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REPORT

OF THE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION, MINUTES OF EVIDENCE TAKEN BEFORE THE COMMITTEE CONCERNING THE REVIEW OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT

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COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

Minutes of Evidence

- ◊ 12 October 1992
- ◊ 26 October 1992
- ◊ 09 November 1992
- ◊ 08 December 1992
- ◊ 05 February 1993
- ◊ 19 April 1993

CORRECTED

MINUTES OF EVIDENCE

TAKEN BEFORE

THE COMMITTEE ON THE ICAC

At Sydney on Monday, 12th October, 1992

The Committee met at 10.00 a.m.

PRESENT

Mr J. Kerr MP (Chairman)

Legislative Council	Legislative Assembly
The Hon. J.C. BURNSWOODS MLC	Mr P.J. ZAMMIT MP
The Hon. S.B. MUTCH MLC	Mr J.E. HATTON MP
The Hon. D.J. GAY MLC	

WJ&RG

PATRICK FAIR, Solicitor, of [redacted], sworn and examined:

CHAIRMAN: I think you have a statement prepared on behalf of the Law Society which you would like to table?— **A.** That is right.

Q. Is there any other material of a documentary nature that you want to put before the Committee?— **A.** Only a short introduction to the Law Society's paper which talks about the theoretical role of rights recognised by the common law, of individuals before tribunals. Although that is set out in very dry terms it is fair to say that the position of the Law Society is that these rights are fundamental to the dignity of people called before tribunals of the State and they have a real effect on individuals in a day-to-day manner and not merely as a matter of legal theory or of putative elegance by the lawyers.

Q. Would you like to take the Committee through the Law Society's submission?— **A.** Yes, certainly. The Law Society's submission, apart from the introduction, addresses each of the issues raised as issues in the discussion paper in turn, and then adds some material which the criminal law committee of the Law Society considered important to put before this Committee. The introduction basically highlights the importance of some of the rights which are removed by the ICAC legislation and makes two observations in relation to the legislation. The first is that the definition of corrupt conduct is so broad that it covers or can cover, in many cases, matters which would not be sufficiently serious to justify the very extreme measure of removing rights in the manner in which the Act removes them. Second, it calls on the Joint Parliamentary Committee to give careful consideration to the nexus between the rights which are removed and the effectiveness of the Commission, and it is the Law Society's submission, as it was last time, that in many cases the removal or abrogation of the rights of individuals before ICAC is entirely gratuitous, and most damaging to the effectiveness of the Commission because it does not give the Commission the proper opportunity to hear all of the evidence from all sides in an open manner. In that way the submission of the Law Society is made in the context of the very serious rights that should not be removed lightly, and certainly should not be removed unless there is a good reason, which is carefully thought out, for their removal.

The first key issue raised by the discussion paper is simplification and clarification of corrupt conduct. The Law Society poses a definition of corrupt conduct which is directly related to criminal offences. That appears at paragraph 2.1.4 of the discussion paper. The Law Society points out that because of the manner in which the Commission is empowered under s.13 (1) (a), the definition of corrupt conduct, if limited in this way, would not seriously inhibit the powers of the Commission to conduct an investigation

because the Commission is entitled to investigate any matter which in its opinion implies that corrupt conduct may have occurred or may be occurring. Because of the words 'implied' and 'may' it is not necessary to have a wide definition of corrupt conduct with conditionals and possibilities in it. All that does is to amplify the extraordinary discretion of the Commission.

It is also the Law Society's submission that by defining the words corrupt conduct in terms of criminal law one gets closer to what is commonly understood by the public as corruption, and in fact there is sufficient breadth in the common law for most things which would be serious enough to warrant investigation by the Commission to be caught within that definition. In the alternative the Law Society suggests a number of amendments to sections 8 and 9 which remove what it would not be inappropriate to call the weasel words from those definitions, because they create conditionals and possibilities which as we have submitted almost make the sections impossible to apply.

The second key issue identified in the discussion paper is whether or not the definition of corrupt conduct should be amended to ensure greater consistency. The Law Society says about that, that if the definition of corrupt conduct was amended to refer only to criminal matters or conduct which involves or potentially involves criminality, then there would be greater consistency because you would not want section 9, which tries to make the conduct described in section 8 serious by making it referrable to dismissal or discipline. You would not need that section there at all because you would have something which was on its face a serious or relatively serious matter.

The next issue under the first heading in the discussion paper is amendment to reflect community understanding of the term. Under this heading the Law Society again says that by making it referrable only to criminal conduct one would approach more closely the community's understanding of the words 'corrupt' and 'corruption'. It is a firm submission of the Society, and I think it would be hard to disagree, that it surely should be the case that when words are used in a statute they approximate the meaning understood by the community.

The Law Society says about that, that it would be reluctant to support an amendment which adopts the improper conduct or official misconduct terms suggested by the discussion paper. In the Law Society's submission, if the matter is serious enough for ICAC to be conducting a formal investigation and exercising its other powers, it should involve corruption defined by reference to the criminal law. If it is merely investigating a matter which turns out not to involve any matter of criminality, then the appropriate course would be for the Act to provide for such an investigation, calling it say 'unsatisfactory official conduct', but not to make a finding by reference to a pejorative term like 'unsatisfactory official

conduct'.

The making of findings which label the conduct of officers or conduct which is not serious enough to warrant a finding of corrupt conduct as we would have it defined, is merely a matter for proper administration, and if ICAC were to find that certain actions had been taken which warranted review, then it could report on those matters to the relevant government department, and allow the department to decide what level of seriousness it had, rather than branding the person involved in that conduct with that pejorative official term.

In fact, the Law Society finds it difficult to see what it adds to brand the conduct of a public servant or other person as improper conduct, when really it is a matter of just discovering that it has taken place, and leaving it up to the people managing the department to do something about it.

The Law Society agrees with the suggestion in the first point under discussion in the meaning of corrupt conduct, that sections 9 (1) (b) and (c) should apply solely to holders of appointment in a unit of public administration, and that issue is not strictly dealt with in the paragraph numbered 2.1 of the paper but that is not meant to be an inconsistency. The Law Society expresses its view there about that.

The next heading in the discussion paper is Findings about Individuals, s.74A and 74B. The Law Society strongly agrees with the submissions which have been made already that ICAC should not make findings about individuals. It makes the submission on the basis that ICAC's powers are structured to facilitate investigation, and that is entirely appropriate, because the perceived need for which the Act was created was to find corruption which had not been identified and was not being identified by the usual processes. However, the power that ICAC can inform itself in any manner it considers appropriate, and the combination of investigation and prosecution power — prosecution used in the context of being able to publish damaging reports and persuade itself that those damaging remarks ought to be made — the combination of that power with the quasi-judicial power of actually making the finding or making the report, is inappropriate and can lead to serious injustice, and therefore the Law Society supports the view that it would be appropriate and would perhaps not in any way remove the effectiveness of ICAC to be able to conduct investigations but not make findings of itself.

The Law Society goes on to say that what ICAC might be able to do if that power was removed, and that of course if findings were left to a court then the appropriate level of scrutiny of the evidence and the appropriate civil rights involved would be observed.

The next heading is Judicial Review and Appeal Mechanisms. That part of the discussion paper is a kind of a query. I suppose the Commit-

tee gets the advice of the Law Society office about what it sees as the extent to which the Commission is subject to the law. It is clearly subject in two ways. First if ICAC acts beyond the powers expressed in the Act then its decisions can be reviewed. An example of that was the Metherell matter. Second, if it does not observe natural justice in dealing with persons called before it, then there is an argument that it could be subject to judicial review. It does not say in the discussion paper, but I think it could be fair to observe, that prevention is better than cure, and it would be far better to give the Commission a duty either to remove its powers to make findings or create due process and avoid the necessity for persons called before it to be involved in litigation, remembering of course that some persons have not or potentially have not actively done anything other than have suspicions and concerns expressed about their relationship with a government department and have been subject to an investigation. Having gone through that process of investigation, then to be subject to finding themselves in a position where they must go for a judicial review, is adding insult to injury.

The next issue in that part of the paper is whether appropriate appeal mechanisms should be built into the Act, particularly with reference to review of findings of non-criminal corruption. The Law Society submits that definitely they should be if the power to make findings is to remain in the Act. This submission is that these would perform two roles — first they would provide a mechanism which would improve the manner in which individuals are dealt with by the Commission and the quality of the findings the Commission would make by improvement of its process, but also it would improve it because the Commission would be subject to review, and at the moment although there are powers subjecting the Commission to scrutiny, in the case of any particular report there is no mechanism for review in it other than to challenge it on the basis that it is *ultra vires* of the Act. That is an entirely unsatisfactory position, that having informed itself on the basis of any evidence it liked, and possibly not giving the persons involved an opportunity to know exactly what might be found against them, the Commission can then publish its report, and that report is not subject to review in any sense.

It is that particular aspect of the way that ICAC makes its findings which is potentially arbitrary and it gives concern on a civil rights basis, as well as on the basis of the quality of what the Commission might do.

The Law Society endorses what is in the discussion paper and earlier materials as to the three-tiered approach to investigations, that perhaps there should be a staged approach where people have different rights and ICAC has different powers.

The next aspect of the discussion paper is on standards to be applied by the Commission, and the Law Society endorses what is said about

standards having to be objective. Of course it is now established by the Metherell decision in the Court of Appeal case that ICAC must apply objective standards. That is some relief, but the Committee would appreciate that it is cold comfort to those who have been subject to the Commission's reports for the three years of its operation. Certainly the fact that it was possible for the Commission to act by a subjective standard reveals a major flaw in the definition. It was not clear from the definition, and it gives rise to the need for amendments to be made to the Act which would make that absolutely clear.

On Protection of Civil Liberties, the Law Society submits that the Commission should not have the power to issue its own search warrants. It has not used that power, and having an independent body issue search warrants provides some check to the process of having houses and offices searched. Obviously if that is a particularly serious matter, the invasion of privacy involved and the anxiety that searches involve are a relatively minor matter necessary to prepare that evidence properly and go before a magistrate to obtain the order. Further, the Act in regard to that process gives the Commission some discretion in any event, because it is preparing the evidence and making the submission.

On the power to cite critics for contempt, the Law Society's submission is in summary that the power granted by (g) of section 98 is really all the Commission needs. Subparagraph (g) is the power to cite for contempt any person who obstructs or attempts to obstruct the Commission or a person acting on behalf of the Commission in the exercise of any lawful function. Beyond that the Commission is protected by the criminal law and the Law Society does not see any need for the more extreme powers to cite for contempt which are expressed in the Act.

Follow-up action on Reports. The Law Society endorses the suggestion that there might be a mechanism to raise from the table ICAC reports so that whether or not action has been taken in relation to those reports can be examined. The Law Society observes that if there were no actions taken on a particular report, it is more likely to depend on what the report contains, its quality, its recommendations, and the motivations of the government in such mechanism might help.

Profile of Corruption. On this issue the Law Society takes the view that there are a number of items of information regarding ICAC in its operation which are not available in ICAC's reports, and that before involving the Commission in the compiling of a profile of corruption formally, consideration should be given to compiling information regarding the true costs associated with the conduct of ICAC, in particular the costs of departments responding to ICAC investigations and paying for representation for staff members affected by the inquiry. The cost to the private sector of responding to ICAC investigations in terms of represen-

tational commercial loss to the parties, and what it costs the State, are not included in what ICAC spends. Government itself spends a great deal on ICAC in a number of places.

In terms of the profile of corruption as a concept, the Law Society has no objection to that other than to observe that the profile arises as ICAC issues each report, and that as there are no costings in the discussion paper, in the absence of a cost-benefit analysis it would be difficult to make a view.

