COMMITTEE ON THE ICAC

COLLATION OF EVIDENCE OF THE COMMISSIONER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION, IAN TEMBY QC, ON GENERAL ASPECTS OF THE COMMISSIONS OPERATIONS

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OF THE
COMMITTEE
ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION
ON THE
COLLATION OF EVIDENCE OF THE COMMISSIONER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION, ON GENERAL ASPECTS OF OPERATIONS

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COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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FOREWORD

The Independent Commission Against Corruption Act 1988 provides for the establishment of a Parliamentary Joint Committee comprising six members of the Legislative Assembly and three members of the Legislative Council. The Committee's functions are set out in s 64 of the Act. They are:

1 (a) to monitor and to review the exercise by the Commission of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

(c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

2 Nothing in this Part authorises the Joint Committee -

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

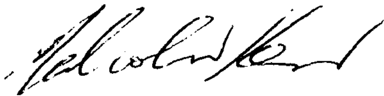
In carrying out these functions, the Committee proposes to hold regular public hearings in which the Commissioner of the ICAC will be questioned about various aspects of the Commission's operations. The first of these hearings was held on Friday 30 March 1990 with Commissioner Ian Temby QC. It was held at Parliament House in Sydney and followed on directly from a

hearing with Mr Temby concerning the Committee's televising inquiry into the proposal for the video-taping and televising of ICAC hearings.

The questions and answers from the hearing have been categorised under various topic headings for easy reference. It is the Committee's view that a number of significant issues were addressed during this hearing and it is the Committee's hope that these questions and answers, now on the public record, will inform debate on the Commission and its functions.

Reference was made during the hearing to a previous hearing at which Mr Temby appeared. This was a closed session, held on 17 October 1989, at which Mr Temby briefed the Committee on the ICAC's 1989 Annual Report and answered a number of questions. Where those questions and answers were still relevant, they were put again at this hearing so that they would be placed on the public record.

The Committee is still deliberating on its televising inquiry, referred to above. However, it has been decided that the transcript of evidence from the hearings on this matter should also be placed on the public record at this stage, in line with the open and frank manner in which the Committee is seeking to conduct its operations.



M Kerr MP
Chairman

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MEDIA REPORTING

CHAIRMAN:

Q: Have you any concerns about media reporting of closing submissions to public hearings, particular submissions from counsel assisting the Commission?

MR TEMBY:

A: Yes, I have some concerns.

Q: What is the nature of those concerns?

A: The investigation process falls into five phases. The first is field investigation, followed by the convening of a hearing and the opening address followed by taking of evidence, followed by closing submissions, followed by a report. The last four of those are public if the hearing is public. The phases which are of the greatest importance from our viewpoint are the opening, because generally we are soliciting information from the public and you cannot get information until people know what you are interested in, and the publicity about the opening address is important in that respect.

Always of prime importance are witnesses and the evidence they give. They are giving sworn evidence and one hopes that they are speaking the truth, although that hope is sometimes disappointed: but in any event they are giving sworn evidence.

As far as the closing submissions are concerned, they are views put by individuals or typically lawyers as to what approach the Commission should take, and in making the closing submissions they will be adopting a slant or a viewpoint depending on the interest they serve.

Finally there is the report. From our viewpoint that is also of the highest importance. So we would say that the evidence-taking and the report are what matter most. The opening statement is important, the closing submission are of lesser importance. That tends not to be reflected in the way the stories are written, and not infrequently the impression one could gather from a report of closing submissions would be that in some sense they represent findings. That is particularly the case with respect to closing submission made by counsel assisting.

An article of faith with the Commission is that the counsel assisting has the responsibility of what closing submissions to make. The presiding officer will preserve the right from time to time to give the investigation direction by suggesting what witnesses might be called and what witnesses might not be called, and may play a very active role in the hearing. The closing submission is up to counsel assisting, because if we told them what to tell us no assistance would be obtained in writing the report which is supposed to record the truth of the matter.

There is a strong tendency to assume that the submissions of counsel assisting, which are only submissions on the evidence, in some way

represent the provisional views of the Commission, and they do nothing of the sort. That is my major concern. Also submissions are not in any sense sworn evidence. It is just assistance to the Commission in writing its report. The fear I have is that it will finish up the wrong way, the submissions getting the greater coverage and the report the lesser. The report is the definitive document, which ought to be looked at more closely.

.... The Committee members might be interested to know what we have done about that. The most significant thing was that a meeting of newspaper editors and other high level editorial staff was convened at the Commission premises on 23rd February. This was a closed meeting and I am glad to say that that was respected, the idea being to try to ensure that matters were proceeding satisfactorily from the viewpoints both of the Commission and of the media collectively.

One of the matters raised and emphasised on that occasion by myself was that to which you have adverted. Finally there is the question whether there should be some change in procedure. So far as that is concerned, we have thought about it. It would be possible to hear closing submissions in private, but there are a couple of difficulties. One is that people must want that to happen, and frequently people will want their closing submissions to be heard in public, and if they want that you could hardly stand in their way. If that is going to happen, then closing submissions by counsel assisting have to be the same.

You can make, as we do, suppression orders. Just occasionally, to protect a witness from threats to life or limb, we have gone into private session. By and large the thing is done privately or publicly. That is one difficulty that is real. The other difficulty is that under the Act the general rule is that hearings have to be in public, and the Act does not distinguish between the evidence-gathering and the submission processes. It might be a small improvement for the Act to say not that hearings will be in public, but rather that the taking of evidence will be heard in public. That would give us slightly greater freedom of movement in deciding that the closing submission phase would proceed in private: but whether that would be useful in practice I am not sure, because as I have said if people wanted to be heard in public you could hardly stand in their way.

Finally, with a view to trying to see that our reports are given proper coverage and people do not just go for some well-known names in the index and see what is said about them in the report, we have written to the presiding officers of Parliament to whom we provide our reports with the suggestion that, so far as long and important reports are concerned, arrangements might be made for a media lock-up so that media representatives get the report on an embargoed basis in advance of its becoming available to the general public, so that they can write reasonably thoughtful and thorough pieces instead of picking out something that might titillate the interests of readers.

