New South Wales

Office of the Inspector
of the Independent Commission
Against Corruption

REPORT PURSUANT TO SECTIONS 57B & 77A

Independent Commission Against Corruption Act 1988

OPERATION "VESTA"

Andrew Kelly, Charif Kazal

And Jamie Brown Complaints

Office of the Inspector
of the Independent Commission Against Corruption

New South Wales Government

GPO Box 5341
SYDNEY NSW 2001
T: 61 2 9228 5260
oiicac_executive@oiicac.nsw.gov.au

28 June 2017

The Hon. John George Ajaka, MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Madam Speaker

In accordance with sections 57B and 77A of the *Independent Commission Against Corruption Act* 1988 ("the *ICAC Act*"), I, as the Acting Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament my Special Report: "Report Pursuant to Sections 57B and 77A *Independent Commission Against Corruption Act* 1988: Operation "Vesta": Andrew Kelly, Charif Kazal and Jamie Brown Complaints.

Pursuant to section 78(1A) of the *ICAC Act*, I recommend that the Report be made public forthwith.

Yours sincerely

Mr John Nicholson SC
Acting Inspector: ICAC

Received by me and authorised
to be made public forthwith on
Thursday 29 June 2017
at 10.00 am

President

Office of the Inspector
of the Independent Commission Against Corruption

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Received by me.
Deputy Clerk of the LA.
(on behalf of the Speaker)
29 June 2017

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EXECUTIVE SUMMARY

The Office of the Inspector to the ICAC received complaints from Andrew Kelly, Charif Kazal and Jamie Brown. The substance of their complaints has been examined in this Report, and in each case on the basis of the complaints and the existing law, their complaints have resulted in no finding of maladministration or abuse of power or improper conduct by the ICAC.

However, the issues raised by Charif Kazal and Andrew Kelly's complaints have caused me to question whether there are effectiveness and appropriateness issues that need addressing as a consequence of provisions of the ICAC Act. '

I have also argued that elements of the offence of Misconduct in Public Office may not have been correctly understood by the Commission and have thought to examine it in some detail an offence that appears to be gaining favour with the ICAC.

The Report looks at five areas, in respect of each of those areas it makes recommendations for consideration of the Joint Committee. The Recommendations are:

PROPOSED RECOMMENDATIONS

Recommendation 1

It is recommended that steps be taken to amend sections 8 and 9 of the ICAC Act to remove the "could" test from each section, so that findings of corrupt conduct are available only in circumstances where it was reasonable for the Commission to expect a properly instructed reasonable tribunal of fact would come to a conclusion on admissible evidence that the opinion or finding of the Commission underpinning the corrupt conduct finding would be sustained. (see para 105 ante)

Recommendation 2

It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given as to whether or not the common law offence of Misconduct in Public Office should be incorporated into Statute law for purpose of better defining its elements and its sentencing range. (see para 132 ante)

Recommendation 3(a)

That section 9 (1)(b) and (c) be repealed on the basis that existing disciplinary tribunals and the Fairwork Commission are capable of dealing with matters to which those sections relate. (see para 225 ante)

Recommendation 3 (b)

Alternatively: that section 9 (1)(b) and (c) be amended so that any ICAC finding that misconduct of a kind it has been considering as conduct falling within the description of "corrupt conduct" as identified in s.8, but which did not qualify as conduct to which s.9 (1)(a) – criminal conduct – applied, but did qualify as conduct to which s.9 (1)(b) and/or s.9 (1)(c) applied should be described as "employment based misconduct" and can no longer qualify as "corrupt conduct". (see para 225 ante)

Recommendation 4

It is recommended that through hearings of the Joint Committee Parliamentary consideration should be given to whether or not the addition of a "closed inquiry" as described in this Report would serve to advance the investigation capacity and effectiveness of the ICAC. (see para 278 ante)

Recommendation 5

It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given to whether or not it is in the public interest that access to an exoneration protocol should be introduced into the provisions of the ICAC Act; and if so, in what circumstances and by what means could an "affected" person pursue exoneration. (see para 347 ante)

It is in the public interest that a careful balance be achieved arising out of seriously competing tensions. The content of the Report has been underpinned by this thesis: it is in the public interest that a careful balance be achieved between seriously competing tensions. The ICAC must be permitted to function effectively when it engages in its investigative functions. Public interest also requires that its findings and opinions, particularly when published, are an accurate reflection, as far as can be possibly achieved, of the true situation and that the ICAC has scope for a nuanced distinctions when coming to corrupt conduct findings. Where unjustifiable and disproportionate consequences flow from ICAC findings and opinions, the public interest and moral imperatives look to a remedial pathway to remove the unjustifiable and disproportionate. Clearly, my view is that the ICAC will be enhanced and areas of major criticism will be diminished if these Recommendations find favour.

Operation Vesta – a study whether the ICAC and the ICAC Act are functioning flawlessly

REPORT – COMPLAINTS ARISING FROM OPERATION VESTA

(1) The ICAC and its Commissioner have been given extraordinary powers to investigate, expose and prevent corruption involving or affecting New South Wales public authorities and New South Wales public officials. Where extraordinary powers of investigation are invested in a public agency or public official there is a need for strong and appropriate checks and balances to safeguard against any impropriety, maladministration, and ineffective or inappropriate procedures relating to the legality of its activities.

(2) The principal functions of the ICAC include investigating allegations implying corrupt conduct. Various investigation options are open to the Commission including use of compulsory examinations of individuals and public inquiries. The Commission is to conduct its investigations with a view to determining among other things whether corrupt conduct has occurred. The Commission has also been given as a principal function a power to make findings or form opinions including a finding or opinion that a person has engaged in corrupt conduct. It is the process involved in choosing investigative options and the process in moving from investigation into making findings and forming opinions that this Report is focused upon.

(3) Significant among the checks and balances found in the ICAC Act is the provision of an Inspector of the ICAC. Among the principal functions of the Inspector is one authorising him/her to deal with complaints of abuse of power or other forms of misconduct. Andrew Kelly (Kelly[1]), Charif Kazal[2] and Jamie Brown (Brown) have made complaints arising out of Operation Vesta, an investigation conducted by ICAC in 2010-2011.

(4) The complaints by these three men will be dealt with by way of a report as envisaged by s.57B (1)(b) ICAC Act. In considering the complaints of Kelly and Charif Kazal, the factors influencing selection of investigative options was a matter that attracted my attention. Further, the distillation of important features of the investigation into findings, including findings of corrupt conduct and a decision to refer a matter to the DPP against the background of s.17 (1) ICAC Act are matters I wish to comment upon. For that reason I have also taken the opportunity on my own initiative to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality and also the propriety of its actions. It is the inclusion of this aspect of my

[1] No offence is intended by dropping the title "Mister" from the names of those who feature in this Report.
[2] Charif Kazal will be referred to by both his given name and surname to distinguish him from other members of the Kazal family.

Report that that leads me to conclude it is also appropriate to submit a Special Report to the Presiding Officer of each House of the Parliament pursuant to s.77A ICAC Act. It will be noted in this Report there are occasions where I report that the Commission has been legally entitled to make a decision or come to a view on some aspect of an allegation made by the Commission; but have questioned whether as a consequence of the legislative provisions being followed, the outcome is one that is effective or appropriate; in other words, raising issues in respect of the legislation being applied, notwithstanding an entitlement of or obligation upon the Commission to have chosen an option which is a subject of my Report. The way I read s.57B (1) and (2), and 77A, these are matters I am entitled to assess and report on.

(5) During 2010-2011 among its other workload, the ICAC initiated an investigation into an undisclosed conflict of interest of a Senior Executive Officer of the Sydney Harbour Foreshore Authority (SHFA). The conflict of interest was said to have occurred in 2007 and 2008 in circumstances that will be detailed more fully later in this Report. The Senior Executive under investigation was Andrew Kelly. This investigation was allocated the formal identity of "Operation Vesta" (hereafter Vesta).

(6) The early months of the investigation enabled the ICAC to distil two allegations it referred to further investigation via a public inquiry – one against each of Kelly and Charif Kazal. The allegation against Kelly and the allegation against Charif Kazal, as set out in the ICAC Report[3] do not reflect word for word the allegations as announced by the Commissioner presiding at the Public Inquiry on 25 July 2011[4]. Set out below are the two allegations the Commissioner identified at the Public Inquiry:

(a) "*... an allegation that Mr Andrew Kelly, in his capacity as an officer of the Sydney Harbour Foreshore Authority, acted in conflict with his duties. He is alleged to have done so when dealing with Mr Charif Kazal and other members of the Kazal family. These dealings are alleged to concern properties owned by Sydney Harbour Foreshore Authority at 91, 99 and 100 and 135 George Street, The Rocks. These properties were, at the time in question, leased by the Sydney Harbour Foreshore Authority to Charif Kazal (sic[5]) and members of the Kazal family. It is alleged that at the time Mr Kelly was or anticipated being involved with Charif Kazal and members of the Kazal family in private business.*

(b) "*... an allegation that Charif Kazal sought improperly to influence the exercise of Mr Kelly's official functions or place himself in a position to do so by holding out to Mr Kelly the prospect that he would or might be involved with him and members of the Kazal family in private business.*"

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3 Investigation into the Undisclosed Conflict of Interest of a Senior Executive of the Sydney Harbour Foreshore Authority – ICAC Report; 16 December 2011; (hereafter the ICAC Report) Summary of investigation and results: p.6 and p.8.

4 The ICAC Report; 16 December 2011; Chapter 1 The investigation p. 8. To the extent of the difference the Report may be thought to be inaccurate. In particular the allegation against Charif Kazal as given at the public inquiry, lacked some important detail by comparison with the allegation as reported to the Parliament. In criminal law, the terms of an allegation contained in an indictment is usually crucial to the accused person mounting a defence. That, of course is not a necessary requirement of an ICAC public inquiry.

5 Operation Vesta Public Hearing (sic) transcript p. 1 Charif Kazal was never a lessee of any of the properties controlled by SHFA.

(7) On 16 December 2011 the then Commissioner, the Hon. Mr David Ipp AO QC submitted a 44-page Report to New South Wales Parliament. In the opening chapter of the Report, the Commission summarised its findings in respect of each of Kelly and Charif Kazal.[6]

"(a) For the purpose of s.8 of the ICAC Act, the conduct alleged against Mr Kelly could constitute corrupt conduct as such a conflict of interest on his part could adversely affect, either directly or indirectly, the honest or impartial exercise of his official SHFA functions and therefore come within s.8 (1)(a) of the ICAC Act and could constitute or involve a breach of public trust, and therefore come within s.8 (1)(c) of the ICAC Act.

For the purpose of s.9 of the ICAC Act, the conduct alleged against Mr Kelly could fall within s.9 (1)(a), on the basis that it could constitute or involve a criminal offence, namely the common law offence of misconduct in public office. Such conduct could also fall within s 9 (1)(b) and 9 (1)(c) of the ICAC Act on the basis that it could constitute a disciplinary offence and reasonable grounds for dismissal on the basis of misconduct.

(b) For the purpose of s.8 of the ICAC Act, the conduct alleged against Charif Kazal could constitute corrupt conduct because such conduct could adversely affect the honest and impartial exercise of Mr Kelly's official functions, and therefore come within s.8 (1)(a) of the ICAC Act.

For the purpose of s.9 of the ICAC Act, Charif Kazal's conduct, if established, could fall within s.9 (1)(a) on the basis that his conduct could constitute or involve the criminal offence of offering a corrupt Commission or reward pursuant to s.249B (2) of the Crimes Act 1900."

Questions of Further Action by the Authorities

(8) The ICAC Report into Operation Vesta noted both Kelly and Charif Kazal had given their evidence subject to objection – and that a declaration made at the time by the Commissioner pursuant to s.38 ICAC Act meant the evidence of each could not be used against him in any subsequent criminal proceedings save for one exception (important in Charif Kazal's outcome, namely an offence created by the relevant provisions of the ICAC Act).

(9) The ICAC Report noted an opinion that consideration should be given to obtaining DPP advice regarding a prosecution of Kelly for the common law offence of misconduct in public office in relation to his alleged failure to declare his conflict of interest.[7]

(10) The ICAC Report also noted an opinion that consideration should be given to obtaining DPP advice regarding the prosecution of Charif Kazal for an offence under s.87 of the

[6] The ICAC Report; Chapter 1: The Investigation p.8
[7] Ibid

ICAC Act in relation to his allegedly knowingly giving false evidence that he never intended to settle Kelly's accommodation account for the May 2007 UAE trip[8].

(11) On the other hand the Commission recognised the futility of prosecuting Kelly for any alleged disciplinary offences – as he was no longer employed by SHFA[9].

(12) Likewise, the ICAC recognised the futility of proceeding against Charif Kazal for an offence under s.249B (2)(b) because of an absence of sufficient admissible evidence to establish beyond reasonable doubt all criminal elements for the alleged offence[10].

Complaints received by the Inspector

(13) As noted above the Vesta Report was published in December 2011. On 26 March 2012 by way of summons Charif Kazal challenged the jurisdictional validity of the contents of the Report and the reliability of its findings in the NSW Supreme Court. On 7 February 2013 Harrison J dismissed the summons noting findings were made on the civil standard, "*the Commission made no error and did not exceed its jurisdiction.*[11]" Subsequent to, and it would seem as a consequence of publicity created by the ICAC investigation into allegations being made against Deputy Senior Crown Prosecutor Margaret Cunneen, and the three court cases litigated in the course of that investigation[12], the Inspector received three complaints arising out of the ICAC investigation into Vesta.

(14) On 4 May 2015 Charif Kazal initiated his complaint to the Inspector. The following day Jamie Brown lodged a complaint. Brown was neither an "affected"[13] person nor a witness before the Commission. His complaint is confined to a single incident occurring during the investigation. His complaint was made in his capacity as a citizen and resident of New South Wales.

(15) The final complaint was made by Andrew Kelly three months later on 19 August 2015.

Limits on Inspector's Jurisdiction

(16) The ICAC holds public inquiries via hearings presided over by a Commissioner or Assistant Commissioner. The presiding officers are invariably legally qualified. Many of them are retired Judges. "Affected" persons usually have legal representation; some of the procedural rules of the ICAC are similar to court room practices. The procedure allows for some limited contest between State investigative authorities and persons facing serious allegations. The Commission receives written submissions from its

[8] The ICAC Report; December 2011, Chapter 8: Conflict of interest? Findings and section 74A (2) statement p.36
[9] Ibid.
[10] Ibid.
[11] *Kazal v Independent Commission Against Corruption* [2013] NSWSC 7 February 2013 per Harrison J.
[12] *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571; *Cunneen v Independent Commission Against Corruption* [2014] NSWSCA 421; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14
[13] Section 74A of the ICAC Act defines that "affected" person as "a person ... against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with the investigation concerned".

Counsel Assisting, "affected" persons and other parties the Commission wishes to hear from. Ultimately the Commission produces a Report arising out of the material from all aspects of its investigation including the public inquiry. There is a capacity for the decision-maker to make findings having a criminal aura.[14] In those circumstances it is reasonable to expect that there may be some confusion between the role of the ICAC and the role of the State's criminal courts, particularly as to its procedures and its adverse findings/opinions against "affected" persons.

(17) It is against that background that the Inspector's functions concerning complaints made to him should be understood. The jurisdiction of the Inspector is limited to the statutory functions given to him or her. They are to be found in s.57B ICAC Act 1988. Thus an Inspector's capacity to deal with or respond to a complaint is limited by the "function powers" of s.57B. It is accepted s.57B (2) permits the Inspector to exercise any of the functions on his/her own initiative. As earlier noted in the course of dealing with the complaints that have been made it has been convenient to undertake some assessments as provided by s.57B (1)(d).

(18) However those making complaints to the Inspector can hardly expect an Inspector to wade through an extensive collection of investigative documents, transcripts, meeting minutes and exhibits looking for misconduct or maladministration on a whim of an aggrieved, affected person, lodging nothing but a general complaint. If the complainant does not raise a matter falling within the defined functions, the overwhelming probabilities are that there is nothing an Inspector will be able to do in respect of identifying the substance or nature of the complaint.

(19) The second thing to note about the functions is that an Inspector has no judicial power. The Office of Inspector is not that of, or akin to that of a Judge or an Appeal Judge. Where all judicial officers may make orders binding on parties, or write judgments (or in the case of appeal judges write appeal judgments) approving or overruling a public authority or an individual's conduct, or a decision of a court below; the role of an Inspector is one of inspecting an outcome sometimes, or the conduct of the ICAC, and reporting, including by way of recommendation, on ways in which the ICAC can improve its performance.

(20) As noted above it is no compulsory part of the Inspector's functions to embark upon considerations other than those arising from complaints to the Inspector. It is to be noted none of the functions set out in 57B requires an Inspector to determine what is in fact true or what is in fact false. The Inspector's functions in response to complaints are limited only to determining whether there was or was not misconduct or maladministration of some form or other by the ICAC, its staff or Commissioner.

[14] Note Harrison J's comments in *Kazal's* case at [26] "The existence and scope of these extra [investigative] powers demonstrate that the legislature did not intend to constrain the Commission by reference to the rules and procedures that apply in courts. The absence of those constraints is consistent with the Commission's role as "primarily an investigative body and not a body the purpose of which is to make determinations ... as part of the criminal process"; *Balog* at 633. It is also consistent with that role that the conduct or outcome of its investigation should not bind or otherwise prejudice subsequent legal proceedings".

(21) The four crucial provisions granting functions to an Inspector as set out in s.57B ICAC Act are as follows – it should be noted only two of an Inspector's functions relate to complaints received by the inspector:

Principal functions of Inspector

(1) The principal functions of the Inspector are:
(a) to audit the operations of the Commission (ICAC) for the purpose of monitoring compliance with the law of the State, and
(b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and
(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

(2) ---

(22) The concept of maladministration relied upon by the ICAC Act involves action or inaction of a serious nature that is contrary to the law, unreasonable, unjust, oppressive or improperly discriminatory, or conduct based wholly or partly on important motives.

(23) The key to understanding the narrowness of the Inspector's jurisdiction in dealing with complaints is to continually remind oneself – is this complaint about the Commission's action in respect of the behaviour of others – or is this about the behaviour of others before the matter reached the ICAC. It is only in the first case that the Inspector would have any jurisdiction. Once the jurisdiction is enlivened, a second question arises. Importantly the question is not "Do I as an Inspector agree or disagree with the ICAC's response and consequential conduct?"; but rather: "Does the ICAC's conduct amount to an abuse of power, impropriety, misconduct, maladministration, ineffective or inappropriate procedural conduct relating to the legality of its activities; or some combination of any of these?" To attract the Inspector's jurisdiction, ICAC's maladministration or misconduct must be of a kind that involves action or inaction of the ICAC of a serious nature.

(24) Having considered the Inspector's jurisdiction in respect of complaints received by him/her, it is now appropriate to identify the specifics of the complaints made as a result of the Operation Vesta Report. Ultimately I will need to determine whether the Inspector's jurisdiction is enlivened by any of them.

Charif Kazal's complaints:

(25) With legal assistance, Charif Kazal identified his complaints as follows:-

(a) The failure in the conduct of the investigation compromising Operation Vesta (inquiry) to consider the submission made at the outset that Mr David, who was a key ICAC witness against Charif Kazal had been involved in a substantial commercial dispute with Charif Kazal (and his brother Tony) that resulted in the Kazals commencing litigation against Mr Roderic David (David) in both the Cayman Islands and Abu Dhabi prior to the ICAC inquiry being called;

(b) The matters complained of regarding Kazal leases were investigated by ICAC early in 2010, and cleared, so on what basis did ICAC decide its own powers of investigation were so flawed as to warrant a formal public inquiry on the same matter?

(c) The use, in the context of the legal dispute between the Kazals and David in the Cayman Islands, of a document by David's lawyers to threaten Charif Kazal and his co-accused, Kelly. This information could only have been obtained during the course of the ICAC complaint process (being a confidential Sydney Harbour Foreshore Authority document) – the implication here being, that the document was leaked outside of the investigation (prior to public hearings in the Inquiry) in breach of the ICAC Act; and

(d) The fact that the ICAC ignored a clearly exculpatory witness statement (of Mr Neilsen) in its possession, that it refused to disclose, and proceeded to public hearings when that statement (which indicated that the Kazal family leases in The Rocks precinct had all been obtained lawfully and without involvement from Andrew Kelly, who was testifying in the litigation brought against David by the Kazals) would have cleared Charif Kazal in accordance with the initial Terms of Reference of the Inquiry.

(26) The document outlining Charif Kazal's complaints argued that each of those complaints fell, "*squarely within the scope of 'maladministration' as defined by s.57B (4) of the ICAC Act.*" The bases upon which that was put included the following:

i. A confidential document, which could only have been obtained in the Inquiry, was used by a witness in the Inquiry in furtherance of a commercial dispute with Charif Kazal (this would arguably warrant consideration of whether such conduct was contrary to law);

ii. A legally conflicted witness (David) that was a defendant in litigation already on foot, was accepted by ICAC as a witness of fact before the Inquiry (noting that factual findings made in ICAC cannot be subsequently reversed);

iii. David was called on by Special Counsel Assisting to stop lying and tell the truth. David's own barrister apologised for him taking prescription medication in the absence of a prescription when defending his poor quality testimony and despite multiple instances of him being found to be lying to ICAC, David was never charged for this, yet Charif Kazal was found corrupt (sic)[15] on a lesser claim that he misled the ICAC in his testimony where the Commissioner found his 'intent' was to pay Kelly's accommodation and although this did not occur, it was claimed Charif Kazal misled the Commission; and

iv. Charif Kazal was deprived of the opportunity to have evidence considered that was refused by Commissioner Ipp which might otherwise have resulted in different findings of fact, given this evidence refuted the suggestion Roderic David never dealt in cash. Commissioner Ipp noted in his Report as part of his reasoning for why he favoured David's evidence over Charif Kazal's that David's company kept good books and he had no reason for dealing in cash; yet his evidence outlined hundreds of thousands of dollars cash he had gifted to avoid ATO obligations. In addition, Commissioner Ipp closed down discussion in the evidence of Tony Touma, when the barrister for Kelly was asking him about reasons David was asked to leave Parkview constructions. Both Charif Kazal and Kelly knew he was found to have taken cash kick-backs and was overpaying himself and Touma threatened to call the Police if John David did not repay the moneys David defrauded. The refusal to allow such evidence and testimony to be drawn out and then noting his supposed well-kept books of Park View Construction was in contrast to that those of Charif Kazal and Kelly proceeding to introduce and is respectfully suggested is not the action of someone making an "independent" analysis of the evidence.

v. In light of the fact the Commissioner cleared the allegations regarding Kazals obtaining leases by inappropriate means at the outset of the Inquiry and yet these were the Terms of Reference for calling the Inquiry, brings into question, on what basis was the decision made to hold a Public Inquiry. In the absence of any evidence whatsoever of wrong doing by Charif Kazal, what basis (if any) do the ICAC have to call this Inquiry.

(27) Charif Kazal also stressed that the items of complaint listed above were by way of example only and not exhaustive. If, what was meant by that was that the Inspector was expected to wade through the volume of material available from ICAC looking for other matters of claimed maladministration and/or misconduct, it is sufficient to point

[15] Charif Kazal was found to have engaged in corrupt conduct on the basis of s.8(1) ICAC Act and s.249B Crimes Act but not on the basis of knowingly giving false or misleading evidence. In respect of that matter, he was referred to the DPP for advice in respect of whether he should be prosecuted for breaching s.87 ICAC Act.

out that any matters not the subject of complaint by Charif Kazal, can hardly amount to "complaints" made by Charif Kazal as referred to in s.57B of the ICAC Act.

Jamie Brown's complaints

(28) Jamie Brown is a former Police officer and now private investigator. He has known Charif Kazal for several years. For reasons that will be detailed later, he came to know of alleged offences of malicious damage said to have been committed upon a motor vehicle and its owner – another former Police officer and now private investigator then involved in surveillance of David. Brown's complaint focused upon an allegation that the ICAC had interfered to a point of causing termination in a police investigation of those alleged offences, notwithstanding the investigation had been legitimately initiated by complaint of the alleged victim to those two alleged offences.

(29) Jamie Brown was concerned that the then Commissioner used his influence or allowed somebody in the ICAC to use the ICAC's influence to stop any prosecution of David on alleged offences of malicious damage and assault.[16]

Andrew Kelly's complaints

(30) Kelly first sought intervention of the Inspector in August 2015 in circumstances where he had seen the Inspector's recommendations to the Parliamentary Joint Committee then considering changes to the ICAC Act. When first contacting the Inspector, Kelly wrote that he was writing to clear his name. Some months later he wrote to the Inspector "*You are my last chance after a grossly disappointing legal system has failed me desperately. All I want is the truth to be publicly reported and you are the only person with ability to shine a light on the matter. I desperately need this stench lifted* ..."

(31) Kelly's complaint seemed to be that although initially questioned about leases he was alleged to have given away for favours, which proved a dead-end, he was then questioned regarding a potential conflict of interest for not declaring he worked for Charif Kazal – and the questioning of other witnesses was couched in those terms despite his denials of that working relationship.

(32) Kelly's claim was he had successfully proved he worked for David – providing bank statements and letter of employment confirming all his dealing were with David. Since David was not a SHFA tenant he was not conflicted in interest in respect of his dealing with Charif Kazal.

(33) Kelly appears to have distilled both of these claims into the following question which he puts up as the major complaint he has against ICAC "*Why did the ICAC, after investigating all of the SHFA leases I was accused of giving away for supposed*

[16] The interview between Acting Inspector Nicholson SC and Jamie Brown 13 December 2016.

incentives, and finding no evidence of any impropriety (as was confirmed by Counsel Assisting on Day 2 of the Inquiry) on my part, decide to proceed with a Public Inquiry if they have investigated well in advance and found no substance to the claims which we know Roderic David orchestrated in the SMH?"

(34) In the course of an interview between the Acting Inspector and Kelly on 15 December 2016, Kelly made reference to a sworn statement said to have been in the possession of ICAC as at July 2011 from one Paul Neilsen (Neilsen). Neilsen, it was said, actually negotiated the lease for 100 George Street Sydney (a Kazal lease). Neilsen's statement was said to be exculpatory for Kelly. Complaint was made that there was no reference by the ICAC to this statement in the list of statements said by ICAC to be in its possession in respect of witnesses who ICAC was not intending be called. That list of potential witnesses whose evidence would be uncontroversial was provided to Counsel for "affected" persons. Nor was the statement made by Neilsen disclosed in the brief of documents provided by the ICAC to counsel for the "affected" person. Finally, neither Neilsen, personally, nor his statement was tendered before the Commission providing evidence of that exculpatory material.

The parameters of the Public Inquiry

(35) At the opening of the Public Inquiry, the Presiding Commissioner indicated the nature of the allegations against each of the "affected" persons. They have been set out at paragraph 6 of this Report.

(36) It is to be remembered a Public Inquiry is one of the investigative tools available to the ICAC. It takes the form of a hearing of sworn testimony given by witnesses and exhibits tendered. Strictly speaking, the sworn testimony is not to be equated to sworn evidence given in a Court.[17] In Vesta, the hearing of the testimony was conducted before the presiding Commissioner who was assisted in this aspect of the investigation by a Counsel Assisting, Mr Newlinds SC. In Counsel Assisting's Opening, he identified the personalities involved, outlined known material arising from earlier investigative activities, and turned to the issues the Public Inquiry would focus upon. Set out below is a brief summary of the matters that insofar as they affected or touched upon Mr Kelly or Mr Charif Kazal. The role of David is also referred to in the Opening. He is important not only in respect of Kelly and Charif Kazal, but, it is to be remembered Jamie Brown complains of an alleged favourable intervention by the ICAC on David's behalf.

[17] See *Balog v The Independent Commission Against Corruption* [1990] HCA 28 at [17]; given a public inquiry is investigation only it is argued the word "evidence" or "sworn evidence" is inappropriate because the sworn testimony is not subject to provisions of the Evidence Act as it applies to Court proceedings. Compare the words of the jurat found in first paragraph of witness statements taken by Police.

The Opening[18] - An overview of the context supporting the Commission's Allegations

(37) Sydney Harbour Foreshore Authority was the owner of properties in The Rocks area which were either leased or available to be leased. The Rocks has significant heritage value. SHFA was the landlord seeking to rent out properties in that area to tenants with a view to making money for SHFA and with a view to the tenants' business being successful so as to create an environment attractive to other tenants and commercial operators within the Rocks.

(38) Kelly commenced employment initially with Darling Harbour Authority in 1988. That authority was taken over by SHFA sometime in 1999. Kelly's first job with SHFA was being Director of Business Services.