False Complaints and Public Statements. The Law Society endorses the suggestion that there should be strong penalties for false complaints made to ICAC. The second issue dealt with under that heading considers that it would be impracticable to attempt to prevent persons from making public statements that matters are before ICAC. If such an act became an offence, many people might innocently be caught by it. It seems to be a practical problem of the operation of any government institution that people make statements which may not be true about what is going on in that department, and really it is a matter of handling each one on its merits as it occurs, rather than of trying to create an offence which prevents something that might practically be created by the offence but will in fact make people criminals for acts that may or may not really warrant it.

In section 11 the Law Society recommends that the provision be amended so that an officer have a duty to report matters only if he has reasonable grounds to believe that the matter concerns corrupt conduct. The Law Society is obviously suggesting that corrupt conduct be defined in the more narrow manner suggested earlier in the submission. The reason for that is that the definition as it stands has two indefinites in it — first that there be reasonable grounds for suspicion, which is very vague, and that the conduct may involve those reasonable grounds. That makes it very hard for anybody to decide whether or not the conduct is something they should notify, and really there should be sufficient trust of public officers that if they had some suspicion as vague as that they might investigate the matter and form a view or belief regarding that conduct before they write an official report about it.

The next is about Entrenchment of Committee's Recommendations. The Law Society suggests that Parliament might exercise its power to make regulations regarding matters where ICAC has given undertakings regarding its processes, so that there is some formal requirement that those procedures be observed. To suggest that that should not take place, because of the resultant costly delay in litigation, in the submission of the Society is a rather unfortunate rationale for two reasons. First, surely if these matters were put in regulations there would be no difficulty with ICAC observing them. How then would costly delay in litigation result? Second, if these matters are matters of rights of people

appearing before ICAC, then surely it is sufficiently important that they be enacted, and the protection of those persons' rights should not be capable of going by the wayside because ICAC has not observed an undertaking which was unenforceable.

Additional Comments. The Law Society makes a couple of additional comments. These are mainly to do with the rights of persons to legal representation and during the course of the Commission.

First, in relation to section 31 (2), which deals with public and private hearings, it is the Law Society's submission that that subsection ought to be amended so that closing submissions shall be heard in private. Closing submissions are the occasion when the most extreme suggestions about the interpretation of the conduct which the Commission has been examining are made, and it is inappropriate for those submissions to be fodder for the media, because of the potential damage they could cause to persons before the Commission. Second, there is a suggested amendment to section 32. The Law Society recommends that that section be amended so that if a person is substantially and directly interested in any subject matter of a hearing before the Commission, that person should be authorised to appear, thereby giving persons affected a right of appearance.

On sections 33 (1) and (2), the Law Society recommends that those sections be amended so that a person giving evidence before the Commission or any person substantially or directly interested has a right to be represented by a legal practitioner. When I was last before the Joint Parliamentary Committee it was pointed out that the definition of affected person does not require the Commission to notify that it considers --

Mr ZAMMIT: Could you just go back over what you said about section 33 (1) and (2) and the right to legal representation?— **A.** The key word in that section is 'may'. The Commission may, in relation to a hearing, authorise. That has two limiting factors in it. First it may not if it decides not to, and second, it relates only to a hearing. A great deal of what the Commission does is not in hearings. In fact it is more frightening for an individual called before the Commission to be dealt with by the Commission outside a hearing context, than elsewhere. So there is no right to legal representation if you are not in a hearing, and if you are the Commissioner can decide that you cannot have it. So the Law Society's submission is that you should be entitled to legal representation in all cases.

The paper does not elaborate on that, but the Committee will recall from the last submission made by the Society that the Society is of the view that persons giving evidence before the Commission are unlikely to give a full and truthful account of their experience without the assistance of a legal representative. The role of the lawyer in this context is to

ensure that those persons have worked their mind over the events they are being asked about, and he brings out all the relevant factors in the context of an ICAC inquiry. ICAC has a very narrow interest in the information which it is seeking. Usually it has an idea, one assumes, of what corrupt conduct it thinks might have taken place and in what circumstances the party being questioned might have been involved. The presence of a legal representative in this context gives the witnesses a chance to give a full account of their behaviour, not influenced by the predisposition of the inquisitor. That was the point I was expanding on when you asked the question.

A Recommended Amendment to Subsection 34 (1). The Law Society submits that if the Commission decides that a person before it should be cross-examined, then the Commission should not retain the discretion to limit that cross-examination. It makes that submission on the same basis as the previous one, namely that the Commission has a focus in its inquiry of getting a full picture, and the role of a legal representative in such an inquiry is to ensure that the person before the Commission gives a full account of the relevant circumstances. The Commission should not be able to limit that account by reason of its predispositions and presumptions regarding the circumstances.

In paragraph 12.5 the Law Society makes a short explanation of its last submission regarding fees of the person who is providing the Committee with the suggested amounts. The amounts suggested were approximately half the fee that a competent barrister would charge for an appearance before ICAC. That is how those numbers were arrived at.

Finally, there is a suggested amendment to section 112 (1). The purpose of that amendment is to prevent the Commission from having the power to prevent persons from informing their legal representatives regarding what has happened to them before ICAC. The prospect of being called before ICAC, asked very serious questions about some events which the person may or may not have recall, and not being able to talk to anyone at all about that is frightening, and there can be no good reason for a person not being able to discuss those matters with their own legal representative, so that they will have some idea of the situation they find themselves in. Really the potential for that leading to some blunting of the ICAC's investigation process is infinitesimal and it is not warranted that a party should not have a right to speak to a legal representative on matters asked about by the Commission.

CHAIRMAN: Thank you. Dealing with section 3 (1) and paragraph 4.2.2 of the Law Society's submission, Mr Tobias at an Institute of Criminology seminar last Thursday warned that removing the ICAC's powers to put labels on individuals' conduct should not be seen as a panacea to problems exemplified by the Greiner-Metherell matter and

the Court of Appeal's decision. He suggested that the ICAC should not be able to make findings of fact which amounted to a criminal offence until the matter had been dealt with by the DPP, much in the same way as a coroner's inquiry. Can I get a response from you to that suggestion?— A. That is the effect of the submission by the Society, that what ICAC should be doing is finding evidence and putting that evidence before the DPP so that it can be tested in a court. That is at the high end of what ICAC does. The Law Society does not say that ICAC should not have a role investigating matters less serious than those that might involve prosecution by the DPP but the serious problem with ICAC as it is constituted is that administrative matters internal to government departments can be dealt with in detail by formal hearings where extremely highly qualified legal representatives are lined up with piles of evidence, seeking to defend the position of individuals who see their rights potentially impugned and their conduct criticised, when really the matter is only one of due process and proper administration.

That is a different issue from removing the ability to make findings on corrupt conduct. Corrupt conduct should not be seen as limiting the flexibility to make positive contributions to the administration of government departments in the State at a more practical level, but should be seen as an attempt to permit ICAC to be aggressive to some extent with very serious matters, but not to deal with them as if it was a court and in some ways a judge in its own cause.

Q. Taking you to paragraph 4.2.5, if the ICAC is not to retain its powers to put labels on individual conduct, but to continue to make findings of fact, should findings of fact be appealable? If so, how can this be done without providing for a re-hearing of the matter?— A. In the context of conduct which is less than criminal conduct, the process that ICAC uses is not so serious. If ICAC is not making a finding that somebody has been improper or someone has been involved in some unsatisfactory labelled conduct, then it merely reports to the department that it has investigated the circumstances of a certain series of events, perhaps a tendering process in which it seems that this person was appointed to a committee where he had a conflict of interest, or may have one, and this tender was not awarded in the normal course as it should have been. If it finds those things to be a fact and then reports them to the department, the implications are that the administration of the department should be active and say 'Who has not been doing their job properly, and what changes do we make to our process?' I would expect that kind of a finding is not really worthy of a major re-hearing and the people concerned with it would not be so adversely affected by it that they will need to have that process in place: whereas when one adopts a labelling process, then the people affected are permanently and seriously affected by what takes place, but quite artificially because of the way the process is constructed. The Society is suggesting that in order

to make these findings a practical possibility, one removes the labels and makes a report regarding what facts seem to have taken place, and allows the department a discretion to act on it. In those circumstances the need for a formal review process would not be as great. Of course it depends on the degree and where you draw the line.

Q. Suppose there was an actual finding by the Commissioner that a certain law officer went to a foreign country and at a particular location was involved in a drug deal, and that person could prove that he was elsewhere at the time, that would be a serious matter?— **A.** That would involve a criminal act and would be of the higher level. That is why I say it depends where one has to draw the line. You have to be careful to write legislation so that serious findings of that sort could be made only in the context of the re-written definition of 'corrupt conduct' so that it would go to the DPP and there would be an appeal process.

Q. Taking you to paragraph 9.1.1, could you elaborate on how civil and criminal law can be applied against false complaints?— **A.** There is a suggested form of words in the discussion paper. In the context of a civil action there could be a right in the Act for persons adversely affected by false complaints to act on them. To have a remedy against the person who made the false complaint is a difficult matter: you would have to be satisfied that the person who made the false complaint did so deliberately or knowingly, so that the affected person would be justified to take civil action. In terms of the criminal position I suggest that the wording in the Act would be sufficient. There are quite some complexities in the civil case, and if the Committee likes me to take that back to the criminal law committee I shall do that.

Q. The submissions we have received in relation to this inquiry can be formally tabled. There being no objection, that is being done, and they will be available. Dealing with section 10 of your submission, that you notify ICAC under section 11, are you aware of guidelines that ICAC has issued to principal officers relating to their duty under section 11?— **A.** The Society has not seen those, no.

Q. Perhaps they might be made available, and you could take a question on notice as to whether the Society thinks those guidelines are effective?— **A.** I can anticipate that the Society's submission would be that if the guidelines postulate a position weaker than the position expressed in the Act, then the Act should be amended to reflect that position.

Q. Could you elaborate on the proposal that the Parliamentary Committee recommend regulations on ICAC procedures and whether such regulations compromise the ICAC's independence?— **A.** The independence of the ICAC depends on its ability to make decisions within its own administrative structure and not be influenced by the potential reaction of other institutions. To some extent that is impossible

because all the institutions of the State are inter-related to some extent.

Whether or not the power to make regulations could be a matter that would influence ICAC and thereby affect its independence would depend on whether ICAC considers that Parliament might make regulations as a kind of punitive measure against it, and therefore decides not to do certain acts because of the potential that regulations would be made as a punitive measure. Or regulations might be made in a way that would tie up ICAC and make it less effective. In the first case surely Parliament would not see fit to make a regulation unless there was good reason for doing so, and in the second case the same answer applies, that setting out procedures which should be followed in dealing with witnesses, which is the context in which this first arises, is a matter which is pretty much the same as writing powers and procedures into the ICAC legislation. It does not really change the relationship between ICAC and the Parliament in any significant respect.

Q. I think probably you mentioned that earlier, particularly in relation to the three-tiered model that was suggested by the Hon. Michael Helsham in view of his experience with the Walsh Bay inquiry, in which the Commissioner was substantially in agreement with what you had in mind in terms of regulations?— **A.** Yes, in terms of dealing with that particular inquiry in that particular manner.

Q. Dealing with section 11, the Committee Reports and Entrenchments of Recommendations, this may be a matter you would like to take on notice. You have suggested that the Committee's previous recommendations should be entrenched. I think you were suggesting regulations under the Act. Are there any particular recommendations you had in mind in relation to that?— **A.** I will take that on notice and bring back a complete list.

Q. Would you suggest a time for that?— **A.** At the end of the month.

Mr ZAMMIT: I refer to 33A (1) and (2) of the Act, regarding legal representation. I asked a question of Mr Roden regarding legal representation and the possible effects on people who appear before ICAC without legal representation, and what this could mean as far as their standing is concerned. He said — I am paraphrasing — that at no stage did anyone appear before him without legal representation who was at any disadvantage by not having legal representation. Would you agree with that statement?— **A.** As a question of fact in the case of Mr Roden I could not answer because I do not know all the people who have appeared before him, but as a general proposition about persons appearing before ICAC, what he is saying if I understand him correctly is that ICAC would take all the necessary steps themselves to advise someone if they feel that person should have legal representation. If they in their opinion feel a person does not need legal representation

they will say nothing.