Q: Thank you. We appreciate the danger of evidence having, in the public perception, not the same standing as opinions expressed in the final

submissions.

When an ICAC report is made public, are those persons substantially and directly interested in the subject matter of the report informed of the contents of the report in terms of statements under section 74(6) or provided with a copy of the report when it is made public?

A: We send copies of the report to the persons affected by it as soon as it is tabled. We cannot properly do it earlier than that. It is done by courier, and nearly always we get it out to them before they start reading about it or hearing about it. I have to say "nearly always". Any human system can operate imperfectly, and sometimes it is hard to get to people, but we do what we can to get reports into the hands of people as soon as the report is tabled, within hours after it is tabled, and before the publicity begins to be generated.

Q: I take it from what you say that you certainly do not wish them to read or hear of it from the media before they see it, and that you take every step to ensure that that does not happen?

A: We do our best and a great deal of effort is put into it.

Q: You mentioned a lock-up in relation to substantial reports before they are tabled in Parliament. The people who are directly interested cannot get a copy of that report until it is tabled?

A: Yes.

Q: Some of the findings may be in the nature of a case which may lead to criminal proceedings?

A: And court accusations. The report will on occasions contain what is effectively a recommendation that consideration be given by the proper authorities to commencement of criminal proceedings for such and such an offence.

Q: Your Commission would find somebody has probably committed an offence?

A: I would not put it that high. I think typically there would be a bit of restraint in how boldly one would so assert. As far as the rest of it is concerned, yes, that will be done, because the statute mandates it and we have no choice. The argument is the so-called Hinze argument. The former Minister for Main Roads and other things in Queensland said before Mr Fitzgerald QC "Can I have a guarantee that at the end my good name will be cleared?" As we know what was produced was a report which did not make findings that were detrimental or favourable to any individual. This Parliament has said that is not the way to go.

Q: My concern is that once it is displayed, the media would seek out a person who has had a finding made against him, and they would go armed with understanding and a knowledge of what has been said, and that person may have very short notice of the report. Is that possibly a problem that might be looked at?

A: Yes and no. I cannot say that a solution springs to mind or is likely

to. The sensible response of such a person, if this is his desire, is to say "My conscience is clear; I have not yet had a change to study the report and I do not desire to make any comment." It is not too hard to handle. People get themselves in strife because they choose to say a lot more. That is their problem and it leads to consequences. Often you do not think rationally when you are confronted with a situation.

MR TURNER:

Q: In your annual report to Parliament to 30th June 1989 at pages 36 and 37 you said:

> Yet in the conduct of public hearings, there is tremendous scope for media coverage and comment. In that and other ways the media can inform the public as to what the Commission is doing and thus help make the Commission properly accountable to the public.

Do you believe that the desired effect of making the Commission properly accountably to the public has been achieved by media coverage to date, bearing in mind that you have now qualified certain matters in regard to final addresses? Did that meeting include country newspaper proprietors?

A: No. It did not. The representation was widespread and it certainly included AAP who are major contributors to country newspapers and do a fine job of that, but they do not write the headlines. I think that overall media coverage has helped in achieving that which is adverted to in that part of the annual report that you have mentioned. It is by no means the only way in which the public are informed, and it is by no means the only way in which the Commission is made accountable. There are other accountability mechanisms which are far more thorough. Yes, I think it has been a contradiction: there are occasions when stories have been written in a way that I do not favour; but we cannot write stories for the press, and I do not think we should try to do so.

Q: The question was accountability?

A: I think it is of some use, not so much the stories, but the presence of the press and public in the hearing room. There are other accountability mechanisms and we are aware of them and they are dealt with in the annual report, and it is important that the Commission be seen as an accountable body. The stories do not help much. The presence of the press and the public means that if we turned into bullies it would be disclosed.

Q: Perhaps you could tell me and the rest of my colleagues about the media committee which is referred to in your annual report at page 53. Is it answerable to ICAC for the reporting of journalists on ICAC proceedings? Do you believe that it has ensured that fairness to individuals is maintained in media reporting of ICAC hearings?

A: The media committee was set up originally on a somewhat ad hoc basis, to try to ensure that the needs of the media were reasonably met in

the design and construction of our building. That was the primary function, and I have heard those facilities are well spoken of. On other occasions there was some liaison. The members of the group included Roberta Baker, who is our media officer, Jacky Baumer from ABC Radio, Mark Coultan from the Sydney Morning Herald and Paul White from Channel Nine. Baumer and Coultan have since gone to postings elsewhere, and the committee does not exist at this moment.

What we were doing with that committee was not of the same sort of significance as this meeting that took place in February which I have mentioned. I do not know that one could accurately say at this moment that there is a media committee, although if the necessity arose to put some sort of group together to try to work out problems after discussion we would certainly do that. It was mostly setting up and sorting out little problems, particularly in the early stages. There might not be a need now, but if there is we can put something together. It was of some use.

MR DYER:

Q: Does the Commission have any concerns regarding the extensive publicity generated by some inquiries and the possibility that such publicity will tend to prejudice future trials where charges are laid?

A: Earlier discussion today has touched upon some of the issues involved. The concerns would certainly be more present were it not for the regrettably long lead times in the court justice system at present.

PUBLIC VS PRIVATE HEARINGS

MR GAY:

Q: As you are aware, our legislation and the whole idea of our Commission are based to a great extent on the HongKong model. In fact a lot of our people visited HongKong, and the legislation was based on that. There is a major difference between the HongKong model and the New South Wales model, and that is in fact that the whole of the operation of the HongKong model is done in camera. It has been suggested that the original thought was for that to come through, and it may have got changed in the drafting. Given the fact of witnesses' rights and something of what you have already pointed to, and what I guess many people have noticed, there has been irresponsible reporting in some cases of hearsay evidence and closing submissions. Can you see us perhaps going to a situation or do you feel we should go to a situation like the HongKong model? When you are conducting hearings quite often you tend to run them in camera yourself?