(39) Around 2001 Kelly disclosed to his superiors in SHFA the fact that he had a consultancy and the fact that that consultancy might cause some tension in his interest with a matter. This was considered by his superiors and considered to be of no consequence. Its importance to the ICAC was that it demonstrated Kelly was well aware of his obligation as an employee of SHFA to identify in circumstances where his interest might come into conflict with SHFA.

(40) In late 2001 Kelly applied for a permanent position that resulted in a contract dated 21 May 2003 for a five-year term. That contract would expire by the effluxion of time in May 2008. Kelly was promoted within the organisation and became the Director of the Tenant and Asset Management Services (TAMS). In 2007 the Tenant and Asset Management Services came under the portfolio of the Minister for Planning and the ultimate responsibility for the acts of SHFA rested with that Minister. Below the Minister was a Board of Directors appointed by the Minister and below that Board was a CEO, at that time one Dr Robert Lang (Lang).

(41) For two years leading up to 2007 Charif Kazal was the person within the Kazal organisation who primarily dealt with SHFA regarding lease matters. As a consequence of Kelly's position he and Charif Kazal had many dealings of a business nature with each other. They also had what they might call a casual relationship; they certainly met for cups of coffee and tea around the place and it was the Counsel Assisting's opinion that they had a rapport that had developed throughout their dealings.

(42) On 26 June 2006, in respect of 100 George Street, generally known as La Mela Pizzeria, on the application of the Kazals' the lease, which still had a period to run, was replaced by a new lease with a longer term. That's a decision Kelly was involved in. He made recommendations to the CEO which went on to the Board. Counsel

[18] This is not a verbatim record of the opening – but a synopsis of relevant portions and some editorial comment for the purpose of this Report.

Assisting makes the point in relation to each of the decisions, it is conceded that in none of them was Kelly the actual decision maker. Kelly's recommendations were given significant weight and were taken into account by relevant decision makers, be that the CEO or the Board. There is evidence of delegations that were in place, but regardless of delegations each of these decisions ultimately did go to the Board and were signed off by the Board.

(43) The next relevant decision relates to 99 George Street, The Rocks Café, and a decision made on 21 January 2007. That involved an agreement by SHFA to pay the Kazals an amount of $335,000. That emerged out of some unauthorised work to develop the property which had been undertaken and completed by the Kazals. In this case there was a dispute between the landlord and tenant as to the quantum of money which the tenant had undoubtedly spent that should be properly allocated to developing what was described as the "base building" and what amount of money should be properly allocated to the "tenant's fixtures". There was to-ing and fro-ing with SHFA with various people making different recommendations. The amount ultimately paid as noted above was $335,000.

(44) It is clear from the documents that some people within SHFA thought that that was too much money. Kelly thought it was appropriate; as did Lang and as did the Board. The importance in this investigation was that it demonstrated the dealings between SHFA and Kazals in relation to decision making; gave close insight into the dealings between Charif Kazal and Kelly and the influence and impact Kelly's view could have on a particular decision within the organisation.

(45) Lang's evidence was anticipated to be that Kelly was good at his job, knew his area, was good at dealing with tenants, and when it came to decisions such as this, there had to be matters of judgement, because no one was able to identify with particular precision how much work had been linked to any particular part of the building and how much to fixtures. It was also anticipated that Lang would give testimony to say that he, Lang, trusted Kelly, gave great weight to what Kelly thought should happen. It was also anticipated Lang's testimony would say that at the time and with the benefit of hindsight, going back through the documents, that he is now satisfied that that particular decision was the type of decision that ultimately would have been made in any event; and will also say that now in the light of what he knows, details of Kelly's relationship with Charif Kazal and what he thinks it subsequently was at a later point in time.

(46) The next relevant decision was on 2 January 2007 concerning 135 George Street, known as Amo Roma, Restaurant. That was a decision that SHFA should pay $20,000 for an electrical upgrade made to the restaurant. There had been some to-ing and fro-ing between the Kazals and SHFA as to whether the electricity supply to the building was adequate for a working restaurant and the result of the negotiations effectively started off with a claim by the tenant which was looked up by someone within SHFA,

a counter offer was put and ultimately the $20,000 figure was settled upon. Again it was anticipated that Lang's testimony would be, that even looking at the decision with the benefit of hindsight, what he thought at the time is what he thinks now, that is, that a decision of $20,000 would have been arrived at in any event.

(47) All of those decisions precede May 2007. May is a significant month (as will be seen later). The next relevant decision is one made on 14 July 2007 concerning 91 George Street, Guylian Chocolate Shop or the Guylian Chocolate Café. The Kazals had taken an assignment of a lease initially owned by Costi Seafood Brand. The seafood business had shut down. There was a period of time when the premises were vacant and the Kazals wanted a rent abatement from SHFA. They also wanted consent to change the use of the shop so that instead of being a seafood shop, it could be used as a chocolate selling shop. This decision stands out because in terms of chronology on 14 May, the decision was made within SHFA, upon the recommendation of Kelly, to decline the application, that is to pay no rent abatement, and to say "no" to the change of usage. That decision is reversed on 14 July 2007. Kelly supported that change of position. Kelly's personal circumstances had changed by 14 July.

(48) At this point Mr Newlinds SC went on to discuss Kelly's written employment contract. Incorporated within the contract was a Code of Conduct for Senior Executives working within the New South Wales Government. Counsel Assisting argued that the contractual Code of Conduct without equivocation makes clear that any conflicts of interest that a Senior Executive finds himself in or identifies within his or her staff are to be disclosed to and declared and considered by that person's superiors. In addition to the contractual Code of Conduct referred to, SHFA had within its own organisation its own Code of Conduct for its own employees which had provisions similar to the contractual one. It also applied to Mr Kelly. The SHFA Code of Conduct identified clearly that an employee was not entitled to take a secondary job without permission, and conflicts of interest are as much about perception as about fact. It made clear that any circumstance which might not in fact involve conflict, but which might create a perception of a conflict, is just as important as factual conflicts and needs to be disclosed. Counsel Assisting hypothesised that Kelly would be accepting in his testimony that he well understood what a conflict was, that he well understood that it was a serious requirement of his employment and of his role and that any such conflict he had he was required to disclose.

(49) In early 2007 Kelly had either worked out for himself or might have been told informally that his contract, which was to expire in May 2008 was not going to be renewed. Consequently he was actively looking for new job opportunities and the documents (exhibits) would seem to indicate that he was particularly interested in working in the United Arab Emirates and was sending a friend there and other people his CV, asking if they were aware of any job opportunities in the UAE.

(50) By May 2007 and possibly earlier there was a plan in place for a group of people to travel to Dubai and Abu Dhabi with the objective of scoping out business opportunity for an organisation known as the Parkview Group. Those associated directly with Parkview were David, the owner, Clinton Willoughby (Willoughby), Tony Touma (Touma) and Emile Tabet (Tabet). Also going to Dubai were Charif Kazal and Andrew Kelly. It was the Investigator's hypothesis that the latter named two were not part of the Parkview Group, although were in some way associated with them.

(51) Whether or not Kazal and Kelly were members of the Parkview Group was in issue in the investigation. Counsel Assisting pointed to the fact that the first four people named travelled in a separate group to Charif Kazal and Kelly. Not only did one group travel together on the Parkview plane but also the other group travelled on another plane, on the same day, but in a different class. Another distinguishing feature from the Investigator's point of view was that the Parkview people all had their airfares and accommodation expenses paid by Parkview.

(52) Again the payment of accommodation and airfares was an issue in the investigation. The ICAC hypothesis was that Kelly paid for his own ticket and accommodation and was reimbursed in cash for that amount by someone, and on the Investigator's case that someone was Charif Kazal. Charif Kazal initially paid for his own ticket and accommodation, but subsequently on provision of an AWT invoice to Parkview by Charif Kazal, Parkview paid the invoice. AWT was one of the Kazal companies. That meant that all the travellers to Dubai, save Kelly, were paid for or reimbursed by Mr David.

(53) It was anticipated that David's testimony would be he did not pay Kelly's expenses and he certainly didn't use cash to pay people. Charif Kazal, it was anticipated, would give testimony that he didn't pay Kelly; and Kelly would also give testimony that David provided him with an envelope with about $11,000 cash in it, which he banked shortly after the trip. Counsel Assisting sought to demonstrate that Kelly's evidence was likely to be unreliable, because the testimony was that David through Parkview kept meticulous records relating to the trip; that an account was set up within Parkview for that purpose and that that account did not demonstrate any reference of the payments or cash payments being made to Kelly.

(54) It was also anticipated that David would give testimony that he didn't know very much about Andrew Kelly until Kelly appeared on the trip with Charif Kazal. David's testimony would be that Charif Kazal and Kelly were a pair and that Kelly must have been some sort of assistant to Charif Kazal. David's testimony would also be that Charif Kazal was there as a consultant to Parkview and it was always the case that he would get reimbursed for his expenses later down the track, and might even get a job if the business got up and running or perhaps some sort of ownership of the business.

(55) What was not in issue, was that David and Charif Kazal both would give testimony that the arrangement for Charif Kazal to come along, was an arrangement made before the trip. It was anticipated that Kelly's testimony was that he would say he was there to help David by way of being a consultant for him, and that was consistent with David's reimbursing him for his fees. Counsel Assisting's understanding was that Charif Kazal and Kelly would give testimony that they had nothing to do with each other because they were both there really as separate consultants to David.

(56) There would be testimony that before, during, and perhaps shortly after the trip various documents were prepared by the Parkview Group of people. Some of those documents identified both Kelly and Charif Kazal as being part of the Parkview team. Indeed some identified both Kelly and Charif Kazal as being directors of Parkview property. Of course neither Kelly nor Charif Kazal at that time were directors of any Parkview company. Shortly and prior to the trip Kelly had been allocated an @AWT email address and in that sense then Kelly and Charif Kazal were allocated or had similar home-base email address @AWT.

(57) Counsel Assisting also opened on the proposition that business cards had been prepared for the trip and that Kelly may have been holding an AWT business card during the period that they were in Dubai. It was anticipated that it could be established that Kelly was also probably involved in the preparation of some of these documents, and it was anticipated that the hearing would establish that Kelly knew about the documents and seemed to have been 100 percent content with the documents being distributed to whoever was interested within the UAE. So what was to be established by the testimony was that Kelly acquiesced in the Parkview Group holding him out as part of their group and holding him out as someone who actually held a senior corporate position within that company.

(58) Counsel Assisting anticipated that there would be testimony that other documents were created in Australia prior to the trip – including some dealing with Chesterton International, a large real estate firm. The documents, it was argued, were probably created by Kelly, and if not created by him almost certainly created to his knowledge. The importance of this was that it would demonstrate both Kelly and Charif Kazal regarded themselves as being part of a team of people who were contemplating a new business venture in Dubai.

(59) Kelly and Charif Kazal flew to the UAE on the same plane, stayed at the same hotel, went to dinners together, had drinks in the afternoon and went to various meetings. While there, they (sic[19]) created a document loosely described as a business plan or budget tending to suggest common knowledge between Charif Kazal and Kelly that the goal of the business included at least both of them being employed in that business.

[19] My understanding of the evidence is that Charif Kazal was not involved in preparation of this document – principally Willoughby and Kelly prepared it.

(60) Coming to the first allegation that had been made against Kelly, Counsel Assisting made the point that the testimony would show Kelly neither before, nor after the trip, disclosed the fact to anyone at SHFA, particularly Lang, that he had gone on the trip. It was anticipated that Kelly's testimony would seek to explain that he wasn't having any business dealings with Charif Kazal, because all that was happening was that he was having some type of business arrangement with David and therefore there was no business relationship that had been compromised or conflicted by his working with David even though he was dealing with Kazal leases.

(61) A second line of defence was anticipated. That being that none of the decisions Kelly was involved in either before or after the trip in respect of Kazal holdings was anything other than a proper decision. It was basically a case that the decisions that were made, would have been made regardless of what relationship Kelly had had with Kazal.

(62) To answer those propositions, Counsel Assisting pointed to Lang who he anticipated would put a number of scenarios to the ICAC including one which he described as being the most benign, namely that Kelly was there as a consultant to David; Charif Kazal also as a consultant to David; Kelly being paid and reimbursed by David and having little to do with Charif Kazal. Counsel Assisting anticipated that the testimony would be that Lang considered even so, that the matter should have been disclosed and had it been disclosed Lang would have told Kelly he was not allowed to go on the trip, and if it hadn't been disclosed and Lang had found out he would have dismissed Kelly. He anticipated that Lang would say that the matter was so serious it justified summary dismissal. The rationale for the conflict is that both are engaged by David, and that meant that both Kelly and Charif Kazal were working towards a common goal, namely getting Parkview up and running in the UAE. Both were hoping to gain opportunities through that business. Given that they were both working together with a common interest, the common possession of that interest was in conflict with the interest that each held in their separate organisations in respect of leases.

(63) Counsel continued his opening, recognising that ICAC might not be able to say whether any of the decisions that were made in respect of the Kazal leases were infected by the conflict or whether they might have been different if there had been no conflict, or if Kelly had disclosed the conflict and had stepped aside taking no part in the decision. Even so, from the point of view of Counsel Assisting, the submission at the conclusion of the inquiry would still be that that didn't lessen the gravity of Kelly's failure to disclose a conflict of interest, because its very failure to disclose would have created the perception which a reasonable person being told those facts would also immediately conclude was a grave failure.

(64) It was anticipated there would be testimony in respect of a second trip to Dubai happening in early 2008. The same people went on this trip, all expenses were

reimbursed by Parkview. A business plan had been advanced to some degree and Kelly by this stage was considered by David to be part of the group. On 10 March 2008 Kelly was offered a job by David in respect of a company known as IPS LLC. a UAE incorporated company. Charif Kazal was involved in that company through share ownership and Kelly held a position in the company. Kelly tendered his resignation on 10 March and finishes his employment with SHFA on 4 April 2008.

(65) The Commissioner posed a question that appears to indicate his view of the significance of a "perception" of a conflict of interest. He asked Counsel Assisting if he was correct in assuming that should the evidence reveal only a perception of bias, that fact still gives rise to a corrupt conduct finding under s.8 (1) of the ICAC Act, because the definition of corrupt conduct contained in s.8 (1) is not only "conduct that adversely affects the honest and impartial exercise of official functions by a public official" but also conduct "that could adversely affect the honest or impartial exercise of official functions ..." (emphasis added). Counsel Assisting agreed with the proposition. The Commissioner continued "and we ... , whilst we are dealing with a conflict of interest and the taking of decisions pursuant to a conflict of interest, it is really immaterial to work out what in fact occurred. Once the tainted conflict is there, that is enough?" Counsel Assisting agreed: "That's correct".

(66) Counsel in coming towards a conclusion of his address noted that there was a much more sinister version of events available which involved Charif Kazal in fact inviting Kelly along to the trip to the UAE for the purpose of helping Kelly obtain a job with David, Charif Kazal paying Kelly for his expenses and the like and that type of thing. Counsel Assisting then argued that those findings if made become incredibly serious because it comes without doubt that it would follow that Kelly deliberately did not disclose the conflict which would therefore make his conduct all the more serious.

(67) Counsel finished his opening by drawing to the attention of those present to two decisions, one being on 2 January 2007 concerning 99 George Street – the Amo restaurant being the electrical upgrade where $20,000 was involved. The other then he draws attention to the fact that in May 2007 there was a decision in respect of the Guylian Chocolate Café and a "change of the use" application and a "rent abatement" application. Initially a negative decision is made on the 14 May 2007, then the first trip to Dubai on 26 May. The parties return on the 2 June 2007. Within three weeks thereafter two deposits by Kelly into his bank account are made[20]. And then on 14 July there is a change in the decision made in relation to the Guylian Chocolate Café.

(68) There is a second trip to Dubai in January 2008. There is work done in March 2008. In February 2008 there is an application for consent of the Guylian Chocolate Café where Kelly is still involved and he leaves on 4 April 2008. These apparently are the

[20] 18 and 20 June 2007.

major decisions that Counsel Assisting was intending to focus on during the course of the hearing.

(69) Counsel Assisting also indicated that a lengthy list of people had been identified as potential witnesses because of their having some involvement in some of the events. The ICAC did not think it was necessary to call all of them but they were all under subpoena or summons and a list had been provided to "*Learned friends and invited them that if they wished to ask them any questions, if they just let us know the topic, we'll make those people available to them.*" Counsel Assisting also asked that if there was "*any other person who we haven't identified who ought to be called, who can give some relevant evidence, in any of these matters,*" to let him know and he would do his best to arrange for them to be available to give evidence.

Kelly's claimed background to this version of events

(70) Prior to making findings, compiling its Report from all options and aspects of the investigation into Operation Vesta, the Commission would have been aware of Kelly's claimed background to his version of events. Kelly started with Darling Harbour Authority which subsequently merged to become the Sydney Harbour Foreshore Authority in 1999. Initially he was a contractor from January 2001 until August 2001. But after the mergers he was employed temporarily and then initially full time until March 2008 by the Sydney Harbour Foreshore Authority. Allegations were raised against him in the Sydney Morning Herald in mid- 2011.

(71) He came to know the Kazals because of their tenancy of properties at SHFA, but his knowledge of them became better after leaving the Foreshore Authority.

(72) He first met the Kazals circa 2005 when he took over the role of Executive Director of Tenant and Asset Management Services (TAMS) – a role that oversaw the property and maintenance of the various SHFA properties. Prior to that role he was involved in financial and corporate matters and not in the tenancy side of matters. He was required as part of his work to attend functions and quarterly stakeholder meetings, and that is where he would, he believes, have first met Charif Kazal. The first of those meetings would have been in the last quarter of 2005 or the first quarter of 2006. He has met four of the Kazal brothers, he thinks. He met Karl Kazal during the period when he started talking to David and Charif Kazal about working for a company that David was setting up. But his more frequent contact with the Kazals has been since he had returned from overseas assisting them with evidence in various legal matters here and overseas.

(73) He met David when David first telephoned him saying he (David) would like to discuss an employment opportunity with Kelly. Kelly puts that call circa April 2007.

(74) The first transaction that he dealt with the Kazals was probably the lease at 100 George Street. When Kelly started with the TAMS and that was in September 2005, Board reports were submitted to the SHFA Board. Officers would work with the tenants and negotiate leases; various leases would then be put forward to Kelly who was the person responsible for the Division that would report leases and the like to the CEO and through him to the Board. He would generally review the reports from the officers, analyse and challenge portions of a report where necessary or approve them. The matter would then progress to the CEO and the management group and from that to the Board.

(75) 100 George Street was an Italian restaurant La Mela. The Kazals had an existing tenancy to that in the same building. The Group Manager of Property, who reported to Kelly and his Senior Property Manager negotiated with the Kazals on renewing the lease. That renewed lease came to him and through him it was put to the Board. There was talk of the Kazals taking the entire building at 100 George Street and Kelly managed that process by talking with his staff at that stage not the Kazals. That occurred around September 2005 when he took over the division. To the best of Kelly's recollection this was the first occasion that he had dealt with the Kazals. Discussions would have taken place between late September 2005 and lasted, perhaps to the end of 2006, when it went to the Board sometime in mid to late 2006.

(76) Both the Senior Property Manager and the Group Manager of Property did a lot of the work on the lease and taking over the whole building. They were the ones who did the bulk of the actual negotiations with the Kazals. Those negotiations focused on whether there was only to be a renewal of the existing lease or whether they were going to be allowed to take over the whole of the building. Leases came to him at a point when both Property Managers (Senior and Group) needed to refer a recommendation to the Board to get approval to take a matter forward. There was a set of procedures in terms of assessing a tenant's suitability for taking out a lease, including a compliance check; that is, to see whether they had complied with past lease requirements, paid rent on time and were capable of maintaining the lease. There was consideration as to what the applicant lessee wanted to do with the building and whether that was feasible in broad terms for what SHFA had in mind for that particular part of The Rocks. A valuer would be called in to assess a suitable rental. If there was a dispute on that, that would be sorted through negotiations to a resolution.

(77) Recommendations in respect of maintenance, change use for property, structural changes to buildings and the like came to the Board from the Group Manager of Property and Senior Property Manager. From the Group Property Manager, matters destined for Board consideration went through Kelly. His task in all this was to vet the paperwork and make sure neither of the Property Managers had missed any obvious things and then to sign off on the paperwork. In circumstances where he disagreed he would challenge the matter upon which he disagreed, query it and then both Managers would submit a revised report.

(78) The role of the CEO was not a case of just rubber-stamping policy-type changes; matters for a decision, such as a new lease, which had to go to the Board for approval, as a preliminary step had to go through the Management Group which was where the CEO could be found. All of the Directors and two General Managers would constitute that Management Group. The system was that the reports would come up, be discussed at the Monday morning management meetings. If there was dissent or disagreement, those disagreements were resolved and quite often the CEO would stamp his imprimatur on the papers and say, well this is what we are doing, finalise it that way and off everyone would go. The CEO was also considered or deemed a member of the Board. Kelly and other Directors would be invited to discuss and answer questions about reports in their divisions.

The Commission makes finding Kelly engaged in corrupt conduct

(79) The Commission's Report details findings that Mr Kelly engaged in corrupt conduct[21]. Set out below are the findings and reasoning in support of the finding made by the Commission. Of course the findings and reasoning must be understood within the context of earlier sections of the Commission's Report.

> ***Mr Kelly's Obligations***
> *A conflict of interest arises when a public official is influenced, or could be perceived to be influenced, by a personal interest in carrying out his or her public duties.*
>
> *Mr Kelly's SHFA employment contract required him to act ethically and maintain high ethical standards. The Code of Conduct and Ethics for Public Sector Executives is referred to in the [SHFA employment] contract. Clause 2.1 of the code requires executives to avoid real or apparent conflicts of interest. Clause 8.2 requires the written disclosure of any potential conflict between personal interests and official duty.*
>
> *Mr Kelly was also subject to the SHFA code of conduct which came into operation on 17 April 2007. It defines conflict of interest as "...a situation where an employee could be influenced or could be perceived to be influenced by a personal interest in carrying out their public duty." It notes that possible conflicts of interest include "any financial or personal interest that could directly or indirectly influence or compromise you in performing your duties" and "secondary employment that compromises the integrity of you or the Authority."...*
>
> *Kelly did not dispute that at all times he knew he was under an obligation to disclose any conflict of interest and the question of perception of bias was as relevant as that of actual bias.:.*
>
> *There was no dispute that Mr Kelly had not declared any conflict of interest arising from his trips to the UAE and the work he did towards establishing business opportunities in the UAE. The central issue for determination was whether Mr Kelly had such a conflict of interest. ...*
>
> *Kelly himself, eventually acknowledged that, from the time of the May 2007 trip to the UAE, he and Charif Kazal were working towards a common goal of getting a business*

[21] ICAC Commission Report – Chapter 8: Conflict of interest? Findings and section 74A (2) statement pp33 – 35.

up and running in which both would be remunerated[22]*. That understanding is clearly evidenced by the draft budget Mr Kelly helped prepare on the first UAE trip.*

After returning from the UAE trip in June 2007 Mr Kelly continued to be involved with Charif Kazal and others in working towards the establishment of a joint venture business. This included travelling with Charif Kazal[23] *and others to the UAE in January 2008 to undertake due diligence work for the proposed venture. All this time he understood that if the business was established both he and Charif Kazal would benefit. When Mr Kelly accepted employment with Mr David he knew that the company for which he would ultimately work would be indirectly part –owned by Charif Kazal.*

Mr Kelly's conflict of interest

Mr Kelly had a common goal with Charif Kazal[24] *to work towards the establishment of a joint venture business in the UAE, which, if established, would financially benefit both of them. He had received $11,170 from Charif Kazal as payment for flight and accommodation expenses he had incurred in May 2007 when working towards the establishment of such a business. As such Mr Kelly had a personal interest involving Charif Kazal which could influence or appear to influence him to act partially in the discharge of his official SHFA duties when dealing with matters affecting the Kazal tenancies.* (my emphasis)

Given his senior position, the nature of the role he played at the SHFA, the payment of $11,170 made to him by Charif Kazal and the substantial reward he would receive by way of employment if a business were established, his conflict of interest was substantial...

Corrupt Conduct

Mr Kelly's conduct in deliberately failing to disclose his conflict of interest and continuing to deal with matters affecting Kazal tenancies is corrupt conduct. This is because his conduct could adversely affect, either directly or indirectly, his impartial exercise of his official functions (when dealing with Kazal tenancy matters) and, therefore, come within section 8 (1)(a) of the ICAC Act. His conduct could also constitute or involve a breach of public trust on his part (when dealing with Kazal tenancy matters and deliberately failing to disclose his conflict of interest) and, therefore, come within section 8 (1)(c) of the ICAC Act. (my emphasis)

Mr Kelly's conduct falls within section 9 (1)(a) of the ICAC Act because his conduct could constitute or involve the common law criminal offence of misconduct in public office (my emphasis). *This offence is part of the criminal law of NSW. The elements of the offence have most recently been considered in R v Quach (2010) 201 A Crim R 522. Redlich JA (with whom Ashley JA and Hansen AJA agreed) said that the elements were as follows:*

> *(1) a public official;*
> *(2) in the course of or connected to his public office;*
> *(3) wilfully misconducts himself or herself, by act or omission, for example, by wilfully neglecting or failing to perform his or her duty;*

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[22] Kelly's acknowledgement that he and Charif Kazal were working towards a common goal occurred in the 2011 public inquiry – some 4 years after the events to which the cross-examination related. In those circumstances this testimony does not constitute an admission that in May 2007 Kelly had the same realization or insight as the one he acknowledged in 2011 after intense cross-examination.

[23] As part of a team of six or so whose fares were being paid by David.

[24] Charif Kazal was part of a larger team of four other persons.

(4) without reasonable excuse or justification; and
(5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

Mr Kelly's omission to declare a conflict of interest was wilful. His omission was serious, particularly having regard to his position as a senior public official and the responsibilities he had in connection with the Kazal tenancies at The Rocks.

His conduct could also constitute or involve a disciplinary offence and, therefore, come within section 9 (1)(b) of the ICAC Act and could constitute or involve reasonable grounds for his dismissal and therefore come within section 9 (1)(c) of the ICAC Act." (my emphasis)

(80) Before the Commission can make a finding of corrupt conduct a two-step process must be undertaken – and the Commission must be satisfied on the balance of probabilities in respect of each. Firstly the relevant conduct must be conduct that falls within one of the concepts of corrupt conduct identified in s.8 ICAC Act.

(81) Then if the relevant conduct, on the balance of probabilities falls into one of the s.8 concepts of corrupt conduct, it will nonetheless be excluded from being labelled as corrupt conduct, unless it could fall within one of the three broad categories identified in s.9 (1) of the ICAC Act namely:

(a) a criminal offence;
(b) a disciplinary offence;
(c) reasonable grounds for dismissing or dispensing with services.

(82) For reasons set out below there is no criticism levelled at the Commission for making a finding that Mr Kelly had engaged in corrupt conduct pursuant to s.9 (1)(b) in that his conduct in travelling to the UAE in the company of Charif Kazal in May 2007 was conduct which may have been perceived as a conflict of interest and therefore captured by s.9 (1)(b), and could also have been captured by s.9 (1)(c).

(83) That is because Mr Kelly's terms of employment at SHFA included a SHFA Code of Conduct and a NSW Public Servant's Code of conduct, which in effect, deemed a perceived conflict of interest situation as one that had to be made known to the employer. If one accepts that different persons may perceive the same event differently, when a Code of Conduct forbids a "perceived" conflict of interest[25]. However, whose "perception" is crucial to the test: the employee, or the employer, or a reasonable person in the position of the employee or a reasonable person in the position of the employer?[26] That matter was not addressed in the SHFA Code of Conduct or the

[25] The SHFA Code of Conduct or example defines a conflict of interest as a situation "where an employee could be ... perceived to be influenced by a personal interest in carrying out their (sic) public duty.

[26] In paragraph 52, Counsel Assisting relies upon the perception of a reasonable person presumably unattached to either employee or employer – yet another option.

Commission's report. In my submission if "wilfulness" is required when omitting to report it, the perception must be one the employee is aware of.

(84) However, for the purposes of my Report only, it is accepted the Commission's observations that the perceived conflict of interest situation could constitute conduct falling into s.9 (1)(b) is not open to criticism. I am however less confident – notwithstanding the evidence of Lang that it could result in termination. I suppose it could if the termination was not challenged at the Fair Work Commission. But I would be far less certain that the Fair Work Commission would regard Kelly's perceived conflict of interest as valid termination grounds.[27]

An Analysis of the Commission's findings

(85) In the Kelly case the Commission relied primarily upon the provisions contained in s.8 (1)(a) and (c) and s.9 (1)(a) (a criminal offence), but also entertained s.8 (1)(a) and (b) coupled with s.9 (1)(b) (a `disciplinary matter) and (c) (a termination matter) to come to finding Kelly engaged in corrupt conduct.