CHAIRMAN: It may be a bit unfair to Mr Roden. We do not have a transcript of what he said. I think what you are saying is that he did not see justification for the spending of hundreds of thousands of dollars on legal representation. There is no reason why the question could not be phrased in general terms?— **A.** I think I could answer it like this. First, the Commission

is not the appropriate body to be deciding whether or not somebody should have legal representation. The Commission is not superhuman, and could not be expected in every instance to know the emotional personal disposition of the person it is dealing with, nor all the facts and information that person has, which the Commission might think are relevant to its inquiry. The Commission reserving to itself the right to decide whether or not somebody gets representation, gives rise to the possibility that witnesses can be treated differently, depending on the assumption the Commission makes before that person is called to give evidence.

It is the Law Society's view that the profile of the Commission is so high in the public mind that just the mention of an investigation or the presence of an officer can cause major anxiety. Companies that are being subjected to investigation, on the most preliminary basis, can be seriously damaged. For that reason everybody whom it deals with should be given the opportunity to have somebody who is retained by them and capable of giving advice in their interests before the Commission proceeds with its inquiry.

Mr ZAMMIT: The second point is in regard to your page 11, 9.2. We say that it is impracticable to attempt by legislation to prevent persons from making statements that a matter has been referred to ICAC, and earlier on in regard to the false complaints to ICAC, you say that false complaints should be discouraged by civil and criminal penalties, and then you go on to say that 'it is impracticable to attempt by legislation to prevent persons from...' Are you saying that we should rely on what? Take the case of civil penalties. If for instance during an election campaign someone says that he has referred the matter of his opponent to ICAC for investigation on the assumption of some information that was passed on to him, which he feels obliged to refer to ICAC. If that came out during the course of an election, the only course available to that person who was in a sense defamed, would be to take action through the courts for defamation. Do you agree on that?— **A.** Yes.

Q. The problem is that in very recent decisions, particularly one that came from Queensland, the general feeling is that if you go to your solicitor and you say 'I believe I have been defamed and the election is on', he or she will say 'In the context of an election, practically anything

goes unfortunately. This is a fact of life.' So how would we overcome that by not enshrining something in legislation saying that these statements should not be made at all? You then go on to say that it 'most unlikely that many statements to the effect that matters are referred to ICAC are made in the honest belief they are true'. If that is the case, why should that person make that statement at all? If they feel satisfied in their own heart that they had to refer the matter, it should be left at that. They should then not go to the local press or the press anywhere and say 'I have referred the matter to ICAC regarding my opponent' — or in regard to anyone standing for election?— A. First, the difference between the view taken by the Society in relation to the two issues arises because in the first case if a matter is referred to ICAC, the Society takes the view then that it would have to be a serious matter that is referred on the basis of the truth and genuine concern. If somebody is making false complaints to ICAC merely for commercial advantage, as might be the case, then they should be subject to criminal or civil penalties, if that is the basis on which the complaint is made. So the first thing is to prevent baseless complaints being made. Once one has taken steps to prevent baseless reports being made to ICAC, the question is, 'Should the person who has made the report be able to state publicly that he has made it?'

Assuming that the report has foundation, then it is a relevant matter for the public to know that something is being dealt with by the Commission. If for example it gives the public the idea in some case quite suitably, that something is being done about an issue of public importance, and assuming that the complaint made is of substance, then in many cases that would not be an issue. In the example you gave the complaint might or might not be justified. If it is not justified then the criminal and civil penalties for making false complaints are available. If the statement, made publicly, that a complaint had been made was false, then depending on the actual nature of the complaints, I am not sure that you would get that advice from your solicitor that there was no defamation action available.

It would of course always be in the discretion of the Commission to state that in fact this person has made a false claim, that there is no report. That can be extremely risky, for someone to be making public statements in view of the risk that ICAC could say 'What you have said is false'. An element of the Law Society's submission is that the person who says that something is before ICAC might not be the person who made the submission. In some of the examples given, it is third parties who say they believe that the matter is being investigated, or they have heard it is being investigated. That is a fairly weak remark, and it could be made by somebody quite unaffected by the formal processes of the Act. In that context and in view of the potential for that the Law Society says 'Is it really worth making this a criminal offence, when in fact it can

be dealt with in practical ways provided there are strong penalties available for people making false reports?'

CHAIRMAN: Your reference to defamation reminds me to ask, 'Have you received a summons under my hand to give evidence today?— **A.** Yes.

Mr ZAMMIT: During the course of the last State campaign my opponent said things about me that were totally wrong, and highly defamatory I thought. I gave the matter to my solicitor, who got a barrister's advice that in fact what he said was defamatory, but in the context of an election campaign the chances of that succeeding in courts would be based on some previous matters that were before the courts, were settled when the courts would say 'It is an election campaign, and tempers get a bit frayed, and we will make allowances for it'. That is just not acceptable.

Q. On page 9, at 6.1.1, regarding search warrants, you say that it is inappropriate for ICAC to issue search warrants. You refer to the issuing of search warrants by an independent third party. Could you mean a magistrate's court? One of the reasons for setting up ICAC is that they should work secretly and fast and not have to rely on passing the matter over to some other body outside of ICAC, because the allegations have been and continue to be about crooked officials. Would it not just play into their hands when these people receive advice that ICAC wants a search warrant? They could immediately go to the person affected and warn him?— **A.** That presumes a level of corruption which nothing that ICAC has produced so far suggests exists. The integrity of the magistrates' courts in this State is not so far under question that one could seriously postulate that one could not make an application to a magistrate for a search warrant without every corrupt official in the State being immediately put on notice that the application had been made.

The Law Society maintains that we should have confidence in the institutions of the State and particularly the independent functioning of those institutions, and it is just not reasonable to proceed on the basis that no-one can be trusted, and on that basis give ICAC power to act pretty much as they like. The contrary is the Law Society's submission, that giving an institution absolute power corrupts its own processes and removes from it the discipline which is imposed by accountability and its interaction with the other State institutions. If one does that one creates a body which is less likely to be effective, and quite dangerous in the social context.

Q. Would it not be accountable to the Parliament, to the Committee?— **A.** That is very cold comfort in the case of the person being investigated by the Commission. ICAC proceeds with an investigation and issues a report, and as the Act stands there is no basis for the findings and the opinions expressed in that report to be questioned. It

might be that this would change if the powers of ICAC were limited to very extreme cases and very serious allegations, but that is not the case. It has a very broad power limited to matters which might involve dismissal or disciplinary offences of public officials. It is extremely broad.

Q. At reference 5.2 of the discussion paper, the Law Society said nothing about the matter of contempt in regard to the question whether it is appropriate that ICAC retain its power to cite critics for contempt. Does the Law Society have any opinion on that?— **A.** The tenor of the Law Society's submission is that it thinks that all the powers relating to contempt should be removed, other than those which relate directly to its functioning.

Q. Paragraph 6.2, Power to Cite for Contempt. I would certainly welcome your comment on that?— **A.** Other than that, the powers are extraneous.

The Hon. J. BURNSWOODS: Going to section 2 on the definition of corrupt conduct, much of what this submission says there deals with the distinction between words like 'could' and 'may' and other words like 'imply'. Part of the discussion seems to me rather semantic. But if it is more than semantic, does it not run the risk of making ICAC equivalent to a court? Does it not in fact narrow the areas down?— **A.** One of the principal problems, in the Society's view, of the Act is the multi-faceted role that the definition of corrupt conduct plays. It is the focus of the power, but not a limitation of the power. Then it is used to label many categories of conduct which ordinary people would not consider involve some corruption in the commonly understood sense. So what the Society is saying about that is that we want to find a definition which is both certain and objective, and the best way of doing that is to look at the criminal law. We have had hundreds of years of English legal history in formulating those matters which are serious enough for the State to deem them crimes, and the whole range of things which are commonly understood to be corruption. All of those things which are considered to be corruption in a serious sense are crimes. So why not stick with something that is objectively known and about which there is some law?

Q. Was not ICAC a similar body to those in other States and countries? Was it not set up precisely because the courts and the criminal law and those definitions were proving inadequate to catch in a net things that people do call corrupt? Is that not the broad background for the setting up of bodies like ICAC?— **A.** That may or may not be the case. I am sure that some people who supported the legislation had that view, but I think the answer to your question exists in the way you have put that — that those bodies were ineffective at catching that kind of conduct. That means that what ICAC should be doing is being effective at catching the kind of conduct which the criminal law

and the court system have been unable to catch. It does not mean that you have to redefine the whole category of conduct and call it corrupt, nor does it mean that you need to give the body the power to make findings of itself without giving rights to the people called before it. All it means is that you need to give the body the power to conduct investigations and to get out information and evidence in a way that our existing institutions do not. Having done that, why add all this heavy baggage, which has caused a great deal of difficulty in some circles?

Q. My concern is that the logical conclusion of some of this has been that ICAC would be narrowed down so that it became, so far as it continued to have powers, merely equivalent to a court and would be made inadequate for that broader role of picking up corruption amongst public officials that was picked up in part?— **A.** That is not the intention of the Law Society's submission. As the submission says at the beginning, it is the Society's view that one can focus properly on those matters which are serious enough to warrant the powers of ICAC, and permit the Commission to continue to act aggressively in relation to those serious matters, and at the same time one should examine seriously the nexus between the abolition of civil rights and the effectiveness of ICAC. In many cases one would find that abolishing civil rights is just a chest-beating exercise which does not add anything to the ability of the Commission to identify corruption. It has been observed elsewhere that three years of these powers has not produced the in-depth findings of corruption that some people continue to believe exist. If one looks at the findings in matters ICAC has been able to identify, the important parts of what ICAC has done has been to get in and find out information about certain conduct — not to conduct its own hearings and make its own findings. What has been important is that ICAC has found the licensing scam at Rosebery and has been concerned to investigate the release of government information, and has found those facts. That is where it stops.

Q. On 4.2.3, is the Law Society suggesting that that three-part procedure should be applied to all investigations by the ICAC?— **A.** I think that one would find that the latter steps would not need to be carried out if the results in the earlier stages did not warrant it, but where the results did warrant it, then, Yes.

Q. That is not clear to me. Do you suggest that first there would be an investigation, and then the person affected would have a chance to comment, and then there would be a hearing by another person independent of the ICAC?— **A.** Yes.

Q. What would make 'c' not happen?— **A.** If one conducted the investigation and found that there was nothing wrong, or the person looking at the results determined that they were happy with those findings and did not want to raise any objections.

Q. I am not sure that I can believe in persons adversely affected being happy with the findings. But surely anyone adversely affected by the findings is going to want some delaying action or protesting action or further hearing. They are not going to say 'Yes, I am happy to be found guilty'?— **A.** Not at all. There would be many cases where ICAC will have carried out its duties perfectly adequately and the person considered that drawing further attention to themselves and spending more money on the exercise would be a complete waste.

Q. So if this process were carried through, it would mean that there would be the ICAC doing the first part, and the person, he or she, independent of the ICAC and perhaps appointed by the Attorney General, would be another kind of investigating body. Is that person or organization, the same person or organization that is referred to in 5.1.2 where there is a reference at the end to a separate body?— **A.** It may or may not be. We have not designed a new structure for ICAC in writing this submission. We are only suggesting mechanisms. In 4.2.3 the observation was made when I last appeared before the Committee that in fact ICAC appoints an assistant commissioner to do many of its hearings, and those commissioners are on a matter basis appointed by the Commission. One is put in a position in a hearing before ICAC where the Commission presents evidence to itself, having appointed the assistant commissioner. The counsel assisting presents evidence to the assistant commissioner, and that is in club, and what the Society is suggesting here is that there is very little practical consequence to the Attorney appointing the assistant commissioner, who is not a commissioner of ICAC but is merely making some findings. One could have an investigation process whereby the actual findings were made by someone who was not affected by the attitude and interests of the person conducting the investigation.

