conduct.

I find that by the conduct summarised above, Mr Jones engaged in corrupt conduct within the meaning of the ICAC Act.

4.3 Formal findings concerning Mr Jones's conduct with regard to his claim for the Sydney Allowance

Findings of fact

I am satisfied to the requisite standard that Mr Jones did not claim the Sydney Allowance as a consequence of mistake or error. He intentionally engaged in a dishonest scheme.

Finding of Corrupt Conduct

I am satisfied to the requisite standard that the conduct referred to above constituted or involved a significant breach of public trust within the meaning of section 8(1)(c) of the ICAC Act. Accordingly, the conduct in question was corrupt conduct for the purposes of section 8 of the ICAC Act.

Further, I am satisfied to the required standard that the requirements of section 9(1)(a) of the ICAC Act, as outlined above, are satisfied in that such conduct could constitute or involve the commission of criminal offences. As has already been noted breach of public trust is both an aspect of the law relating to misconduct in public office and a criminal offence under the common law. There is no doubt that in New South Wales a breach of public trust can amount to a criminal offence. In *Greiner v Independent Commission Against Corruption* (1992) NSWLR12 at 165, Justice Mahoney adopted what has been regarded in England and Canada as the most important decision on the subject, namely the decision of Lord Mansfield in the *King v Bembridge* (1783) 99 ER679. In that case Lord Mansfield said (p.681):

The law does not consist of particular cases but of general principles which are listed and expanded by these cases. Here there are two principles: first, that

a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office: that is true by whomever and in whatever way the officer is appointed: secondly, where there is a breach of trust, fraud or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.

Adopting this statement of principle, I am satisfied to the required standard that Mr Jones's conduct could constitute or involve the criminal offence of breach of public trust.

Such conduct could also constitute or involve offences against section 178BA or s.178BB of the Crimes Act 1900, as outlined above. As I am satisfied that Mr Jones was aware he had no entitlement to the 'Sydney Allowance' when he lodged his applications on 27 August 2001 and/or 4 December 2002. I am of the opinion that such conduct could constitute or involve criminal offences against sections 178BA and/or 178BB of the Crimes Act, 1900, and so satisfy section 9(1)(a) of the ICAC Act.

For the reasons set out above, I am also of the opinion that such conduct could constitute or involve a substantial breach of clause 4 of the Code of Conduct, so satisfying section 9(1)(d) of the ICAC Act.

I find that by the conduct summarised above, Mr Jones engaged in corrupt conduct within the meaning of the ICAC Act.

4.4 Section 74A(2) statement

In making this report I am obliged by section 74A(2) of the ICAC Act to make a statement in respect of each 'affected person' as to whether or not in all the circumstances the ICAC is of the opinion that consideration should be given to the prosecution of the person for a specified criminal offence, the taking of action against the person for a specified disciplinary offence, or the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An ‘affected person’ is one against whom, in the opinion of the Commission, substantial allegations have been made in the course of or in connection with the investigation. In relation to this investigation, I have determined that the only ‘affected person’ is Mr Jones.

In accordance with the requirement of section 74A(2), I state the opinion that consideration should be given to the prosecution of Mr Jones for offences under sections 178BA and/or 178BB of the Crimes Act 1900, together with the common law offence of breach of public trust, in regard to those matters dealt with above.

I further state the opinion that consideration should be given to the prosecution of Mr Jones for an offence under section 87 of the ICAC Act, in regard to the evidence given by Mr Jones before the Commission concerning his belief, understanding or opinion as to the meaning of the expression ‘principal place of residence’.

Mr Jones is a serving Member of Parliament and it is clear that the Legislative Council has the constitutional power to expel a Member or, in other words, to end the term of office of the public official (*Greiner supra* per Mahoney JA at 170). This power is conferred by the common law and is in addition to the powers specifically conferred by the *Constitution Act 1902*.