(86) This ICAC Report is not an *ex tempore* Report. It was nearly five months in compiling. It is argued in this Report the Commission chooses its words carefully and constructs its sentences carefully so that they convey with precision what the Commission intended the Parliament and other readers should understand.

(87) The Commission made a finding in respect of Kelly's conduct in failing to disclose a potential conflict of interest and continuing to deal with matters affecting the Kazal tenancies as corrupt conduct. This was because:

(a) His conduct could adversely affect, either directly or indirectly, his impartial exercise of his official functions (when dealing with the Charif Kazal tenancy matters) and, therefore, his conduct came within s.8 (1)(a) ICAC Act;
(b) Kelly's conduct **could** also constitute or involve a breach of public trust on his part (when dealing with the Charif Kazal tenancy matters and deliberately failing to disclose his conflict of interest) and therefore coming within s.8 (1)(c) (sic) of the ICAC Act. (my emphasis)

(88) The Commission also found that Kelly's conduct fell within s.9 (1)(a) of the ICAC Act because his conduct could constitute or involve the common law criminal offence of misconduct in public office. It also included the same conduct as qualifying within s.9 (1)(b) and (c).

(89) What flows from the Commission's s.8 findings as stated above is that Kelly's relevant conduct falls within two of the concepts of corrupt conduct established by s.8 (1) of the

[27] See for example *R v Goubran* and *R v Petch* – Downing Centre Local Court 8.6.17 per Schurr L.C.M discharged Ivan Patch from Misconduct in Public Office Charge re allegations of downloading Internet porn. Weekly Times – Gladesville; 14 June 2017.

ICAC Act – namely: "*could adversely affect the impartial exercise of his official functions*" and also "***could*** *constitute or involve*" a breach of public trust.[28] In order for either or both of these two concepts of corrupt conduct to be labelled as corrupt conduct, they would then need to fall within one of those three broad categories identified in s.9 of the ICAC Act. (my emphasis)

(90) It is to be remembered the Commission "is not bound by the rules of practice of evidence and can inform itself on any manner in such manner as it considers appropriate"[29]. Given this advantage over the judicial system, on the material before it, the Commission was entitled to come to the view that Kelly was saddled with a conflict of interest by virtue of the terms created by the SHFA Code of Conduct and the Code of Conduct and ethics for Public Sector Executives. But in reality this conflict of interest was classified as "perceived" by the SHFA Code; and "apparent" by the Code for Public Sector Executives. But, it is argued so far as the criminal law was concerned the conflict was dormant at best, and at law, non-existent – because it was not acted upon to the detriment of the employer. It is however conceded that at the hand of employer it could amount to a disciplinary matter – and as such a breach of his terms of employment, therefore, the breach was one falling within s.9 (1)(b). It is argued this is not a case where the same test satisfies both a criminal and a disciplinary criteria set out in s.9 (1).

(91) The situation as found by the Commission is complicated by the fact that the conduct described in Item (b) of paragraph (87) above does not appear to me to qualify as conduct falling within the parameters set by s.8 (1)(c). This is because the "could" test does not apply to s.8 (1)(c). Section 8 (1)(c) is mandatory in its mood – the relevant conduct must either "constitute" or "involve" a breach of trust.[30]

Section 8 (1) 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 ...
>
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or ...

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[28] It is worth pausing a moment here to consider the extent to which these findings reflect the initial allegation made against Mr Kelly at the outset of the public inquiry. The nub of the allegation made at the outset was one of acting in conflict with his official duties when dealing with Charif Kazal and the members of the Kazal family at a time when he was or anticipated being involved with Charif and members of the Kazal family. There was nothing in this allegation that identified in specific terms an allegation of corrupt conduct based upon the proposition that the conduct could constitute a breach of trust. If this be a fault – as I would argue it is – the fault lies not at the foot of the Commission, but as an unintended consequence for the grant of extensive powers to the Commission, including the power to make a finding not earlier telegraphed, without any serious consultation into the potential consequences arising from the concept of what is the extent to which a "fair go" must be extended to those who, for good reason, are investigated in respect of allegations and of misconduct and frequently unlawful behaviour.

[29] *Balog v The ICAC* [1990] HCA 28 [6]

[30] "Involve" should be understood as "to include as a necessary circumstance, condition, or consequence; to include, contain, or comprehend within itself or scope; to envelope or enfold as the surrounding thing does.

It will be seen s.8 (1)(a) offers two options for corrupt conduct findings, namely "*conduct that adversely affects* ..." and conduct "*that could adversely affect* ...", while s.8 (1)(c) offers only the one option.

(92) Assuming, as I have, that my interpretation is correct, then the bases available to the Commission for finding corrupt conduct is significantly less compelling because the only legal basis left is the s.8 (1)(a) basis.

The "could" and "double could" tests

(93) Conduct which satisfied the "could" test is much easier to establish than conduct which "constitutes or involves" – the first only requires a possibility the second requires an established fact – in the case of Commission's findings, that fact would need to be established on the balance of probabilities. It is said the findings of corrupt conduct by ICAC must be made on the balance of probabilities. Said quickly it sounds pretty fair given the Magistrate only has to find a prima facie case before he/she commits a defendant to trial on any indictable matter. But if one scratches the surface, that is not the true picture. That is because the definition of "corrupt conduct" permits an uncertain standard to apply to the concept of "corrupt conduct". The classic example is to be found in conduct, which is defined as corrupt conduct in s. 8 (1) (a) and s. 9 (1)(a) of the ICAC Act. Conduct of that genre - i.e. that **could** adversely affect and that **could** amount to a criminal offence can be labelled as "corrupt conduct" provided the Commission is satisfied of that situation on the balance of probabilities.

(94) There is a consequence of inclusiveness found in 9 (1)(a). Strangely, s 9 is meant to be exclusive. If the conduct identified in s.8 does not also fall within the parameters of s. 9 then it is excluded from being labelled as corrupt conduct. Use of the word "could" opens the door far wider, because "could" in reality means no more than a "possibility". It is my argument that *prima facie* – that is on the face of it, provides a higher standard of proof that the concept of a "mere possibility" being sufficient.

(95) The effect of s. 9 (1)(a) is to broaden ICAC's access to a quasi criminal label of engaging in "corrupt conduct" beyond criminal offences to disciplinary offences, or conduct which justifies dismissal or termination of services. Likewise, s.9(1) (b) and (c), also subject to the "could" test broaden access to disciplinary and termination misconduct type matters being labelled as "corrupt conduct" when in reality, such as before a disciplinary tribunal or the Fair Work Commission that the same conduct examined there might reasonably result in the same findings being a remote possibility.

(96) There should be no doubt the public perception of a finding that a person engaged in "corrupt conduct" amounts to a label – as potent as any criminal label short of "murderer". Staff at the Office of the Inspector have seen many cases come to us where a person has been labelled as "engaging in corrupt conduct", which reduces to the label of "is corrupt" in the mind of the public in circumstances where the DPP has been unwilling to take the matter to court.

(97) The problem with the "could" and "double could" approach is that it undermines the presumption of innocence, which is supposed to apply to all those who remain un-convicted of an offence.

Further analysis of the Commission's findings

(98) I hasten to add – given the powers afforded to the Commission earlier referred to and the provisions of s.8 (1)(a) and s.9 (1)(a) – I do not question the Commission's power to make a finding of corrupt conduct on the basis of circumstances where the Commission might rely only on a s.8 (1)(a) finding. But that is not what the Commission has done here. Indeed, it would be difficult to resist the inference that in this case the Commission was not prepared to make such a finding based only upon s.8 (1)(a) because it used a totality process of s.8 (1)(a) and (c) to take to s.9 (1) filter.

(99) But there is an even more important issue – and that is whether the Commission has correctly understood what is encompassed by s.8 (1)(c) – namely "conduct ... that constitutes or involves a breach of trust" by a public official. I deal with this point more fully later in this report. For present purposes, and assuming the breach of trust is confined to a breach of trust in the public authority rather than the individual,[31] it is argued the "breach of trust" must relate, in the circumstances of this case, to public funds or financial issues such as are imposed by fiduciary obligations in respect of public funds. If I am correct there has been nothing established in the evidence supporting any such breach of fiduciary duty or misuse or theft of public funds.[32]

(100) What is being questioned is the grant of power available to the Commission to make such a finding in those circumstances where the criticised conduct is subjected to the "could" test let, alone, subject to the "double could" test. As mentioned earlier "could" does no more than raise a possibility. It is the past tense of "can". Meanings of "*can*" include: *"to be able to"; "to happen or be true on certain occasions"; "referring to a possible event".*

(101) This is best demonstrated by exampling at the lowest threshold available from the Commission's finding in this case. Available from the Commission's finding is the following proposition: that Mr Kelly's conduct in deliberately failing to disclose his conflict of interest and continued dealing with matters affecting Kazal tenancies is corrupt conduct [s.8 (1)(a)]. This is because the conduct could adversely affect indirectly his impartial exercise of his functions, and also because that conduct could constitute or involve the common law offence of misconduct in public office [s.9 (1)(a)].

[31] Breach of trust in who or what is a matter needing clarifying. There are jurisdictions that refer to Breach of Trust by or in the public official e.g. where public officers take sexual advantage of another by virtue of their position.

[32] *R v Bamridge* [1783] 3 Doug 327 99 ER 679

(102) With respect to the Commission, but with real concern as to the efficacy of provisions s. 8 and 9 of the ICAC Act, the Commission's above findings mean no more than: it is Kelly's chances of possibly "adversely affecting" [s.8 (1)(a)] and, should that occur there is a possibly of its "amounting to "a criminal offence" or "a disciplinary offence" or "be a termination of employment matter" – so a possibility per s. 8 (1)(a) may bring about a [s.9 (1)(a),(b) and (c)] may *"happen, or be true on certain occasions"* or, are *"possible events"*. By contrast, the test for a Magistrate committing a defendant to trial on an indictable offence is: *"a reasonable prospect that a reasonable jury properly instructed would convict.* Likewise a Coroner when adjourning a coronial hearing to refer papers to the DPP can do so either: when the Coroner *"forms the opinion that the evidence is capable of satisfying a jury that a known person has committed an indictable offence:* or when *"there is a reasonable prospect a jury would convict a known person of the indictable offence"*.

(103) Thus the terms of the ICAC Act on this approach permit a public servant to be labelled as being involved in corrupt conduct if his failure to disclose a potential conflict of interest relationship could (as a possibility) indirectly, adversely affect his decision making impartiality because it could (as a possibility) be misconduct serious enough to be criminal.[33] Given the potency of the label and permanency of the label, these tests are too easily achieved. As experience is showing they also bear too weak a link to the requirements needed to put a person on trial for an indictable offence.

(104) It is argued an important test for legislators to consider when formulating law is whether the available consequences prescribed by the law are all foreseeable. It is argued, in particular the "double could" test, but also the "could" test, fail the foreseeability of available consequences arising from a law that prescribes "corrupt conduct" as conduct that "could adversely affect directly or indirectly" and therefore "could amount to a criminal offence".[34] Yet that is the effect of s.8 (1)(a) and s.9(1)(a), (b) and (c).

(105) The Commission is not authorised in a report to make a finding that an "affected" person is guilty of an offence (see s.74B); but neither is a Magistrate committing an accused person for trial, nor a Coroner referring the papers relating to a person of interest to the DPP. I have wondered whether this accounts for the Commission's expressing its findings in item (b) of paragraph 76 using the word "could". Whether there is any common law offence or any other offence known to the law in NSW[35], containing only the elements identified in s.8 (1)(c) ICAC Act is unknown to me – but I doubt it. For example *Quach*[36] (which the Commission relies upon) appears to have at

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[33] It is difficult to conceive of an indirect affect on impartial decision making being a "wilful" act of misconduct but presumably someone at the Commission has been able to envisage such a situation to permit the finding to be made in these terms.

[34] See Stephens Vol 11 Chapter XXVIIIpp 128-129. See also *R v Bembridge* [1783] 3 Doug 327; 99 ER 679 where the term "breach of trust" is used to relate "to the public revenue" consistent with it being an offence of dishonest dealing with moneys. See also *Russell on Crime* Chapter XXXI pp274-276.

[35] S.122 of the Canadian Criminal Code provides for a Breach of Trust type offence. See later in this Report.

[36] (2010) 201A. Crim. R. at 522

least two and possibly three elements which would not be picked up by the words in s.8 (1)(c). As earlier noted the consequence of using the word "could" plus the addition of the relevant words from s.8 (1)(c) is to put the conduct described in paragraph 87, item (b) outside the scope of a breach of public trust. **Arising out of my concerns expressed above, I make a recommendation at the conclusion of this Report.**

(106) Such a situation must impact upon any assessment of whether conduct identical to Kelly's conduct now under scrutiny can amount to a common law offence of Misconduct in Public Office[37]. The case law, it is argued, requires a situation where an alleged offender is under a duty or a responsibility which existed, and was breached at the time of the offending conduct.[38] That is to say, the conflict of interest (as understood by the common law) must have existed, and the failure to disclose it must have existed simultaneously at the time of the offending behaviour. It is to be remembered, Kelly was an endorsement or recommendation away from the real decision maker.

(107) One difficulty emerging from the corrupt conduct finding as expressed by the Commission, is that the time of the offence is expressed as "when dealing with Kazal tenancy matters".

(108) It is unclear whether the offending conduct as described by the Commission is intended to refer to:

(1) a continuum of conduct from at least May 2007 until April 2008 namely, including any occasion a Kazal tenancy matter, whether controversial or not, came before Mr Kelly as a consequence of his failure to disclose the conflict of interest, or

(2) as seems more likely, one event, namely offending conduct occurring in July 2007, when Kelly endorsed a recommendation made initially by the Senior Property Manager, and earlier endorsed by the Group Manager of Property, and after his (Kelly's) endorsement was to be passed on to the CEO, Lang, who in turn endorsed it and submitted it to the Board for its consideration, at a time when Kelly failed to disclose the relationship with Charif Kazal.

(109) In *Quach* Redlich JA notes one indicia of the breadth of the offence of Misconduct in Public Office is the nature of the harm which the offence is designed to address. In support of that observation he cites a passage from a learned 1977 article by P.D. Finn (as he then was)[39].

> *"The kernel of the offence is that the officer has been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position."*

[37] It is to be remembered an Inspector does not make findings when compiling a Report, nor do I seek to do so.
[38] see *R v. Quach* at [36]
[39] P.D. Finn "Public Officer: Some Personal Liabilities"(1977) 51 ALJ 313 at 315

(110) Chief Justice French when speaking on Public Office and Public Trust made the following observation:

> *It is probably not controversial that ethical behaviour derives from a view that the actor holds of himself or herself in relation to others. In the case of a person occupying public office, the relationship will always be defined by the constitutional proposition that the office is held for the benefit of others. Public offices are created for public purposes and for the benefit of the public... The powers which are conferred on any public official must necessarily be exercised only for the purposes of, and in accordance with, the law by which those powers are conferred.*

(111) In the circumstances as outlined above in respect of the second paragraph 108 scenarios it is argued such abuse, as is to be found in an endorsement of someone else's recommendation, is technical or administrative rather than criminal.

(112) In the first scenario of paragraph 108, if the continuum of the offending conduct lies in failure to disclose the existence of the conflict of interest as each Kazal tenancy matter - whether controversial or not - landed on Mr Kelly's desk, is what was meant by the Commission, the nature of that conflict while it exists by virtue of the Codes of Conducts provisions, must be considered dormant until occasion arose whereby the conflict of interest became a live issue. That, it is argued, would only occur when a controversial matter, or matters requiring more that rote input involving the Kazal tenancies came to be resolved by SHFA staff and it is argued only on occasion where the conflict was tempting to or controlling the partiality of Mr Kelly's behaviour of the conflicted person.

(113) The only specific occasion (the second scenario) that appears to be identified post May 2007 appears to be the endorsements as a third level or tier of endorsements referred to above in respect of 91 George Street. Otherwise there does not appear to be any Kelly conduct evidenced at the public inquiry, or elsewhere in the material before the Commission, that demonstrates that he made a decision, or endorsement of anyone else's decision favourable or unfavourable to the Kazal tenancies. Nor was it ever suggested by Lang that any decision before or after May 2007 was an endorsement or decision made by Kelly that reflected improper partiality in favour of any Kazal tenancies.

(114) Nor was there any evidence that as a consequence of the matters found by the Commission evidencing the conflict of interest, that any of those matters brought advantage of any kind to Kelly at the hands of Charif Kazal; or to Charif Kazal or Kazals at the hands of Kelly.

(115) Later in this Report I examine the response of the DPP to the referral made by the Commission to it in respect of this offence of Misconduct in Public Office.

(116) For me the Commission's findings, its referral re Kelly, and DPP's response raise an issue of whether or not the public interest has been served in the way the Commission anticipated when determining to conduct a Public Inquiry into its allegations made against Kelly.

(117) Before leaving the Commission's finding re Kelly, I return to the s.8 (1) (c) finding that Kelly's conduct could have amounted to a breach of trust. The most recent seminal exposition of the essential elements of a breach of trust offence is to be found on the Canadian Supreme Court docket list[40]. For Canadian Courts it settled upon these elements for the offence:

> *1. The accused is [a public] official;*
> *2. The accused was acting in connection with the duties of his or her office;*
> *3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;*
> *4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and*
> *5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose."*

Focussing on the second scenario set out in paragraph 87 (the breach of trust scenario), it would be open to infer a reasonable jury properly instructed in fact and law would be likely to find elements 1, 2, and perhaps 3, established. However, it is argued a jury properly instructed in fact and law would be unlikely to find elements 4, or 5 proved. One must accept the Canadian elements may not be replicated in NSW, but given their origin and reasoning in support of them, it is argued any difference is likely to be at the edges, rather than in substance.

The nub of element 3 focuses on "*the standard of responsibility and conduct demand of him*"; so described, Kelly's situation qualifies by virtue of being "deemed so to be" a breach of his terms of employment. To this extent it may be arguable that much of the third element could be proved beyond reasonable doubt; i.e. breached the standard of conduct demanded of him in his position by the Code of Conduct.

(118) There are however two issues of concern in respect of this third element. The first is whether this breach was wilful or not – that matter is in dispute. Kelly's case is, while he was well aware that he and Charif Kazal:

(a) Had a common interest in the Kazal tenancy matters; and
(b) Had a common interest in David's business venture succeeding;

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[40] *R v Boulanger* [2006] 2 SCR 49 at 47. - Accepting, as I do, that breach of public trust did fall within the ambit of matters covered by Misconduct in Public Office, then the elements of s.122 Canadian Criminal Code as defined by the Canadian Supreme Court – while not binding – are not without some relevance. I earlier argued the breach of public trust conduct which the Commission found Kelly had engaged in could not satisfy elements 4 and 5 of the Canadian set.

he did not view these two factors as creating a relationship of such closeness as enlivening the demands of the Codes of Conduct. A second hurdle for the prosecution is the requirement that there are two aspects of the breaching that need to be proved: i.e. responsibility and conduct. As earlier noted, whatever the fate of element 3 before a jury, elements 4 and 5 are the primary hurdles for a prosecution to leap.

(119) As noted above much of the conduct aspect involved in the third element of *Quach* is capable of being established. However Kelly's primary responsibility was to deal honestly and impartially with all tenancy matters including the Kazal tenancy matters. There has been no complaint made by Lang, the CEO, the SHFA, the ICAC or anyone else on this score. It is argued the evidence would be insufficient to satisfy a tribunal beyond a reasonable doubt on that issue, and therefore on this third element.

(120) Of course, if I am right, no tribunal would need to go any further. Even so, my argument is that the prosecution would have difficulty on the evidence relied upon by the Commission in satisfying the fourth element, viz – a serious and marked departure from the standards expected of an individual in Mr Kelly's position.

(121) The failure relied upon by the Commission seems to be comprised of two components – a failure to disclose a conflict of interest; and participating in decision making in respect of the Kazal tenancies. The hallmarks of seriousness include partial conduct **and** measurable or identifiable personal gain; loss, impairment, or damage to the public or the public agency. Frankly there is no claim of partial conduct, no claim of loss, impairment or damage to anyone; clearly no measurable or identifiable personal gain. This is a matter that at best rates at a disciplinary level on the scales of remedial action. Likewise it is argued the prosecution would have difficulty establishing any intent in Kelly to use his public office other than for the public good (fifth element). Frankly there is no evidence to my mind that assists a prosecution in respect of this fifth element. My argument is, that conduct identical to the Kelly conduct found established by the Commission, is unlikely to establish a "breach of trust" component of an offence of Misconduct in Public Office.

Misconduct in Public Office – an offence in Transition[41].

(122) Misconduct in Public Office was selected by the Commission as the offence best satisfying the filter test, "involve or constitute" a criminal offence posed by s.9 (1)(a) of the ICAC Act. I am not critical of the Commission for selecting this offence. In the view of the Commission, reflecting the criminality of Kelly's conduct, as found by the Commission, it was the most appropriate offence for that conduct.

[41] I have attached an Annexure 1 to this Report with a more detailed examination of the development in the past 60 years of the offence of Misconduct in Public Office.

(123) Misconduct in Public Office is a common law offence. It is not defined in any NSW Criminal statute. As a common law offence the penalty for the offence is at large. In such instances it is the practice of the courts to adopt an analogous or corresponding statutory offence [assuming there is one] as a reference point for the imposition of penalty.[42]

(124) In England – and perhaps more significantly – in New South Wales it was in 2011 an offence of extreme rarity. That does not make it inappropriate – but it does beg the question "Why is it so rare?". My argument is that it has a problematic history.

(125) By the end of 2011, when the Commission's Report was written, only six persons had been before the Courts in NSW for this offence and had the matter finalised between the period 1994 and 2011.[43] In 1994 there was one prosecution; one also in 1995; then none in the following 13 years; one in 2008; one in 2009 (on 11 charges); two in 2010; and none in 2011.[44]

(126) Since 2012 only 21 persons have had their charges finalised – two in 2012; five in 2015; two in 2014; eight in 2015 and four in 2016. In total since 1994 the BOSCAR records show only 27 persons have had this charge finalised up to 2016.

(127) Scattered among the 27 persons are 66 charges. My understanding is the offence of Misuse in Public Office is an indictable offence not a Table 2[45] offence, and therefore a matter that needs to be tried in the District or Supreme Court. However, on that issue my confidence is shaken because in 2010, the Local Court sentenced a male charged with the offence who pleaded guilty to it in the Local Court. There were two other Local Court finalisations – but in each of these matters the prosecution (NSW Police) withdrew the charges. All other offences have been dealt with at the District Court level – save one offence tried in 2016 before the Supreme Court. Of the 27 persons before the Court only three have contested their guilt – and only one (2016) of those was convicted. Of the remaining 24 prosecutions, six of them were withdrawn; 17 were sentenced after pleading guilty and one sentenced after a jury finding of guilty.[46] Of those sentenced after pleading guilty, the outcome for three offenders was described as "otherwise disposed of (e.g transferred to Drug Court)".[47]

(128) For completeness, it is more difficult to determine the prosecuting authority. All District Court prosecutions would be by the New South Wales DPP but some of their prosecutions may have originated from the Police Integrity Commission or from ICAC referrals. My guess is these two authorities would be the major source of referrals to

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[42] *Blackstock v R* [2013] NSWCCA 172 at [8]

[43] The NSW Bureau of Crime Statistics and Records (BOSCAR) only holds records of court finalisations commencing from 1994.

[44] Figures supplied by BOSCAR 15 June 2017

[45] A Table 2 Offence is an indictable offence that can be tried or dealt with summarily in given circumstances.

[46] Ibid

[47] That outcome does not necessarily mean apparently that the matter ended up in the Drug Court. BOSCAR explains that is an option, but the outcome could also include a deceased defendant, and possibly some other less common outcomes.

the DPP. Between 1994 and 2011 there were only six cases; between 2012 and 2016 there were 21 cases suggesting the offences finding greater favour – at least with the ICAC and likely the PIC as an appropriate means of bringing to account those public officials, including police officers, whose misconduct is serious enough to merit criminal condemnation.

(129) There is an uncertainty inherent in the offence of Misconduct in Public Office. That is one of the factors that makes the offence problematic. The noun "Misconduct" can apply to so many different genres of conduct – some serious – indeed serious enough to amount to criminal offending e.g sexual assault; serious harassment; police have been charged with the offence in circumstances where there was a neglect of duty to attend and stop a riot; failing to assist a victim when present at his assault in circumstances where the victim subsequently died; acting partially for dishonest purposes pursuant to a conflict of interest; and so on. The selection of the offence of Misconduct in Public Office seems to have been attractive to the Commission because there was no evidence of any deceit, dishonesty, fraud or other well recognised offence available. One of the dangers of an offence as amorphous as this one is that it may be a choice of last resort for a charging authority when there is a sense of untoward conduct that defies cataloguing into some better known and well-defined criminal offence. That can lead, as is argued in respect of Kelly's matter to, at least, uncertainty as to whether the identified misconduct amounts to criminal conduct.

(130) Another danger with the offence of Misconduct in Public Office is that the seriousness of the conduct is not identifiable by some defined fact, but left to a value judgement, that is that minds may differ, as indeed they did in the assessment of seriousness of Kelly's misconduct.

(131) The final problematic difficulty I wish to highlight is that the sentence is at large. Again minds may differ. Where there is only a small base of case law it is difficult to achieve consistency in sentencing for varying forms of and varying duration of misconduct; and varying positions of seniority being held with varying levels of responsibility; and varying employment history and varying other subjective features. In fairness, I ought to note that the sentencing outcome is not a concern of the Commission. But it is, a problematic issue for the criminal courts dealing with this offence.

(132) There is a case for arguing that the offence should be referred, again, to the Law Reform Commission with a view to seeing whether, by replacing the common law offence with a statutory offence carrying a statutory maximum penalty, some greater certainty can be given to the circumstances in which the offence can be used and some greater guidance to the courts as to the appropriate penalty range. **Arising out of my concerns expressed above and further discussed in Appendix 1, I make a recommendation at the conclusion of this Report.**

(133) It is accepted that Kelly's situation at the time might well have been perceived by others as a Code of Conduct defined conflict of interest, in that he was in a small group in which Charif Kazal was also a member – interested in advancing – each in his own way – the business interest of David for the benefit of himself alone.

(134) Its elements as defined by the Victorian Court of Appeal in *Quach*[48] are:

i) a public official;

ii) in the course of or connected to his public office;

iii) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;

iv) without reasonable excuse or justification; and

v) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

It is these elements in *Quach* that the Commission relied upon in 2011 to make its assessment that the Kelly conduct it identified could amount to this criminal offence. It was not until November 2015 that the elements for the common law offence of Misconduct in Public Offence became settled in New South Wales[49]. The New South Wales Court of Criminal Appeal confirmed the formulation of the five elements as set out in *Quach* also encapsulated the offence in New South Wales.

The Finding Charif Kazal engaged in Corrupt Conduct

(135) Chapter 8 of the Commission's Vesta Report contains the findings of the Commission. In respect of Charif Kazal, the Commission found:

> *In holding out the prospect of employment in the UAE to Mr Kelly and paying him $11,170 for his May 2007 flight and accommodation expenses with the intention these would tend to influence Mr Kelly to exercise his official SHFA functions in a manner favourable to Kazal business interests, Charif Kazal's conduct is corrupt. This is because such conduct could adversely affect, either directly or indirectly, Mr Kelly's impartial exercise of his official functions (in his dealings with Kazal tenancy matters) and therefore comes within section 8 (1)(a) of the ICAC Act, because it could constitute or involve an offence under section 249B (2)(b) of the Crimes Act of corruptly giving an agent (Mr Kelly) a reward, the receipt or expectation of which would tend to influence the agaent to show favour to any person in relation to the affairs or business of the agent's principal (the AHFA).*

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[48] *R v Quach* (2010) A Crim R 522.

[49] See *Obeid v R* [2015] NSWCCA 309 [1`33]-[142]

(136) However, the ICAC's view was that there was not sufficient admissible evidence available to make out the s.249B (2)(b) offence. In these circumstances it did not refer the s.249B (2)(b) material to the DPP for its advice.