Q. Excepting that 4.2 envisages two quite separate hearings. There is the hearing by ICAC and then there is a further hearing by this other person. It seems to me that the Society's submissions are depending on whether the separate body in 5.1 is the same as the separate body in 4.2.3 (c). It is running the risk of either setting up three ICACs or one ICAC and two reviewing bodies?— **A.** I apologise if it gives that impression. When 4.2.3 begins 'the hearing', the hearing referred to is the hearing referred to in 4.2.3B which says 'be invited to be heard on one other finding'. It is not intended that there be two.

Q. It is still a separate one from (a)?— **A.** Paragraph (a) is just an investigation.

Q. It would be a hearing with witnesses?— **A.** No. It is preparing the case which at the moment counsel assisting the Commission presents to the Commissioner or the Assistant Commissioner.

Q. So in our structure ICAC would cease to conduct any hearings?—

A. It would be the counsel assisting at the hearing.

Q. The Commission would cease to do any of that hearing process, the investigations by hearing, eliciting facts or whatever at a hearing?— A. That is an interesting question. I can see a case where the investigation might involve calling persons to give sworn evidence in open commission. But that would not be necessary. The Commission could do that without any hearing. That is right.

Q. There is nothing in this submission which leaves room for the Commission to continue to hold hearings?— A. It is not suggested that the Commission continue to hold hearings; that is right.

Q. In regard to section 8, the profile of corruption section, the Society seemed very concerned about the question of costs to government departments. I was interested in your comment about how that concern might be balanced with the cost to the community of corruption and equally the Society's discussion in section 12 about the right of legal representation and how the issue of costs might be addressed in relation to that?— A. In order to make that assessment of how the cost of the Commission might be balanced with the cost of corruption to the community, one needs to know the cost of the Commission to the community, and that is primarily the point the Law Society is making, that at the moment we do not know that cost, and we have no opportunity to assess it. It is not making any submission that the cost might be more or less than is warranted, but until we know it we do not have that opportunity. Second, the cost of corruption to the community is no doubt an extremely serious matter, but one will be able to assess that cost by looking at ICAC's reports and assessing the level of corruption which exists in the State and perhaps comparing that with the real cost of the Commission.

Mr GAY: Though I am drawn to parts of the submission, superficially I find it contradictory. Is that because you targeted each of the areas in a discrete way, because when you look at your re-definition of corrupt conduct, you go on to 'corrupt conduct should only be something criminal', and to others which are quite sensible, then 'No Findings and Appeals'. Those areas are contradictory. Is that the reason?— A. Yes. One should not assume that in the Society's submission we have constructed a new ICAC and are advocating a consistent view. Each paragraph presumes that the Act exists as it stands, and addresses whether or not an amendment ought to be made in the contact of the Act as it stands. I think it is quite true as the Hon. Mrs Burnswoods pointed out, that when one makes one amendment, for example the amendment to 'corrupt conduct', one then has a re-evaluation process to make on the other parts of the Act because you then have a new context of seriousness of activity on which to consider the other parts. The Law Society has not presumed that the Committee is going to embrace

immediately its first suggestion, and thereby made its other comments in that context. It is making each comment in the context of the Act as it stands, and I am presuming that the other things will remain the same. Clearly if that definition changes, and even more important if the Parliament chooses to remove the ability of ICAC to make findings against individuals a finding of fact, then many of the remarks we have made change in context completely.

The Hon. S. MUTCH: I draw your attention to 12.1.1 and on to page 13. You did explain what you were trying to do. You substitute 'shall' for 'may'. I am concerned in trying to include a legal representative, and I have heard concerns from people in that earlier area. All you have done is made it compulsory, and I suggest that perhaps the word should be 'should' rather than 'shall'. You have made it compulsory that in an interview someone has a representative, in substituting the word 'shall' for 'may'?— **A.** I think that only creates a dilemma for the Commission in deciding on what criteria and in what circumstances the Commissioner 'might' not, knowing there is a moral imperative that he 'should'. Is this a situation where 'I won't' just adds complexity to the issue. Our submission would be that in many circumstances where the Commission considers it unnecessary or a matter not greatly affecting the Commission, it is a matter of extraordinary seriousness for the person involved, who ought to be given that opportunity.

Q. Your word does not allow the person to make that decision. The insertion of the word 'shall' makes it compulsory?— **A.** We are talking about 12.1.2?

Q. No, 12.1.1?— **A.** Are we talking about closing submissions, and the word 'shall' in the first line.

Q. It also applies to 1.2 as well?— **A.** In the context of 1.2 it does not apply because it just says that the person shall be authorised. If the person does not take that right, then it would be up to them. In the context of 12.1.1, one does not know what submissions are going to be made, and one could decide that one would have it in open hearing, thinking that submissions will be harmless or anticipating that the publicity from them would be beneficial, and discover that matters which were not foreseen at all are submitted as being the adjudicative position of the counsel assisting or one of the other parties. For that reason it is not appropriate that it be in.

The Hon. S. MUTCH: I was interested in the same matters that the Hon. Jan Burnswoods raised. I am interested in your alternative procedure and wondering whether to some extent that has already been adopted in the terms of assistant commissioners. They might already be moving to distance themselves from the preliminary investigations. You are saying that they should be completely separate, but then you said you would have counsel assisting that person anyway?— **A.** At the hearing

there is an assistant commissioner and the counsel assisting the assistant commissioner. The appearance of that to the parties at the hearing is that one is appealing from Caesar to Caesar, and that the person presenting the evidence and the person receiving it are the same organisation. It may be that an assistant commissioner would take the attitude of independence and separate himself. That would still not be of such great comfort to those involved as a process whereby that person was in fact, by the way the commission is ordered, separate.

Q. You are envisaging bringing in barristers or judges from outside who would act on one matter and then bring down some conclusions, which you would then have as an addendum to a report?— A. Yes. At the first level the Society supports the view that there should be no ability to make findings, and in that context it is saying that if ICAC retains an ability to make findings, then it should do it in a process where the person who is evaluating the evidence and making the findings in the context of an ICAC hearing is independent of the person who is the counsel.

Q. It would not be an ICAC finding, in other words?— A. No.

Q. It would produce the report?— A. Yes.

Q. Are you saying there would be two separate reports?— A. The suggestion is that the findings be separated from the evidence.

Q. Then would the evidence and the findings both be published at the end of the hearing?— A. That is as it is now, yes.

Q. Concluding the investigative report?— A. It would be difficult to say whether that would be appropriate in all cases. I would like to think that that might be subject to the decision of the person writing the report.

Q. So the person writing the report would choose the matters that are to be raised in the public hearing?— A. Yes. In that context you have someone who is not influenced by the thrill of the chase, making determinations about what is actually put before them and what has actually been found, rather than what was suspected? The ICAC seems to make a lot of the fact that people come forward and new evidence comes forward during the hearings.

Q. You are saying that the only way to answer that is that once the hearings do occur and information comes forward they would have to go back to ICAC and say 'Do this again and re-submit', or would you continue the investigative functions while the hearing is taking place?— A. One would not proceed to a hearing on a particular matter unless one is satisfied that one has pretty well established or found and brought forth all the evidence that was available. If then the complexion of that changes, it would be much like a court situation where the parties have to be given an opportunity to react to the new information and an opportunity to reconsider any positions that have been adopted, and

having regard to it, so I would not think that an independent commissioner receiving information would find it beyond his wits to evaluate the consequences of any new information and react to it promptly.

Q. Would it not be better if the actual findings of the independent person plus whatever report is to be published by ICAC, were together so that you have the allegations and the critique of those allegations in one document?— **A.** That is what is envisaged there. In most situations that would be the case. It would be far better merely to have the information which was before ICAC packaged and sent to the DPP for any serious matters to be tested by a court.

CHAIRMAN: Thank you very much for your evidence.

MICHAEL CHARLES BERSTEN, of [redacted] solicitor, on former oath:

CHAIRMAN: Will you acknowledge that you have received a summons from me for today's hearing?— A. Yes, I have received that.

Q. You have prepared a written submission for this Committee?— A. Yes, I have received that.

Q. Do you wish that to be tabled as part of that evidence?— A. Yes.

Q. Would you like to make further submissions or an opening statement?— A. Yes, I would like to take the opportunity to make a short opening statement. I appear in a private capacity and not in a professional capacity. My interests are as a private citizen, and you know that from my relationship with this Committee by my making submissions from time to time and publishing articles on the ICAC. The present inquiry has been given an impetus by a very special case, namely the Greiner-Metherell affair, and it has led to some very fundamental questions being asked about the ICAC and in particular the focus has been on ICAC accountability and the effect that the ICAC has upon the rights of those who are dealt with or touched upon by their investigations and reports.

These questions are arising in isolation from the total design of the ICAC, which I assume would be a matter for review next year. However, there is a danger now, I suggest, of extreme cases making bad laws. That is something that the Committee needs to bear in mind. The total design of ICAC has to be taken into account, and dealing with one particular problem without that broad perspective could lead to some quite deleterious results.

I want to make one additional point of detail which is not mentioned in my submission. It concerns the contempt provisions. The Committee might be aware of a court decision in a nation-wide news case; the media reports have been quite widespread.

The case, as the Committee might be aware, concerns the legislative power of the Commonwealth Parliament to legislate to enact contempt provisions in connection with statutory bodies, and the High Court found that the Commonwealth Parliament lacks that legislative power. That of

course would interfere with the system of representative government, and accordingly contempt provisions of the type in which they are involved is one which created a criminal offence by which a journalist was charged for making comments which it thought to be in contempt of the Industrial Relations Commission. That particular provision has been struck down.

I am not suggesting that that particular decision has any legal bearing on the New South Wales legislative powers, but I would suggest that the political principle which has been established by the High Court is something at least to be borne in mind, as it is focused rather sharply. In this country the question of freedom of speech and freedom of expression might be affected by contempt powers. That is all I wish to say by way of an opening statement.

CHAIRMAN: Could I get you to flesh out your proposal for an appeal on ICAC findings of fact and the way this could be done that does not involve a rehearing of the matter?— A. The starting point at the moment is that findings of fact would not be the subject of judicial review unless they involved unreasonableness or there was no evidence for them. I think that is well established. The kind of appeal mechanism I have in mind would probably treat points of law and points of fact on the same basis, and would be akin to what occurs in a criminal appeal, which is that a court of appeal examines those findings with a view to seeing whether there has been some miscarriage of the process by which they were made. If there has been a miscarriage then those findings would be rendered null and void and the matter might be remitted to the ICAC to reconsider, and in an extreme case perhaps the appeal court could substitute an alternative finding.

Q. Could I get you to elaborate on your views on issues 5 and 10 of te Committee's discussion paper, with particular reference to issue 5, that is the protection of civil liberties, and issues related to the profile of corruption?— A. In relation to issue 5 there are two points — search warrants and contempt power. On contempt power first, my opinion is that the ICAC does not require a power to be able to bring a person before a court for contempt because of comments they make outside the ICAC. The ICAC is big enough and ugly enough to be able to handle that by an appropriate rebuttal which can be recorded in the media, and I think the answer there is for the ICAC to exercise its own powers of speech in response to that. I do not think it needs it to protect itself. I have framed my answer in that way because I am not dealing with other types of contempt which might arise such as contempt in the face of the ICAC including powers to prevent people from interfering with its processes by things they might do to scandalise it or to interfere with its investigation. We are dealing with the

question of what people say. I think the ICAC does not need that power and I cannot see any just reason for retaining it.