There is a precedent. In 1969 the Legislative Council expelled a Member, the Hon. Alexander Ewan Armstrong (as he then was), in the exercise of its inherent powers on the ground of ‘conduct unworthy of a Member of the Legislative Council’. The validity of the expulsion was upheld by the Supreme Court in proceedings brought by the Member challenging the validity of the House’s action: *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241. In particular, Sugerman JA (as he then was) made clear that the proper discharge of the legislative function ‘demands honesty and probity of its members. Indeed, the need for removal and replacement of a dishonest member may be more imperative as a matter of self preservation, than that of an unruly member’(at p. 261).

I have found that the conduct of Mr Jones involved both dishonesty and untruthfulness. Mr Jones’s lack of credibility and lack of candour on oath, when combined with the foregoing matters, is conduct which, in my opinion, is redolent of the conduct which led to the 1969 expulsion.

For the above reasons, I state the opinion that consideration should be given to the expulsion of Mr Jones from the House.

Chapter five – Preventing corrupt conduct with regard to additional entitlements

Investigations like this one present opportunities for the Commission to examine the organisational circumstances in which corrupt conduct occurred in order to see whether more could be done in respect of an organisation's systems and procedures to prevent the corrupt conduct occurring again.

5.1 Scope of review

The investigation has found that Mr Jones abused three of the entitlements that were granted to him. They were:

- The Sydney Allowance – claiming this allowance from 27 August 2001 until the time of the hearings in January 2003 when he was not entitled to it.
- The Logistic Support Allowance – misuse of this allowance to fund non-Parliamentary duties.
- Using staff provided to him in breach of the Guidelines.

5.2 The Parliamentary Remuneration Tribunal Determination and guidelines

The important principles and features of the PRT scheme are as follows:

Members are granted a number of entitlements 'for the purpose of facilitating the efficient performance of the Parliamentary duties of members' and the onus is on Members to show that any claim for reimbursement relates to parliamentary duties.

While the entitlements can be applied to a defined category of activities in relation to the activities of recognised political parties, the guidelines set out a number of 'political' activities that entitlements cannot be used for. For example, impermissible uses are:

- Party membership drives
- Mail distributions for non-electorate or non-parliamentary activities
- Election campaigning
- Fund raising for other party political Members
- Costs previously borne by political parties which are not principally related to a Members' parliamentary or electorate duties.

The general conditions of the Guidelines provide that all Members' additional entitlements in the nature of fixed allocations and Sydney Allowance are to be audited annually for compliance. And, in addition

to any internal audit conducted by the Parliament, Members' additional entitlements in the nature of fixed allocations and the Sydney Allowance are subject to external audit conducted by the Auditor-General of NSW.

The three allowances abused by Mr Jones are all allowances subject to annual internal audit and external audit by the Auditor-General.

5.3 The administration of the Parliamentary Remuneration Tribunal Determination generally

Two different groups share responsibility for administration of the PRT's Determination:

- The Members themselves, who are obliged to manage their use of the entitlements against the requirements of the Guidelines and to comply with substantiation requirements.
- The Parliamentary administration, which processes claims for reimbursement and develops administrative policies and procedures to support the appropriate and efficient use of Members' entitlements.

Over time, the parliamentary administration has established a range of administrative arrangements to manage the appropriate and efficient processing of claims for entitlements. This approach is consistent with the view expressed by the PRT in its report and Determination of May 2002:

The Tribunal is of the view that it is not its role to determine the minutiae of each entitlement. The Tribunal's role is to determine the rules and guidelines which meet the statutory need and community expectation for accountability and transparency in the use of public funds. It is then a matter for the Presiding Officers to develop the administrative policies and procedures which are consistent with those rules. (page 2)

The PRT then quoted from its 2001 Determination report:

In many instances, once the conditions applicable to particular general entitlements and conditions have been determined administrative procedures in relation to these matters should be left to the Presiding Officers who are the administrators of the scheme. For example, the Tribunal has required that Members provide evidence of their attendance in Sydney on parliamentary business to receive the Sydney

Allowance. It has, however, left the type of evidence required at the discretion of the Presiding Officers to give effect to this rule. (page 4)

The administrative policies and procedures developed by the parliamentary administration are published in the Members' Handbooks for both Houses.