A: Can I first say that the number of hearings I have run in private might not be much different from the number of hearings I have presided over which have been public, but in terms of sitting days the enormous preponderance have been public. Second, I am a more enthusiastic proponent of public hearings than I was 12 or 18 months ago. I have to say that, for two principal reasons, the first being that if we conducted our hearings in private, the inevitable cry would be "Star Chamber".

You cannot expect the public to have confidence in an institution that functions behind closed doors. They do not know what is doing, and they cannot be secure in the knowledge that they are not applying thumb-screws or using other illicit methods. You understand what I am saying. I wish the National Crim Authority no ill, and they are doing useful work, but they are caught by their legislation. My judgment is that there is more public confidence in the ICAC than in the NCA. I think that is the main distinguishing factor.

The second reason is that, without resiling from what I said in a question from Ms Nori earlier, which is that most of our investigations have stemmed from reports from public officials, most of them could not have been taken as far as they have been were it not for the fact that people know what we are investigating and thus come forward with further information. I do not think this is an appropriate occasion to give examples, because some of them have not yet been reported upon, but a couple of matters that have turned out to be major investigations would have been minor, and relative failures, had it not been for the information that came to us as a result of public knowledge that we were interested in the particular field.

MR DYER:

Q: What criteria are applied by the Commission to determine whether a hearing should be held in public or in private?

A: I think it is best if the Commission allows its reports to speak for themselves. I refer to what was said in the Park Plaza report at pages 15 and 16, which putting it shortly were the general arguments in favour of the cost of public hearings, and the Hakim report had schedule 1 which is a set of reasons for deciding that that matter should proceed in public, and finally Park Plaza report and the reasons therein contained for proceeding in private in the particular case.

It has to be said that the question whether to proceed in public or in private will quite often be a difficult one, in some cases getting quite close to the line.

Private hearings could be convened to safeguard witnesses or to safeguard operations or to safeguard coming to a criminal trial. We have done each of those things in particular cases. Could I say also that the Commission does not in any sort of reflex manner proceed with a public hearings just because the Act says that is the general rule, nor does it automatically proceed with private hearings in any given circumstances. I will find some figures as an update of what I said to the Committee six months ago.

I mentioned that there have been 19 investigations approved to date. Although one has been disposed of without a hearings of any sort, 12 have been supported by hearings. Some of those investigations are over and some are not. In 5 of those 12 there have been hearings exclusively in public. There have been hearings exclusively in private in 5 of them, and mostly they are shorter hearings. One of them will certainly go public: the others probably will not. I know in two cases there have been both public and private hearings. The hearings are very predominantly public hearings, with the private hearings being for reasons of concern to which I adverted a moment ago. That is a summary of the present position.

CONDUCT OF HEARINGS

MR GAY:

Q: Do you envisage any changes that could be brought into the legislation in the operation of the Commission, to attract people from the daily reporting and sometimes irresponsible reporting of hearsay evidence that is later found to be incorrect?

A: It would not make much difference to our deliberations if we could not receive hearsay evidence, because we receive very little of it, and for my part I would wish to challenge the assertion that hearsay evidence is reported daily.

Q: On daily reporting I mean that it is reported on the day it happens, and it may be challenged three weeks later and found to be incorrect?

A: There is truth in that. I understand now what you say. There is little hearsay evidence received by the Commission. There is a certain amount of hearsay evidence received by the courts, and any impression to the contrary is incorrect, and there is not a lot to choose between us and the courts. It is important to stress that there is not much to choose between us.

In some respects we are a mile in front of the courts. Anyone who is the subject of damaging evidence before ICAC here is given the right to come along and deny it, and people do not have that right before the courts. If you draw up a sort of balance sheet I do not think we would finish up behind.

MR MUTCH:

Q: When Committee members recently visited a Commission hearing it was noted that witnesses were sitting in on the hearings before giving evidence. At one stage two witnesses were seen to be chatting together about the case. Would that have been a normal occurrence, and would you have any observations about this occurring?

A: I am concerned if people are chatting in the hearing room if it has a disrupting effect. If I had noticed it I would do something about it. Second, the courts quite often on request make orders that witnesses be out of the court. We have not done so. I would not be disinclined to do so if application was made. If somebody said, "This witness must give evidence without that witness being present", I would make an order excluding the latter from the hearing room. We have not done that, but I can see situations in which it could happen. You are always striking a balance. One of the things we try to do is to let people hear what is said about them, so that they can say something in reply. We are trying to deal with all of them, rather than do justice between adversaries. There is not quite a parallel but we can make an exclusionary order if we want to.

Q: In relation to investigations which lead to hearings, do you have any modus operandi in relation to the role you play in gathering evidence, and as to the supervisory role you may have on the officers who are

assigned to those particular matters?

A: I have or assume a general supervisory responsibility with respect to strategy. I approve the investigation, I set its scope and purpose, and amend the scope and purpose if necessary, so that in the level of strategy and direction the responsibility is mine. I do not attend team meetings. I generally do not see witnesses' statements in advance, although there might be some special reason why I should see a witness's statement to decide whether we should go to extreme lengths to get the person to come along, or something of that sort. I see some key documents in advance, but not the majority of them.

It is to be remembered that we are conducting an investigation and in the end I am the investigator, although there are others who do the work. In the end I have to reach a conclusion and write a report. I would describe my role as being that of strategic direction, and the operations are left to others.

Yesterday somebody came to me and said "We have to get information: should we do this by way of search warrant or section 22 notice?" They wanted to go to an accountant's office. It is a pending matter. I said, after some discussion, I was not prepared to sanction a search warrant being issued and we should use a section 22 notice though it might be less efficacious. I do not have time to go into levels lower than that. I ought to remain a bit distant because in the end I have to hear the witness and try to make a judgment about the matter.

Q: And in relation to other Commissioners who might be presiding, you try to retain that distance?

A: Practices vary somewhat because it is a judgement that pretty well has to be made by the individual concerned. None of us has an inclination to go out and knock on doors and interview witnesses. We are a long way from that. As I have said, when it comes to the hearing I have talks to counsel, less often than daily on average, generally brief but sometimes if necessary extended and intense. The responsibility for the direction of the hearing is that of the presiding officer. We are the investigators, but counsel assisting have as a matter of professional judgement a say in what they put in the closing address. That has a distancing factor also.