In connection with search warrants, the ICAC enjoys a rather unusual position of being able to issue its own. I am not aware whether it has ever done that. Its operating practice I understand is to go before a justice in the usual way that a police officer has to do, to do the job.

Q. The Commission has provided a written submission this morning — so you would not have had an opportunity to see it — which says that the present Commissioner of ICAC 'has never issued a search warrant in the three and a half years of operation of the ICAC, even where search warrants have been required urgently. This is not to say that circumstances may not arise where it is appropriate.'?— **A.** In that regard special circumstances could be, according to the media article provided to me by Quentin Dempster, that if ICAC was investigating a judge it could hardly expect to get a fair hearing before another judge to get a search warrant, but I assume that there is some suggestion that the judges would band together and close ranks. It is an extreme case. I am not sure that that would apply to the full run of search warrants that ICAC might seek to have.

Q. If the police were investigating a criminal matter that involved a judge, they would be in that situation?— **A.** Yes, they would be.

Q. We are dealing with a fairly extreme kind of case.?— **A.** Only where a judge is the subject of investigation. In all the other cases that ICAC has I do not see any problem going for it before a judge, so we are left with that one area that has been marked out. I would be inclined to suggest that that is an example where an extreme case makes bad law, where the extraordinary tightening up of the issue of search warrants might be justified in a very extreme case. If the Committee thought that to be a particular case that required a special provision in the Act, it could be appropriately amended to deal with that particular situation. Otherwise I think the powers of the Commissioner to issue his own search warrants lacks any justification.

Q. Were there any other issues you wish to comment on?— **A.** Not on part 5.

Q. What about the profile of corruption?— **A.** As the discussion paper notes, the profile of corruption possibly has its origin in what I and some other people have said from time to time. One of the things that it would be very useful to know is what ICAC knows about corruption. There are a

number of reasons why that might be a good thing to know. The main one I want to focus on is that it tells us something about its own effectiveness. It provides an information base on which the operation of ICAC can be evaluated against its proper objectives. I see that Mr Tembe and others have raised the question of ICAC's resources that would be required, and the question of diverting ICAC away from its primary objectives to meet this particular task. That is something that would need to be investigated.

I think that in trying to create an authoritative profile of corruption, a lot of effort would have to be put into it. Perhaps that is a relatively small price to pay in the overall context, if it is a profile from which we can get a real picture of ICAC's effectiveness and the position of corruption in this State.

Q. In relation to that matter, I think you referred to the collation of evidence to March of this year, when a series of questions were put on notice to Mr Tembe, and Mr Tembe's response. Have you any comment on that collation?— A. My reaction, with no disrespect to Mr Tembe, was that it was a bureaucratic kind of response, if I might put it that way. There is an understandable response that organisations have to requests for information which they perceive as not relating to their own central objectives. They try to shift them off a little bit to one side. That sort of reaction of trying to avoid being diverted from what they see as their main task runs through that particular response, and I suspect that some other approaches that ICAC takes to some requests made of it are also of that sort.

Q. Are there any comments you would like to make on issue 6, the follow-up action on ICAC reports?— A. My reaction to that is similar to those in relation to the Ombudsman, and for other people like the Auditor General. People are concerned about what happens to their workings. Parliament appropriates taxpayers' money to set up these bodies to investigate reports. It seems that the obvious thing is to ensure that at least an intelligible reaction should be given to those recommendations within a reasonable time. I do not know whether six months is a reasonable time or not, but some reaction is desirable. The responsible Minister for that particular agency or department seems to be the right person to make the response, so I am in general agreement with what is suggested.

Q. False complaints and public statements would be an issue for further elaboration?— A. On the false complaints front, I think it is desirable to have a specific offence provision with some criminal penalty there, otherwise resort might be had to some common law features of causing a public mischief, which I think are generally regarded as quite inappropriate ways

to handle that situation. One concern is that the mental element should clearly be one of intentionally or knowingly or recklessly doing it, rather than just making a false complaint, because in some ways the false complaint provision might be seen as stifling people's reference of matters to ICAC. That sort of criticism was made of legislation enacted by the New South Wales Parliament — I cannot remember the name of it — under Premier Wran, which established a rather nebulous body which was to investigate corruption.

Q. The Commissioner of Public Complaints?— **A.** Thank you. That was a feature of that particular legislation which was rather notorious. It presented a fairly high hurdle to jump over to begin with. I do not think the false complaints provision should be such as would discourage people going to ICAC.

Q. Issue 9 is section 11, a duty to notify ICAC. Does that call for elaboration? Have you seen the guidelines issued by ICAC in relation to that?— **A.** I have not seen the guidelines.

Q. In relation to issue 10, could you elaborate on your proposal for procedures to be legislated by way of regulations under the ICAC Act and how this could be done without compromising its independence?— **A.** Courts which are as independent as ICAC, or should be treated as being as independent as ICAC, have rules of court which are published as regulations, and provided that ICAC is able to control what goes into those regulations, I do not see why ICAC should enjoy a position of greater flexibility and ambiguity than a court which has plenty of procedural things in regulations. That is what I had in mind there.

Mr HATTON: I find myself much in agreement. I have no questions at this time.

The Hon. S MUTCH: I was interested in what you had to say about the Law Society's submission that you could have a preliminary investigation by the ICAC officers, and then take it to a hearing which is presided over by an independent person, perhaps appointed by the Attorney, and that person is only able to make findings of facts?— **A.** I have only just heard about this now. I have not read their submission. Is that a bit like committal proceedings?

Q. No, there would be no hearing beforehand. It would just be an investigation, and then it would go to a hearing presided over by an

independent person separate?— **A.** So ICAC is an investigator but some separate person in a quasi-judicial way makes a finding on the basis of what ICAC has sent?

Q. And then what happens at the end is that the findings that person makes can possibly be made available in printed form with the investigation papers?— **A.** From what you have told me about it, I can understand where the Law Society is coming from in that it is anxious to separate the investigative functions from the judicial functions. They are, no doubt, about to point to a tradition in British justice that that should always be followed, so that we have prosecutors and police separate in the course. That seems to raise a very fundamental question about the design of the ICAC. If you look to the model of the ICAC it is the Royal Commission. The Royal Commission is not like that. The model of European Commissions of Inquiry is not like that, and it seems to me that their suggestion, which may or may not have merit — a matter I will get onto in a moment — is what you might want to consider in your more general review of the Act next year. It seems to go to the heart of what ICAC is doing. My reaction to that is that if we are going to do that, let us forget about ICAC and rather have the police do investigations and leave ICAC out of it. I cannot see the point of having this elaborate apparatus. I would rather have ICAC as a commissionary inquiry in the way it was originally envisaged, or nothing.

Q. We are talking about matters that are non-criminal, but 'potentially corrupt', a broad definition of the term 'corruption'?— **A.** Can I focus on that particular point. If you have criminal matters, presumably the criminal justice system, whether it does it well or not, can handle those. If you have disciplinary matters you have administrative procedures for handling those, and the people who are subject to them, for example public servants. When you are dealing with that sort of amorphous character vocabulary outside of that, of what is corruption in some way, you are getting into something where it is fairly hard to legislate as to what it is. But assuming you can, it becomes a little bit like a form of Stalinist jurisprudence. You have a general moral subjective principle, which is applied by analogy to cases, and from that you drag people into investigations because somehow they fall into what the investigator's opinion of that area is. Then you have all sorts of problematic results from that as to what it really means after that has occurred. I think that is precisely the kind of thing you are steering away from. We should be looking for public and definite objective standards of what corruption is. There are real dangers once you step outside of what are legally definable categories in doing that. I am still not convinced of the justification for the Law Society's suggestion there.

Q. The ICAC's submission refers to a number of examples of precisely that type of conduct. It may be a subjective view that it is inappropriate conduct.?— **A.** That seems to be what the ICAC tends to be all about. The approach I suggested in my submission might be appropriate. The focus has been on ministerial conduct. There are ministerial codes of conduct which I have not had the opportunity of fully studying, but as I understand it there are some aspects which are fairly definite and some that are fairly vague, and I think that a Premier has the opportunity of dispensing with some of the requirements in particular cases. It provides a sufficient degree of definiteness for my tastes if you have something along those lines. What I would be a bit worried about is a general statement of ICAC's investigating something which by community standards is not corrupt. That is a further strain again which I am extremely concerned about.

Q. There is a submission on page 2 where you are saying under item 7 that clearly Ministers and Premiers should be subject to ICAC's jurisdiction. That is a clear statement with which I agree, but the position of Cabinet is not so easy. I think a bit of clarification is required there. What you are saying is that Cabinet documents are unlikely to be accessible by any Parliamentary action. Is that what you are saying?— **A.** Perhaps I can turn that around a little. Parliament, if it enacted express legislation, could require the production of Cabinet documents and papers, but that would be a very extreme and unprecedented approach. There are very few precedents for that situation. What I am focusing on there is that the justification for that is that there seems to be a high public interest in preserving the secrecy of Cabinet decisions and the process of Cabinet decision-making. It is a very narrow compass of things I am thinking of. It would have to be within the formal bounds of Cabinet rather than the broader political sense. In other words, it would be up to Cabinet to resolve the tension itself. If a Cabinet Minister were under investigation and were deemed to be an interested person or a substantially affected person, then Cabinet would have to make up its own mind as to whether it could or would produce documents which might move towards the innocence of the party. Then we will get the tension that we got in Canada between the Auditor General and the executive government as to how you define a Cabinet document. I suppose a court would have to arbitrate finally on that. I think it is a difficult area but there is a genuine public interest somewhere in there for Cabinet secrecy. I am not in a position to be able to define precise boundaries, and I think the kind of question is testing what in fact those boundaries might be. I think there is a public interest in Cabinet decision-making. The kind of thing I have in mind there is where Cabinet itself makes a decision which might well fall within the definition of corrupt conduct.

Q. Yes, that answers the question. That is what I am getting to — the

individual Ministers subject to ICAC, but the Cabinet as a body brings us into a whole new area which is very difficult.

CHAIRMAN: There are a lot of competing public interests there.

Mr HATTON: If a Cabinet takes a decision, however, which is demonstrably corrupt, but the Cabinet documents are not available, it is an area of significant tension between one set of public interests, that is Cabinet secrecy, and public accountability. That is the area I am trying to get to.

CHAIRMAN: You mentioned an article by Quentin Dempster?— **A.** Yes.

Q. It might be tabled so that other members will know what you are referring to?— **A.** This was provided to me several days ago. I have already alluded to two things. One is the question about search warrants, and the comment I made that extreme cases make bad law, and in particular a theme I have put to the Committee before, which is that as honourable as I think ICAC is as an organization, there are some things that are too precious to trust to any individual, and one of those is the power to issue one's own search warrants. The next point I want to raise is on the contempt power. I found it rather unusual for an experienced and respected journalist to be in favour of a contempt power, and I provided reasons earlier why I think this may be justification for the contempt power in question.

The third comment is something related to the problem of finding what ICAC is actually doing. Dempster focuses on the question of Terms of Reference being vague and asks how ICAC can go about its business because one does not necessarily know in advance exactly what one has to investigate. The picture emerges as you get further into the investigation. I think those are after-event comments, and this is where perhaps ICAC rightly points out that people with legal training, including myself, are uncomfortable with concepts of commissions of inquiry, because we are inclined to think in terms of litigation. I think those are fair comments. As I said before, I am in favour of the commission of inquiry model for ICAC if we are to have an ICAC, so in those respects I am in agreement with what Dempster raises. It is more the tone of the article that surprised me, if I might say so. In the second paragraph of the article it was suggested that we are witnessing a monumental struggle between the anti-corruption body and its supporters and the collective weight of the political and judicial cultures. He seems to bring my mind to some of the old ways that people

talked about corruption and organised crime and black-hats and white-hats, in what was going on. I am not sure that this inquiry is really about being divided on partisan lines, and I am not sure that this is necessarily a party-political issue. I think that there are more conflicts and subtle issues involved than that. I was a little surprised by that reference because I think it is out of character with what the inquiry is really about.