5.4 The administration of the Sydney Allowance

The Sydney Allowance is provided to Members who reside in non-metropolitan electorates to compensate for the additional costs associated with staying in Sydney to attend sessions of Parliament, meetings of parliamentary committees or other parliamentary business. Members whose 'principal place of residence' are in specified categories of electorate are entitled to receive the Allowance. The key requirement is that a Member's 'principal place of residence' be in the specified categories of electorate. This term is not defined in the PRT determination.

The Sydney Allowance is discussed in the 2003 Legislative Assembly Members' Handbook at pages 116 to 118 and the forms relating to the claiming and processing of the allowance appear at pages 190 to 194. The draft 2003 Legislative Council Handbook contains similar guidance at pages 30 to 34. There are four separate forms for the application to receive, claim for reimbursement and reconciliation of the Sydney Allowance. The forms vary slightly between the Legislative Council and Legislative Assembly but in substance the forms are substantially the same.

Could the administration of the Sydney Allowance be improved?

The forms and processes provide a reasonable level of substantiation in relation to the administration of the Sydney Allowance once it has been granted. However, the 'gateway' to the Allowance, namely the application to receive the Allowance, does not presently require any evidence of entitlement other than an assertion by the Member of his or her entitlement to the Allowance.

As noted above, the PRT determination does not define 'principal place of residence'. Nevertheless, it was not the absence of such a definition that contributed to the relevant corrupt conduct finding against Mr Jones. His conduct was deliberately and intentionally dishonest rather than being a product of an innocent mistake about the meaning of the

term. Nevertheless, the Commission is of the view that further guidance could be provided to Members to assist them in identifying their 'principal place of residence' where they are confronted by a choice about this.

In this regard, the parliamentary administration has developed a draft guideline for Members in relation to helping them to determine the issue. This new material has been informed by research undertaken by staff of the administration on how other comparable parliamentary jurisdictions deal with this issue. The new draft election form (the Legislative Assembly election form is referred to above as SA-001) synthesises elements from these other jurisdictions as well as experience in NSW to pose a number of questions to those contemplating making a claim to the Allowance of the factors that they should bear in mind in making an assessment of their principal place of residence.

For example, the election form requires Members to certify that they are on the electoral role for a particular address and answer the following questions in relation to that property:

- Were you living in this property at the time of your election?
- Does your family currently reside in the property?
- Do you usually return to the property when not staying elsewhere as required by parliamentary business?
- Is this the property you stay at most on a regular basis?
- Is your mail (i.e. telephone bills, general household services, personal mail, etc) usually directed to this residence?
- Is this the property at which you keep the majority of your possessions?
- Are you a recognised active member of the local community?

The form provides for 'Yes/No' answers to these questions as well as space for comment. The form also requires Members to circle 'Yes/No' to the statement 'I have read and understood the guidelines regarding the Sydney Allowance as they are laid out in the Members Guide.' Members are then asked to sign the bottom of this page before completing the second

page of the form. The second page of this form then contains the following:

I understand the questions and issues that need to be considered in determining my principal place of residence. I certify that my answers to [the listed questions] are true and correct and that my principal place of residence is ...

I further understand that the Auditor-General of NSW will audit my Sydney Allowance annually.

This draft administrative guideline prepared by the parliamentary administration will assist Members to work through their personal circumstances in order to differentiate between their places of residence and determine which of them would be their 'principal place of residence'. Both the Auditor-General and the Commission have been consulted about this guidance document. Its implementation will assist in clarifying the matter and it will increase the level of control with respect to the administration of this Allowance.

Recommendation

I recommend that the parliamentary administration implement its draft Sydney Allowance Guidelines about determining 'principal place of residence' as soon as possible.

5.5 The administration of the Logistic Support Allocation

In relation to the form for reimbursement for the Logistic Support Allocation, a space is provided on the form for a description of the item purchased or services supplied (LSA-001). The form also requires Members to certify that the claims are for official parliamentary duties and comply with the conditions of the PRT determination.