MR DYER:

Q: I submitted six questions to you. I do not think there is any need for me to put the last one orally dealing with counsel's fees, as it has been included in the document that is publicly available. Is it proposed when examining matters where criticisms rather than adverse findings are made, to give the person criticised an opportunity to respond to a matter alleged against them before such criticisms are made?

A: Yes. This question was put on notice and also has been put and answered previously, as we know.

Q: The response publicly was not publicly given?

A: I think it is best if I give the same response as previously. It will involve reading and it might sound dull.

> "There is a continuum between incidental critical comment and the statement of findings required in some circumstances pursuant to section 74 of the Act. The requirements of natural justice as recognised by the Courts certainly dictate that a finding which could affect rights must be preceded by a opportunity to respond. The Commission goes further, and seeks to give witnesses who are attacked some right of response. The Commission also seeks to give to a person who faces criticism such an opportunity. That may be done by putting propositions in the course of their evidence, or by giving notice of possible conclusions. The latter will always be required in the case of persons substantially and directly interested in the subject matter of a hearing.
>
> The steps outlined will not satisfy everybody. To say that the evidence of witness A is preferred to that of witness B might not be appreciated by the latter, but it is done by the Courts everyday, without giving witnesses rights of representation and formal notice that such a course might be followed. In generally similar manner, if in an Annual Report the conduct of a public authority or a public official is said to be disappointing that might be seen by some as criticism, but it will hardly be practicable to give them an opportunity to respond in advance. It must be remembered that while the work done by the Commission is weighty, it does not claim to be immune from criticism if any view it expresses is reckoned to be unjustifiable."

Q: Finally, could I put a question to you with which you probably will not find yourself in agreement. If the ICAC is intended to operate in a non-adversarial manner, why are many witnesses at public hearings being treated in an adversarial way by counsel assisting the Commission?

A: I do not think that they are so treated. In fairness to counsel assisting, if they are, then presiding officers must take a fair share of the blame for that, so I would not want anyone to think that I am shaking my head and saying you cannot control them.

By and large, counsel assisting are doing the job we want them to do. They might sometimes go a bit far, but by and large they are doing the job we want in carrying out a satisfactory investigation where the facts are not known and in the nature of things are likely to be hidden, with a strong desire for them to remain hidden. It is necessary to have special powers and it is necessary to ask probing questions and it is necessary to give people the opportunity to reply, which means that allegations have to be put to them, because if we did not put allegations they would say "We had no chance to reply; this is outrageous".

I really do think that a proper understanding of the necessity to give justice to individuals and to witnesses would go far to persuading people that we are not being adversarial in nature and we are not being nasty for the sake of it. This is about how the job has to be done. If you ask me whether I would rather appear in the witness box before the ICAC or go to the police station to be questioned about a matter of real significance in a court context, I think I would opt for us. We are investigators: they are investigators. I think I would rater be in our hands than police hands when police are conducting a major criminal investigation. They push pretty hard. We do it at least under scrutiny: the police could not. At least people come along and watch, and if we turned into bullies we would be exposed as such.

MR TINK:

Q: Mr Roden has said that there is much to be said for calling upon a person under investigation to say where he or she stands very early in the piece. He described that as a form of oral pleading. That appears to cut right across a natural justice concept, namely that people ought to have a right to know of things that are alleged against them. While I appreciate the investigative function of the Commission, it seems to me to be a practice that carries a lot of dangers. What is your view on that?

A: First, it is by no means done invariably, and in the Sutherland licensing police matter we have decided the appropriate course to follow is at least to call the lay witnesses first and call the police last. We do not do it invariably. The sort of practice we adopted in the Waverly matter involved calling those who were the subject of serious allegations at the end. Secondly, the natural justice principles do not on any view of them dictate that there must be knowledge at the beginning of an investigation as to just what might be said against a person at the end of the investigation. All that is necessary is that the person have a full chance to answer in the end. In that sense one has to trace the contrast between the investigative function and the trial function. In a trial somebody is presenting a case because they reckon they know the answer. In most investigations you are trying to find the answer and you do not know, so you cannot put a case to someone when there is not a case. In something that looks like a case we have shown a tendency to call the individuals last, not first. Apart from that one is driven to comments like "Circumstances alter cases".

MR GAY:

Q: The last time we met I voiced my concern that there was not a room for visiting counsel to meet with their clients. Has that been rectified?

A: Yes, there are two or three rooms for use by counsel other than counsel assisting, and a room for use by counsel assisting. If we get into a matter which involves extraordinary demands upon counsel other than counsel assisting, we would provide them with space for a compactus. We will help them. At the moment there are a couple of rooms which are used. I can only say that they do not ask for more. If they need more and are too timid to ask you cannot help them much.

Q: You approve of costs for legal representation for witnesses, and of course it comes into the whole area of witnessess' rights. As the law is becoming more complex in regard to people's reputations, and a lot more witnesses before the ICAC are seeing the need and probably it is essential for them to have legal counsel, have you addressed the burden that this is placing on witnesses before the ICAC?

A: No. We have not conducted any sort of a survey. There are statutory provisions that make this question one for the Attorney General, and I have from time to time mentioned that as a possible avenue, but I am sorry, I do not know how it is working.

Q: So you feel there is a burden on witnesses, and it is an area that should be addressed?

A: There is an area there which could amount to a difficulty, but I have not addressed it. We have not surveyed it. The statute provides its own answer, which is that people can apply to the Attorney General. I do not know how well it is working.

CORRUPTION PREVENTION AND EDUCATION

CHAIRMAN:

Q: Dealing with a different topic, what strategies has the Commission developed in relation to its corruption prevention functions under section 13 (d) - (g) of the ICAC Act?

A: Could I make available to the Committee our corruption prevention strategy, which has been finalised within the past few weeks? A Director of Corruption Prevention has been appointed and takes up duties on Monday. We are in the course of making job offers to several people who will be called Corruption Prevention Officers, and they look to be people of distinctly high quality, although I have not seen any of them in the flesh yet. I am going to do that starting this afternoon.