Mr HATTON: On this matter, do you see that there is no jealousy or tension between the courts and an organisation such as ICAC, which has been given special powers and is not a judicial body and is not of the court structure — which I think is the point that Quentin Dempster is trying to make? Do you see no tensions?— A. I think there are tensions: perhaps not 'monumental struggle' and so forth. I think they exist, in the sense that the judicial system in Australia is initially the place where facts are found and legal findings are made and those findings have legal consequences. For example, a conviction results in a sentence or a court case results in an order of some civil award.

Q. In a case where a judge came under investigation by ICAC, would there not obviously be extraordinary tensions, monumental tensions? At the moment there is a judicial conduct division of the judicial commission, which is a closed shop, controlled by the profession itself. ICAC has the potential to open that up if a judge's behaviour came under question. What would your comment be on that?— A. I would agree that that would be a monumental situation. I am not sure whether that issue has in fact been faced. I say that because I am not aware of ICAC having publicly stated that it is investigating a judge. That is the case. I think those tensions are of a different sort than the one he is talking about. I think Dempster is talking about the definition of territory. The tensions you have just described are a different sort of tension, which is the one between an operational agency on one side, that is to say the police or courts, and on the other side some external mechanism of accountability such as the Ombudsman or ICAC. Tensions of that sort have been around for a very long time and they are extremely serious tensions, I agree. But I do not think that is what Quentin Dempster was getting at. The territorial could be a judicial tension area.

Q. I agree in general with what you are saying. On the question of contempt I agree also very strongly, and I have voiced that agreement in and out of this Committee; but Ministers, particularly powerful people such as a Premier or an Attorney General, could have sufficient influence to affect the operations of ICAC by public statements and sustained attack. That may well be the context in which this is written, because they are different from

ordinary people. Whether ICAC can withstand a blast from a number of Cabinet Ministers is another question, is it not?— **A.** Yes. I would not want to prevent a Cabinet Minister who had a justifiable complaint from venting it. They are elected, and by that process they enjoy high office, and if they have a justifiable complaint they should make it, and they should make it without fear of criminal penalty in that situation. The situation you would be concerned about, in that question, can be whether there would be justification, for example because it affects them on a party-political basis.

Mr HATTON: That satisfactorily answers my question.

CHAIRMAN: Thank you very much.

(The witness retired)

KEVIN THOMAS FENNELL, Deputy Auditor General of New South Wales, sworn and examined:

CHAIRMAN: I think you have been issued with a summons under my hand to attend today's hearing?— **A.** Yes.

Q. By reason of your office you have a special interest in the terms of this inquiry?— **A.** Yes.

Q. Do you have a written submission for the Committee, or an opening statement you would like to make?— **A.** An opening statement. I was not sure whether I would have to appear before the Committee, and in the absence of the Auditor General, who has been away on leave for a week or two, we did not put a written submission together. I have some notes here and I could speak from them. The problems that come to our notice as an audit office, bearing in mind that we work very closely with the Commission, revolve around the series of sections 8, 9 and 11. In talking about that I have to bring in 74A as well, which was part of the amending Act.

In the first place, section 8 is a problem because of the wide-ranging definition of corrupt conduct. Anybody who looks closely at section 8 will find any type of corrupt conduct which can be imagined, ranging from criminal acts to the type of activity that would be generally punishable by suspension or taking it further, by dismissal, or only by reprimand.

On the whole concept of corrupt conduct, which is a huge area, and taking a line from the seminar I attended on Thursday night, it could well be that in view of the perceptions held in the community on public behaviour, there might be a case for taking a close look at section 8 and coming up with a general type of definition. Mr Tobias suggested that the objectives stated in the annual report of the Commission might be used to define what type of investigation the Commission ought to be or can be carrying out. The other point of that was of course that to come before ICAC, as a private citizen or as a politician, always puts a kind of stigma on the person. A lot of discussion revolves about how you can overcome that. You might take the definition of corrupt conduct out of the Act, and say that the Commission can investigate certain matters. I do not think it will make any difference whether you do that or not. The very nature of the Commission, to investigate corrupt conduct, still applies. When the Commission makes a statement of fact that someone is guilty of corruption, there are certain degrees of corruption involved.

Looking at the Metherell case in particular, there seemed to be an injustice there, because the Premier was found, applying section 9, to be guilty of corrupt conduct, while two of the other parties, Dr Metherell and Mr Humphrey, because of the technicality involved, maybe the point under the Public Monies (Amendment) Act, were found not to be corrupt. So you have the situation where Nick Greiner and the Minister for the Environment,

Tim Moore, were found guilty, and the other two were able to avoid any taint of corruption, which seemed to be rather strange. It occurred to me, just from an early reading of the proceedings, that something needs to be done about section 9. Mr Tobias quite rightly pointed out that you do have accepted conventions of behaviour that are well known and there should not be any need to specify them in legislation.

In terms of local government, which creates quite a bit of work for ICAC, there is a code of behaviour laid down for local government, and I think ICAC has something to go on there by way of guidelines. Just looking at section 74A, there was a complaint about this on Tuesday night that the Commission had not given a reason for its finding. If you look at 74A (1), the Commission is authorised to explain its findings in the report, so I suggest that if you take out 'is authorised to' and replace it with 'must', it puts the onus on the Commission then to state the reasons for its particular findings. At the present time it can put the finding in without going into any reasoned arguments as to why he made the finding.

If you look closely at section 9 then, in conjunction with the revised section 8, and the reporting provisions of section 74A, I think you could probably repeal section 9. I do not think section 9 does anything at the moment, and when you red it in connection with 74A it creates confusion.

Taking that a little bit further, reading section 74A with section 11, 74A (2)(c) has already been found to have an inherent problem insofar as you have the problem of an appeal to the Government and Related Employees Appeal Tribunal. In a recent case it seemed to me that GREAT may have made a decision without paying particular attention to what the findings of ICAC were. In that case ICAC recommended that the officer be dismissed, and he was dismissed, and then on appeal GREAT ordered his reinstatement. That creates a definite problem for the person doing the employing.

That brings us to section 11. We have had some problems with section 11 in the Audit Office, and I guess some other people have as well. Section 11 is taken to mean that if the CEO has any reasonable suspicion that conduct has taken place, he is duty bound to make an immediate reference to ICAC. We have been doing that. We have been making references to ICAC but by the same token we have also in the Audit Office carried out certain inquiries and investigations by way of special reports and other reports we put to Parliament, before we made the report to ICAC. That brought down the wrath of the Commissioner, who roundly condemned us for that and said that we should have reported those things to him immediately.

One case in point was a fairly lengthy report we put in on the Housing Department. That was at a time when the Royal Commission was in full swing, and the Royal Commissioner in fact wanted a copy of the report. It had not yet been tabled in Parliament so we told the Royal Commissioner he could not have it until it had been tabled in Parliament, and we virtually

told ICAC the same thing. ICAC took a different view and said 'It should have come to us'. In other words, in the midst of the inquiry we should have sent what documentation we had to ICAC. We did not see it that way, and I would like to see something going into section 11 which would enable us to make an investigation in the first instance and then make a report to ICAC.

In saying that I realise that there was a report in the *Herald* this morning talking about the police and the Ombudsman. The Ombudsman has been frustrated to a large extent because police internal inquiries had to take place before the matters could be placed before the Ombudsman. I would not want to impose anything of that nature into this Act, so it is a question to be decided if you decide to deal with people under section 11. You would need the wisdom of Solomon to know just how you would word the thing to allow the CEA to make some inquiries, and if he sees fit to take initial action necessary before the material goes to ICAC, without prolonging the inquiries to the extent that ICAC does not see it for so long a time that it becomes useless. I think there is good reason to go in and look closely at that area.

We did quite a number of anonymous allegations and there has been another case that went before ICAC which was the result of an anonymous allegation that caused the people concerned up at Ballina quite a lot of problems. We in the Audit Office do investigate anonymous allegations up to a point. If we can see that there could be some substance in the allegation we will take it on and deal with it, and if necessary eventually report it to ICAC. There is no way we would take an anonymous allegation straight to ICAC. Looking at section 13 (1), which deals with what ICAC is supposed to do, I would be inclined to strike out anonymous allegations. In other words, get people thinking along the lines that if they want to allege something against somebody, they should come out in the open and say so.

The whistle-blowers legislation, which is an up-and-coming job, will affect the Ombudsman and ICAC in no uncertain terms. It might solve that problem. Nevertheless I would want something in the ICAC legislation to remove the necessity for ICAC to do anything about anonymous allegations. The whistle-blowers legislation will then protect anybody who is worried about publishing their own name.

I think that is about all I wish to bring to your notice, Mr Chairman. I would be putting emphasis on section 11 and probably section 13 as well.

CHAIRMAN: Dealing with section 11, you have the guidelines that ICAC has issued to principal officers?— **A.** Yes.

Q. Are these guidelines effective?— **A.** They are fairly wide-ranging. I would like to see them reviewed.. I know for a fact that ICAC is getting material that is having a snowing effect on them. They are getting hold of things that could be investigated but are not to be worried about. I think

there is some concern over in ICAC itself that possibly the guidelines might need to be revised.

Mr HATTON: We ran into exactly the same problem in the Ombudsman's inquiry, with the tension between the police and the Ombudsman. I put this question to you. Do you think that the suggestion that was finally adopted by that Committee could work in this case? In other words, why not do both? Why not report to ICAC, and liaise with ICAC, and you get on with your investigation? If at some stage they are not satisfied with that investigation, they can then come in and question you about it, and if their experience is that with you, as an Auditor General's department, the inquiries are sufficient and efficacious, then that trust and working relationship could be built on. What would be your comment on that?— **A.** I think that to a large extent we have built up that trust and working relationship already, and we have demonstrated that to a large extent in the State Rail case about the signals, which as you know was a lengthy inquiry. That involved ICAC for a long time. There was another one where we co-operated with the Roads and Traffic Authority. We made material available in both cases, and we made people available as well. We have not been backward in coming forward in co-operating with ICAC. The only problem we have had is where we have been on some special job of our own which would involve a report to Parliament, and we did not want it to be made public until it was tabled in the House.

Q. It is going to be difficult, Mr Chairman, to word the Act accordingly, but wording to the effect that upon report to ICAC of a suspected matter that falls within the definition of the Act, ICAC may authorise the organisation or authority to carry out investigations. That may solve the problem up to a point, but I can see where if you have a very possessive ICAC Commissioner it may not. My second question is, do you see in the Auditor General's Department that the sheer volume of your work puts a very onerous responsibility on you in terms of having to report matters under the ICAC Act where it is suspected that corruption occurred?— **A.** It does. It has not had any undue effect on us so far, but as we go on and as the working relationship between us and ICAC becomes stronger, I think it will. In particular looking ahead to the whistle-blowers legislation, I think it will have a marked effect on our operations and on ICAC's operations as well. Some references will go to the Audit Office, some will go to ICAC, and I can see an avenue there, not that I would be over-concerned with it, for more co-operation between ICAC and the Audit Office as a result of that legislation. On the other hand, as things stand at the moment, I think that ICAC are getting references that they would not need to investigate, taking the line from section 8 which covers all kinds of different levels of corrupt conduct. If ICAC are getting a lot of references at the bottom level of corrupt conduct, that could well be information that needs to be dealt with by a revision of the type of material that should be referred to it.

The Hon. J. BURNSWOODS: Have you seen the submission we got from the ICAC this morning?— A. No.

Q. They seem to think that the number of section 11 reports is not very great?— A. That is good.

Q. It was a suspicion I had, because they can exercise a discretion as to whether matters are trivial or old, and that cuts it down as well?— A. Yes.