The Commission has examined examples of these claims and it is apparent that receipts from, for example, postal services suppliers such as Australia Post accompany the claim form as substantiation that the cost has been occurred. However, beyond requiring Members to certify on the question of the claim being for parliamentary duties and that the claim complies with the conditions of the PRT determination, no other evidence is provided that the cost for which reimbursement is being sought has in fact been occurred in accordance with these conditions.

Could the administration of the Logistic Support Allocation be improved?

Given the misconduct uncovered in this investigation with regard to Mr Jones, where he claimed reimbursement on the basis of a simple description of 'constituent mail out', the question arises as to whether more detailed information ought to be required of Members seeking reimbursement.

The claims that can be made against the Allowance are varied, for example the 21 illustrative items listed in the Determination. These claims can be for relatively modest amounts and several claims can be made each month.

These claims are subject to internal audit and the external audit conducted by the Auditor-General. The nature of the audit is that the claims for expenditure are reconciled against a receipt. In the absence of there being anything suspicious about the claim or receipt, the audits do not go behind the receipt to establish that the expenditure was in conformity with the Guidelines.

In the light of the conduct uncovered in this case, the Commission is of the view that the Parliament should consider developing a program of audits that is more focused on pro-actively detecting abuse of the entitlement. This can be done in the context of the Parliament's more strategic use of its internal audit program and a recommendation is made in this regard below at Recommendation 3.

The Commission notes that the Auditor-General does not audit the Electorate Allowance. The Electorate Allowance is subject to substantiation to the tax authorities. Given the cost of administering and auditing the LSA, the parliamentary administration might want to consider the costs and benefits of the LSA being subject to the same method of substantiation as exists for the Electorate Allowance.

5.6 The administration of the Allowance with respect to Equipment, Services and Facilities

It is under this category of entitlement that staff are allocated to Members. The staff are selected for appointment by the Member but employed by the Presiding Officers. Each Member of the Legislative Council who is not a Minister is entitled to one staff member, other than those Members who are not Ministers and are elected as a cross bench Member

who are entitled to two staff Members. There is no programmed system of supervision of staff aimed at checking that staff are undertaking their duties in accordance with the Guidelines.

Could the administration of the Allowance with respect to staff be improved?

The use of this entitlement is subject to audit (see above). Other than audit, designing cost-effective measures to ensure that staff are only undertaking permissible activities in accordance with the determination has been carefully considered by the Commission. Members employ a large number of staff and the nature and variety of their duties would make it very difficult to monitor their activities on a day-to-day basis.

Nevertheless, it is important that all staff employed by Members are aware of the PRT determination rules governing their work. At present the administration provides its Members' Handbooks to Members and these Handbooks are therefore available to all staff employed by Members. However, measures to bring the PRT determination and rules to the attention of staff could be improved.

Recommendation

I recommend that the documents of appointment for staff employed pursuant to the Equipment, Services and Facilities allowance include specific reference to the relevant PRT rules and conditions governing the appropriate use of the allowance.

Further, the documents of appointment should also advise prospective employees that they should decline to perform duties that are not permitted under the PRT rules and conditions, and that if Members persist in making such requests then the relevant Presiding Officer should be informed.

5.7 Internal audit

The Parliament has had an internal audit program for a number of years and has recently appointed a new internal auditor following an external tender process. This internal auditor reports to a Committee which is independently chaired by a person external to the Parliament. Other members of the Committee include the Clerk of the Legislative Assembly, the Clerk of the Parliaments and the administration's Financial Controller. Present at Committee meetings as an observer is a representative of the Auditor-General.

The Committee meets quarterly and will be soon meeting with its internal auditor to develop a program of internal audits. Reports from the auditor are presented to the Presiding Officers for sign-off.

The Parliament's internal audit program offers an opportunity for the parliamentary administration to closely examine the operation and administration of entitlements to ensure an on-going level of assurance with respect to internal control measures.