There has been extensive liaison with the Office of Public Management and numbers of other bodies. We wrote letters to all the Ministers seeking advice as to what they have done in their respective portfolios. We wrote to a considerable number of ambassadors seeking advice in their countries. A couple of our reports have contained broad corruption prevention recommendations, particularly that concerning the Silverwater operation, and we were equally concerned in the local government code of conduct which went out in late January.

Q: This may be an overlapping question. What strategies has the Commission developed in relation to its educative functions?

A: We have not made much progress in that area, but that is not to say that public education has been ignored. As Committee members would know, members of senior management have spoken on a fair number of occasions, and we try to pick the occasions carefully. We disseminate our investigation reports very widely. We have a general approach of openness so far as the Commission and the way it works are concerned, so I would urge that we are active in the public education field. We do not have any specialist staff in that area yet, and we do not have a fully formulated strategy in that area.

Q: You prepared a document on the Corruption Prevention Strategy. Do you wish that document to be included as part of your sworn evidence?

A: Yes. It is as follows.

CORRUPTION PREVENTION STRATEGY

THE LEGAL CONTEXT

The principal functions of the New South Wales Independent Commission Against Corruption in relation to corruption prevention are contained in Sections 13(d), (e), (f) and (g) of the ICAC Act 1988. They are as follows:

- "13(d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct;

- 13(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated;

- 13(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct;

- 13(g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct."

THE PRINCIPLES

The concept of "corruption prevention" is based on the following principles:

- **Prevention is Better than Cure**

  Corruption, in whatever form it takes, is invariably described as a disease or sickness in society. As with many diseases, it may be possible to cure after it has been identified, but with no certainty either that the cure is complete or that the disease has not done irreparable damage. Most people would agree that it is better to prevent than to cure.

- **Corruption Prevention is a Managerial Function**

  Administrative and managerial failures in an organisation may give rise to loopholes that could be exploited by employees or others with a corrupt intent. There are certain common features of managerial weaknesses that are conducive to corruption: outdated policy, unenforceable legislation, inadequate instructions, excessive discretion, unnecessary procedures leading to delays, and lack of effective supervision. Corruption prevention aims to plug these loopholes by introducing administrative and managerial improvements to the system. If corrupt practices exist within an organisation, its normal operations will undoubtedly be jeopardised. It is therefore essential that managers at all levels, when carrying out managerial functions, watch out for possible corruption opportunities and introduce preventative measures where appropriate. Corruption prevention is, therefore, an integral part of good management.

- **Accountability makes for Committed Management**

  A system of accountability, under which people are responsible for the acts or omissions of themselves and those they supervise, is a valuable tool in the attempt to eliminate opportunities for corruption. Senior officers should be obliged to account for their own conduct and for the conduct of those acting under their control. A management system which demands accountability should result in the pinpointing of problems before they become serious, and allow potential loopholes to be closed.

THE WORK

There will be several means by which potential areas for corruption prevention activity will be identified. It is anticipated that the chief among these will be:

- as a result of investigations by the Commission, when the focus will pass from particular individuals to the institutional conditions which made corruption possible;

- complaints from members of the public and reports from principal officers of public authorities, when a decision has been taken that there is insufficient information or evidence of corrupt conduct to warrant formal investigation;

- information provided to the Commission which, while not constituting a complaint or report of corrupt conduct, may highlight some particular deficiency in policies or procedures, thus giving rise to concern that they could be exploited for a corrupt motive;

- requests from organisations to examine aspects of their operation which they have identified as existing or potential problem areas;

- the identification of expected change, for example in policies and legislation, the enforcement of which may have the potential for corruption;

- regular liaison with appropriate bodies such as the Auditor-General, the Ombudsman, the Office of Public Management and the Department of Local Government;

- feedback from public education programmes.

From time to time the Commission will also target for examination such specific areas as it sees to be appropriate.

THE PROCESS

Corruption prevention work will take a number of forms:

- Formal Studies

  Formal studies will involve the critical examination of the existing system and procedures involved in a defined area of activities within an organisation to identify weaknesses and to recommend methods of improvement.

  This is likely to be the most appropriate approach to matters arising out of an investigation or complaint or report to the Commission.

- Monitoring

  Having made recommendations, it will be necessary to stay in touch with the client's progress in implementing them, and provide support where necessary. After the changes have been effected Commission officers will go back, if necessary, to observe whether or not they work as intended or whether they themselves have given rise to new opportunities for corruption.

- Working Groups

  Corruption prevention involvement in the process of change, including the examination of draft legislation, advice on new procedures, systems or procedural manuals, will take place usually in the context of a working group's deliberations. Involvement in such groups will also be an opportunity to educate officials and authorities on

corruption prevention issues. This method of involvement is an effective and efficient use of the limited resources available to the Commission for corruption prevention work, as are the conduct of seminars and participation in the development of codes of conduct.

- **Seminars**

  Corruption prevention is essentially a managerial function. In order to assist managers in their execution of this function, seminars will be held for those in managerial and supervisory positions. Through analysis and discussion of typical managerial weaknesses identified as conducive to corruption and the identification by participants of potential problem areas in their own organisations and possible solutions, participants will acquire a basic knowledge of corruption prevention techniques which can then form an integral part of their managerial skills.

- **Codes of Conduct/Practice Rules**

  Assistance will be given in drafting codes of practice, practice rules and other guidelines so that staff of client organisations are clear on the ethical standards required of them.

CONCLUSION

Successful corruption prevention work will depend much on the co-operation and wholehearted involvement of the client organisation's management and staff. This is something which will require nurturing, principally by a demonstration of the contribution the Commission can make by way of its corruption prevention work to good management.

MR HATTON:

Q: Over many years of my looking at corruption I have come down to an equation which says: Opportunity and/or extent of corruption equals power/position plus secrecy minus public accountability. In this corruption prevention strategy paper you mention mechanisms of accountability and systems which obviously are at the heart of prevention. However, in my view public expenditure should equal public knowledge, and I would have liked to see that aspect emphasised - that is the public nature of it and freedom of information. In other words, let the light in, and therefore you have fewer dark corners. Where does that fit into your philosophy?