Q. I wonder if you think it might be the case in this context that even though a quite higher volume of superficially trivial section 11 reports come in, that might reveal a pattern that might turn out to be useful?— A. That is definitely possible, particularly if it is coming from one direction or one organisation, say school education or something like that. If all of a sudden a whole lot of evidence or allegations came through, when you put it all together it could indicate to ICAC and indeed to the Audit Office that there was something seriously wrong.

Q. Do you have any official or unofficial consultation mechanisms by means of which the Audit Office can check with ICAC whether there is something going on?— A. We do it on an unofficial level. It does happen. One of the problems we have had with ICAC, on the other hand, is that though we have put a number of references to them, we have difficulty in finding where they are at. In other words, are they going to investigate them, or if they are investigating, how far have they gone. That sort of thing involves matters at the lower level of the conduct scale. On anything at the high level, we get very good co-operation from him and that is a mutual thing. We work closely together on anything of that nature.

CHAIRMAN: I appreciate that you have not seen ICAC's report which was only issued this morning. Section 11 is dealt with on pages 44 to 47. There is a summary which I might read to you, but you may well wish to do a considered response with the Auditor General to the whole report. The summary is this:

> Section 11 reports are a valuable source of information for the Commissioner and have been the genesis of most of its significant investigations. The Commissioner would prefer to see the scope of the reporting requirement remain 'reasonable suspicion', with the discretion for the Commissioner to specify old or minor matters which need not be reported, than to see the reporting requirement reduced to 'reasonable belief', which may cause the Commission to be deprived of valuable information.

Would you wish to make any comment on that, or would you prefer to make a considered response?— A. I would like to have an opportunity for the Auditor General to look at it, and then we shall make a response to the Committee on it.

Q. Would you like to state a time within which the Auditor General's Office could do that?— A. We could have this back to you fairly smartly I think.

Q. Within fourteen days?— A. Thank you, Mr Chairman.

Mr GAY: Could I also ask, following on that Law Society's submission, that 2.3.2, 10.1 and 10.2 — the first applying directly to the Auditor General and the second to section 11 — be included in your report back?— A. Yes.

The Hon. J. BURNSWOODS: You refer to a case involving the reinstatement of an official. Might it be possible to get information that? We have had a couple of cases that sound similar, involving local government, but I do not think we have had information on this one. It might be useful for us to have a summary of it.

CHAIRMAN: We have a copy of the statement here and we will be hearing from Mr Hatton of the Water Board in evidence this afternoon.

Mr HATTON: In the experience of your department with ICAC, are you supportive of ICAC in terms of its education, monitoring, and prevention of corruption objectives, and do you know whether it is achieving those objectives and assisting you in your work?— A. Yes. I would say that it is. As far as assisting us in our work is concerned, probably not so much, but in getting on with their own objectives and getting through their own work, it has been quite effective up to date. As for helping us out, the boot is probably more or less on the other foot. As auditors we are not people who are chasing fraud or corrupt activity *per se*. That comes out as part of the job. We are more likely to do something about that initially and then send it to ICAC for inquiry, rather than ICAC finding something and sending it over to us, but that has happened a couple of times.

Q. In general then would you perceive that ICAC, from your experience in your department, is doing a great deal or little or a reasonable amount? I would like you to assess the level with a view to improving the efficacy of practice within government departments and bodies?— A. I would say it has had a very strong effect up to date, so far as the ramifications of section 11 and the guidelines laid down by the Commission have permeated throughout the public sector. They have had the effect of making people more aware of the possible consequences of corrupt conduct. I would extend that right out over into local government, where it may have been even more necessary, bearing in mind that local government is regarded as a fairly loose kind of arrangement outside of the realms of central government itself.

Mr ZAMMIT: I have a question to which you may not wish to respond. Is it your feeling that the public service sees the ICAC as using methods that are fair, rather than methods that could be seen by others as being heavy-handed and almost McCarthyist?— A. McCarthyist is a strong kind of term.

Q. A lot of submissions we have received have used that sort of terminology?— A. I think there is some element of feeling along those lines. I have read many of the ICAC reports and I would not like to come up in front of the inquiry. There is no doubt about that. But people who have put themselves into a situation where they are under the spotlight of ICAC,

generally speaking are there because there is reasonable suspicion that they have acted corruptly. That having happened, I think the methods of inquiry or interrogation adopted by the Commission will always tend to come under criticism by people who are a bit frightened of what is going to happen to them. I guess that includes 'politicians as well. It will always be there irrespective of how they go about it,bearing in mind that the type of activity they are inquiring into, getting back to section 8 again, bears some kind of stigma.

I guess there is a defence mechanism built into all of us to defend by saying 'You are not giving me a fair go; I do not like the line of questioning'. Not being a lawyer, I cannot answer the question in any straightforward terms other than what I have said, apart from agreeing with you, Mr Zammit, that there is a feeling in the public sector generally that they could be a bit heavy-handed. I do not have any evidence to back that up.

(The witness retired)

Luncheon adjournment.

KEITH HENRY JOHNSON, of [redacted]
self-employed farmer,sworn and examined:

CHAIRMAN: I think you have received a summons under my hand to attend today?— A. Yes.

Q. You have made a written submission to the Committee? Is that correct?— A. Correct.

Q. There was a response from ICAC, and you have provided further material to the Committee?— A. That is correct.

Q. Would you like that to be tabled today?— A. Yes, but if possible I seek the proviso that people whose names are mentioned in the report be not publicly identified. I feel that quite enough harm has been done to people by the use of their names in the public arena, associated with allegations that had no foundation, without adding to that.

Mr GAY: You referred during the report to S.E. and S.P.?— A. That is my abbreviation for Shire Engineer and Shire President.

Q. Do you want that to stay in?— A. No. By name or by title it identifies people.

CHAIRMAN: Is that an opening statement that you would like to make to the Committee?— A. I would like to emphasise key points. I am not suggesting that ICAC not deal with an honest complaint. I am suggesting that they apply a very stringent standard of proof to those complaints that are received, because I have evidence before me of the complaints received; I will demonstrate later that they are quite unsubstantial, even on the first reading. I shall endeavour to demonstrate why that is the case. I believe that the use of anonymous complaints is provided by a lot of gossip, to which ICAC has to respond, and to which I myself had to respond. I have no way of assessing the proportion, but a proportion of that is in general too gross to act upon. I think it encourages malice and pettiness with people who have an axe to grind. I think the use of these anonymous complaints is very devastating to those involved, as you will see from the documents. What starts off as a confidential inquiry from ICAC to myself ultimately becomes a public inquiry, with the documentation I have provided tabled in that inquiry, without any reference to me. All of the people therein named are now publicly named, even though in ICAC's words, there is no basis for charges or accusations.

One of the consequences of all this is that it encourages people into a tin-plating approach to life. They become nervous about the possibility of very simple acts being misunderstood, and as a consequence they are quite timid about going about their daily duties because of the risk involved, and that discourages flexibility and some measure of risk-taking which is inevitable in public life and public administration.

The other drawback of these methods is that they shift the burden of proof to the person who is accused in these accusations, unlike the normal standard of British justice where those who accuse must first prove before the other person is required to answer. This burden appears to have been shifted in this case. In the end I believe it wastes a considerable amount of ICAC effort and local government effort. I can only speak for myself and, if it is at all representative, I certainly wasted a considerable amount of time. I put in well over a hundred hours of my time, and while I do not wish to dwell on the subject, I would point out that local government mayors and presidents do not receive a salary. Although we have expense allowances and things of that nature, the work is given at the expense of one's normal occupation.

The second point I would care to make is that in the interaction between ICAC and myself, the security leaves a lot to be desired. They communicated with me by open fax, even though the letter I had sent in was clearly marked 'Confidential', and the letter they sent to me in the first instance was clearly marked 'Confidential'. One of the first guidelines on security is that you never use a communication mechanism that you do not positively know to be secure, and that was clearly not the case with ICAC on this occasion.

CHAIRMAN: In view of what you have indicated about naming people, Mr Johnson, it might be better for your submission not to be tabled, and we will just rely on the evidence you give us here today.?— **A.** Okay. The next point I would make is that the quality of the questions asked in the matters that have been put before me leaves a lot to be desired. You will see from the documents I have tabled that the very first reference to me by ICAC asked some seven or eight questions, some of them of a very, very general nature and very difficult to deal with: nevertheless I did my best to deal with them. Subsequent to that, and if you turn to the documents, the more recent ones that were signed by Mark Hummerston reference to C91/3013; of the five matters that were put to me on that occasion, the first one, as you can tell by my response, simply does not, even if correct, constitute anything of any consequence. The second one is too broad to deal with. The third one had already been covered by a previous request from ICAC, to which I had responded very fully, the fourth one had not been, and the fifth one was just of such a gossipy rumour-mongering nature that I did not feel it deserved being dealt with, and that was the view I put across verbally by phone to the action officer at that time.

Subsequent to that, they dropped the first two questions, they came back to me and to the shire clerk and said that my previous response was unsatisfactory, and they now were asking three heads of questions, one of which is in fact all about one that was previously answered. This is the fourth time it has been raised. It has been fully answered twice, three times in fact, and yet they are coming at it for a fourth go.

The most recent communication from that, which I table, directs questions with respect to three of the issues that were previously raised, and the last one , item 5, where they refer to Councillor Diane Edwards, having previously alleged that there had been a *de facto* relationship for 17 years with a Mr Barry Porter, they have now shifted that across to Mr Barry Porter's brother, notwithstanding the fact that I rang them and made it perfectly clear that to the best of my knowledge there was no such relationship. The relationship to the extent I can ascertain was between Councillor Edwards and the brother of Mr Porter's wife, and that is not a blood relationship or one which, under the requirements of the Pecuniary Interest Disclosure (Local Government) Act, requires pecuniary interest disclosure. Nevertheless Councillor Edwards has always, when she was knowledgeable who the applicant is, has always declared a pecuniary interest.

The point about questions of that sort is that I am not a member of the police force, I am not an investigator, and if someone says 'So-and-so is alleged to have a *de facto* relationship', how am I supposed to sensibly respond to that? I can only rely on hearsay, gossip and rumours that get around a country town. I am not in any position to say categorically 'Yes, that is or is not the case'. As to those questions, in the context in which they were asked in this case, with the three preceding questions being of no consequence or already having been dealt with, I believe the exercise of a reasonable amount of judgment would have led to the action officer saying 'I do not think that needs to be dealt with'.

I think the fact that this question about the sand quarry, which comes up again and again, despite the fact that I answered very fully on the first round, points to the fact that there is a lack of internal co-ordination. They receive a complaint, and whatever their data base was it is quite clear that it does not throw up a connecting link, or if it does people are not going to and using the data base in a way that would show the connections between previous requests and reports and answers given. I have raised that by phone with the people concerned, and the general impression I get is that if they have a data base it is not particularly effective.

The final point I would make is that some time back, between the Department of Local Government and ICAC, a code of conduct for local government was issued and adopted by most councils without change. In the case of Ballina Shire Council we amended it, because in our view it was badly constructed, and then issued it ourselves. Notwithstanding the presence of that code of conduct and the enactment of a major change to the Local Government Act, nothing has been done to give that code of conduct any effectiveness in terms of sanctions.

I want to highlight the point I am making here. If Ballina Council puts on a new employee, it has a personnel package which includes our code of conduct, and one of the terms of employment is that they are to abide by that code of conduct. Thus an employee or staff member of the council can

be dismissed for breach of the code of conduct. That is not an unreasonable situation. Councillors, who also are covered by that code of conduct, are not subject to any form of sanction whatsoever. If they breach the pecuniary interest requirements of the Local Government Act, then of course by normal court action they can be penalised. All of the other things covered by the code of conduct, and laid out at length, are not subject to any form of sanction capability through the existing mechanisms. The question I ask is, 'Why has ICAC not sought, in conjunction with the Department of Local Government, to set up such a mechanism?' I see that the Local Government Act contains nothing along those lines. There is the opportunity to do so, and the opportunity has not been taken. So we have a situation where we have a code of conduct and a set of expectations and standards laid out, and they are to all intents and purposes unenforceable.