(137) Although the matter was not referred to the DPP that should not be the end of the matter. I wish to make a comment in respect of the appropriateness of the finding in the circumstances, as I understand them to be. Underpinning this finding of corrupt conduct engaged in by Charif Kazal was the Commission's earlier finding:

> *[T]hat Charif Kazal was the primary mover behind the decision to explore property management business opportunities. He invited Mr Kelly to participate in the May 2007 trip. He paid Mr Kelly $11,170 to cover the costs of his airfares and accommodation expenses. He offered Mr Kelly employment in any business that might be established in the UAE.*

(138) It is argued some of those findings seem questionable with the case the Commission was advocating at the public inquiry. It is to be remembered David was not in issue with the Commission or the two "affected" persons in the following aspects:

- By May 2007 and possibly earlier there was a plan in place for a group of people to travel to Dubai and Abu Dhabi with the objective of scoping out business opportunity for an organisation known as the Parkview Group. (paragraph 50)
- David's testimony would also be that Charif Kazal was there as a consultant to Parkview and it was always the case that he would get reimbursed for his expenses later down the track, and might even get a job if the business got up and running or perhaps some sort of ownership of the business. (paragraph 54)
- Charif Kazal initially paid for his own ticket and accommodation, but subsequently on provision of an AWT invoice to Parkview by Charif Kazal, Parkview paid the invoice (paragraph 52); although in cross-examination David agreed Charif Kazal used David's Parkview corporate credit card to pay for his airfare which must have happened before departure.
- There would be testimony that before, during, and perhaps shortly after the trip various documents were prepared by the Parkview Group of people. Some of those documents identified both Kelly and Charif Kazal as being part of the Parkview team. Indeed some identified both Kelly and Charif Kazal as being directors of Parkview property (paragraph 56)
- All the travellers to Dubai, save Kelly, were paid for or reimbursed by Mr David. (paragraph 52).

To that list some other points are also worth noting:

- The variations to the Parkview profile were prepared specifically for negotiations with Seba Real Estate in the UAE. It was instructed to be prepared prior to leaving, but was not finished in a presentable form and had to be emailed after David's return.

- The lie in the profile that Parkview had experience in the area of facilities and assets management was a lie adopted by David.
- Before the trip in May 2007 an area David was interested in pursuing was business interests including facilities and assets management
- David arrived with four consultants – Willoughby, Touma, Taber, and Charif Kazal.
- In the events following the trip, the joint venture is a David – David's Group exercise rather than a Charif Kazal – AWT exercise.
- Kelly's fare and accommodation expenses as indirectly incurred are consistent with his position not being aligned to either Charif Kazal or David.

(139) The Commission found Charif Kazal engaged in corrupt conduct because, on the testimony and other evidence it accepted, it found that it was Charif Kazal and not David who reimbursed Kelly for his travel and accommodation expenses in respect of the May-June 2007 trip to the UAE. In respect of that payment it also found its significance went beyond reimbursement to a point where it could constitute a corrupt giving of a reward to Kelly – then a SHFA senior management officer, to persuade him to show favour to the Kazals in relation to their leases and various properties at The Rocks. "*When does a 'reimbursement' become a reward – when it is paid to Andrew Kelly by Charif Kazal*" might be a difficult proposition for a prosecution to persuade a jury of beyond reasonable doubt.

(140) I have dealt elsewhere with the dispute between the Commission and Kelly over his claim that David was the one who reimbursed him – and canvassed arguments Kelly could have advanced in support of his claim. It is worth pointing out that at any trial his arguments, assuming he gave evidence, would also have been available to Charif Kazal.

(141) The prosecution would also have faced the difficulty that the figure of $11,170 was just a few dollars less than the expenses incurred by Kelly and that he understood the payment was recompensed for moneys spent by him on the journey.

(142) My memory of Kelly's testimony is that it was never put to him by counsel assisting, or by the Commissioner presiding that when receiving the $11,170 he understood that it was being paid to him not only as recompense but as a bribe – or as part of a grooming exercise so that he would treat the family of the donor of the money with favour when looking at their leases. It was not essential that cross-examination be done and may also have been because of Kelly's refusal to concede he had been paid by Charif Kazal, or because of an oversight.

(143) I have already noted the allegation recited at the commencement of the Public Inquiry made no mention of the reimbursement of Kelly constituting a basis for finding corrupt conduct.

(144) The cross-examination of Kazal on the bribe allegation was obscure. Kazal was cross-examined by Counsel Assisting in respect of the Investigator's thesis that Kazal was the person who paid the $11,170. The relevant cross-examination was introduced by this question:

Q. A few minutes ago ... you said, did you not, "I was asked questions about a payment that was made on my behalf" – didn't you?
A. I said I was asked question repeatedly about a payment to Mr Kelly, me and others
....
Q. What in fact happened is you did pay Mr Kelly to reimburse him for his expenses?
A. I had nothing to do with payment to Mr Kelly.
Q. And perhaps even your wife did make deposits into his bank account, but he fact is you paid Mr Kelly for those expenses, didn't you.
A. No, I did not.
Q. And the reason you did is that Mr Kelly was there to help you as much as Mr David, wasn't he?
A. That's not correct.
Q. And anyway, you were anxious to do things for Mr Kelly's benefit because that resulted in a benefit to you and the Kazal companies in their dealing with SHFA, correct?
A. Absolutely wrong[50].

And nine days earlier these questions were asked of Charif Kazal:
Q. And you knew that Mr Kelly would be grateful to you for assisting him in going to the United Arab Emirates where there was, as you understood it, a real prospect that he might get a job through whatever Mr David ended up doing there, isn't that right?
A. That is not the case, no
Q. You knew that Mr Kelly's opinion as to what should happen to 91 George Street would carry weight within SHFA?
A. As would a director, yeah
Q. And it suited you at the time to ingratiate yourself and the Kazals generally with Mr Kelly didn't it?
A. That wasn't the case at all.
Q. And you knew at the time of the first trip that Mr Kelly would be grateful to you for, in part, arranging for him to have that opportunity (of obtaining work), correct?
A. I did not arrange for Mr Kelly.[51]

(145) What is missing from the cross-examination is any suggestion that Charif Kazal was acting dishonestly, corruptly, or with specific intent to obtain improperly from Kelly partial decisions for the Kazals; and the payment was a reward for so doing. Thus important ingredients of the s.249B charge were not directly put: - dishonesty,

[50] Transcript p. 743-744'; 03/08/2011
[51] Transcript p. p. 196 – 197; 26/07/2011

corruption, intending to obtain partial decisions, and offering to Kelly a reward commonly known as a bribe.

(146) However after the testimony stage of the public inquiry had concluded, in his submissions Counsel assisting did submit the payment was a s.249B benefit to Kelly in that he, in effect, received an all-expenses-paid trip to Dubai together with the prospect of obtaining employment in the UAE. While the submission fairly brought the matter to the attention of Kazal and Kelly's counsel, it was against a background of cross-examination that until that point gave no inkling the Commission was relying upon it as a bribe to Kelly.

(147) It is argued the reasoning given in the Commission Report explaining how the Commission came to a finding of the intention alleged – i.e. bribing or grooming Kelly to find a favourable decision – is weak and flawed. It is argued that is because the reasoning relies upon a number of propositions said to be established in the evidence and a finding by the Commission that:

> "*These actions are consistent with a desire on his (Charif Kazal) part to protect Mr Kelly's position at SHFA so that he would be able to act favourably towards Kazal's interest.*"

(148) Other Commission findings which also seem to underpin its view a corrupt payment was made in order to influence Mr Kelly to act favourably are:

- Charif Kazal needed Kelly's expertise; (*however, it was David who relied upon Kelly's expertise*);
- Charif Kazal held out UAE employment prospects to Kelly; (*However it was David who employed Kelly*);
- Charif Kazal reimbursed Kelly's expenses; (*Disputed by both Kelly and Charif Kazal*);
- Charif Kazal knew Kelly would be attracted by offer of UAE employment, particularly if it involved management of a property portfolio; (*apparently so did David – the employment offer came from David*);
- Charif Kazal knew Kelly made decisions and recommendations impacting upon the Kazal brothers' tenancies; (*but no untoward decisions were made in respect of the Kazal tenancies during the period May 2007 to April 2008*);
- The Kazal brothers requested additional permitted use of for 91 George Street – five-year lease extension; a rent-free period; (*apparently a sensible request approved by SHFA Board upon recommendation and endorsements in which Kelly was only at middle management level*)
- Within days of returning from the UAE in June, Charif Kazal sends a letter of SHFA requesting change of use, extension of lease period, rental relief and consent to a liquor licence being granted (*again apparently a sensible commercial request which was properly considered as such by SHFA*);

- Kazal knew that Kelly was in charge of tenancies at SHFA and that Kelly's opinion carried weight (*Such knowledge was widespread and his opinion apparently carried weight because he was good (including diligent) at his job*);
- Kelly was one of the officers who recommended (sic) that the SHFA Board approve change of use request, rent abatement of $96,000 plus and grant of new lease. (*The recommendation did not come from Kelly! – it came from Senior Property Manager for endorsement to Group Property Manager and then to Kelly and then to Lang and then to Board*)

(149) It is worth pausing to note Kelly's role was not one of recommending the approved change of lease and so on, but simply one of endorsing a recommendation by the Senior Property Manger to that effect. The difference is not insignificant. There is a difference between endorsing an outcome of a colleague that contains recommendations and the formulation of the recommendations. One is a determination of the terms of the recommendation; while the other is support of a recommendation in terms already determined by considering whether it is a fair, reasonable and an available option. It cannot be said that Kelly did any more than consider a recommendation already determined and endorsed it as being fair, reasonable and an available option.

(150) It is also worth noting that many of the propositions contained in the list above although legitimate findings made by the Commission were in respect of matters very much in issue between Kelly on the one hand and the Commission on the other; and Kazal on the one hand and the Commission on the other. They appear to rely heavily upon the Commission's acceptance of David's evidence.

(151) This list of findings needs to be recognised as a list of circumstances in what amounted to a circumstantial case on the question of whether Charif Kazal could have been committed to a s.292B (2) offence of giving a reward in expectation of favour by Kelly when dealing with Kazal tenancies.

(152) Circumstantial cases can only be established if the tribunal of fact is satisfied beyond reasonable doubt of the circumstantial test it must apply. That test has two steps:

(a) Is the Tribunal satisfied beyond reasonable doubt that the circumstances established by the evidence are consistent with guilt (a finding the Commission made); and
(b) Also satisfied beyond reasonable doubt the circumstances are inconsistent with any other rational explanation on the evidence before the tribunal (a finding the Commission did not make).

(153) The second leg of the circumstantial test is crucial in this case because:

(a) The claim by Kelly was that the money came from David to Kelly;

(b) The fact appears to be the money was intended as a reimbursement – and no evidence tendered that it was any more than a reimbursement or that it was for grooming purposes;

(c) The reimbursement of accommodation moneys on the Commission thesis was not at the time it was promised in the p.267 document[52]; but was some weeks later causing Kelly on the Commission thesis to use his own credit card.

(d) There is no evidence suggesting Kelly regarded reimbursement of his expenses as creating any sense of indebtedness to any other person including Charif Kazal or any other member of the Kazal family.

(e) There is no other evidence that would qualify as "grooming" of Kelly by Charif Kazal;

(f) There is no conversation or documents establishing, directly, that Charif Kazal harboured any intent of bribing or grooming Mr Kelly;

(g) Kelly appeared keen to leave SHFA even in June of 2007 for a better employment opportunity. Yet, the payment of a bribe or the grooming, was predicated upon continued SHFA service by Kelly presumably for a longer term;

(h) There appears to be no other payment or gratuities made by Charif Kazal to reinforce the bribing or grooming. Put another way there appears to be no difference in the relationship between Charif Kazal and Kelly in the post trip period to the relationship they experienced prior to May 2007.

(154) The Commission appears to have failed to consider the second leg of the circumstantial case test. I say that because the second leg gets no mention in the Report and although there has been a general acknowledgement that the Commission found the evidence of Kazal and Kelly unreliable at least by comparison with that of David, it has not addressed in its reasoning any specific matters including those identified above.

(155) Having made the finding of corrupt conduct, the Commission came to a view there was insufficient admissible evidence available to prosecute Charif Kazal and therefore declined to refer the question of whether Charif Kazal should be charged to the DPP for its advice.

(156) The consequence of that course, is that Charif Kazal will never have the opportunity to clear his name. To the extent that any assessment of the strength of the prosecution case upon testimony or other evidence accepted by the Commission as relevant – my view is the prosecution case was not a strong one. It is accepted the Commission, on the view of the facts it took, and was entitled to take, was required to express a view or make a finding – It made a finding on the double "could" test – i.e. it was possible the conduct may adversely affect directly or indirectly Kelly's performance of official duty and it was possible the conduct could constitute a s.249B (2) offence.

[52] Email sent by Charif Kazal to hotel in UAE regarding payment of accommodation expenses. See later.

(157) That finding having been made, however, leaves Charif Kazal with a stain upon his honour, reputation and his right to be considered as a person of good character with no means at law of being able to retrieve or recapture those qualities through recourse to the law or to have the findings of the Commission expunged from the records of ICAC and its publishings on the internet. It has impacted upon his presumption of innocence. To the extent that it interferes with his interest in retaining his presumption of innocence it may be in breach of Articles 11 and/or 12 of the Universal Declaration of Human Rights. It is argued that is an unsatisfactory state of the legislation.

(158) The Commission declined to refer this matter to the DPP for its advice, because the Commission was satisfied there was insufficient admissible evidence, by virtue of s. 38 ICAC Act – namely that generally evidence given under objection could not be used in criminal proceedings.

Charif Kazal referred to DPP for knowingly giving false or misleading evidence

(159) The Commission, however, had another matter involving Charif Kazal, which it did refer to the DPP. In the s.74A (2) statement[53] as to whether or not the Commission should seek DPP's advice with respect to prosecuting Charif Kazal for a specific offence, the following was reported:

> *"At the commencement of his evidence in the public inquiry, Charif Kazal was asked whether it was ever his intention to settle Mr Kelly's accounts in relation to his airfare and accommodation in relation to the May 2007 trip to the UAE. He responded "No". His email of 23 May 2007 clearly evidences his intention to settle the account for Mr Kelly's accommodation.*
>
> *The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Charif Kazal for an offence under section 87 of the ICAC Act in relation to his evidence that he never intended to settle Mr Kelly's accommodation account for the May 2007 trip.."*

Background and circumstantial context to referral.

(160) An important matter at issue in the Operation Vesta investigation was who recruited Andrew Kelly to spruik lease management skills relating to tenancies in the UAE. David had a history in construction in NSW. Charif Kazal had experience in oversighting the several tenancies his family had with SHFA. The Commission saw the choice as lying between these two business men. The payment of Kelly's expenses is closely linked to this issue. The stronger inference is that the recruiter is the more likely to have made the payment.

(161) David was interested in exploring business opportunities in the UAE. At least one of Charif Kazal's brothers had several contacts there. Charif Kazal knew and dealt with, among others, Kelly in respect of SHFA leases held by the Kazal family. Charif Kazal

[53] ICAC Report, Chapter 8, p. 36

was neither a director of any Kazal company associated with SHFA leases nor a holder of a SHFA lease.

(162) Both David and Charif Kazal were keen to establish a business venture in the UAE – while taxes were lower, an observer might conclude that the UAE was keen to ensure that the locals had a share of ventures set up by foreigners. It would appear a UAE operative had to be attached to every venture set up by a foreigner. Even so, from the perspective of Charif Kazal, David, and Kelly money could be made if one could get established there.

(163) What is not in dispute is there was also recognition by all three of a mutual interest in successfully opening doors to service potential clients in the UAE. All recognised there was value for the Australians if they could comfortably and profitably provide a service relating to construction of buildings or management of leases or both, although there was some concern as to whether one or both could be successful. Nor is it in dispute that there was some level of consultancy among the three men that the pathway to success lay in advancing the business dealings of David. In terms of personnel numbers and tasks allocated, the predominant pre-departure focus centred on establishing a David driven vehicle to be involved rather than a Charif Kazal or A.W.T vehicle.

(164) What was disputed at the Public Inquiry into Operation Vesta, was who recruited Kelly. The status of Kelly and Charif Kazal within the group heading to the UAE as at the time of the first trip to the UAE was also in dispute. Although perhaps not determinative but certainly relevant to the resolution of their status at the time of the first departure to the UAE was the identity of who paid Kelly's airfare and accommodation expenses in respect of the first trip some weeks after their return from the UAE.

(165) Six persons travelled to the UAE – significant among them were David, Charif Kazal, and possibly also there with aspirations, Kelly. The other three were Willoughby, Touma, and Tabet. There is no dispute these last three were clearly attached to David's aspirations. Those four travelled on one flight. Departing that same day on a second plane, which took a different route, were Charif Kazal and Kelly. The flight bookings, as best I can determine, were completed separately. Kelly paid for his own airfare on his credit card. He also paid on the same credit card for his accommodation expenses when leaving the UAE. Charif Kazal also made separate arrangements, although had access to David's Parkview corporate credit card, or card details.

(166) Prior to departing, on 23 May 2007, by email emanating from an A.W.T address, Charif Kazal had informed a relevant hotel that two groups including him and Kelly were arriving. That communication became significant in appreciating a number of the aspects of the cross-examination of Charif Kazal four years and three months later. The significance of the cross-examination centred around Charif Kazal booking six

executive rooms indicating that Messrs David, Touma, Tabet, and Willoughby would settle their own accounts, while he, Charif Kazal, would settle both accounts (namely his own and Kelly's). The total costs of Kelly's expenses – airfare and accommodation – amounted to almost $11,170 on Kelly's credit card.

(167) Kelly's testimony as to how he was reimbursed for his expenses, was to the effect that he had attended upon David at Parkview office, been given an envelope, which he understood was cash; and perhaps a day or so later deposited, in a single deposit, the cash which amounted to slightly more than his credit card debt. However, the bank records showed there were two deposits – constituting a total $11,170 - one on 18 June and the other on 20 June 2007. Kelly was unable to explain this inconsistency although it really doesn't throw any useful light on the competing versions, but may impact upon Kelly's credibility.

(168) There was information available to the Commission from investigations conducted outside the Public Inquiry, that Charif Kazal had history with David going back to April 2006. Charif Kazal's claim was that he had helped Parkview (a company with which David was associated) with a number of different projects and other matters and by that means came to know and admire David.

(169) The circumstances of reimbursement of Charif Kazal's expenses was explained by Counsel Assisting in his opening.[54]

> "*Mr Charif Kazal paid for his own ticket and accommodation and was subsequently, on provision by him of an invoice to Mr David's company Parkview, just to put that in a more formal position. One of Kazal's companies is called AWT and AWT provided, after the trip, Parkview with an invoice seeking reimbursement for Mr Kazal's expenses and Parkview paid those expenses. So we're now at a stage where we think we can prove without any doubt that everyone except Mr Kelly was definitely paid for or reimbursed by Mr David.*"

(170) The opening also anticipated correctly that David would deny paying Kelly's expenses, and indeed that he certainly never paid in cash. It was also anticipated that Charif Kazal would claim that he had not paid for Kelly's expenses.

<u>The Cross-Examination of Charif Kazal resulting in referral to the DPP</u>

(171) Four years and three months after the May trip to the UAE Charif Kazal is called to the witness box in the Public Inquiry. The first questions he is asked are:

> "Q: *Mr Kazal do you remember travelling to Dubai in the middle of 2007with various people including Mr Roderic David* (sic – Mr David travelled on separate plane) *and Andrew Kelly?*
> "A: *Yes.*

[54] see t.25/07/2011 pp8-9

"Q: *Now, casting your mind back to the weeks prior to that trip was it ever your intention to settle Mr Kelly's accounts in relation to his airfare and his accommodation in relation to that trip?*
"A: *No.*
"Q: *Did you ever think that it was possible that you might be going to pay for Mr Kelly's expenses?*
"A: *No, never.*
"Q: *Can I show you a document please. It's page 267 ... Is this an email you wrote on 23 May, 2007?* [hereafter "the p.267 document"]
"A: *Yes.*" (T.26/07/2011 p176)

(172) Many cross-examiners seek to find a question very early in their cross-examination that unsettles the witness. I suspect the fourth question is meant to be a "Gotcha" moment designed to unsettle Mr Kazal.

(173) Bearing in mind s.17 ICAC Act provides the Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it thinks appropriate; one can understand Counsel for Mr Charif Kazal not objecting to that question.

(174) In a court trial before a Judge, it may well have been objected to on the basis that it had sought to raise two propositions and hence within the framework of a single question amounted to two questions touching upon:

- forming an intent to settle Kelly's account re airfare; and
- forming an intent to settle Kelly's account re accommodation

On the other hand, Counsel asking the question could have maintained by use of the plural "accounts" and combined with the conjunction "and" only one question was intended, and that question was a question about intent to settle in relation to <u>both</u> airfares and accommodation. Indeed the following question re "Mr Kelly's expenses" would appear to support that interpretation. It is useful and hardly unreasonable to assume Counsel Assisting intended in his question to cover both. I am also fortified in that assumption by the final question asked before the luncheon adjournment:

"Q. *And in fact you did reimburse Mr <u>Kelly for his expenses, that is the hotel accommodation and his airfare</u>?*

"A. *Never.*

"Q. *- - after the trip, didn't you?*

"A. *Never.*"

(175) Although I have come to the conclusion that both accounts or a global response to Kelly's expenses (rather than one or either) was the focus of these questions and Kazal's answers, it is clear the Commission finds the answer "Never" is inconsistent

with what is contained in the p.267 document and also that the answer can be applied only to "accommodation" for purpose of referral to the DPP. No doubt the Commission was also satisfied only one person paid Kelly's expenses.

(176) The second question in this cross-examination referred to an intention to "*settle*" accounts in relation to airfares and accommodation. The last question before lunch was one focused on "reimbursement for expenses – hotel and accommodation". There is of course a difference between "settling an account" and reimbursing the person who incurred and settled the account himself. To settle an account means to make a payment to the person holding the debt – in this case both the airline and hotelier. "Reimbursement" means paying – in this case, Kelly, for settling his own accounts. That is a distinction that may be important because by 23rd May (the date of the p.267 document), it is likely Kelly had already paid his airfare.

(177) Further, the key question at the outset of the cross examination raises the issue of an "intention" formed prior to the trip departure date in respect of both airfare and accommodation expenses – a proposition not without significance given both items of expenditure were reimbursed after the trip and (semble) together – But the p.267 document written prior to departure only deals with accommodation expenses.

(178) Returning to the sequence of questions asked at the outset of this cross-examination the third question was a turning of the screw to go beyond "No." to "Never.". And then comes the email document dated 23 May 2007 (p.267 document). Again, in an ICAC investigation – remembering the rules of evidence don't apply – that course of producing a document was one Counsel Assisting was permitted to pursue.

(179) In a court trial, however, where the rules of evidence do apply and Counsel is seeking to raise the credibility (believability) of a witness, he is permitted to show the witness a document that demonstrates inconsistency between the testimony being given and the reality of the past. However, what is essential to demonstrate any inconsistency is accuracy. By that I mean, in order to demonstrate inconsistency with the use of a witness's previously made document, the document must demonstrate with some precision that the evidence being tested is totally inconsistent - that is, the testimony differs from the document. On the question asked in a criminal trial the p.267 document may have been objected to – and if so – its use as demonstrating inconsistency may have been denied. Where a question deals with a total concept [both accounts] and a document deals with only one claim [the accommodation account] inconsistency is not an available option.

(180) Had it done so, that would have been a true "gotcha" moment; however it did not. The document talks only about settling the accommodation accounts. The initial question asked by Counsel Assisting focused on both airfares plus accommodation. This document does not prove inconsistency yet it appears from the following questions that Counsel Assisting believed he had a "gotcha" moment. I should note conduct of

Counsel Assisting is beyond any jurisdiction I have as Inspector. My jurisdiction is confined to conduct and actions of the Commission and its officers.

(181) The 32 questions asked between the opening and the final question before lunch focused on the words in the document and Charif Kazal's claimed intention of attracting corporate rates for himself and Kelly when other arrangements, thought by Counsel Assisting, would be more consistent with Kazal's claims of not reimbursing Kelly. These questions were all relevant only to the accommodation expenses. But the final question related to both accounts.

(182) Cross-examining on the issue of a person's intent is difficult because the concept of "intent" is an abstract and intangible. What is written in a document may be indicative of intent – but not necessarily determinative of it[55]. Put another way it may provide relevant evidence of intent to be considered along with any other evidence that also goes to the issue of intent. In the absence of any other evidence, then the written word may well be determinative. In this instance however, the cross-examination was more complex than it may have been if the question of intent related to one event only. An assumption open to the witness being cross-examined, was that the cross-examiner was seeking to demonstrate that situation (namely the witness's intent) before departure (payment of Kelly's ticket) and Charif Kazal's intent status at the conclusion of the trip (payment of Kelly's accommodation) were identical and shared the one origin – that is, that it was one and the same intent exercised on two occasions. Certainly that proposition cannot be obtained from the p.267 document shown to Mr Kazal.

(183) After lunch Counsel Assisting had Charif Kazal agree that he did not in fact settle Kelly's account. Although, it was unstated, the question was limited to a time when Charif Kazal departed the hotel at Abu Dhabi and settled his own account. My understanding from the testimony at the Public Inquiry is that occurred the day before Kelly departed. That conduct by Charif Kazal may also bear on the question of his intent when he compiled the p.267 document (namely that he falsely represented his intent). Given that situation, Charif Kazal's conduct was inconsistent with the claimed intention expressed in the p.267 document. That is, there was evidence before the Commission that within three or four weeks of expressing an intention to do one thing, Charif Kazal was doing another. A fair reading of the p.267 document is that Charif Kazal is expressing an intention to settle only both his and Kelly's accommodation costs before leaving Abu Dhabi:

> "*A similar booking is required for me and Mr Andrew Kelly. I will settle both accounts and could the invoicing be made out to Australian World Trading Pty Ltd.*"

What is expressed here is both the claimed intention (settle both accounts) and the claimed procedure or means of achieving that intent (paying an invoice made out to AWT).

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[55] In that sense the p.267 document may have been relevant to use to attack Charif Kazal's credit, if the introductory questions had been confined only to the issue of accommodation expenses.

(184) The intent expressed in the document is one of settling an account in circumstances where a corporate entity will be responsible for receiving the billing. If the corporate entity is responsible for settling the accommodation account, then strictly speaking Charif Kazal is not. The questions asked did not contemplate that proposition, i.e. that Charif Kazal would cause the account to be settled through a corporate structure.

(185) Another available consequence of making this request, one might think, is to obtain corporate rates for both himself and Kelly. The fact is that corporate rates were obtained for both men. The second indisputable fact is, each took responsibility for paying his own accommodation costs; Kelly paying on his credit card. These facts are undisputed. That means the procedure or method by which the claimed intent was to be achieved has also failed to occur.

(186) The Charif Kazal's explanation of seeking corporate rates for Kelly is consistent with the outcome achieved by the p.267 document. Yes, there was another way to have obtained corporate rates which was not taken; and that was to list all six Australians together in the Parkview group. That was a legitimate area of cross-examination – and it was pursued; and in its pursuit the explanation given by Kazal and supported by the evidence above was disparaged as "making no sense" – a proposition with which the witness agreed reluctantly.

(187) While evidence that a case of claimed conduct was "making no sense" was permissible at an ICAC Public Inquiry by virtue of s.17 (1) ICAC Act, it may not have been relevant, and may have been, or been regarded as, opinion evidence in criminal proceedings conducted in court. It was opinion evidence grudgingly conceded during testing cross-examination after six questions. Even so Charif Kazal never abandoned the corporate rate explanation. Importantly his acceptance of Counsel Assisting's assessment "it makes no sense" was qualified with words such as "looking back at it" and accepting Counsel's summary of "with the benefit hindsight". On that basis the witness's opinion four years after the letter is written may well have been regarded as irrelevant: Its value as an admission of knowingly understanding he was, four years earlier, also engaged in wrong doing must be nil or of no weight. It has no value on the question of Kazal's intent at the time of writing the p.267 document.

(188) Another difficulty for me is the absence of the true significance the payment of expenses was to the allegation being made against Kazal – i.e that his payment of both the airfare and accommodation expenses was important because it was to be identified as corrupt conduct – a proposition that could have been mentioned when the Commission's allegation against Kazal was announced. In the allegation announced at the commencement of the proceedings, his suspected corrupt conduct was limited to holding out the prospect that he (Kelly) would or might be involved with him (Charif Kazal) and members of the Kazal family in private business.