A: You and others said it before I did. I said at an early stage in an address I gave at Newcastle, something to the effect that corrupt practices thrive in dark corners; letting the light in has a withering effect. That was said to a local government audience, urging the general principle of openness or increased openness in that sector. I do not quarrel so far as your conclusion is concerned; I would love to see it, but I would not like to comment on its mathematical or other accuracy. But I would think about it.

The Corruption Prevention Strategy is a new document. I do not doubt that it will change, and that at times in the future we will be making comments about the notion of openness. We have to be careful to make those in a manner which is accompanied by a degree of restraint, remembering that while our role is important it is also a limited one. It is a pretty general question and I know it is a pretty general answer.

MR DYER:

Q: Does the Commission see its primary role as being the exposing of corrupt conduct, and the securing of criminal convictions as being subsidiary or incidental to that primary aim?

A: I see the primary role as being to minimise corruption by investigation and hearing, by corruption prevention, and by public eduction. All three of them are important in terms of the statute and in terms of our strategy. I see the securing of criminal convictions as being subsidiary and incidental to those primary aims and methods. That is my answer.

SILVERWATER REPORT

MR GAY:

Q: May I move to an entirely different area, and I apologise if my question may be longer than your answer. I preface it by saying I am not a lawyer, which will make it even more astounding. I am quoting from the galley proof of Hansard, the Address-in-Reply speech made by the Hon Michael Egan on 27th March 1990. You are probably aware of it.

A: This is entirely fresh to me. I have never heard of it before.

Q: Give me two or three minutes to read it. He is quoting from the report on the Silverwater filling operation.

> "One page 15 Commissioner Temby said 'However, Ministers cannot and should not seek to do everything themselves. Their proper role has to do with policy, strategy, resource allocation, and the sorting out of major problems. They should leave management of departments and agencies within their portfolios to the properly appointed senior executives and all matters of administration to appropriate functionaries. They should not involve themselves in matters of small moment...and must not act as whimsical directors'."

Mr Egan says:

> "My view is that Mr Temby simply has it wrong. It seems to me he is taking a very anti-democratic and elitist view of the proper role of a cabinet Minister. After reading his comments I took it on myself to write a letter in which I stated , 'I believe that ideally everything should be a matter for the Minister. In practice of course that is impossible, and Ministers must usually devote most of their time to major matters. I have had many years of experience with the public service Ministerial staff and as a member of Parliament, and I believe it is one of the great strengths of our system of government that most Ministers will, as far as time allows, direct their attention to minor matters that are brought to their notice by representations from MPs or individuals or organisations or firms that come to their notice in some way'."

He goes on to say:

> "That does not accord with the conventional theory under the Westminster system that the business of government is for the elected Minister and not for some functionary. It has simply come about because of the vast volume of work that governments have to deal with in our society.
>
> The next comment, which I very strongly disagree with, is the Commissioner's statement from the report:
>
> The public service are there to serve the public, not to please their Ministers. Accordingly they must be prepared to press their views if the public's interest as they perceive it so requires."

There is one last paragraph. Mr Egan says also:

> "Let me remind Mr Temby that public servants are not elected, they are not responsible to the electorate. Ministers are elected and are responsible to the Parliament and the Parliament is responsible to the people. It is the role of the public service to serve the public, but only by serving the Ministers, and if any servant believes that he or she has some independent loyalty or independent channel of responsibility to the public, he or she is sadly mistaken."

I ask for your comments on that?

A: I had not known that had been raised in the Parliament. Unfortunately the provision of Hansard to us lags behind. I had not been aware of that. I was aware of the topic because the honourable member wrote to me. I do not have a copy of my reply here, and I take it he has not tabled it. What we said in effect was that we would wish that our reports speak for themselves, and do not wish to revise it in view of the comments made. It is of course recognised that Ministers also have constituents, and that Ministers should properly make representations, including representations in matters of small moment. Otherwise I must say that I have the misfortune to disagree with the honourable member.

Q: By agreeing with that it changes the whole premises?

A: By agreeing that they have constituents - I would have thought it was clear enough. The report was speaking of Ministers qua Ministers. The same individuals are members of Parliament. I do not doubt that for a moment. If you want to contemplate some sort of ideal society in which you do not have to do work through functionaries and you have a group of Ministers who run the State and personally build

the roads and the prisons, I do not quarrel with that. The fact is that typical Ministers preside over organisations consisting of hundreds if not thousands of individuals, and I think there is a lot to be said in those circumstances, the real circumstances, for the approach that is outlined in the report. But in the end our reports have to speak for themselves. If people are not persuaded by them, then the report is not successful.

MR TINK:

Q: I would like to take up where the Hon Duncan Gay left off earlier, and refer in particular to a comment you made in the Silverwater report, It reads this way:

> They should not involve themselves in matters of small moment or do favours.

I do not quibble about favours, but "in matters of small moment". Perhaps I should put two things to you in connection with that. First, as I understand the Act and as I understand your comments, the parameters for the ICAC are, as far as Ministers may go, management practices which may be corrupt or give rise to corrupt practices. I have some difficulty with the concept of Minister's being involved in apparently small matters necessarily giving rise to corrupt opportunities?

A: Can I make a comment on that, if you do not mind my taking it up?

Q: Sure?

A: We all know the definition of corrupt practices is wide. Parliament drew it wide for fairly obvious reasons. One aspect of the definition is the notion of partiality. It was the notion of partiality which was essential to the Silverwater report. The argument was that the Minister involved himself in something which he himself said was unimportant and he effectively said was unworthy of his involvement, and I concluded that he was in there doing a favour for a friend. His involvement had a blighting effect on the way in which public servants performed their duties because they saw this as something which the Minister wanted done. That is the way in which management practices so far as Ministerial conduct is concerned could be seen to come within our grasp. I tried to say a moment ago that we have to have a proper humility as to how far our responsibilities go, and I think if we do not we will have to be told so. But I saw the justification as being sufficient along that line.