Additionally, the Parliament should consider as part of its internal audit program the development of a program of pro-active, random, fraud detection audits to increase the chances of detection of the type of misconduct uncovered in this matter. These audits need not be numerous because their random nature and fraud detection focus should provide an effective incentive for compliance with the Guidelines.

Recommendation

I recommend that, as part of the development of its internal audit program, the parliamentary administration:

- (a) consider the findings in this report and assess whether the Parliament's internal audit program can be deployed to further improve internal control measures; and
- (b) consider developing a program of pro-active, random, fraud detection audits of the use of Members' auditable allowances.

Appendix 1 – The Commission's role

The *Independent Commission Against Corruption Act 1988* is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of New South Wales, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or of conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct within the meaning of the ICAC Act.

The ICAC Act applies to public authorities and public officials as defined in section 3 of the Act. Section 3 expressly defines 'public official' as including a Member of the Legislative Council. Mr Jones is, in this capacity, clearly a public official for the purposes of the ICAC Act.

The Commission was created in response to community and parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, based on an ethos of probity.

The principal functions of the Commission, as specified in section 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and co-operating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

It is not part of the Commission's role to prosecute for offences that an investigation undertaken by the Commission may reveal. However, the Commission may form and express an opinion as to whether or not any act, omission or decision which falls within the scope of its investigation has been honestly and regularly made, omitted or arrived at, and whether consideration should or should not be given to the prosecution or other action against any particular person or persons, be they public officials or not.

Appendix 2 – Corrupt conduct defined and the relevant standard of proof

Corrupt conduct is defined in section 7 of the *Independent Commission Against Corruption Act 1988* as any conduct which falls within the description of corrupt conduct in either or both subsections (1) or (2) of section 8 and which is not excluded by section 9 of the ICAC Act. An examination of conduct to determine whether or not it is corrupt thus involves a consideration of two separate sections of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Section 8(1) provides that corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Section 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection. Such offences include:

- official misconduct (including breach of trust, extortion and imposition) (section 8(2)(a));
- bribery (section 8(2)(b));
- obtaining or offering secret commissions (section 8(2)(d)); and
- any conspiracy or attempt in relation to any of the above (section 8(2)(y)).

Section 9(1) provides that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) in the case of conduct of a Minister of the Crown or a Member of a House of Parliament, a substantial breach of an applicable code of conduct.

Three steps are involved in determining whether or not corrupt conduct has occurred in a particular matter. The first step is to make findings of relevant facts. The second is to determine whether the conduct, which has been found as a matter of fact, comes within the terms of section 8(1) and/or section 8(2) of the ICAC Act. The third and final step is to determine whether the conduct also satisfies the requirements of section 9 of the ICAC Act.

In applying the provisions of section 9 of the ICAC Act it is appropriate to recall the approach outlined by Priestley JA in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125. His Honour said that the word ‘could’ was to be construed as meaning ‘would, if proved’. In the course of discussing the proper construction of section 9(1)(a) of the ICAC Act, he said:

Despite section 8, conduct does not amount to corrupt conduct unless, in the case of a criminal charge which could be tried before a jury, the facts found by the ICAC as constituting corrupt conduct would, if the jury were to accept them as proved beyond reasonable doubt, constitute the offence charged ...

Such a construction is applicable to sections 9(1)(b), (c) and (d).

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there is no right of appeal against findings of fact made by the Commission nor, excluding error of law relating to jurisdiction or procedural fairness, is there any appeal against a determination that a person has engaged in corrupt conduct. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a royal commission and its investigations and hearings have most of the characteristics associated with a royal commission. The standard of proof in royal commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336:

... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (at 362)

This formulation, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, is to be understood:

... as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. (at 171)

Also relevant are *Rejtek v McElroy* (1965) 112 CLR 517, the report of McGregor J into Matters in Relation to Electoral Redistribution in Queensland in 1977 and the report by the Hon W Carter QC into An Attempt to Bribe a Member of the House of Assembly (Tasmania) in 1991.

As indicated above, the first step towards considering a finding of corrupt conduct is to make a finding of fact. Findings of fact and determinations set out in this report have been made applying the principles detailed in this Appendix.

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