(189) Yet another difficulty I have with this portion of the cross-examination is that in the initiating questioning, minimal context was given to Charif Kazal to recall an event occurring more than four years previous. His attention was drawn to the first UAE trip. The next question drew his attention to "weeks before this trip" and then to the two or both accounts, "accommodation and airfares." For example it was unclear whether the questioned intent to pay accommodation and airfare was to be discharged with one payment after the trip, or two payments - one after the conclusion of accommodation, and one upon returning to Sydney. I have mentioned above the issue of being responsible for causing AWT to make the payment as being absent in the question. But, if the general intention was one payment (which is what appears to have happened) then the p.267 document was inconsistent with such intent. The evidence never established whether the AWT was responsible for the single payment or whether that payment came from Charif Kazal's funds. A question containing minimal context can create difficulties for a witness to recall to an event which satisfies the terms of the question and thereby lends itself to a negative answer. One cannot rule out that was precisely counsel's purpose when framing the questions.

(190) Yet another difficulty for me is the absence of the true significance the payment of expenses was to the allegation that had been made against Kazal - *i.e.* that his payment of both the airfare and accommodation expenses was important because the Commission was considering (as seems to have been the case) whether it was to be identified as another unmentioned aspect of the corrupt conduct central to the allegation.

(191) It is to be remembered the document relied upon to demonstrate inconsistency referred to only one of those accounts. In that sense the question did not reflect accurately the situation Counsel must have had in mind that he could successfully challenge. It is to be remembered from the opening and indeed from other information available to the Commission, that Counsel anticipated an answer in the negative to his questions.

(192) Also of significance were the intruding events during the previous four years known to Counsel Assisting involving litigation arriving out of "Kazal–David" disputes, articles in the Sydney Morning Herald, affidavits and other prospective litigation, perhaps arising from those, and recently two compulsory examinations conducted by the ICAC. No doubt as he sat in the witness box what was in Charif Kazal's mind regarding the May-June 2007 period had already been the subject of questions by others. Out of this vast array of matters raised since this period, Kazal was asked to focus on one specific aspect absent of any precise context other than settling Kelly's accounts in the weeks prior to the trip. Targeting of the question, settling with whom; or in what circumstances or by what means of communication, whether by one payment or two were not in any way divulged in the questions grounding the referral to the DPP.

(193) There would be many investigators who would not regard the approach of Counsel Assisting as being unfair; indeed could see some value in unsettling a suspect early in

an interrogation. Investigators, not infrequently, regard suspects as untrustworthy, devious and manipulative.

(194) On the other hand there would be jurists, who in court proceedings, would have intervened on the basis of unfairness. But, of course, court proceedings are interested in providing both sides a "fair go" for determining whether a conviction is, or is not, to be obtained in respect of a particular charge. The Presiding Commissioner, experienced as both jurist and investigator chose not to intervene. That conduct is beyond criticism.

(195) But nonetheless the Commission did rely upon the above questions and answers as exposing an issue of knowingly giving false or misleading evidence to the Commission on that single aspect, namely that Kazal never intended to settle Mr Kelly's accommodation account for the May 2007 UAE trip; - relying, no doubt, on the 32 questions targeting only accommodation costs together with the portion of the contents of the p.267 document.

(196) Even accepting as I do, the Commission was entitled to make this referral; on examination its prospects of bringing about a successful prosecution were always doubtful. Open to defence Counsel would be the following propositions over and above material already canvassed in the Report. Many of the bullet points set out below are predicated upon a thesis that before a tribunal of fact could convict on a charge of knowingly giving misleading or false evidence to the Commission, the tribunal would have to be satisfied beyond reasonable doubt that Charif Kazal ultimately honoured the alleged intent by reimbursing Kelly for his expenses around mid-June 2007.

- David was a witness whose evidence (that he did not make any June 2007 payment to Kelly) would, in my opinion, require a s.165 Evidence Act warning that it could be or may be unreliable (the need for Davids' evidence to be approached with caution is a fact the Commission's Report recognised);
- David subsequently on return from the UAE reimbursed the AWT for Charif Kazal's expenses – making five out of six persons involved paid for by Parkview and/or David.
- The primary promotional material for the venture (excluding the unsuccessful attempt to enlist the worldwide leasing firm, Chestertons International) was prepared by and promoted Kelly as an important person in Parkview. That could not have been done without David's approval.
- Willoughby (a member of the David team) and Kelly worked together on projects promoting the David driven effort to set up a UAE profit making vehicle, while Charif Kazal and Kelly do not appear to have worked jointly on very much other than the approach to Chesterton International. The claimed allocation of that task to AWT was supported by an explanation that a tribunal of fact may have found as being reasonable.

- Kelly's presentations from the outset in the UAE appear to have been for the benefit of David and/or Parkview and not for the benefit of AWT or Charif Kazal – making it more likely David would have had the stronger interest in retaining Kelly.
- Although booked as two groups –all six persons stayed at the same hotel, were part of the same consortium, and had equal access to each other. There is no evidence that the Kelly/Charif Kazal contact was greater than any other, indeed there is some testimony albeit from Kelly to the contrary.
- Kelly saw his role in the consortium as being one for David's benefit and as being a role more important than Charif Kazal's role in winning business contracts for David.
- David offered Kelly employment shortly after January 2008 trip – supporting the proposition David's interest in Kelly was greater than Kazal's.
- David paid Kelly's expenses and airfare for the 2008 trip – suggesting an earlier arrangement had been made as a consequence of on-going contact between Kelly and David.
- David paid the expenses of all others in the 2008 trip; likely suggesting the possibility of same profile for both trips.
- Given the work undertaken by Kelly prior to and while in the UAE in May-June 2007, it would have been unfair for David to have paid the expenses of all others but not Kelly's.
- Significantly there was no evidence of any attempt by Charif Kazal or AWT to retrieve Kelly's expenses from David after, or at the time David reimbursed Charif Kazal. That would be consistent with Charif Kazal not feeling any obligation to see Kelly reimbursed for his UAE expenses.
- There is no forensic evidence linking Charif Kazal to the reimbursement of the Kelly accommodation and airfare costs – while the same is true in respect of David – on this aspect the prosecution case against Kazal is nonetheless weakened.
- Given Charif Kazal used AWT as the vehicle for his reimbursement, there is no evidence of an AWT invoice being raised for Kelly's expenses. That would be consistent with accountants of AWT not regarding themselves as being under any obligation to reimburse Kelly.
- In the 2008 trip to the UAE David took the lead role – perhaps consistent with the situation in the earlier trip.
- Many of the above bullet points could be established in the defence case through cross-examination of David – assuming he attended Court.

(197) It is also true the existence of many of these facts touching upon the identity of the person who paid Kelly's accommodation may be relied upon by the prosecution as inferences adverse to Charif Kazal. However, where, in a criminal trial there are competing inferences on material matters the tribunal must be satisfied beyond reasonable doubt the adverse inference is the only available inference. For that to be

successfully done two propositions must be established: a) the evidence is beyond reasonable doubt consistent with guilt (proposition the Commission was satisfied of); and b) the evidence beyond reasonable doubt is inconsistent with any other explanation (a proposition the Commission was silent on).

(198) For any prosecution against Charif Kazal to be successful, it is argued the tribunal of fact would need to be satisfied beyond reasonable doubt that it was Charif Kazal and not David who intended to undertake responsibility for settling Kelly's accommodation account. The defence thesis to knowingly giving false or misleading evidence is anchored to establishing the fact that Charif Kazal paid no part of Kelly's expenses – or alternatively raising a reasonable doubt as in respect of this issue. The Commission itself has conceded in its finding against Charif Kazal there is insufficient admissible evidence for the prosecution to establish this proposition. That proposition must also hold true in any prosecution of Charif Kazal for knowingly giving false and misleading evidence regarding payment of accommodation expenses – given the accommodation expenses were paid simultaneously with the airfare expenses.

(199) In light of the numerous factors to which I have drawn attention it was never probable that a tribunal would have convicted on the s.87 offence referral. I am fortified in my view by the DPP's response to the referral.

The DPP response to the referrals – Some General Comments

(200) It is always important to keep in mind that the ICAC is not a court; it is an investigative Commission albeit one given a capacity to make findings[56] including that an "affected" person has engaged in "corrupt conduct". It was upon that basis that it referred Kelly's matter to the DPP for its advice. The Commission was also of a view that Charrif Kazal had knowing given misleading or false evidence when questioned by the Commission. It was upon that basis that it referred Charif Kazal to the DPP for its advice[57].

(201) However, other government agencies – at least as I understand the law – are not bound by the findings of the ICAC. In particular, at least in respect of the two Vesta referrals to the DPP, the DPP would not have considered itself bound by the Commission's train of reasoning or the finding that there was sufficient material before the Commission to demonstrate beyond a reasonable doubt that in respect of the first referral Andrew Kelly had committed the common law offence of Misconduct in Public Office; or in respect of the second referral that Charif Kazal had knowingly given false or misleading evidence to the Commission.

[56] See s.12 (2) – (5) ICAC Act

[57] I have assumed this is a reference made pursuant to s.53 (1) although the incident referred to the DPP occurred during the investigation of another matter. For more abundant caution, consideration should be given to amending s.53(1) to cater for offences contained in Part 9 ICAC Act alleged committed during or connected to an ICAC investigation also being referred to a ***relevant authority***.

(202) The focus of the DPP would be one of evaluating for himself the investigative material supplied by the ICAC to assess whether a prosecution should be initiated. This would require both an assessment of the strength of the available admissible factual material and discretionary considerations as to whether in all the circumstances it is appropriate and proper to initiate a prosecution.

(203) It was open to the DPP to form his own view of the available admissible evidence in respect of each referral – no doubt recognising five important factors.

(a) The ICAC was not bound by the rules of evidence when coming to its findings; however, on the other hand:
(b) An allegation against each of Kelly and Charif Kazal had been carefully formulated by the Commission before the public inquiry with a view to the public inquiry investigation focusing testimony in respect of each allegation.
(c) The Commission was staffed with numerous experienced lawyers well aware of the elements of the offences[58] and evidence admissible in respect of each; and
(d) No one from the DPP had observed the demeanour of the witnesses as each gave evidence.
(e) Each "affected" person was represented by counsel at the public inquiry.

(204) The DPP's response to the two referrals made to it is worth considering. Such consideration in this matter bears upon the Inspector's function of assessing the effectiveness and appropriateness of the ICAC procedures relating to the propriety of its actions.

(205) The Operation Vesta report was published on 16 December 2011. On 19 March 2012 a referral document was drafted and presumably despatched to the DPP shortly thereafter. It drew the DPP's attention to the respective two referrals (Kelly and Charif Kazal). In respect of each referral an analysis of the elements of each referred offence was given, and in respect of each of the elements, the Commission drew attention of the DPP to evidence the ICAC regarded as admissible in support of each element. The matter remained with the DPP for some months. There were substantial transcript evidence and presumably other exhibits for the DPP to consider. There was also a meeting between the DPP and ICAC legal representatives.

(206) On 28 August 2012 the Solicitor for Public Prosecutions advised the ICAC "*that the DPP considers there was insufficient evidence against Andrew Kelly and Charif Kazal to commence proceedings for any criminal offences.*"

(207) On 6 September 2012 the senior lawyer at the ICAC in an internal response to the Solicitor for Public Prosecutions' letter indicated "*With respect to Mr Kelly's matter I*

[58] It is argued later that the element structure of the Misconduct in Public Office offence has not been settled in NSW. The observation made above in the Report is limited to the elements of *Quach*.

consider the decision not to proceed as reasonable on the basis that none of the witnesses (David, Taber and Touma) who travelled to the United Arab Emirates with Mr Kelly and Mr Charif (sic) would provide statements."[59] However, she did not agree with the DPP's decision not to recommend a charge against Charif Kazal.

The ICAC seeks Reasons

(208) In any event On 2 November 2012 the ICAC sought reasons from the DPP as to why it came to a view in respect of both Kelly and Charif Kazal there was insufficient evidence against both persons to commence proceedings for any criminal offence. In doing so the ICAC was relying upon arrangements set out in a Memorandum of Understanding.

(209) On 4 December 2012 the Deputy Director of Public Prosecutions, Mr Alder, forwarded his advice in support of the Solicitor for Public Prosecution's September advice of insufficient evidence to prosecute. The Deputy DPP's response is set out in some detail below at paragraph 212.

(210) On 17 December 2012 the Commission requested the Deputy's advice be reviewed. It was reviewed by the Director himself. He forwarded this review on 20 February 2012. Although he arrived at the same result as the Deputy and Solicitor, in one important aspect, he agreed with the Commission's view that an undeclared conflict of interest alone could amount to a criminal offence, and therefore, it would seem, could sustain a criminal finding of Misconduct in Public Office. As will be seen below, this is a proposition I disagree with.

(211) It is important to remember the DPP was asked by the Commission to consider a referral sourced to s.9 (1)(a) ICAC Act that Kelly's conflict of interest situation could constitute or involve a criminal offence. As I understand the Commission's reasons for reaching this decision, it had two bases: conduct adversely affecting, based upon the conflict of interest and continuing to act basis (s.8 (1)(a)); and conduct that ...constitutes or involves a breach of trust basis (s.8 (1)(c)).

(212) On 4 December 2012 the Deputy DPP, Mr Keith Alder, exposed the reasoning whereby the DPP had come to a view of insufficient evidence. He dealt firstly with the Kelly matter:

> *"The proposed charge against Kelly was Misconduct in Public Office. The misconduct relied upon was confined to a failure to disclose a conflict of interest. The Commission in their inquiry, found there was no evidence Kelly had taken any action that was adversely affected by his conflict of interest and that there was no cogent evidence that the Kazal business interest were unfairly favoured.*

[59] It should not be thought the reasons advanced by the Commission's senior solicitor were the same reasons relied upon by the DPP when deciding not to proceed against Kelly.

*"**It was observed in Quach[60] that the breach of standards relied upon must represent 'the serious departure from proper standards ...must be so far below acceptable standards as to amount to an abuse of the public trust in the office holder**"* (emphasis in original) *emphasising the degree of departure from the proper standard that must be established. A mistake, even a serious one, will not suffice and a criminal state of mind is required.*

'The cases you referred to in your email of 23rd of August 2012 each involved other conduct in combination with the conflict of interest which amounted to Misconduct in Public Office.

'In the circumstances of this case and in the absence of any finding of improper dealings by Kelly, I do not consider the failure to declare a conflict of public interest, without more, sufficient to establish the offence of Misconduct in Public Office.'

Accordingly I consider that on the available evidence it cannot be said that there is a reasonable prospect of a conviction against Kelly for the offence of Misconduct in Public Office."

(213) Bearing in mind the differing views held by the Commission and the DPP on the one hand, and the Deputy DPP and myself on the other, I have set my reasons for supporting the Deputy's approach. Although the explanation I have set out below presents more detail than that of the Deputy DPP, Mr Alder, I agree with the expression of reasons supplied by him.

(214) I noted earlier there were two bases upon which the Commission found Kelly's conduct could amount to a criminal offence. So far as supporting the Deputy's position, it is only necessary to deal with the conduct amounting to a conflict of interest basis. It is to be recalled corrupt conduct findings in respect of the conflict of interest were also predicated upon the Commission's reliance on s. 9 (1)(b) and (c) – that is could constitute or involve disciplinary action and grounds for dismissal. This distinction is crucial. It is to be remembered the referral was based upon the existence of a conflict of interest as defined in two Codes of Conduct (a perceived Conflict of Interest) and continuing to participate in a team determining matters in respect of Kazal leases with SHFA.

(215) It is clear from the evidence that as a consequence of two documents – the New South Wales Code of Conduct and Ethics for Public Sector Executives and the SHFA Code of Conduct for its employees, that upon Kelly accepting employment at SHFA, each Code of Conduct became part and parcel of his terms and conditions of employment in that public authority. None of these terms and conditions constituting either Code has been promoted by Parliament to a status where it has become the law of the land – or even part of the criminal law of the land. Nor, so far as is known has any superior judicial

[60] *R v Quach* (2010) 201 A Crim R 522

decision elevated Codes of Conduct compiled by employers into the common law offence of Misconduct in Public Office.

(216) Likewise, Misconduct in Public Office has not been promoted to statute offence. It, however, is part of the judicially declared law – hence known as a common law offence. It is indictable – that is reserved for the District or Supreme Courts criminal jurisdiction. The sentence is at large.

(217) Of course, a public servant acting partially in favour of a third party, who shares a common interest with the public servant that is not shared by the public authority **and** acts to the detriment of the public authority, or any other party is clearly breaching terms and conditions of his employment – In such a case because of a conflict of interest he is acting partially – if the consequence be serious enough he may also be acting criminally.

(218) But, it is argued, the criminal concept of 'conflict of interest', when applied in the common law is likely to remain constant whether the offence relates to public office, or private enterprise; whether it be a public official or a fiduciary relationship. The essence of conflict of interest type offences is the act of exploitation in circumstances where a duty of loyalty of service is owed to the party being exploited.

(219) Codes of Conduct applying as terms and conditions of employment, particularly in recent times and in government departments, have been drafted with safety and security of the employer's resources in mind; a mindset of diminishing opportunity for employees' malfeasance and providing strategies for managing a conflict and with an eye of setting best practices for its workforce. Hence the requirement to recognise and declare any potential conflict of interest situation that may arise. An example of what is being discussed can be found in an overview of a concept of conflict of interest promoted by the Victorian Education Department:

> "*A conflict of interest arises in circumstances where an employee's private interest will be seen to influence a public duty. It can affect employees at all levels of seniority and in every area of work in the Department. Conflicts of interest are an inevitable fact of organisational life, and can arise without anyone being at fault. However, where an actual, potential or perceived conflict of interest exists, it creates serious risks for the Department and for the individual which must be identified and managed appropriately.*" (my emphasis)

(220) Failures to comply with this type of requirement may well be viewed as disciplinary offences because of potential risks. However, absent any act or attempted exploitation based on the conflict such misfeasance or nonfeasance involved in a failure to disclose would not amount to conduct capable of sustaining the necessary elements of a conflict of interest type criminal offence. It is also worth noting the ICAC website under the heading Conflict of Interest sets out the following propositions:

"The need to manage conflicts of interest is based on two propositions. One is that people in public positions must avoid situations in which private interests can affect their public duties. The other is that situations where there is the appearance of a conflict must also be avoided, if only because protestations of innocence and integrity may be impossible to judge.

Conflicts of interest are not wrong in themselves and can happen without anyone being at fault. However, it is vital that they are disclosed and managed effectively so that public officials perform their duties in a fair and unbiased way.

Personal interests that can give rise to conflicts may be pecuniary, involving an actual or potential financial gain, or non-pecuniary without any financial element.

In some circumstances the failure to disclose a conflict of interest in accordance with public sector policy may constitute corrupt conduct as defined in the Independent Commission Against Corruption Act 1988." (emphasis mine)

(221) While the website does not say so, the basis of ICAC reaching a decision that "a failure to disclose a conflict of interest [and nothing more] … may constitute corrupt conduct", has to be found by the ICAC on the basis that it qualified in s.9 (1) of the ICAC Act as either (b) a disciplinary offence or (c) provided reasonable grounds for dismissing dispensing of services or otherwise terminating services.

(222) So far as section 9 (1)(a) ICAC Act "could amount to criminal conduct" is concerned, for reason given above an employer's "terms of employment" cannot be the appropriate test for criminal conduct. This, I suspect, is the point of departure between my arguments and those of the Director. Acting pursuant to a "conflict of interest" has a legal meaning at common law – which in the criminal law context, it is argued involves partial and/or dishonest conduct arising from what the law holds as a conflict of interest; that is both the existence of the conflict of interest **and** partial or dishonest conduct as a consequence of it. Each must be proved before a case of acting in a conflict of interest is established.

(223) On the other hand s.9 (1) (b) and (c) are employment related provisions, and "terms of employment" may well be determinative of whether the alleged conduct is corrupt or not. In short, the employment related provisions provide a different criteria (notwithstanding the claimed misconduct is one and the same conduct) for entry into the realms of "corrupt conduct" Thus acting in a situation where a perceived or potential conflict of interest as a term of employment is being breached, such breach may provide a basis for either disciplinary or perhaps even termination type response from the employer.

(224) The response given by Counsel assisting to the question posed by the presiding Commissioner referred to in Paragraph 65 ante, may well have been based upon the distinctions I have just noted. That is because the conflict described by the presiding Commissioner was one that could have qualified pursuant to s.9 (1)(b) or (c).

(225) It is worth interrupting the flow of the argument to highlight the inappropriateness of having conduct that could amount only to disciplinary conduct or termination of employment conduct equated with a label of "corrupt conduct" also applicable to more serious conduct that could amount to criminal conduct. Conduct falling into the first and second categories is not available for reference to any court or tribunal involved in the administration of justice, while conduct falling in the third category is potentially available for reference to the criminal justice system. Yet all three categories qualify equally as "corrupt conduct". **In that respect I make a recommendation at the conclusion of this Report.**

(226) Returning to the argument. The Commission found the misconduct to be serious, based upon Kelly's seniority. Kelly was in middle management – below the CEO but above the Group Property Manager. In that position misconduct limited only to a failure to disclose a conflict of interest and continuing doing his job impartially – particularly where the conflict of interest was limited to only a perceived conflict of interest – while open to constituting a disciplinary action, or perhaps even a job keeping issue, would not, without more, rise to a level of criminality.

(227) From the elements set out in *Quach,* a reasonable jury properly instructed in respect of the ICAC s.8 (1)(a) finding would find proof beyond reasonable doubt would be: "At the relevant time Kelly was a public officer; and the alleged conduct – failure to disclose a perceived conflict of interest, occurred in the course of Kelly's public office.

(228) However, in respect of the other three elements, a reasonable jury properly instructed would be less likely it is argued to find those elements proved:

Element (3) – wilfully misconducts himself by omission
Element (4) - without reasonable excuse or justification;
Element (5) – where such misconduct is serious and meriting criminal punishment having regard to:

(a) the responsibilities of the office and the office holder;
(b) the importance of the public objects which they serve;
(c) the extent of the departure from those objects.

In respect of the third and fourth elements, the ICAC finding was that Kelly and Kazal were involved in a common goal to work towards the establishment of a joint venture business in the UAE which would financially benefit both of them. That situation developed, at the very least, a perceived conflict of interest which Kelly failed to disclose to SHFA and continued to work on Kazal focused leases.

(229) On the ICAC thesis there was no partial favouring of any Kazal tenancy decisions. Kelly was never the decision maker in respect of the Kazal tenancy issues that came to exist. Those recommendations had already been made by the Senior Property Manager

and endorsed by the Group Property Manager. Kelly's task was to assess the recommendation and endorsement of his colleagues and if satisfied it was a proper and appropriate decision to endorse it for a second time and the original recommendation passed on to the CEO to consider, and if thought appropriate, and proper, to submit to the SHFA Board for its action and/or approval.

(230) Likewise, Kelly's involvement in the common goal was in circumstances where – particularly after the first trip, David through Parkview and subsequently the David's Group was orchestrating matters as suited his schedule. Team-work between Kazal and Kelly, to the extent it had been established as existing before May 2007, diminished afterwards. Each was concerned with his own role and future in the David's enterprise – their futures were not interdependent – nor in lockstep.

(231) Kelly provides a reason for not disclosing, that being, he did not regard the mutual interest in the joint venture being set up by David as the relationship impacting upon his working connection with Charif Kazal. He did not regard his situation as one that needed to be identified as infected by a conflict of interest. Kelly had worked with Kazal before outside SHFA when Kazal was President of the Rocks Chamber of Commerce. In that situation, the relationship had not been regarded by him, or by SHFA, or by the Commission, as one creating a conflict of interest.

(232) The prosecution case on these two elements is far from overwhelming; but the test for ICAC was one of whether a jury "could" find these elements proved beyond reasonable doubt. My own view is unlikely a reasonable jury would, but I cannot rule out that a jury "could" find these two elements also proved beyond reasonable doubt.

(233) As to the fifth element, my view is the prosecution would be in real trouble. There are aspects of the public office that need to be considered in determining (1) whether the misconduct is serious and, (2) whether it merits criminal punishment. The three aspects of the fifth element (responsibilities, importance of public objects; and extend of departure) appear to me to be focused upon the breach of public duty and the circumstance surrounding the duty.

(234) The Commission thesis was:

(1) Kelly's omission to declare the perceived conflict of interest was unlawful;
(2) It was serious having regard to his position as a senior public official;
(3) Also serious in respect of the responsibilities he held in connection with the Kazal tenancies at the Rocks.

(235) What the Commission thesis misses is the absence of any partial behaviour; and the absence of any public as distinct from private (employer/employee terms of employment) consequence. All of the seminal cases and others I have reviewed of Misconduct in Public Office have, in respect of the public duty, been able to point to criminal gain or benefit to the accused or some third party at the expense of the relevant

public authority – i.e a breach of public trust. It is the criminal gain or benefit at the expense of the public authority and the betrayal of loyalty owed to the public authority by the office holder that is the nub of the fifth element. That nub is missing in this case.

(236) To the extent the ethical test espoused by Chief Justice French can be adapted to the criminal law – Kelly's conduct could not be regarded as of a seriousness as to merit criminal punishment:

> *"Public Offices are created for public purposes and for the benefit of the public ... The powers which are conferred on any public officials must necessarily be exercised only for the purposes of, and in accordance with, the law by which those powers are conferred.*[61]

(237) Kelly's office was Director of TAMS – he was responsible for reinvigorating the Rocks area through management oversight of SHFA leases. He was in turn oversighted by a CEO and the SHFA Board. None of his actions in respect of the Kazal leases reflected badly upon any of those he served with; none of his actions in respect of those leases demonstrated any dishonesty, or disloyalty to his work colleagues or to the objects which they all were working towards. The proposed joint venture in the UAE had no capacity to impact financially upon any Kazal tenancy in the Rocks. The Kazal tenancies and the UAE business interest were completely unconnected. The extent of his departure as represented by the misconduct the ICAC found established was one limited to a failure to disclose a conflict of interest to his employer. That conflict frankly was not much greater than any conflict arising from socialising with the head of the local Chamber of Commerce.

(238) I have noted on 20 February 2013 the Director himself expressed a different view on the mechanisms by which he arrived at the same position as his Deputy. Also of interest was his reporting to the Commission that prior to Mr Alder's decision, the matter had been looked at in detail by three senior lawyers from the Director's office who were all of the same opinion as Mr Alder.

(239) The Director also made the following observations:

> *The requested review has now taken place and I am of the view that there is no basis to come to a different conclusion than that reached by Mr Alder*
>
> *In relation to Mr Kelly I stand by the reasons outlined by Mr Alder in his letter to you of 4 December 2012, except in one area which requires clarification. Mr Alder, in providing reasons to you indicated, 'I do not consider the failure to declare a conflict of interest, without more, sufficient to establish the offence of Misconduct in Public Office'.*

[61] Seventh Annual St Thomas Moore Forum Lecture – Public Office and Public Trust Chief Justice French AC; 22nd June 2011, Canberra.

That led to your response of 17 December where you stated, "Mr Alder has advised in the absence of any findings of improper dealings by Mr Kelly, [that] he does not consider the failure to declare a conflict of interest sufficient to establish the offence of misconduct in public office. The Commission disagrees with this conclusion."

There is little doubt that at law the failure to declare a conflict of interest is capable of establishing the offence of misconduct in public office. Clearly it would not be difficult to contemplate such a significant breach of a failure to declare a conflict of interest, that irrespective of whether the person was receiving any benefit, or desired any benefit, they (sic) would still be guilty of the offence.

Mr Alder was not suggesting in his letter of 4 December 2012 that the offence cannot, as a matter of law, be established by a conflict of interest alone, but in the factual circumstances of this matter, the fact that the evidence does not establish anything more than a failing to disclose a conflict of interest is a very relevant consideration. I note that your belief is that "given his seniority within the SHAFA (sic) and the seriousness of the conflict of his failure to report the conflict was a serious departure from proper standards." I am of the view, however, that the misconduct in this case was not at the level required to establish the offence of misconduct in public office, in particular, the failure to declare the conflict of interest was not so serious as to merit criminal punishment in all the circumstances of this case. It is my view that a jury is unlikely to regard this conduct as meritorious of criminal punishment/

I appreciate that these assessments are often subjective in nature, and reasonable minds may differ. Whether the approach is "conservative" as suggested in your letter again turns on subjective analysis of the merits of the case. Clearly had Mr Kelly obtained some advantage from his conflict of interest, the matter would likely have been viewed in a different light.

(240) By way of reasons supplied by the Director, he said "*There is little doubt at law a failure to declare a conflict of interest is capable of establishing the offence of Misconduct in Public Office*". If by that he meant a failure to declare a conflict of interest, and that alone, is capable of establishing the criminal offence of Misconduct in Public Office, I have disagreed with him. I note he has not relied on authority. I stand to be corrected, but in respect of the offence, my view is it is doubtful any exists.