Q: I have no quibble with any of that, and I can see the force of your point about a Minister being involved in a small matter which could have led him into a difficult situation. It may be I am reading your report or comment wrongly or

out of context. My difficulty is that it seems to be a comment of potentially much more general application, and therefore having such potential to be misunderstood, and it may be I am doing that now. I will give you an illustration along these lines.

With reference to the question of driving examiners, we saw some footage of an examiner answering questions. Suppose a back-bench member of Parliament has a situation where a student says "Look, I have had a learner's permit for six months and I consider I am a reasonably good driver, and all other things being equal I ought to be able to get a driver's licence. I have been to the registry down the road and I have been tested, and I felt I should have passed. Next door is a fellow who is absolutely hopeless. I have seen him drive into the garbage bin and all that sort of thing. He went to the same registry and on the same day got a licence.

For a Minister for Transport having that matter raised by a back-bench member of Parliament, on the fact of it the matter would seem to be of incredibly small moment for a Minister to be involved in. In some senses it is silly, but on the other hand, notwithstanding that on the face of it that is a small matter, it may well have given rise to something which is of fundamental importance to the whole department.

Just as Ministers may fall into error, so may whole rafts of people in the public service, which is what can be found in a number of these inquiries. Not only are the Ministers a source of trouble, but also they might shed light on areas of practice, so a small thing may grow?

A: It may be that the Silverwater report did not sufficiently emphasise what I conceded earlier, that Ministers are also members with constituents. I would have thought it was clear enough in the context of the report, but if there is any doubt that is readily conceded. I have a great respect for the institution of Parliament, and I hope the Commission will never become presumptuous with respect to the way Parliament or members of the Parliament do their jobs. Of course, in those circumstances the member will and should pass the matter on to the Minister, and the Minister will of course pass it down with a direction that it be looked at, and he might well say "Keep me posted". None of that is criticised.

I do not categorise that as a Minster becoming involved in matters of small moment. Again you come back to the particular case. The Minister took over this thing which from his viewpoint, he said so himself, did not amount to a row of beans, and he effectively became a negotiating party and stepped past the experts. That is nonsense. I say nothing about the way Parliamentarians do and ought to perform their tasks, and nothing I say is to be taken as in

any sense critical of that.

If that is anything like accurate, as I have tried to recount it, that sort of thing should happen. There is no reason why a Minister should not get a report back, but there is no reason he should go out knocking on doors. He has to work through functionaries. He should not be saying "Give me a report, but I want a negative report". You can go into many matters of Ministerial import which could be improper.

Q: That to me has been a useful comment.

RESOURCES

MR HATTON:

Q: The last question I have is probably one we will need to deal with again. We are continuing to deal with it. I should have given you notice and I apologise. Are there any immediate ways in which this Committee could assist you to make your work more effective in terms of resources or changes of legislation? Both of those are long-term on-going questions, and consequently you may not wish to comment on them to any extent.

CHAIRMAN:

Q: You might want to take that question on notice?

A: Substantially I would want to. We have no complaints as far as resources are concerned. In a general sense we have no perceived need for extended powers. There are some small statutory amendments called for concerning which we are in dialogue with the government, and I think they have to be brought forward at an early time.

I make available to the Committee, and this could be a public document, three pages. They comprise a staffing summary as at the end of last month, which gives staff numbers by category. The position as to staff is that it has been agreed that our staff could be 120 at the end of the current financial year, and we now stand at 96 because the security service is provided on a contract basis. It has been agreed that we can go up to 140 by the end of the following year, and government expectation is that we will stop there. I think that is big enough. I think that a bigger organisation would be difficult to manage.

The second page is a one-page summary of budgetary matters. The figure of $4.7 million which is the penultimate figure of the fist column is one-off. The rest is recurrent expenditure. The recurrent expenditure in the current year is a little under $10 million, and the right-hand bottom figure is how close to budget we reckon we will get and a quarter of a million out of $10 million in our first year of operation is, I think, a good result. I hope the figure is accurate: we will know on 30th June.

The third page shows the total amounts paid to counsel, broken up by investigation, which is information the Committee sought the last time I appeared before you six months ago. I thought I might provide an update, and it will be provided in each annual report also. I submit the three pages to which I have referred.

INDEPENDENT COMMISSION AGAINST CORRUPTION

Staffing Summary @ 31 MARCH 1990

UNITS	
Executive	6
General Counsel	3
Secretary to the Commission	16
Operations	30
Administration	41
TOTAL	96

SECURITY	
Security Officers	13

EMPLOYEE STATUS	
Employees	72
Seconded Police Officers	12
Temporaries	0
Agency staff	6
Temp Part Time	2
TOTAL	92
Constutants	4
GRAND TOTAL	96

EMPLOYMENT CATEGORIES	
Executive	7
Administrative	16
ADP	1
Secretarial	6
Lawyers	10
Investigators	20
Analysts	5
Technical Staff	2
Support Staff	13
Assessment Officers	3
Word Processor Operators	6
Receptionist	1
Drivers	2
TOTAL	92

INDEPENDENT COMMISSION AGAINST CORRUPTION

REVIEW AS AT 28 FEBRUARY 1990

Expenditure Category/ Line Item	Budget	Actual Expenditure year to date	Forecast Expenditure to 30 June 90	Variation On Budget + OR -
	$OOO	$OOO	$OOO	$OOO
Employee Related Payments	5,402	2,145	4,302	(1,100)
Maintenance and working Expenses	3,368	2,132	3,925	557
Other Services				
-Legal and other costs	1,000	754	1,300	300
-Accommodation fit-out	4,700	3,535	4,700	0
Total , Consolidated Fund	14,470	8,566	14,227	(243)

FEES PAID TO COUNSEL

TOTAL EXPENDITURE TO DATE ON MATTERS

	$
TWEED	510,697.80
WAVERLEY	172,125.00
RTA	132,005.00
QUINN (ie Hakim)	30,925.00
SILVERWATER	21,600.00
LAND TITLES	18,075.00
KUMAGAI GUMI	10,222.00
OTHER	14,476.30
TOTAL	910,126.10

DATE: 29 March 1990

MR HATTON:

Q: Fortunately the Commission is less expensive than Royal Commissions and probably, on-going, more effective.