The Referral of Charif Kazal

(241) Any offence created by s.87 ICAC Act could only have occurred if the Commission was correct, and its correctness could be established beyond reasonable doubt, namely that Charif Kazal had knowingly given false or misleading evidence. One would presume the Commission would not make a referral to the DPP of the kind made against Charif Kazal unless, on its (the Commission's) assessment there were

reasonable prospects that a criminal court would convict on such admissible evidence that the Commission could supply.

(242) As argued in the paragraphs above, before any finding that false and misleading evidence in respect of settling Kelly's accommodation costs had been knowingly given to the ICAC by Charif Kazal, the prosecution would need to persuade the Court:

(a) That the p.267 document must have evidenced Charif Kazal's real intentions to do what he set out in the letter (the Commission's stated positon); or

(b) That Charif Kazal when putting forward his intention in the p.267 document he was only honest as to payment but not as to means as set out in the p.267 document[62]; or

(c) A third alternative could be that there were reasons available from the evidence why he did not pursue the means as set out in the letter of intent **and** that the "corporate rate" explanation given by Charif Kazal in evidence was never part of his intent – which seemed to be a theme of Counsel Assisting's cross-examination.

(d) That the accommodation reimbursement made to Kelly was made post return from UAE by Kazal in light of the intention he had expressed in the p.267 document – and that Kazal's avoidance of means as set out in the letter became known to Kelly before he left the hotel, and thus he (Kelly) paid for his accommodation by credit card.

(e) That some further (unevidenced) arrangement re settling Kelly's accommodation expenses must have been made between Kelly and Kazal as a consequence of (i) Kazal's failure to settle Kelly's accommodation account and; (ii) Kazal's failure to adhere to the means of settlement as initially set out by Kazal in the p.267 document.

(243) It is argued the Commission's true position seems based only upon (b) above in the absence of any cogent evidence in respect of issues (a), (c), (d) and (e). It is further argued that in the absence of such evidence reliance on (b) alone is unsafe.

(244) Apart from the specific expression of intent to settle Kelly's accommodation expenses in the p.267 document, the only corroborative material to that expressed intent could be the June 2007 reimbursement of Kelly's expenses by Charif Kazal. Absent that supportive evidence, and in the face of undisputed evidence from both Kelly and Charif Kazal that the nominated means of carrying out the intent (so far as Kelly was concerned) were not pursued; together with Kazal's claim – supported by the evidence that he was doing no more than organising corporate rates for Kelly, the prosecution of

[62] My understanding of the evidence is that it did not establish whether or not Charif Kazal paid an invoice made out to AWT to cover his accommodation costs – but given David's insistence of having an AWT invoice for purposes of reimbursement, it seems likely the hotel did invoice AWT re Charif Kazal's accommodation.

the s.87 offence of knowingly giving misleading or false evidence could not proved beyond reasonable doubt.

(245) In respect of proving Charif Kazal was the person who made the $11,170 reimbursement payment it has to be remembered the Commission conceded that there was insufficient admissible evidence for it to do so in respect of establishing against Charif Kazal the elements of a s.249B (2) offence of corruptly giving a reward with intent etc. Surely the same proposition would apply in respect of the knowingly giving misleading evidence referral made by the Commission

(246) Given all I have said above, it would seem to me, that a prosecution arguing Charif Kazal knowingly gave false evidence in relation to his evidence that he never intended to settle Mr Kelly's accommodation account for the May 2007 UAE trip when he answered the fourth question asked of him on 25 July 2011, would likely face a *May v O'Sullivan*[63] favourable verdict.

The DPP response – Charif Kazal

(247) On 19 March 2012 the Commission referred Charif Kazal to the DPP seeking its advice with respect to prosecuting Charif Kazal under s.87 ICAC Act in relation to evidence that he never intended to settle Mr Kelly's accommodation account for the May 2007 UAE trip.

(248) In order to succeed on this charge the prosecution at the very least would need to satisfy a tribunal of fact beyond reasonable doubt that at the time of composing the 23 May 2007 email document, or at the time it was sent, Mr Charif Kazal set out within the document the intentions that he expressed in the document – or at very least his intention to pay Andrew Kelly's accommodation costs. It is accepted as the referral is formulated theoretically there would be no need to establish Mr Kazal actually paid Andrew Kelly's accommodation costs in June 2007 – although clearly, that would assist the prosecution case if it occurred as being conduct consistent with the initial expression of intent, and weaken it seriously if that fact were not proved.

(249) But the fact is there were other propositions contained in the May 23rd document closely linked to the claimed intent, namely:

(a) An intent to pay both accounts at the time of settlement;
(b) The benefit of billing AWT via invoice meant corporate rates for Andrew Kelly;
(c) The settling of both accounts at one in the same time, the invoice being one instrument of claiming the debt and a cheque or money order or transfer being a response mechanism to settle the accounts; i.e. constituting the means of satisfying the claimed intent.

[63] *May v O'Sullivan* (1955) 92 CLR 654 at 657-658

(250) On analysis all that the p.267 document accomplished was corporate rates for Mr Kelly – no other undertaking made in the document was fulfilled, consistent with an expression of intent to achieve a benefit accompanied by false promises. This would not have been the only fraudulent document produced prior to the UAE trip by Charif Kazal or others involved in attending on that trip.

(251) What is useful now is an assessment of the Deputy DPP, Mr Alder's, advice given on 4 December 2012.

> *"Not every inaccurate or false statements by a witness will be perjury or, in the case of proceedings in the Commission, a breach of s.87. The only fact that can be proved beyond reasonable doubt in relation to the payment of Kelly's accommodation and flights is that they were paid for with Kelly's own credit card.* (my emphasis)
>
> *In my opinion the available evidence falls short of being able to prove beyond reasonable doubt that Kazal reimbursed Kelly for his travel expenses.*
>
> *Certainly there are aspects of suspicion that may attach to Kazal's explanation, but that is insufficient. The proposed cases rely upon rejection of Kelly's evidence (that David reimbursed him) and acceptance of David's evidence (that he did not reimburse Kelly). The case would involve the implicit proposition that if David didn't reimburse Kelly, someone else must have and that someone can only logically have been Kazal.*
>
> *Even if Kazal intended to "settle" the account on 23rd May 2007 when he sent the email, it was Kelly who ultimately paid the account. It is not insignificant that the events in question occurred approximately four years before the evidence was taken at the Commission.*
>
> *Accordingly, I consider that on the available evidence, and noting that it cannot be proved that Kazal reimbursed Kelly, it cannot be said that there is a reasonable prospect of proving that Kazal's knowingly gave false or misleading evidence to the Commission."*

(252) By letter dated 17 December 2012 the Commission sought the Director himself review Mr Alder's decision. The Director replied on 20 February 2013.

> *In relation to Charif Kazal, I again see no reason to overturn Mr Alder's previous decision. I note in your letter of 17 December 2012, you highlight a particular concern about Mr Alder's reasons, however by far the more important reason provided to you by Mr Alder was his outlining the importance of what needed to be proved in the false evidence charge, namely proof beyond reasonable doubt that Kazal intended to settle the account when the email was sent, approximately four years earlier is insufficient and that he knew in 2011 that the evidence he was giving about the email of 2007 was false and/or misleading. It is very difficult to accept that a jury will be satisfied beyond reasonable doubt that at the time Kazal was giving evidence on 26 July 2011 about a subject matter that relates to an email over four years earlier in time, that he must have*

been knowingly giving false or misleading evidence. Clearly the passage to time, and the subject matter itself, is capable of raising other reasonable possibilities.

In any event, even if I were of a different view and thought that there was a reasonable prospect of a conviction in relation to Mr Kazal, there would be strong discretionary factors to be taken into account before pursuing this particular charge."

(253) It will be noted Deputy DPP's observation in the second paragraph quoted at paragraph (251) ante reflects the ICAC's own position. It would seem that corroborative evidence was regarded by the Deputy DPP as essential for the prosecution to prove to succeed with the s.87 charge. That is a position I agree with.

(254) The Director in his letter of the 20th of February 2013 made the following observation in respect of the Commission's response to the Advice the Deputy Director of Public Prosecutions had given in respect of the prosecution of Kelly:

"I appreciate that these assessments are often subjective in nature, and reasonable minds may differ. Whether the approach is 'conservative' as suggested in your letter, again turns on subjective analysis of the merits of the case. Clearly had Mr Kelly obtained some advantage from his conflict of interest, the matter would likely have been viewed in a different light."

(255) The Deputy Director and the Director of Public Prosecutions were, at the time of giving their advice, senior lawyers of great experience in the criminal law within the agency of the government that specialises in prosecution. It is concerning when challenging legal advice in respect of the prosecution of Kelly, offered by the second most senior officer at the DPP, in respect of a charge as problematic as "Misconduct in Public Office" that the Commission would seek to advance that task by predicating – even if only as partial criticism – that the Deputy's approach is "conservative". Such a criticism borders on the personal attack rather than an analysis of the legal flaws or weaknesses claimed in the advice under review.

THE PUBLIC INTEREST ISSUES

(256) Not surprisingly the Parliament – no doubt conscious as it was of the extensive powers it was bestowing on the ICAC, was concerned that those powers only be exercised when it was in the public interest so to do. Already mentioned was the grant of powers to balance, mute, neuter or modify the impact of those powers when appropriate. A concept of "**interest**" is not confined in its meaning to curiosity or desire[64], but also includes concepts relating to rights, claims, or privileges, and it is argued, legitimate and reasonable expectations. "Public interest" – is a difficult concept to capture with words.

[64] See paragraph 229 ante.

(257) When considering whether or not it is in the "**public** interest" to hold a public inquiry, an argument is available that the fourth concept – embracing the public's legitimate and reasonable expectations of outcomes in keeping with the purpose, provisions and spirit of the ICAC Act, namely, "expectations of legitimate and reasonable outcomes" gives meaningful insight into what is meant by the "public interest".

(258) Thus, it is argued, the concept of the "**public interest**", which the legislation requires the ICAC to consider when determining whether or not to conduct a public inquiry, includes, but also goes beyond consideration of the concepts of rights, claims, and privileges, to a consideration of public expectation which would include legitimate and reasonable outcomes in keeping with the provisions and spirit of the ICAC Act (hereafter legitimate and reasonable outcomes). That expectation would justify the introductory words of s.31 (2) of the ICAC Act[65]. That expectation would permeate and be manifest at all stages of the public inquiry procedures – firstly, in the process of determining whether or not to conduct a public inquiry; then, with the manner in which that public inquiry was conducted; and finally, in the outcome and conclusions, by way of findings made, opinions formed, and recommendations formulated for the taking of appropriate and proportionate actions arising from those findings and opinions, usually by way of a Report. There would also be legitimate expectations, not covered by the ICAC Act that would be entertained in the concept of "public interest".

(259) The overwhelming bulk of criminal investigation is done beyond the public gaze by public officials, usually police – accepting, of course, the public may be well aware an investigation into an offence is on-going. Indeed, most frequently suspects will know they are being investigated, although their friends may not.

(260) There are clear and sensible reasons why criminal investigation is done behind closed doors – security of the investigation personnel, exhibits and investigation plan among them. There are also public benefits coming to the community as a consequence of closed door investigations – suspects' and witnesses' privacy is preserved resulting in personal reputation, honour and character not being unnecessarily devalued.

(261) By contrast public scrutiny investigations into scenarios that could be associated with criminal conduct are miniscule. The only permanent standing forum empowered to conduct its investigations that I can think of is the ICAC. Although the Perry Mason courtroom invariably ran an investigation, in the real world a criminal courtroom normally provides a trial based upon the results of an investigation; and in circumstances where the prosecution entertains a reasonable belief that a reasonable jury properly instructed as to fact and law will convict.

(262) There are two aspects by which an ICAC public inquiry provides public scrutiny – namely through the hearing and the reporting processes. In that sense, apart from

[65] "Without limiting factors that [the ICAC] may take into account in determining whether or not it is the public interest to conduct a public inquiry, ..."

Royal and other designated Commissions, it is unique. With the public scrutiny investigation, privacy, reputation and character of "affected" persons are put in danger of being invaded, devalued – and in some cases being trashed.

(263) People in New South Wales, in common with most communities throughout the western world instinctively value privacy, reputation, honour and the fruits those qualities bring to our daily lives. Although the Universal Declaration of Human Rights has no binding legal force in NSW, the values it espouses are not foreign to our culture. It is worth diverting for a moment to consider a number of the Articles contained in the Declaration and understanding how a public scrutiny investigation may impact upon the propositions contained within the Declaration.

(264) Relevant Articles I wish to draw attention to are:

> ***Article 11****(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*
>
> *(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law.*
>
> ***Article 12*** *No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*
>
> ***Article 22*** *Everyone, as a member of society, has the right to social security and is entitled to realization, ...of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*
>
> ***Article 23****(1) Everyone has the right to work, to free choice of employment, ...and to protection against unemployment.*
>
> ***Article 25*** *(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, ...*

(265) Each of the cited Articles sets out a right or interest envisaged by the Declaration that is well recognised in NSW as an appropriate aspiration. No doubt the sharp lawyer would point to the literal nature of the various Articles to suggest they don't apply. For example the sharp lawyer might point out that Article 11 might be thought to confine the presumption of innocence only to a situation where a person is formally charged with a penal offence. My argument is that the presumption of innocence is an interest or right alive at all times although usually it may only come into play in the face of a formal charge. My argument is that right is battered wherever a finding of corrupt conduct is made, and more particularly when that label is applied to conduct that at best

only amount to disciplinary or termination type conduct. Numerous persons who have had that label stamped upon their forehead have been keen to clear their name so that their honour or good character (including the presumption) can be restored.

(266) A second example may see the sharp lawyer pointing out that Article 12 appears to confine the declared right to situations where "arbitrary" interference is afoot. The definition of "arbitrary" is wide enough to include an ICAC finding of corrupt conduct that cannot be challenged: "**arbitrary**" – subject to individual will or judgment; not attributable to any rule or law; uncertain, unreasonable. An ICAC finding of corrupt conduct that cannot be challenged, given the procedural circumstances in which it occurred prior to the recent amendments to the ICAC Act, must qualify as an arbitrary decision even though made after a limited adversarial encounter.

(267) The consequences of a finding of corrupt conduct can be as devastating as any conviction. The Supreme Court in obiter said:

> *To say that the Commission investigates allegations of corruption is not a complete statement of its functions. It is also to be observed that the Commission takes evidence and evaluates that evidence of the purposes of deciding whether it should make a finding of corruption. Such findings may be extremely damaging to reputations and indirectly to financial interests.*
>
> *As is the case with the criminal law, a balance has to be struck. From the standpoint of an 'affected person' (sic), an inquiry by the Commission is analogous to a criminal trial because the outcome may be a finding no less damaging than a conviction for many criminal offences.*[66]

(268) Assuming the public interest is aptly described as including expectations of legitimate and reasonable outcomes, then, expectations of legitimate and reasonable outcomes also serve as a measure to assess whether the public interest criteria selected by the ICAC as underpinning the need for a public inquiry in Vesta were fulfilled.

(269) Some guidance invoked by the concepts of rights, claims, privileges or expectations of legitimate and reasonable outcomes attaching to consideration of whether or not there should be a public inquiry can be found in the Second Reading Speech to the ICAC Bill given by then Premier Greiner, on 26th May 1988:

- *The commissioner will have a wide discretion to investigate a complaint, to refer a complaint to another agency for investigation, or to decide that a complaint should not be investigated.*
- *The bill makes specific provision to allow the commission to refer matters to other investigative agencies to be dealt with. Obviously that will be the most sensible way to deal with the majority of matters that will come to the attention of the commission.*
- *...[T]he independent commission will not be a crime commission. Its charge is not to investigate crime generally. The commission has a very specific*

[66] Morgan v The ICAC Unreported NSWSC 31 October 1995 per Sperling J.

purpose which is to prevent corruption and enhance integrity in the public sector... [T]he focus of the commission is public corruption and that the commission is to co-operate with law enforcement agencies in pursuing corruption.

- *The commission will have very formidable powers. It will effectively have the coercive powers of a Royal commission. There is an inevitable tension between the rights of individuals who are accused of wrongdoing and the rights of the community at large to fair and honest government.*
- *[T]he commission will be required to make findings about persons directly and substantially involved. The commission will not be able to simply allow such persons' reputations to be impugned publicity by allegations without coming to some definite conclusion.*

Four further matters also merit consideration as potential public interest factors – but of course, a point clearly made by the opening words of s.31 (2) there can be no prescriptive list of public interest factors. Even so, these three matters would seem to have some relevance.

- *What impact will modern technology have, particularly in respect of unrestricted access to information, coming from the holding of a public inquiry and findings arising from it?*
- *Section 31 appears to limit the holding of a public inquiry "[f]or purposes of an investigation". If the prospects of the sum of knowledge already available to ICAC through earlier non-public inquiry investigation will not grow by any quantum or only a quantum close to zero to that already acquired in the investigation, then what other value is to be gained from holding a public inquiry, and at what cost to the State and/or to affected individuals?*
- *Is a public inquiry the best available method of accumulating more information to add to the information obtained already from completed investigations?*
- *Is the need to use the coercive powers available to the ICAC a true reflection of an absence of cooperation of "affected" persons*[67] *and other witnesses, and/or an inadequacy of the totality of material already collected by the ICAC investigators and potential witnesses.*

The Importance the ICAC Act places upon consideration of Public Interest

(270) At the outset of this Report I noted the extraordinary powers given to the ICAC to enable it expose and prevent corruption wherever State government money flows. I also noted the grant of extraordinary powers required strong and appropriate checks and balances to safeguard against impropriety and overreaching. The Office of the Inspector is one such check and balance. Another is the very important role the public

[67] See s.74A (3) Independent Commission Against Corruption Act 1988.

interest has been given in the legislation when framing the use of these extraordinary powers.

(271) There is, of course a fundamental difference between there being **a** public interest criterion being served and **the** public interest being served by the holding of a public inquiry. The difference shortly put is one of focus – the serving of a single public interest criterion may be at the expense of the overall public interest – that is, legitimate and reasonable outcomes.

(272) When considering these concepts, emphasis on the public interest as a brake upon the unnecessary use of powers overriding the traditional restraints on investigative bodies, can be clearly discerned within the structure of the ICAC Act. Division 1 of Part 4 of the ICAC Act sets out the functions of the Commission. The flagships sections leading this Part are ss.12, 12A and s13(2). Sections 12 and 12A are set out below:

> **12 Public Interest to be paramount**
>
> In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.
>
> **12A Serious corrupt conduct and systemic corrupt conduct**
>
> In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct[68].

(273) Thus, permeating the grant of functions to the ICAC is an admonition from the outset that

- Paramount is the protection of the public interest;
- Also paramount is the prevention of breaches of public trust;
- A direction to attend, as far as practicable to serious corrupt conduct and/or systemic corrupt conduct; and
- Take into account the responsibility and role of other public authorities and public officials in preventing corrupt conduct.

(274) It is argued the location of these admonitions at the forefront of the **Part 4 Functions of the Commission** is to steer the Commission into a conservative use of its powers to secure further the public interest and public trust in the administration of government institutions and, to recognise, when considering the public interest and public trust, the capacity of legislative responsibility given to other investigative agencies, prosecutorial agencies and the courts to prevent corrupt conduct. Implicit in all this is that the ICAC

[68] This section was introduced to the ICAC Act in 2005 and subsequently amended in 2008 to read: *"to direct its attention to serious corrupt conduct and systemic corrupt conduct..."*

should reserve the use of its extensive powers for serious corrupt conduct and/or systemic corrupt conduct. It is argued Premier Greiner's Second Reading Speech also reflected this approach.

(275) Public interest is next specifically mentioned in Division 3 of Part 4. Division 3 contains provisions giving the ICAC power to conduct compulsory examinations and public inquiries. The compulsory examination is an important investigative tool. It is conducted in private. It is presided over by a Commissioner or Assistant Commissioner. It may be used to examine witnesses one by one, as was done on ten occasions during Vesta.

The case for an additional investigative tool – the "closed" inquiry.

(276) It is argued, it may also be useful for the ICAC to have as an additional mechanism of investigation a "closed inquiry" where relevant affected parties and other witnesses are present, but not the general public. In such a scenario, numerous witnesses and "affected" persons[69] would be examined and then become available to one or more affected parties' legal representatives for cross-examination, as occurs in a public inquiry. It is anticipated most "affected" persons would prefer a "closed inquiry" – but nonetheless, there should be a safeguard provision included allowing an "affected" person to apply to the presiding Commissioner for a "closed inquiry" to become a "public inquiry" with a right of appeal, or perhaps a right to seek leave to appeal to the Supreme Court to both the Commission and the "affected" person. Whatever other basis might be relied on by the Commission or Supreme Court to justify a decision to hold a public inquiry when resolving such an application, the decision maker would also need to be satisfied that the holding of a public inquiry better served the public interest than could be, or was being done by the closed inquiry.

(277) But there is no provision in the ICAC Act for a private (as distinct to public) inquiry, – in other jurisdictions called a "closed inquiry" where all evidence is taken in the absence of any access to the general public and media. "Closed inquiry" is the term that will be used in this report to distinguish it from the compulsory examination, and the public inquiry. A closed inquiry was not an option the Commission had available to it. There will be occasions where a closed inquiry would better serve the public interest than either of the other two options.

(278) Importantly, it is again noted the option of a closed inquiry mechanism of investigation was not open to the ICAC when it came time to consider whether a public inquiry was in the public interest. Nor is it speculated, one way or the other, that had such an option been available the Commission would have chosen that option. **In respect of the option of a "closed inquiry" a recommendation will be made at the conclusion of this Report.**

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[69] See s.74A (3) Independent Commission Against Corruption Act 1988.

The public interest role within the ICAC Act

(279) Returning to consideration of the role the public interest plays in the structure of the ICAC Act. A complete array of powers contained in Division 2 and elsewhere is bestowed upon the ICAC for the purpose of any investigation undertaken by way of compulsory examination. Section 30 (1) requires the ICAC to be satisfied that it is in the public interest to conduct a compulsory examination. It contains no prescription of public interest issues requiring mandatory consideration.

(280) Likewise a public inquiry is an important investigative tool. It is conducted in public. It is presided over by a Commissioner or Assistant Commissioner. The same complete array of powers is bestowed upon the ICAC for the purposes of carrying out an investigation through a public inquiry. Section 31 (1) also requires the ICAC to be satisfied it is in the public interest to conduct a public inquiry. Indeed s.31 (2) gives some guidance, albeit limited compulsory guidance, upon some of the parameters that may be factors going to the public interest. Section 31 (1) and (2) require:

> (1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
>
> (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
>
> (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
> (b) the seriousness of the allegation or complaint being investigated,
> (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
> (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned. (emphasis supplied by author)

(281) It is argued provisions contained in s.31 (2)(a) – (d) do not amount to some automatic tick-a-box type consideration of public interest, but are propositions that must be considered in all instances "in determining whether or not" to conduct a public inquiry. Nor, it is argued, are the provisions of s.31 (2) (a) – (d) matters that can be called in aid after a determination is made to conduct a public inquiry. Moreover, the opening words of s.31 (2) are crucial words: "*Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry*". Clearly the drafters were requiring the Commission to conduct a thorough balancing act "whether or not" the public interest was being served by having regard to all known factors that may impact upon the public interest in holding, and in not holding a public enquiry.

(282) Of some importance when considering the Vesta investigation, is the question of the point in time that satisfaction of public interest should have been reached, who or what

needs to have reached the relevant point of satisfaction, and whether some written expression of being satisfied is necessary. That necessarily involves recognising what is involved in "conducting" a public inquiry.

(283) Firstly the ICAC Act recognises there is a difference between "determining" to conduct a public inquiry[70] and "conducting" a public inquiry. Next there is a need to distinguish (as indeed the ICAC Act does) between "conducting" a public inquiry, and holding the hearings of a public inquiry.[71] There are a number of investigative and administrative matters that are expected once the determination to conduct a public inquiry has been made. From the investigative point of view there are witness statements to be sought and collated; there are exhibits to be identified, perhaps collected and organised into an exhibit book. From the administrative side there are allocations of increased resources (including personnel – Case Lawyers, Counsel Assisting); responsibilities that fall to the Case Lawyer, briefing of counsel assisting, organisation of witness lists, preparing summons and Public Inquiry Hearing Plan, identifying and securing a hearing venue to name but a few. All of that involves expenditure of State funds – hence one relevant aspect of public interest. However, I am advised by the ICAC that a decision to conduct a public inquiry does not usually take in the increased additional allocation of internal resources to an investigation. I am also advised there were no additional internal resources allocated to Vesta once a decision was made to conduct a public inquiry. The only additional resource said by the Commission to be allocated was Counsel Assisting.

When was Consideration Given to the Public Interest criteria

(284) It is difficult to determine when a decision was made to conduct a public inquiry to further investigations into Operation Vesta. The first indication that it was in the Commissioner's mind appears to be on 11 February 2011, when a minute note records him as observing that "Vesta may be ready to go to public inquiry." As best I can understand from the documentation (10th February) the allegations to the extent they were distilled were:

> *That Charif Kazal and members of his family received favourable treatment from former officers employed by the 'SFHA' Andrew Kelly and ----- relating to properties owned by the 'SHFA at 91, 99 and 100 George Street, The Rocks.*
>
> *ELEMENTS of corrupt conduct:*
>
> - *Andrew Kelly and ----- are public officials*
> - *They dishonestly authorised financial reimbursement for costs allegedly incurred by the Kazal's in circumstances where it was not warranted:*

[70] See s. 31 (3) Independent Commission Against Corruption Act 1988.
[71] See s.31 (8), (9) and (10) Independent Commission Against Corruption Act 1988.

- *In return for providing favourable treatment tey received financial benefits.*

(285) On 22 March 2011 an investigation progress report noted "no date set" for Public Inquiry. By that date five persons, four of whom worked with SHFA, including Andrew Kelly, -----, and Charif Kazal had been identified as suspects who had engaged in corrupt conduct. Also by that date, the ICAC had identified conduct it described as "*Andrew Kelly failed to declare a conflict of interest when he recommended to the Board of the SHFA the Kazal lease arrangement for 91 George St.*" It was also noted Kelly and Charif Kazal had travelled to Dubai to establish a property and facilities management business.

(286) On 29th March reference was made to the fact that the former CEO of SHFA would be called to the Public Inquiry as a witness regarding Kelly's conduct. By this time the suspect list had been reduced to two – Kelly and Charif Kazal.

(287) By 19 April 2011 a Public Inquiry Brief was in the process of being prepared. It would also appear by this date a commencement date for the public inquiry had been fixed as 25 July 2011.

(288) The decision to hold a public inquiry should be regarded by the ICAC as a "key decision". The ICAC regards a key decision being one where it is necessary to alter or confirm one or more of the significant conditions of the investigation planned. A decision that results in a change to the scope and purpose of the investigation, and/or the resources need to complete the investigation objectives would be regarded as a key decision[72]. The Commission records presumably in writing key decisions made in the course of its investigations including the reason the decision was made, the information upon which it was based; the expected benefit to be achieved or risk to be avoided; and details of the date of the decision and its author.[73]

(289) On the material being made available to me the first record I can find of the public interest criteria required by s.31 ICAC Act appears on a document entitled Public Inquiry Hearing Plan dated as "approved" 12 July 2011. At least one person had read the document on 11 July 2011. The formal approval of the Public Inquiry Hearing Plan was made by the then Commissioner. The Public Interest Criteria was identified as:

- *The allegations are serious.*
- *Public exposure will be an important deterrent to similar corrupt conduct by others.*
- *Public exposure of failed or inadequate systems if (sic. read "is") necessary to encourage public agencies to actively engage in reform.*

[72] See Operations Manual – Procedures for conduct of public inquiries and compulsory examinations – Procedure No. 5; 5.Definitions p.40 of 41.
[73] ICAC – general investigation, standards and procedures April 2013, para 3.5.3 Key Decisions, p12.

- *The public interest in exposing the matter outweighs the public interest in preserving the privacy of persons concerned and minimising damage to reputations.*

(290) There is no inherent power in the Commission to compel attendance of a person to a public inquiry. Thus the Commission must rely upon a statutory grant of power. The Commission holds that two essential conditions are required for the exercise of the Commission's power to summons a witness to take evidence, including evidence given under compulsion:

a) The power to summons must be exercised for the purpose of a Commission investigation conducted under the ICAC Act. The power to summons may not be exercised for the purpose of another function of the Commission; and
b) It must be in the public interest to conduct the public inquiry[74].

(291) It is against this background that the Commission requires a Public Inquiry Hearing Plan to be prepared by the Case Lawyer in support of the summonses that are being issued.[75] A required ingredient of that Public Inquiry Hearing Plan is a recitation of the Public Interest criteria relied upon pursuant to s.31 (2) ICAC Act.

(292) My understanding is that the ICAC Case Lawyer assigned to the Operation Vesta brief bears the responsibility of preparing the Public Inquiry Hearing Plan and draft summons of various witnesses required for the Public Inquiry in approval form. The commencement date was 25th July, 13 days after approval had been granted. The Hearing Plan must address a number of criteria[76] including:

- Date, time and nature of the proposed hearing and who will be involved;
- Witness details and legal representatives if known;
- The nature of the allegations or complaint under investigation;
- Whether the allegations will appear on the summons and if not when the witness will be advised of the allegations;
- The general scope and purpose of the inquiry;
- A short statement of the facts under investigation;
- How the proposed examination will assist the investigation;
- Details of any documents or thing required to be produced and reasons for its production and whether or not the documents may be produced by post;
- Why it is in the public interest to conduct the hearing or produce a document or thing; (emphasis mine)

[74] Operations Manual – Procedure No. 5 – Procedures for Conduct of Public Inquiries and Compulsory Examinations, Criteria for Exercising the Power to Summons a Witness; para 4.1.3, p.4 of 41
[75] Ibid.
[76] Operations Manual – Procedure 5 – Procedures for Conduct of Public Inquiries and Compulsory Examninations for Exercising the Power to Summons a Witness, para 4.1.3; p. 4 of 41.

- The justification for conducting the hearing in private or public as the case may be.

(293) The importance of that is that what is contained in the Operation Manual in respect of s.31 (2) (a)–(d)[77], it is argued, is seriously misleading because it confines consideration to only four criteria, or more accurately aspects of the four criteria – where clearly that does not reflect the intent of s.31 (2). The Operation Manual provides considerations said to be relevant to the four criteria found in s.31 (2)(a) - (d). These are set out below

- Whether public exposure would be likely to:
  - Educate the public about serious corruption or systemic failures and issues
  - Encourage others to come forward with information relevant to the investigation
  - Encourage public agencies to engage in reform and/or establish public understanding of why change is necessary
- The seriousness and nature of the conduct alleged, for example:
  - Whether the conduct involves a criminal offence/s
  - The seniority or standing of the public official/s involved
  - The level of sophistication, organisation and planning
  - The number of persons involved and whether the alleged conduct is systemic
- Whether the allegations are already in the public domain and the public inquiry would:
  - Provide a transparent mechanism for public officials and others to be publically accountable for their actions
  - Enable persons the subject of the allegations, including false accusations or innuendo, an opportunity to provide an account
- The desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission's conduct of investigations.

A review of the "considerations" set out above also demonstrates they suffer from ignoring crucial introductory words of s.31 (2) – "*whether or not it is in the public interest*". The Operation Manual presents the "considerations" as positive potential available reasons for the public hearing being in the public interest. There is nothing in the relevant section of the Operations Manual that encourages consideration of any competing tensions or contrary considerations to the public interest case. In failing to be a true reflection of s.31 (2), the Operations Manual increases the chances of a failure to exercise discretion properly by a decision maker, or those recommending a decision to the decision maker, and entrenches what appears to be a practice of having a non-decision maker providing tick-a-box public interest criteria. Elsewhere in this report,

[77] Operations Manual – Procedures for Conduct of Public Inquiries and Compulsory Examinations – Procedure No. 5; paragraph 4.1.4 pp5-6.

other criteria that may inform a decision on public interest reasonable and legitimate outcomes were ventilated[78].

(294) Among the Vesta paper work are numerous documents entitled Public Inquiry Hearing Plan – all dated 25th July 2011 – 12 August 2011. Each is different in some respect from the others. All are sourced from the ICAC documents supplied to the Inspector. Some are but a couple of pages, others several pages. But while most appear to copy the four July 12 public interest criteria, one sets out five additional criteria. This suggests to me that setting out the public interest criteria is a responsibility that falls upon the person completing the Public Inquiry Hearing Plan. If that be right – and in fairness I cannot say one way or the other – it is concerning, because it also suggests s.31 (1) and (2) ICAC Act are not being taken seriously by the Commission. I should note the Commission advises me that in Operation Vesta, the then Commissioner "*determined that it was in the public interest to conduct a public inquiry for the purpose of the relevant investigation.*"

(295) As earlier stated, the first record that can be found of the public interest criteria is approved on 12 July, thirteen days before the public inquiry opened. The determination to hold a public inquiry appears to have been on or close to 11 April 2011. But there is no written record of the consideration of and settling upon the public interest issues necessary to determine whether or not it was in the public interest to hold a public inquiry before the determination to hold the public inquiry was made. But for the Commission's advice to the contrary, the circumstances outlined above raise a threshold of real likelihood that no consideration by way of a key s.31 (2) decision was given by the then Commissioner, or anyone else at the 11 April meeting when determining that Vesta may be ready to go to a public inquiry, in respect of any competing tensions, for and against the holding of a public inquiry prior to the determination to hold one.

The effectiveness and appropriateness of the Commission's procedures in this case

(296) It is no part of the Inspector's remit to determine whether the elevation of the Vesta investigation to public inquiry status on 11 April 2011 was warranted or not. But it is within the Inspector's jurisdiction to assess the effectiveness and appropriateness of procedures engaged in by the Commission relating to the legality and propriety of these activities[79].

(297) The first criterion selected was "*The allegations being investigated are serious.*" At one stage it was thought up to five persons may have been involved in conduct of a kind that could be labelled corrupt conduct. It would seem as I understand the documents, the possibility was speculated that there may have been some financial

[78] See paragraphs 299 -302 ante.
[79] S.57B (1)(d) Independent Commission Against Corruption Act 1988.

benefit to at least one and possibly two of those persons. But by 10th April that number had dropped to two – Kelly and Kazal. Nor, as I read the material was there any solid evidence of financial gain by either two as a result of their relationship. The identified conflict of interest was "perceived" only and there was no evidence of partial behaviour by Kelly. Misconduct in Public Office, it is argued was not an available offence. At best the allegations could only reflect "disciplinary" conduct.

(298) The second criterion was: *Public exposure will be an important deterrent to similar corrupt conduct by others."*

(299) The second presumption is based upon an historical fantasy found in the criminal law sentencing jurisdiction[80]. That fantasy has been long recognised by academics, and also by Chief Justice Bathurst when off the bench[81]. As a matter of common sense, it is only when certainty of detection AND charging AND certainty of punishment are in play that general deterrence is likely (but not always) going to be effective (e.g. known camera detection of speeding and traffic light compliance). The whole of the CCTV surveillance industry relies upon increasing certainty of detection. Certainty of detection of corruption of a kind similar to that alleged against Kelly and Charif Kazal is a long way off.

(300) A presumption based upon a fallacy would clearly fail any expectation of a legitimate and reasonable outcome. Reliance upon a fallacious presumption would likewise fail the legitimate and reasonable outcome test at the point of determination to hold a public inquiry.

(301) The doctrine of criminal sentence proceedings outcomes constituting deterrence to other would-be offenders is based upon false logic predicated upon an inadequate array of valid assumptions linked together by unreliable beliefs to arrive at callously punitive outcomes. To transfer such an unfortunate package from sentencing outcomes to a feature favouring investigation via public inquiry is a travesty of intellectual integrity. This report is not the place to debunk the deterrence doctrine in sentencing, or as a real outcome of the investigation work of ICAC. Rather, it is for ICAC to point to strong empirical evidence in support of what amounts to no more than a medieval belief based upon superstitious speculation in respect of sentencing. While deterrence has played a regrettable role in sentencing, it should be given no credibility as a valid basis for investigation in the twenty first century. My understanding is that ICAC does not

[80] General deterrence is an element in sentencing. The consequence is that a sentence is increased beyond what might otherwise be appropriate on account of a desire to deter others from offending. It is viewed by the law as having a punitive impact upon sentence outcomes. Reliance upon the doctrine by the ICAC raises an interesting metaphysical question – given the ICAC has no power to punish, or of punishment (in circumstances of setting up an investigation), is it appropriate (putting the fallacy argument aside for the purpose of the question) for it to rely upon a general deterrence factor in serving the public interest.

[81] Bathurst CJ (NSW); Keynote Address to the Legal Aid Criminal Law Conference 2012; *"Beyong the Stocks – A Community Approach to Crime";* Sydney; 1 August 2012 [8] – [16].

review or overview the effectiveness of the public interest criteria it selects in individual Operations. More is the pity.

(302) Further, the administration of deterrence in the criminal sentencing law is punitive in its impact. Any form of punishment to "affected" persons or other witnesses or non-witnesses, direct or indirect, is beyond jurisdiction of ICAC and not an appropriate outcome for an "affected" person. Investigation should not be confused with some vigilante form of offering their plight before the Commission as some form of warning/deterrence to others. There should be no concept of "just deserts" in investigation.

(303) However, deterrence provides a good tick-a-box option. The ICAC had been in existence for more than 20 years when this option was selected. Some reflection by ICAC of past occasions when the "deterrence option" and been successful should have been used to inform the decision making. The point being made is that the ICAC would, it is argued have no end of difficulty pointing to occasions where - by holding a public inquiry – it had successfully reduced the instance of corrupt conduct in any area of public administration by virtue of deterrence.

(304) As stated above, the purpose of that analysis of the July 12 public interest criteria is only to demonstrate the weakness arising out of a failure to conduct a proper consideration of the question raised by s. 31, namely, whether or not the conduct of a public inquiry is in the public interest.

(305) While it is true a public inquiry is an investigative tool, there is a lack of logic and respect for the legal norm of presumption of innocence in the terms of the Case Lawyer's item (b) criterion re:- "*the public interest in exposing the allegations*". It would also appear to be beyond jurisdiction. A section 31 public inquiry (for investigation purposes) specifies as a compulsory "public interest" consideration "*the benefit of exposing to the public and making it aware of corrupt conduct*" – not allegations of corrupt conduct. Further, s.13 (3) provides that (in addition to investigative functions) another principal function is the power to make findings and form opinions, on the basis of the results of its investigations. That function would appear to be confined to being exercised when making Reports based on investigation results. Invariably 'allegations' are a necessary pathway to be travelled to reach a point of finding 'corrupt conduct' – but that is the point, the journey must be undertaken first, because sometimes the end point will not be 'corrupt conduct'.

(306) The lack of logic springs from a reality, namely, that an allegation is an unproved assertion of wrong-doing. Further, the ICAC cannot prove – in the sense the same sense a court might prove – an allegation; however, what it can do is make a finding of corrupt conduct. What is to be gained from the high profile public exposure of only an allegation of wrong-doing by a senior officer of a public authority? One can understand as a legitimate and reasonable outcome, a public interest in exposing corrupt

conduct by a senior official of a public authority – but that was not the criterion expressed. Moreover, given that a finding of corrupt conduct:

a) depended upon the outcome of the whole of the investigation including what went before and after the public inquiry; and
b) that if a corrupt finding was to be made on material/evidence coming out of the whole investigation the corrupt finding would only be exposed in an ICAC report containing history, reference to relevant material/evidence and reasons why the corrupt finding was made[82]; and
c) in the event that a corrupt find was not made by the Commission, the high profile ventilation of allegations occurring at a public inquiry would not only still reflect badly upon the targeted person , but also reflect badly on the ICAC itself;

the public interest in a legitimate and reasonable outcome could not be satisfied on this second criterion. Arguably, an aim of a public inquiry limited to exposing allegations against a senior official of a public authority would also be an abuse of power.

(307) Early in this report I gave a detailed account of Counsel Assisting's opening. The Opening was based upon what the Commission already knew about Vesta. A comparison between the material available to the Commission at the opening and the material available at the conclusion of the public inquiry would indicate, it is argued, minimal additional information, if any, coming into the basket of material already gathered.

(308) It must also have been obvious in March or April when consideration was being given to holding a Public Inquiry that the conduct in question appeared to be little more than a breach of employment based Codes of Conduct to the extent the Kelly conflict of interest amounted to no more than a "perceived" or "apparent" conflict of interest without any evidence of partial behaviour by the public officer. It respect of Charif Kazal, at least until the public enquiry his alleged influence over Kelly amounted to no more than an uncertain but potential job offer in the UAE which may, or may not have come from him (Charif Kazal). Section 12A – although not expressed in mandatory terms, but rather *as far as is practical*, did seek to direct Commission resources to serious corrupt conduct (or prior to the amendment of the Act, serious and systemic corrupt conduct).

(309) The Commission made a number of recommendations in its Vesta Report. None of those recommendations – or the subject they dealt with formed any part of the public interest rationale espoused in the Public Inquiry Hearing Plans, suggesting the holding a public inquiry was not motivated by any of those considerations.

(310) The most recent amendments to the ICAC Act now involve more than one Commissioner in determining whether to hold a public inquiry. Hopefully, those determinations will now give greater efficacy to the provisions of s.31 (2) – and in

[82] A result which requires does not require an investigative function to be exercised, but a s.13 (3) function of a power to make findings and form opinions on the results of investigations.

particular to the balancing exercise of whether or not the public interest is served in holding a public inquiry.

Addressing the complaints made by Kazal, Kelly and Brown

(311) I now turn to examine the complaints made by each of Kazal, Kelly and Brown. My understanding is these are to be dealt with in accordance with the functions defined in s.57B (1)(b) and (c).

Kazal's complaints

(312) Kazal's first complaint[83] alleges a failure in the conduct of the public inquiry to consider that David had been involved in a commercial dispute resulting in litigation between David and Charif Kazal and Tony Kazal.

(313) The Commission is master of its own practices and procedures. Reference has been made to *Balog* – which was cited by Justice Harrison in Kazal's Supreme Court Appeal at [26]

> *"The existence and scope of those extra investigation powers demonstrates that the legislature did not intend to constrain the Commission by reference to rules and procedures that apply to courts. The absence of those constraints is consistent with the Commission's role as primarily an investigative body and not a body, the purpose of which, is to make determinations as part of the criminal process."*

(314) Further, s.17 (1) of the ICAC Act provides:

> (1) The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate."

(315) Notwithstanding Kazal's complaint, the Commission has the power to "inform itself on any matter in such manner as it considers appropriate." That really is the answer to Kazal's first complaint.

(316) However, the terms of the complaint, suggesting the Commission "failed to consider" submissions David was in conflict with Charif Kazal and Tony Kazal is inaccurate. At p.10 of the ICAC Report there was "A. Note on the evidence" contained in the Report in the following terms:

> *"During the course of the Public Inquiry, important witnesses including Mr Kelly, Charif Kazal and Roderic David (whose evidence affected both Mr Kelly and Charif Kazal) admitted that in dealings with prospective UAE business partners they lied in regard to relevant issues at one time or another or made false representations. Several relevant documents were deliberately created to bring about a false impression. There had also been a falling out between Mr David,*

[83] Paragraph 25(a) ante alleges a failure in the conduct of the public inquiry to consider that David had been involved in a commercial dispute resulting in litigation between David and Charif Kazal and Tony Kazal.

on the one hand, and the Kazals and Mr Kelly on the other hand. Accordingly the Commission has approached their evidence and the documentary evidence with caution. Rather, the Commission has paid particular regard to facts that are irrefutable or are common ground and cannot be challenged as well as overall probabilities."

I also noted that I regard the Commission's approach to David's evidence, akin to giving itself a s.165 Evidence Act direction.[84] On reflection, the Commission's stated approach may evidence more caution than a s.165 direction would have required.

In respect of this complaint the answer is there is no abuse of power, and/or other form of misconduct or maladministration to be dealt with arising from this complaint.

A second complaint[85] that there was an earlier investigation by the ICAC in 2010 and the Kazal leases were "cleared"; so, on what basis did the ICAC decide its investigation powers were so flawed as to warrant a formal public inquiry on the same matter?

(317) There are a number of assumptions contained in this complaint:
(1) The Kazal leases were "cleared";
(2) The ICAC decided its investigation powers were flawed;
(3) The Operation Vesta inquiry was on the same matter.

(318) I am unable to confirm whether the first and third assumptions are correct. I have not been provided with the necessary material to come to a view about that. However the second assumption is expressed in an unnecessarily confronting tone, and is incorrect.

(319) Most investigations undertaken by the Commission come about as a consequence of the ICAC choosing to investigate a complaint. The Vesta inquiry was no exception. Section 10 (2) of the ICAC Act provides that the Commission may investigate a complaint or decide that a complaint need not be investigated. There are far more complaints made than full-on investigation undertaken by the ICAC. The Commission may investigate; or choose not to investigate a complaint[86]. Having investigated a complaint, and discontinued that investigation, there is nothing in the ICAC Act prohibiting it being resurrected for further investigation particularly on the basis of fresh material coming to the ICAC's notice.

(320) The proposition postulated in the complaint could, "the ICAC decided to investigate because its own powers of investigation were flawed" contains two assumptions expressed here: (1) the reason why there was an investigation is because the ICAC was concerned about "flawed investigative powers", and that the subsequent investigation

[84] A 165 direction consists (a) of a warning the evidence in question may be unreliable; (b) information accounting for the reason why it may be unreliable; and (c) a caution in determining whether to accept the evidence and the sense of importance to be given to it.
[85] Paragraph 25 (b) ante
[86] Section 10 (3) ICAC Act.

was undertaken on an irrelevant consideration, namely an initial flawed investigation. All public inquiries come after extensive investigation has already occurred. The Public Inquiry may seek to build upon knowledge already gained through earlier investigation. There may be other reasons why a public inquiry is called.

(321) Section 31 (2) of the ICAC Act sets out four matters the ICAC is to consider before determining whether or not it is in the public interest to conduct a public inquiry but those matters are dealt with later. Suffice to say that the ICAC Commission would have come to a view that it was in the public interest to conduct such an inquiry as was conducted.

(322) The second assumption is that the ICAC decision to investigate arose out of an irrelevant matter. As earlier mentioned the ICAC undertook this investigation as a consequence of a complaint lodged to it. As earlier noted that is the normal course for many, if not most, of the ICAC investigative matters.

(323) The third assumption contained in the complaint was that the Vesta was dealing with the same subject matter as an earlier 2010 inquiry. I am unsure whether that assertion of fact is correct or not. Either way it makes no difference. The only criteria that the ICAC Act required is that a public interest is served. No doubt repeating myself – that fact being determined in the positive, the ICAC is permitted to conduct the Inquiry.

(324) Insofar as the second complaint is concerned, there is no abuse of power, and/or any form of misconduct or maladministration to be dealt with arising from this complaint.

(325) The third complaint[87] contains insufficient information for me to investigate, deal with or act upon. The complaint centred on "a document" or presumably a copy of it, being passed on from the ICAC to David or some person associated with David to be used, presumably in support of David, in litigation overseas involving David and some of the Kazals.

(326) The difficulty for me is that the document remains unidentified including by date, name, signatories, source, business centre, received by and so on. Moreover, the role of the document in the legal dispute was not identified. Was it an exhibit, a negotiating document, a document containing an admission, a document setting out terms and conditions? None of this was made clear. Where was the document issued; - in New South Wales, the UAE? This was not identified. In which of the several disputes was its unauthorised use associated with? What was the nature of any threat used or intended towards Charif Kazal other Kazals, or Kelly? Where was the threat delivered; by whom, in what circumstances and what if any words were used, and if no words were used, how was the threat and its terms conveyed; who if anybody witnessed the threat; and who was the person who made it? Nor was this factor identified – who

[87] Paragraph 25 (c)

initially surrendered the document to the ICAC; by what procedure did the document come into possession of ICAC; when and where and on what date? At the time that it came to the possession of ICAC, what, if any conditions was put on its surrender by the possessor of the document? Clearly, as matters presently stand, this is a complaint I am unable to resolve.

(327) The fourth complaint[88] was a complaint that the ICAC ignored an exculpatory statement by a Mr Nielsen and that the ICAC refused to disclose that statement to public scrutiny.

(328) This complaint appears to suggest the complainant has misunderstood the ICAC's purpose in ventilating past transactions and disputes between the Kazals and the leasing authority SHFA over leases held by the Kazals. My understanding is the ICAC sought to demonstrate that there was an ongoing working relationship between Charif Kazal (on behalf of the Kazals) and Kelly on behalf of SHFA in respect of the Kazal leases; but Kelly's voice and opinions when advocating on behalf of a proper outcome for the Kazal leases was persuasive and listened to by the CEO and Board each of whom considered Kelly's endorsements as providing possible decisions they would endorse; and also that the Kazals held several leases and were regarded by SHFA as tough dealers and negotiators as well as important and by virtue of the calibre and number of leases held were regarded as a significant client and a powerful force to deal with.

(329) As I understand the findings of the Commission, there were no findings that past decisions made by the Board in respect of the Kazal leases were influenced by partial behaviour of any one. The Commission found there was no cogent evidence that the Kazal business interests were unfairly favoured. My understanding is that finding applies to all decisions made up to and including April 2008 when Kelly departed from SHFA.

(330) The evidence in respect of the lease history – given the flavour of it, was one of tough dealing by the Kazals. The importance of that was that it was led to establish a cause for or motive for Charif Kazal to inveigle himself with an influential force in the decision making process – namely Kelly. The importance of the evidence was past history to give context to the ICAC's investigation thesis that "having someone on the inside batting for" the Kazals would improve their chances of retaining or perhaps increasing favourable lease outcomes for the Kazal family.

(331) Nielsen's evidence bore no connection to aspects of tough negotiating of disputes reviewed by the ICAC. The disputes as described in the ICAC Report and as is dealt with in the evidence appeared factually correct. That is to say, the identified disputes in respect of the identified leases, the identified subjects did occur and to the extent that Kelly participated in their resolution, that also appears to have been accurately

[88] Paragraph 25 (d) ante

documented. Nielsen's statement of being responsible for a specific lease going forward for approval was not relevant to the purpose the ICAC was seeking to draw from the past Kazal lease history. There was no impropriety or maladministration in the ICAC conducting its investigation through the public inquiry process the way it did. It was not obliged to reveal or evidence all information it held. Rarely do investigators do that. This was not a trial that was being conducted, but an investigation. As was explained by Justice Harrison and as provided in s.17 of the ICAC Act, the Commission is entitled to conduct its investigation in the way it did.

Andrew Kelly's complaints

(332) Kelly's first complaint is one where he is seeking to clear his name. I have referred to s.57B (1)(b) and (c). No matter how those sections are read, it will be seen the Inspector's jurisdiction does not extend when dealing with complaints to "clearing" the name of an "affected" person who has been found by the ICAC to have engaged in corrupt conduct.

(333) Kelly's second complaint related to the reluctance of the ICAC and Counsel Assisting to accept answers he had given and Counsel Assisting thereafter framed further questioning of himself and other witnesses that was not based upon the given answers.

(334) Cross-examination is about testing the testimony of a witness. Counsel Assisting in an ICAC public inquiry is not bound by an answer given. In a trial if there is no other contradictory evidence or inference available, counsel may be bound by an answer – but as earlier noted what I am dealing with here is an investigation and s.17 (1) is cast in terms permitting the Commission to ignore the rules of evidence and to inform itself in such manner as it thinks appropriate. There is no improper conduct or maladministration by ICAC revealed in this complaint.

(335) Kelly's third complaint was more a statement of his case than a complaint. Kelly's complaint was that he had successfully proved to the ICAC that he worked for David; and since David was not a SHFA client, he was not conflicted when dealing with Charif Kazal. The ICAC conducts investigations with a view to determining whether or not public officials and those dealing with public officials have engaged or are engaging in corrupt conduct as defined by the ICAC Act. The Commission may conduct its investigations in any way provided by the ICAC Act. It may accept or reject any evidence, including the testimony it wishes to reject. It may place such sense of importance of any evidence as it sees fit. It may draw from evidence such conclusions as it finds the evidence will sustain. That an "affected" person believes he has proved the contrary does not make the ICAC finding any weaker. The short answer is – on the evidence before it, the ICAC was entitled to make the decisions it made. Elsewhere I have been critical of the Commission's thought processes and conclusions, not because they were unavailable or improper, but rather because the provisions of the Act permitted them to be made.

(336) Kelly put his major complaint, "Why did the ICAC decide to proceed with a public inquiry if they had investigated well in advance and found no substance to the claims which David orchestrated in the Sydney Morning Herald?" This complaint presumes a finding by the ICAC for which there is not one scintilla of evidence. Indeed, the public inquiry opened with the recitation of allegations formulated against Kelly and against Kazal no doubt based upon material it was disposed to accept coming from earlier investigations.

(337) This is another complaint that can be answered by reliance upon s.10 of the ICAC Act – the Commission may investigate or decide not to investigate a complaint. Save for any obligation it may owe to Parliament, the Commission is not required to explain why it investigated, or why it failed to investigate a complaint – although of course it may do so in certain circumstances. Where it does so it is not by way of obligation but rather by way of procedural fairness, or courtesy. As earlier noted, one explanation for the public inquiry proceeding, although no doubt there would be others, is that the Commission determined it was in the public interest to conduct an inquiry. There is no misconduct or maladministration to be found as a consequence of the last or any of Kelly's complaints.

The complaint of Jamie Brown.

(338) Brown has known three of the Kazal brothers including Charif Kazal for more than 15 years. Brown is a former Police officer as are the other two persons involved in this account. At the request of one of the Kazal brothers (not Charif Kazal) he had organised through a private investigation company to conduct surveillance on David with a view to ascertaining his activities in respect of some business matter or commercial matter the particular Kazal brother was interested in. My understanding is that the surveillance was conducted by persons who were not associated in their employment with Brown as co-employees.

(339) The surveillance was being conducted at a time the ICAC was conducting the Vesta investigation. The operative conducting the surveillance was known to Brown. Brown alleges, apparently from what he has been told, that during the course of surveillance David commenced photographing the operative with his (David's) mobile phone camera. As I understand the allegation that was being done through the driver's side window of the vehicle in which the operative was seated. In some way or other David lost possession of his phone. Brown's understanding is the phone ended up on the street somewhere. But David's response might be thought to be consistent with David believing the phone was somewhere in the vehicle occupied by the operative. Brown – from what he has been told, alleges David set about jumping on the car bonnet, smashing the front windscreen and tearing the driver side mirror and a radio aerial from their mountings. In short Brown's allegation is one of malicious damage to the vehicle by David. There was also an allegation of assault upon the operator.

(340) Again, on information supplied to him, David's account is that Police called into the operative's house at 9 or 10 pm that night seeking the phone or information as to its whereabouts.

(341) There is a further allegation based also on hearsay that a colleague of the operative was contacted by Detectives and asked "Who engaged you [to take this surveillance]?" The colleague "No, [not telling you]. It's commercial confidence." The phone caller's response was "Well you better tell us – you know it's very hard to get a private investigator's licence in New South Wales so I suggest you co-operate." Brown himself was called before the ICAC where he was questioned in what appears to have been a compulsory examination. That occurred in May 2011. He reports that he was told by the Commission "We are concerned when one of our witnesses is interfered with."

(342) Brown's complaint is that Police refused to investigate malicious damage to the vehicle said to have been damaged by David. Brown claims the operative did complain to the Police in respect of the malicious damage to the vehicle. Brown's opinion – formed on the basis of his experience, is that the ICAC has interfered with a Police investigation.

(343) As Inspector, I am declining to deal with this complaint. Brown was complaining as a New South Wales citizen. But the complaint does not arise directly out of the Vesta investigation. Nor is there any suggestion either of the "affected" parties requisitioned the surveillance. The only connection with Vesta is that an important witness, David, was in some way impacted by the events that Mr Brown has described. That being so, the ICAC cannot be criticised for being concerned that a person assisting their investigation might be the subject of surveillance, intimidation or some other detriment on the grounds of his willingness to assist.

(344) The whole account given by Brown is hearsay. It would be inappropriate for me as Inspector to initiate any dealing upon an uncorroborated hearsay account.

(345) The major complaint is predicated upon an absence of police investigation, and it would seem should have been directed at alleged decision makers in the Police service for refusing to lay a charge of malicious damage notwithstanding the existence of damage, an alleged perpetrator and a legitimate complaint by the victim. As I understand it, neither Brown, nor the operative have complained to the Police, the ICAC, the Police Integrity Commission or either of their Inspectors in respect of this failure to investigate. The Commission, has spoken to Brown – but my understanding is that conversation did not occur as a consequence of any complaint to it.

(346) Brown's complaint is one, in reality directed at Police failure to ignore a request or alleged pressure from the ICAC. As such the complaint, assuming it was to be pursued, should be made either directly to the relevant Senior Police in an appropriate squad; or

to the Police Integrity Commission, or formally to the ICAC. If the matter is to be investigated, my view is it should not be investigated under the Operation Vesta banner.