MR MUTCH:

Q: You said you had no complaints as far as resources are concerned. Does that mean that there are no references you wold like to investigate, which you feel precluded from investigating on the basis that you do not have the resources?

A: It does not mean that, although I need to say a few words by way of explanation. It does not mean that everything which could possibly be investigated in a useful manner will be investigated. I do not know how big a body you would need to do that. If we investigated everything that could be investigated with a profitable positive outcome, with a finding of corrupt practices and useful prevention of corruption recommendations, I guess we could do five or ten times as much work as we are doing, or perhaps a hundred times as much work. Then you would have a thousand people, or five thousand people. It would cost the earth, and the State does not want it.

The resources we have in people and money and the strategy we have in moving from area to area ought to get results in a cost-effective manner. We do not want more, and we do not want to be doing more investigations than we are doing. If the Act were changed so that we were put under a statutory obligation to investigate everything that savoured of corrupt practices, which would be a possible approach, you would need a very big body. We are not doing everything that could be done, but we reckon we are doing a sufficient job to get results so as to reduce corrupt practices and to influence the public attitude towards corrupt practices. There is a big distinction between what we could do and what we think should be done.

Q: You would deal with those matters that you do not investigate, by referring them to other agencies?

A: We do a lot of referring back. Some stuff is not pursued because we think it is trivial or it is one-off. Whatever we do in this area would not have an effect that we are reducing the profitable use of resources to do that. As I said to the Committee previously, we are very selective in what we take on for formal examination. There are only 19 matters approved for formal examination today. We are convinced it is the best strategy and highly effective.

The operations review committee is the accountability mechanism in that area. They have to advise us before we

turn off an investigation, and on every occasion I have followed their advice. It is not as if we are being wilful about it.

MISCELLANEOUS

DEFINITION OF CORRUPT CONDUCT

MR TURNER:

Q: Under the Act is it possible to have an announcement of a corrupt conduct without that person being subsequently charged and taken through the courts of law and subsequently being convicted?

A: That is right.

Q: Do you believe that is a fair and reasonable provision, that a person can be, by your guidelines, found corrupt but not taken through the courts and found guilty?

A: Could I try answer by stating the nature of the difficulty. The classic form of corruption involves the giving and taking of a bribe, and there is strong tendency for neither side of the transaction to report it. When bribes are paid the debilitating effect upon the functioning of society - and particularly the public sector if public officials are involved - is very great. The real question is, as I would urge, whether something should be done about it, it cannot be done by traditional investigative methods and through the criminal justice system. You cannot get results except by setting up a specialist body and giving it specialist powers. Hence the ICAC Act.

If the Act were repealed then a judgement is made that the job has been substantially done and levels done and levels or corruption are down to a point which does not demand a specialist agency. My answer accordingly is that if you want to tackle corruption you have to do it in something like this way. You cannot do it through the criminal justice system, because that is a proven failure. You cannot use traditional methods of investigation and prosecution and get results. It has been tried, and it just does not work.

The alternative that the Parliament has opted for is to say "We will set up a specialist body. It will have investigative powers and coercive powers and an obligation to report to Parliament." Therefore we have to do that which you are questioning, and it will have prevention functions and public education functions. If Parliament has made a wrong judgement, the remedy lies in Parliament's hands. But I say that it is not possible to go back to what some see as being the "good old days" if you want to tackle the corruption problem.

Q: I appreciate that it is certainly in our hands. I find it a bit disturbing under section 9 that corrupt conduct

cannot be found and that it is a disciplinary offence?

A: I understand that, and I hope that our reports will be written with a degree of sensitivity that reflects the various levels that occur. We opened a new investigation yesterday which you may not have heard of. There were issues identified in the opening address which ranged from the actual solicitation and payment of bribes to police, which is a matter of the utmost seriousness, down to "free meals for the cops" and things like that which are at a much lower level. There is more, but that will suffice.

It was made clear in the course of the opening that these are not all seen as being of the same level of iniquity. I doubt that free meals and drinks for police officers, while it is something that needs to be looked at, ought to be seen as a corruption prevention problem. I am by no means satisfied that at the end of the day there will be a formal finding of corrupt practices in that area, because I do not think it would be worth while. We are sensitive to the undesirability of always speaking in a voice of consistent tone and firmness. We are trying to speak with a modulating voice. We will not always get it right, and not from the viewpoint of the persons concerned because it is not a pleasant experience. Sometimes people who protest their innocence, sometimes falsely, will be highly critical.

<u>COMMISSIONERS VIS A VIS ASSISTANT COMMISSIONERS</u>

MR TINK:

Q: Again with reference to Mr Roden, I think he said that he is subject to your direction. I am wondering what your view on that is. What is the role of a Commissioner vis-a-vis an Assistant Commissioner from time to time?

A: I would not for my part talk in terms of direction, and I do not think Mr Roden is to be taken as having described present practices as involving direction. The statutory provision is that assistant commissioners are there to assist the Commissioner. I can and very largely do decide what we will formally investigate and I suppose I could say "You will assist me by conducting this hearing". But in fact the matters are discussed. I suppose in other respects I could give directions, but I do not and I am not inclined to.

It is important, and it may be that it is necessary, when it comes to assessing evidence, that the presiding officer has to do it because someone who has not seen the witness cannot do it, and I would not dream of trying to tell the assistant commissioners what findings they should make. If a Commission report - and remember they are Commission

reports, and I am the Commissioner - was going to contain significant material of a corruption prevention sort, I would be interested in seeing that first and perhaps making suggestions as to what it might contain, and that might lead to some discussion and amendment. That summarises the position in practice, and that is how it will continue.

Could I say also that the powers of the Commission have been formally and exclusively delegated to the Assistant Commissioner. There are some small reservations which are readily explicable when you look at the statute, but by and large the Assistant Commissioner has had delegated to him the powers that I enjoy, although in practice typically the decision will be taken by him.

MR DYER:

Q: When you say "formally delegated", is that in writing?

A: There is an instrument of delegation.