(347) From the Inspector's view point, this complaint by Brown is closed.

CONCLUSION

(348) As will be seen, the complaints mechanisms offered by s.57B (1)(b) and (c) are an inadequate form of check and balance for an incorrect result arising from the exercise of extraordinary powers of the ICAC. Whether my analysis of the outcome of Vesta proves right or wrong is one issue – but perhaps a more important issue is the status of the mechanism available for the righting of any outcome that may incorrectly label and "affected" persons as having engaged in corrupt conduct. The legislation preserves the work of the ICAC as though it is infallible. Any organisation manned by humans is far from infallible and that there should be mechanisms to correct rights that occur however rarely that may be.

(349) It offends the populous sense of the "fair-go" if a label of corrupt conduct can be placed incorrectly upon a person without any real chance of him or her having the label reviewed. Even those convicted of corrupt dealings, and indeed those who have had their appeals finalised, still have mechanisms for having their innocence restored to them should it be the case that they are able to mount a compelling case that they are in fact innocent of a crime.

(350) Each of Charif Kazal and Kelly, for different reasons was unable to test the corrupt finding made against them in a court of law. The consequence is that each has been stigmatised and shamed by a finding that has not been made, and cannot be tested in an environment that has rules of evidence and procedures established over the centuries to ensure a fair and impartial hearing to them and to their opponents. The aim of the social policy should be to ensure that those who are guilty, <u>are</u> so labelled not those who "<u>could</u>" be guilty.

(351) Likewise, our society has long recognised a level of anti-social behaviour must be present to a point of criminality before conviction is an appropriate sanction. The introduction of a criminal label "corrupt conduct" should be reserved only for those engaged in criminal conduct. Those involved in misconduct in the course of their employment amounting to less than criminal conduct should not be required to wear a criminal label. True it is the ICAC does not find persons guilty of crime, or guilty of disciplinary or termination level misconduct. Nor does it directly order the diminution of rights and interests flowing from a finding of corrupt conduct. But, the diminution or rights and interests flows directly as a consequence of the publication of such findings and remains stubbornly impregnable from any relief in circumstances where relief would be a proper outcome. In that sense, the label is responsible for what amounts to punishment.

(352) Unpaid leave, summary dismissal, reputational damage through media reports, sustained unemployment, dislocation of children schooling, marital pressures and mental health issues have frequently been reported to the Office of the Inspector as arising from findings of corrupt conduct. Punishment, is to impose or inflict a penalty of, or pain for some offence or transgression. The difficulty with punishment flowing from the ICAC's adverse decisions, is that the adverse consequences to the "affected" person are not directly imposed by order of ICAC. They are the direct, but perhaps unintended consequences of a finding.

(353) One of the public interest criteria to be found in s.31 (2)(c) any risk of undue prejudice to a person's reputation ... One of the forms of prejudice that needs to be considered seriously by those determining whether or not to hold a public inquiry is the disproportionate punishment that attaches to an allegation of a corrupt conduct finding. **Arising out of my concerns expressed throughout this Report I make a fifth and final recommendation at the conclusion of this Report.**

PROPOSED RECOMMENDATIONS

Recommendation 1

It is recommended that steps be taken to amend sections 8 and 9 of the ICAC Act to remove the "could" test from each section, so that findings of corrupt conduct are available only in circumstances where it was reasonable for the Commission to expect a properly instructed reasonable tribunal of fact would come to a conclusion on admissible evidence that the opinion or finding of the Commission underpinning the corrupt conduct finding would be sustained. (see para 105 ante)

Recommendation 2

It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given as to whether or not the common law offence of Misconduct in Public Office should be incorporated into Statute law for purpose of better defining its elements and its sentencing range. (see para 132 ante)

Recommendation 3(a)

That section 9 (1)(b) and (c) be repealed on the basis that existing disciplinary tribunals and the Fair Work Commission are capable of dealing with matters to which those sections relate. (see para 225 ante)

Recommendation 3 (b)

Alternatively: that section 9 (1)(b) and (c) be amended so that any ICAC finding that misconduct of a kind it has been considering as conduct falling within the description of "corrupt conduct" as identified in s.8, but which did not qualify as conduct to which s.9 (1)(a) – criminal conduct – applied, but did qualify as conduct to which s.9 (1)(b)

and/or s.9 (1)(c) applied should be described as "employment based misconduct" and can no longer qualify as "corrupt conduct". (see para 225 ante)

Recommendation 4

It is recommended that through hearings of the Joint Committee Parliamentary consideration should be given to whether or not the addition of a "closed inquiry" as described in this Report would serve to advance the investigation capacity and effectiveness of the ICAC. (see para 278 ante)

Recommendation 5

It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given to whether or not it is in the public interest that access to an exoneration protocol should be introduced into the provisions of the ICAC Act; and if so, in what circumstances and by what means could an "affected" person pursue exoneration. (see para 347 ante)

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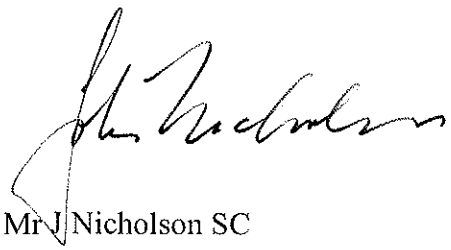

Mr J Nicholson SC
Acting Inspector: ICAC
29 June 2017

APPENDIX 1

MISCONDUCT IN PUBLIC OFFICE

(1) A common law offence widely regarded as problematic – namely Misconduct in Public Office was selected by the Commission as the offence best suited to reflect the criminality that Mr Kelly could be convicted of. I am not critical of the Commission selecting this offence. In the view of the Commission it was the most appropriate offence reflecting criminality Kelly's conduct could have constituted. But it is an offence with a problematic history.

(2) The earlies cases involved malfeasance or misfeasance – that is some action by the public officer that constituted misconduct. A second group of cases – the nonfeasance, or neglect of duty group also emerged later. There was a view that these did not require any particular *mens rea* – but what elevated them to the level of criminality was a consequence which flowed from a wilful nonfeasance or failure to perform duty. For example wilful failure to stop a riot causing harm among the victims; wilful failure by a Constable to intervene in an assault he was witnessing – the assault resulting in the death of the victim; wilful failure to attend a fire, causing damage of property to the owners. It can be seen these nonfeasance type cases involve a different genre of misconduct.

(3) In more recent times the approach has been to morph the concept of misconduct and the nonfeasance group (a neglect of duty group) into one unified concept involving both public misfeasance and neglect of official duty into a unified offence. Thus whether the offence is comprised of an act of omission, the omission must come about as a consequence of wilful misconduct or reckless indifference. The concept of "wilful" carries a meaning attached to "deliberateness". Wilful can also mean with reckless indifference as to whether the conduct was wrong or not. Recklessness is also taken to mean "*an awareness of the duty to act or a subjective recklessness as to the existence of the duty.*" Any of these concepts will constitute the relevant *mens rea* of an offence of public misconduct.

(4) With most law, but particularly the criminal law, there is a need for precision and certainty as to what conduct is prohibited and ergo, what conduct is permissible. For many years now, various jurisdictions have been engaged, one way or another in seeking to provide more certainty about what constitutes the offence of Misconduct in Public Office. A number of jurisdictions have looked to the superior courts for guidance. Other jurisdictions have created a statutory offence with defined essential elements. England Prosecution Service has developed "Guidelines" it applies when considering whether or not to initiate charges of Misconduct in Public Office. On my

understanding one of the criteria when determining the relevant misconduct is the significance played by or because of the "public office" in the criminal conduct at hand. Another is whether some other clearly defined criminal conduct – fraud, theft, sexual assault and the like is a properly available option.

(5) I turn to examine the modern development of the law in respect of this offence to highlight a need in NSW to clarify, for NSW public officers, what Misconduct in Public Office means in NSW.

(6) Misconduct in Public Office is a common law indictable offence; it is not defined in any statute. As a common law offence the penalty for misconduct in public office is at large. In such instances in is the practice of courts to adopt an analogous or corresponding statutory offence [presuming there is one] for a reference point for the imposition of penalty[1]. Even so a statutory point of reference does not establish a de facto maximum. The common law maximum would be life imprisonment.[2] The offence is widely considered to be ill-defined and has been subject to recent criticisms by [UK] government, the Court of Appeal, the press and legal academics. Generally persons consulted, responding to a Law Commission of England and Wales background paper, agree the law is in need of reform, in order to ensure that public officials are appropriately held to account for misconduct committed in connection with their official duties.[3]

(7) The Law Commission of England and Wales identified a number of problems with the offence:

> *"The legal concepts involved in the offence of misconduct in public office are highly technical and complex and not easily accessible to non-lawyers. Furthermore there is often some confusion between what the law* ***is*** *and what* ***should be****. The question of the appropriate boundaries of criminal liability for public officials is clearly a matter of broad public interest.*
>
> *Misconduct in Public Office is a common law offence: it is not defined in any statute. It carries a maximum sentence of life imprisonment. ...*
>
> *The offence is widely considered to be ill defined and has been subject to recent criticism by the government (UK) [the Court of Appeal, the press and legal academics].*
>
> *Statistic suggests that more people are being accused of misconduct in public office while fewer of those accusations lead to convictions. One possible reason is that the lack of clear definition of the offence renders it difficult to apply.*

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[1] Blackstock – R [2013] NSWCCA 172 at [8].

[2] Much of the material in this section is taken from the UK's Law Commission's Papers – particularly Reforming Misconduct in Public Office Consultation Paper 229

[3] Consultation Paper 229 pp1-2

We have identified a number of problems with the offence:

(1) 'Public Office' lacks clear definition. It is a critical element of the offence. This ambiguity generates significant difficulties in interpreting and applying the offence.

(2) The types of duty that may qualify someone to be a public office holder are ill defined. Whether it is essential to prove a breach of those particular duties is also unclear from the case law.

(3) An 'abuse of the public trust' is crucial in acting as a threshold element of the offence, but is so vague that it is difficult for investigator, prosecutors and juries to apply.

(4) The fault element that must be proved for the offence differs depending on the circumstances. That is an unusual and unprincipled position.

(5) Although 'without reasonable excuse or justification' appears as an element of the offence, it is unclear whether it operates as a free standing defence or as a definitional element of the offence."

Historically the offence held public officers to account for their misconduct, where there were no other adequate ways of doing so. Nowadays such misconduct will usually amount to another, narrower and better defined, criminal offence."[4]

(8) The Law Commission of England and Wales recognised five arguments for retaining the offence without endorsing any. The Law Commission did note that the consultees who responded to the initial background paper agreed with its (the Law Commission) view that the law is in need of reform, in order to ensure the public officials are appropriately held to account for misconduct committed in connection with their official duties.

(9) The Law Commission's research indicated in England and Wales there were somewhere in the region of 72 reported cases for such offences between 1783 and 2003. Only, approximately 17 of which were heard after the publication of Stephen's *Digest* in 1877. The significance of Stephen's *Digest* is that it set out or sought to set out the nature of the offence and its constituent elements. The Law Commission noted by contrast that there were a large number of prosecutions in other common law jurisdictions in the 20th Century, particularly in North America.[5]

(10) The Law Commission noted the offence was frequently being used in circumstances where it might be thought to overlap other statutory offences, equally available, to offer accountability for misconduct without the need to require as an element of the offence "public official" and "breach of public trust" and raised the question of whether a requirement that a public officer be acting as such still carried any practical

[4] Consultation Paper No. 229 – Issue Paper 1 – The Current Law p.2.

[5] Consultation Paper No. 229 – Appendix A The History of the Offence of Misconduct in Public Office p.11[A.53]

significance.[6] Its examination of cases led the Law Commission to consider that only a small category of cases were really not covered by statute law namely:

> *"(1) Public office holders will exploit their positions to facilitate a sexual relationship.*
> *(2) Public office holders who deliberately use their positions to facilitate a personal relationship which may create a conflict with proper performance of the functions of their position.*
> *(3) Public office holders who act in a prejudicial or bias manner or under a conflict of interest.*
> *(4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising.*
> *(5) Public office holders who fail properly to protect information that comes into their possession by virtue of their position."*[7]

(11) The expressed concerns of The Law Commission noting some confusion as to what the law concerning misconduct in public office is, appear to have been recognised by the Canadian Supreme Court in *R v Boulanger* :

> *"Public Officers, like other members of the public, are entitled to know where the line lies that distinguishes administrative fault from criminal culpability."*[8]

(12) Chief Justice French has sought to identify the sources or rationale of the uncertainty[9]:

> *The holder of public office in a representative democracy is expected to behave in his or her official capacity, according to standards which overlap and have different sources. The fields of inquiry about such standards are ethics and the law. These fields overlap. Sometimes ethical principles are reflected in legal rules. To take a simple example – the acceptance by an official of a bribe in return for a favourable decision is generally recognised as unethical behaviour. It is also a serious crime. Ethics, as a distinct field of inquiry leading to identification of standards of behaviour, however, can be difficult and contentious. That is because, apart from statements of great generality, there is no single ethical theory which all can agree will provide a complete guide to ethical behaviour by public officials or by anybody in a position to exercise power over others. That difficulty is an aspect of the challenge facing theories of ethics generally.*

What is true for defining ethical behaviour for public officials is equally true for defining their criminal misconduct for the law.

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[6] Consultation Paper No. 229 – Chapter 2 – Summary of Issues Paper 1 and responses – pp.15-18

[7] Consultation Paper No. 229 – Chapter 2 – Summary of Issues Paper 1 and responses – p.24

[8] *Boulanger* [2006] 2 SCR 49 at [47] per McLaughlin CJ.

[9] *Public Office and Public Trust;* Seventh Annual St Thomas More Forum Lecture; 22 June 2011; Canberra.

(13) For the past 60 years there has been uncertainty inherent in the offence of Misconduct in Public Office. The noun "misconduct" can apply to so many different genres of conduct. The uncertainty of the misconduct to which the offence of Misconduct in Public Office applies appears to be sourced to what constitutes available concepts of "misconduct", what constitutes available employment roles that qualify as "public office" and concepts of the minimal level of seriousness to convert non-criminal conduct to criminal conduct. As with a rock dropped in the still water of a pond, in ever increasing concentric circles more and more genres of misconduct; and more and more candidates of 'public office' are filling those increasing spaces. Concepts of the minimum level of seriousness to convert non-criminal administrative errors of conduct to criminal conduct differ in the minds of different decision makers – as is instance in Kelly's referral (see later). The fact that it is an indictable offence – usually tried on indictment by a jury, carrying a maximum penalty of life imprisonment are factors sometimes not taken into account when determining the minimum level of seriousness required. My understanding it, that it is not a Table 2 offence capable of being tried summarily. The question of whether a maximum penalty should be life imprisonment needs to be seriously questioned by law makers.

(14) The very early offences in the 16th and 17th Century of misconduct in public office appeared to require a *mens rea* that embraced the need to prove partiality and malicious or corrupt influence in pursuit of duty. The *actus reas* of the early offences appears to require some positive misconduct or action on the part of the offender (public official) that involved exploitation of the relevant public authorities – i.e. malfeasance. The nature of the misconduct was usually confined to fraud, embezzlement and other financial gain type offences.

(15) The "Public Office" element has a history dating back centuries, when some office holders wore the seal of office around their neck or as a ring on their finger. Initially public office holders could trace their appointment to public office back to the Crown – either directly or indirectly from another public office holder with the power of appointment or delegation.

(16) The concept of "public office" appears to have widened with the passage of time– but there appears to be still no workable definition of what is meant by that term. This creates problems too of which the Law Commission noted:

> *"2.71 The Council of HM Circuit Judges stated: 'It is apparent to us that the uncertain scope of this offence can lead to dependence on prosecutorial discretion and policy rather than clearly defined law.' However the CPS (Crown Prosecution Service) submitted that the risk that these difficulties will result in inconsistent charging decisions 'appears to be offset in part by the application of the CPS Guidance which sets out the limited circumstances when the offence should be charged and invites prosecutors to consider seeking the advice of the Director's Legal Adviser to resolve any uncertainty as to whether it would be appropriate to bring such a prosecution'.*

2.72 The CPS also provided examples of factors that are important when making a charging decision in more difficult cases: Did the person swear an oath to the Crown? Were they a civil servant? Were they subject to the Official Secrets Act? Were they vetted for security clearance? Did they have a CRB check? Were they paid by public funds? In the specific context of nursing, they considered whether the individual's responsibilities go "So far beyond the ordinary duties or responsibilities of nurses working in a hospital as to be considered of substantial importance to the public at large.'

2.74 [A Police Constable, Fraud Investigation team, Serious Crime Division, in Greater Manchester Police] submitted that clarification is required in relation to those working in the criminal justice system as to whether employees of private companies (to which public services had been outsourced) are included within the definition. For example Detention Officers employed by G4S."[10]

(17) The Appeal Courts of England are no longer the single source of formulation of the common law – even though common law offences available in New South Wales may have shared their origin with the same named offence in England. The consequence of that is that in the early years of this century, Hong Kong, England, Canada, Victoria and Queensland[11] have reviewed this offence. Hong Kong, England and Victoria have settled upon an element structure for the offence that differs in each jurisdiction. Canada has settled on an element structure of a statutory offence of Breach of Trust by Public Officer, which has been informed by the English and earlier (2002) Hong Kong decisions. Victoria's element structure appears to be modelled on the Hong Kong later decision (2005). NSW Court of Criminal Appeal has adopted the *Quach* statement of elements of the offence of Misconduct in Public Office.[12]

(18) It is argued the offence of Misconduct in Public Office be referred to the New South Wales Law Reform Commission for its advice as to whether the common law offence of Misconduct in Public Office should be abolished; incorporated into Statute law; or remain available in its present state as a prosecutorial option.

Some case law – Development of the Elements of Misconduct in Public Office

(19) There appear to be four seminal cases which informed the decision in *Quach*[13], namely *R v Bembridge*[14], *Shum Kwok Sher* [2004] WLR 451, *Sin Kam Wah v HKSAR*[15] and *Attorney General's Reference* (No. 3 of 2003)[16]. The Victorian Court of Appeal also considered the elements of the Canadian Criminal Code s.122, Statutory Offence, of

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[10] Consultation Paper No. 229 – Chapter 2 – Summary of Issues Paper 1 and Responses pp27-28

[11] Queensland Parliament in 2009 amended the Queensland Criminal Code to introduce s.92A. This section creates an offence for a public officer to deal with information gained because of office, to perform or fail to perform a function of office or to do an act in abuse of the authority of office, with intent to dishonestly gain a benefit for the officer or another person or to dishonestly cause detriment to another person. Maximum Penalty 7 years.

[12] *Obeid v R* [2015] NSWCCA 309 at [133-141]

[13] R *v Quach* (2010) 201 A Crim R 522.

[14] [1783] 22 State Trials 1 at 155

[15] FACHK published 26 May 2005 per Mason NPJ with Chief Justice and other justices agreeing

[16] [2004] WLR 451

Public Official Committing Fraud or Breach of Trust, as determined in the Supreme Court of Canada's decision in *R v Boulanger*[17].

(20) The first of these cases is generally regarded as a useful starting point upon which to base an understanding of the development of the Misconduct in Public Office offence. The two Final Appeal Court Hong Kong decisions are instrumental in formulating the five elements of the offence accepted by the Victoria Court of appeal in *Quach* as binding in Victoria.

(21) *Shum Kwok Sher* per Mason[18] NPJ gave the leading judgment, other justices agreeing. The Final Court of Appeal in Hong Kong was entertaining an appeal in respect of four charges of Misconduct in Public Office. It is instructive to note each charge was particularised as "*Series of Acts calculated to injure the public interest*". For example charges 1 and 2 identified the Acts as:

- Comprise an act of failing to declare a conflict of interest;
- Failing to abstain from the decision-making;
- Acting partially in favour of [a nominated third party]

Charge 3 also was in the same terms "Series of Acts calculated to injure the public interest" but the acts relied upon in that charge were:

- Dishonestly causing and permitting the wrongful award of a management contract … in favour of [the same nominated third party].

The Acts comprising charge 4 were:

- Failing to declare a conflict of interest with [three nominated parties, one of them being the earlier nominated party];
- Keeping all quotation letters in his exclusive custody;
- Failing to abstain from the exercise and control of the quotation system in respect of the award of short-term contracts despite the conflict of interest aforesaid;
- Recommending the [nominated third parties] for contracts.

This indictment before the various Hong Kong courts illustrates the point earlier made that a range of "misconduct" is available for prosecution in this common law offence. Significantly, no charge relied solely upon only the content of criminality arising from the conflict of interest situation as being sufficient to satisfy the requirements of the Offence. In each charge there was further feature or features which involved partial action against the interest of the public and the product of that partial action which was gain to the nominated third party or parties.

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[17] [2006] 2 S.C.R. 49, [2006] SCC 32; 268 DLR (4th) 385 is likewise a seminal non-binding decision that also contains a useful analysis of the historical development of the misconduct in public office offence

[18] Sir Anthony Mason, formerly Chief Justice of the High Court of Australia.

(22) Not surprisingly from the prosecution perspective, when proving the charges, proof that the appellant was aware of the potential for conflict of interest was a way in which, not only conflict of interest was established – but wilfulness in acting partially also became an available inference, both arising from the employer's circular of a Code setting out the circumstances in which conflicts of interest might arise. For those reasons the employer's circular of its Code of Conduct was relevant and in evidence before the court. Many of it provisions are somewhat similar to the NSW Public Service and the SHFA Codes of Conduct – but the nature of the conflict of interest that was important criminally was one involving actual partial action and actual third party gain.

(23) In *Shum Kwok Sher,* evidence was that public officers were reminded by their employer "*that [they] should at all times make a conscious effort to avoid – or declare as appropriate any conflict that may arise or has arisen. Failure to do so may render them liable to disciplinary action which may result in removal from service.*" (my emphasis)

(24) That is to say in Hong Kong something more than failure to declare would appear to have been required to elevate conflict of interest activity beyond "disciplinary" status to "criminal conduct" status. In New South Wales, however, it is the definition of corrupt conduct as moulded by ICAC Act's s.9 (1)(b) and (c) that elevates failure to declare a conflict of interest as "corrupt conduct". But, conduct falling within those subsections is almost inevitably going to be conduct that does not reach a level that "could constitute" criminal conduct.

(25) In *Shum Kwok Sher* Sir Anthony Mason at [69] wrote:

> *"The difficulty which has been experienced in defining with precision the elements of the offence stem not so much from the various ways in which they have been expressed as from the range of misconduct by officials which may fall within the reach of the offence. This is because, to quote the words of PD Finn, ...*
>
> ***The kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position.***
>
> *It follows that what constitutes misconduct in a particular case will depend upon the nature of the relevant power or duty of the officer or of the office which is held and the nature of the conduct said to constitute the commission of the offence.* (emphasis in original).

(26) His Honour after reviewing some of the comments in *Bembridge* went on to note at [72]:

> *"In the course of time, the description of the offence tended to focus on the nature of the misconduct charge, more particularly in those cases where the misconduct complained of was not a simple breach of a positive duty to which the officer was subject, but consisted of a failure to exercise, or amounted to a wrongful exercise of a discretion or power, as, for example when an officer exercised a discretion or power attaching to his office for personal gain or advantage. There were other cases where the officer acted outside the scope of the powers of his office.*
>
> *Most of the reported cases in the 18th and 19th Centuries involved dishonest, corrupt or partial conduct on the part of office holder, who, in performing their functions or exercising their powers, did so for personal gain or personal advantage. In describing the relevant conduct the courts referred to the defendant's motive as 'dishonest', 'corrupt' or 'partial' or used some other adjective to describe an improper motive. These descriptions appear to reflect a view that, in some cases at least, a motive so described must be established before the defendant could be convicted of misconduct in public office."*

(27) It is argued what Mason NPJ is seeking to make clear is where neglect (for example failure to disclose this situation or conflict of interest created by term of employment) is the basis for "misconduct", more is required to make it a criminal offence; namely that the conduct must also be injurious to the public interest and also of a sufficiently serious nature as to warrant a criminal conviction. My argument is a failure to declare a perceived conflict of interest thereby constituting a breach of an employment condition, and nothing more, cannot be said to be anything more than a private matter between employee and employer. There is no public injury or breach aroused.

(28) The charges before the Court of Final Appeal in Hong Kong, contained elements of nonfeasance and malfeasance. The nonfeasance was the wilful failure to declare a conflict of interest. In respect of this, that inadvertence was not enough standing on its own to warrant a criminal conviction. But there was more namely a "series" of others acts which were undertaken which constituted the malfeasance. It was not just the wilful refusal or failure to declare the conflict, but the conduct which arose exercising that conflict which made for the offence.

Appellate Courts define elements of Misconduct in Public Office – the Chameleon

(29) In the first of the Hong Kong cases Sir Anthony Mason settled upon only four elements:

(1) A public official;
(2) Who in the course or in relation to his public office;
(3) Wilfully and intentionally;
(4) *Culpably misconducts himself.*

as constituting the elements of the offence of Misconduct in Public Office.

(30) Between the two Hong Kong cases, in 2004 the Attorney-General of England sought clarification of the ingredients of the common law offence of Misconduct in Public Office. The Court of Appeal defined the elements of the offence as:

i) A public officer acting as such;
ii) Wilfully neglects to perform his duty and/or wilfully misconducts himself...
iii) To such a degree as to amount to an abuse of the public's trust in the office holder..
iv) *Without reasonable excuse of justification...*[19]

(31) In the second Hong Kong case, *Sin Kam Wah*[20] Sir Anthony Mason reformulated the elements he then regarded as amounting to misconduct in public office. In coming to this formulation his Honour was influenced by considerations which appeared in *Attorney General's Reference (No. 3 of 2003).* The five elements as they now were for Hong Kong are:

"*(1) a public official;*
(2) in the course of or in relation to his public office;
(3) wilfully misconducts himself by act or omission, for example, by wilfully neglecting or failing to perform his duties;
(4) without reasonable excuse or justification; and
(5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the office holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities."

(32) It is to be noted there are some differences between the elements as described in 2002 and the elements as described in 2005. In 2002 one element was described as "culpably misconducts himself." In 2005 that became "wilfully misconducts himself; by act or omission." In 2005 a new element "without reasonable excuse or justification" was inserted as the fourth element. His Honour noted at [46]:

> "*Wilful misconduct which is without reasonable excuse or justification is culpable.*"

Thus the notion of 'culpability was not lost' – it was simply more clearly formulated as 'without reasonable excuse or justification.'

(33) The other addition to the elements was the inclusion in 2005 of an element of seriousness to be gauged against the responsibilities of the office and the office holder, and the importance of public objects which they, that is the responsibilities of the office

[19] [2004] EWCA 868
[20] [2005] 2 HKLRD 375 at 45.

and office holder serve, and equally importantly the nature and extent of departure from those responsibilities. It is argued that the nature and extent of departure required to amount to criminal conduct must be a serious departure from the responsibilities of the office and the public objects being served.

(34) In respect of the s.122 Canadian Criminal Code offence of Breach of Trust by Public Official, the Canadian Supreme Court, after reviewing three of the four cases referred to above and others, returned to determining the elements of s.122 a Breach of Trust by Public Official offence. The Court settled upon the following factual requirements to constitute the elements of offence[21]:

> "*1. The accused is [a public] official;*
> *2. The accused was acting in connection with the duties of his or her office;*
> *3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;*
> *4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and*
> *5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.*"

(35) I have earlier expressed doubt as to whether any common law offence or statutory offence founded on s.8 (1)(c) exists. I am fortified in my doubt by the Commission's decision to link that offence as falling within the common law offence of Misconduct in Public Office. Accepting, as I do, that breach of public trust did fall within the ambit of matters covered by Misconduct in Public Office, then the elements of s.122 Canadian Criminal Code as defined by the Canadian Supreme Court – while not binding – are not without some relevance. I earlier argued the breach of public trust conduct which the Commission found Kelly had engaged in could not satisfy elements 4 and 5 of the Canadian set.

(36) The English Court of Appeal in the *Attorney-General's Reference No. 3* did include a breach of public trust concept as one of the essential elements of Misconduct in Public Office– however the relevant breach of public trust required was one targeted to "an abuse of the public's trust in the office holder". By contrast a s.8 (1)(c) ICAC Act breach of trust concept is one caused by the office holder's conduct, but as to the nature or aspect of the person or persons, or item, office or public authority in which the trust was originally invested, is not spelt out in the ICAC Act.

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[21] *R v Boulanger*, [2006] 2 SCR49; 2006 SCC 32 (CanLII).