CHAIRMAN: In regard to the obligation to report complaints to ICAC under section 11, have you seen the guidelines issued by ICAC?— **A.** There has been a series of guidelines issued over a period of time. The general impression I have is that I am regarded as the principal officer of the institution, and I have an obligation to report anything that comes to my attention which is of a nature likely to be classified as corrupt, and that I am required to use my best offices in responding to queries directed to me by ICAC. I have done my best to conform to those requirements. One of the other requirements put before us is that matters should normally be dealt with confidentially and ought not to be put before council as a routine thing. I have abided by that. But in the first instance I received a confidential inquiry and I replied in confidence. Subsequently it got into a hearing at Coffs Harbour, and all the material that I provided believing it was confidential, became a public document, without any further reference to me.

Q. The guidelines that were issued to you, did you find they were helpful?— **A.** Yes. It was not something that was put to me asking how I felt about it.

Q. Having read the guidelines, is there any other aspect you would like to see included in those guidelines that might be of practical assistance in determining whether something should be reported or not?— **A.** No. I am quite comfortable in using my own judgment about that. My feeling is that I am reasonably well versed, as is all our council, on pecuniary disclosure requirements. If there were to be a breach of that I would act directly through the court system as well as advising ICAC. I would be tempted not to act unless there was a firm basis for doing so.

Mr GAY: We have not tabled this paper which I have in front of me. You said that in early August 1991 the edition of the local throw-away paper, the North Coast Issues, contained statements concerning this, and they did not come from the people involved. Would you elaborate on that? First, to clarify my mind, I am aware of a pretty scurrilous paper written by a gentleman up there called Fastbuck?— **A.** The North Coast issue is now

defunct. It has gone into liquidation. The point I was making there was that those people who have used the process of an anonymous complaint were also doing their best at a time when local government elections were imminent, to suggest corruption was present in the council. That was the purpose of that particular editorial. It was quite clear from that editorial that communication had taken place between those people who had originated the anonymous complaint, and the editor of that newspaper. I raised that because it is my belief that under the ICAC Act there is the capacity for ICAC to act against people who falsely make accusations. The reason I raise it there is to bring to your attention that there is more than sufficient opportunity for ICAC to follow up by making inquiries of the editor, to ascertain to whom he spoke and who said what, as the basis for that editorial, so that they in turn can get in touch with people who have used anonymity to hide what I believe is an attempt to discredit the council with pressure on particular individuals who had frustrated some of the activity they were involved in.

Q. Did you contact ICAC at the time? The Commissioner has been quite clear about it, and in fact he circulated a paper to all MPs and to shire councillors, about using a reference to ICAC in this way?— **A.** I was in touch with him on the very first submission. As part of that submission I specifically requested that they put before Mr Temby my concerns about the anonymous complaints in this particular case, and laid out my reasons for doing it. I made specific suggestions on the correct direction they should take. As you will see from the attachments the response I received was, in my view, a bureaucratic brush-off — 'Don't call us, we'll call you: things are under constant review', and so on. I have read plenty of those letters over the years and I know they are going nowhere.

Q. On the specific situation with the editorial?— **A.** No, I did not raise that as a specific issue at that time. I think the timing was such that it came out after I had responded to the letter. I just took note of it at the time, and subsequently, I think it was in October, the hearings were in Coffs Harbour. Quite frankly, on that first cycle, I was very glad to see the end of it, in the belief that there would not be a recurrence.

CHAIRMAN: Can I ask you to specify the circumstances in which you think ICAC should be able to act on anonymous complaints?— **A.** Sure. If someone, for whatever reason, sends in a complaint which says 'Keith Johnson is a thief and a vagabond and he is ripping off the council' they should tear it up and put it in the wastepaper basket. If on the other hand they get an anonymous complaint which says 'Keith Johnson has a Swiss banking account with the Bank of Zurich, number 12345, in which he deposits funds illegally gotten', then that is a piece of information which can be objectively verified. If it turns out that he has that bank account in Zurich, then it requires further investigation and they ought to do it. I understand the process of criminal investigation generally relies on informers,

and you cannot do without them, but given the generalised nature of the sorts of things that have been put so far, it is really quite pointless.

To have a complaint that council has taken on the role of developer in the shire, and the council is making development decisions that benefit the council, is misleading. We develop, we subdivide, and we do so at a profit. The statement that the councillor has taken on the role of a developer in the Shire and is making development decisions to benefit council in that capacity is absolutely right. The developments themselves make a profit on behalf of the county. The bottom line is, 'So what? What is wrong with that?' The next one is that Mr X has colluded with three developers in relation to business interests held by that family in the Ballina Shire. Once again you cannot do anything about it. It is a very general shot-gun accusation which takes you nowhere. I cannot sensibly respond to it, and I do not believe that anyone else can.

Mr GAY: Let us go back to the question about Councillor Edwards's private life. Can you remember how often you were asked about this?— A. The first time it came up was in April this year, 7th April, their reference C 913013. The reference in that case was 'That Councillor XX has never declared a pecuniary interest at council meetings when dealing with Mr Porter's development applications, whom she was in a *de facto* relationship with for 17 years, and that Ms Edwards always voted in favour of these applications'. All of this is contingent upon a relationship that is asserted without proof. It is not a relationship on which anyone can respond.

Q. So that was just answered once?— A. Yes. I went back and said 'This is absolute nonsense. I think the words I used were 'This is lavatory wall writing' and you ought to ignore it, throw it in the waste paper basket'. Subsequently the query is 'It has been alleged that the councillor may have had an indirect pecuniary interest in a number of development and building applications that came before council arising out of her marriage (*de facto*) to the brother of the person who was previously a local developer'.

Q. This was number two, and you had answered it once?— A. Yes. 'Could you please provide comment on this allegation, including (1) brief details of Mr Porter's DAs which have been considered by council, whether the councillor in question has declared an interest in any of these, and how she has voted in support of Mr Porter's DAs?'

Q. There is no avenue in that question to answer in the negative to the first question. It is an assumption that all the rest hinges on?— A. Yes.

Q. Without any avenue in the question to answer in the negative?— A. Precisely. I am not in a position other than by the use of tenuous hearsay and very indirect information. Alternatively what do I do? Do I call the councillor and say 'Do you or do you not have a certain relationship with that person?' I have no power to require an answer to that question which has to do with their personal sleeping arrangements.

Q. What was your reply to this?— **A.** I point out in the most recent reply, which has not reached ICAC yet, that whilst I would reply to the best of my ability to do so, they must understand that I am relying on gossip and hearsay. In this particular case I have actually spoken to the councillor and she has indicated to me what the relationship was. But bear in mind that she was under no obligation to do so. I feel quite embarrassed about having to raise issues like that. We have three lady councillors. What about the next accusation, that councillor x is sleeping with...? And she is a married woman and she is sleeping with someone else who is a developer. What have you to say about that, Keith Johnson? How do you keep that out of the gutter press as it arises, given that somebody in the community is raising that query and then taking the opportunity to legitimise it by saying 'ICAC is looking into it'?

Q. Also the concern is that there is no place in the question to refute it originally. It is an assumption; it seems to assume that it is a fact?— **A.** That is right, in the first instance. And my first reaction was quite frankly one of disgust. It is the sort of material I endeavour not to deal with in public life. That was the view I expressed to the action officer. However, as you see, I said it was complete nonsense, and went on to explain to the best of my knowledge what the relationship was. Notwithstanding the explanation they still get it wrong. If they have been in communication with the complainant, why do they not get the complainant to prove these things? It took from April until recently to get the next response, and there were five questions asked there. Two were abruptly dropped, one of them was previously answered but now they have expanded it into a series of questions. One introduced for the first time, and factually correct, we have responded to. And the old one re-hashed except that now we have changed the lover. It has shifted from the individual to the brother.

The Hon. S. MUTCH: How did you receive the first letter that came to you from ICAC? It does not seem to be marked 'Confidential'?— **A.** I know when I received it, it either came in two envelopes, or there was a 'Confidential' marking somewhere. In any case, I certainly treated it as confidential, and in my reply on the first page I typed 'Confidential' on that.

Q. Did it come in the ordinary mail, certified mail or registered mail?— **A.** I do not believe it came through certified mail. It came addressed to me personally. As is the custom, it was put on my desk without being opened. But the subsequent follow-up by fax — I do have the actual attachment that came in on that occasion from my secretary. She wrote: 'Councillor Johnson, this was faxed!!! Denise on switchboard received the photocopy and said she is not aware of the contents of the letter. No-one else has seen it apart from me.' That came through an open fax, and that was the second piece of correspondence, referenced GF.John._whatever. When I rang and said 'Look, you sent this on an open fax'. The response was 'Oh, was it?' That is not how you run security.

Mr ZAMMIT: A lot of these inquiries were made by telephone, were they not?— **A.** Not a lot. The first letter I got I responded very thoroughly and it was done in writing. I then got a second response which elaborated on some of the material I had responded to, but then added a little more. Because I received it by fax, and because of the open nature, I rang on that occasion, but only for those purposes. I did not go on to give a thorough reply. I then received another one, which is not tabled here, concerning a complaint about a land dealer, and that was dealt with by mail. Then I received the one that is attached there with the five queries, and having late last year gone through the public inquiry at Coffs Harbour, I thought quite frankly it was getting beyond a joke, and on that occasion I rang and said, 'Look, really, (a) it has been covered, (b) it is nonsense.' By the time you go through the file and eliminate three that had no purpose in being there, and then look at the nature of the fifth one, you would surely have to conclude that most of what you are dealing with is rubbish'. The response I got was 'I will relay that to the supervisor and act accordingly'. That was the second occasion I contacted them. Then I got the next one, and I took the opportunity on that occasion to ring the action officer once again, because now they were saying that my previous response was unsatisfactory. I said 'When is all this going to stop? I think there is one hell of a lot of nonsense being perpetuated.'

Q. ICAC never phoned you, but you phoned them?— **A.** Yes.

Mr GAY: Having spoken to Councillor Edwards in the end yourself, did she elaborate whether an action officer had contacted her in the first person rather than writing continually through a third party, namely yourself as shire president? Had any contact been made to her as to these allegations concerning her, to elicit the information?— **A.** No. We have discussed that point. No contact has been made with her.

The Hon. J. BURNSWOODS: When this section in the latter part of your chronology about anonymous complaints was given, I am wondering whether what you suggest is not almost worse than the problem you are talking about. Accepting that anonymous complaints are obviously a very difficult area, it seems to me that unless ICAC decides not to accept them at all, for instance when you suggest checking facts verifiable by an independent source to check on the DA details and ownership and so on, if I was someone who was being complained against I would find checks of that sort just as offensive as the sort of process you were talking about. I wonder wheether what you are suggesting here is not, for many people, just as bad as the process you were complaining about?— **A.** I will deal with that in a number of layers. First, if a judgment has to be made whether or not to deal with anonymous complaints at all, it is my view that if they cannot deal with them in a precise, definitive way, it is best not to deal with them at all. I see a good deal of harm being done to reputable, hard-working, dedicated individuals. Let me assure you I have extensive management experience in a number of

firms, and if you destroy the viability of organisations by the constant risk to individual reputation being held up to public scandal, the price throughout New South Wales in terms of the effectiveness of public administration will be a huge price to pay. But at a more human level, I have to believe that the value of our democratic system rests upon whether or not individual humans are truly free and treated with dignity. Though you must have a careful balance between the wellbeing of society as a whole and that of the individual, in this case if you had to come down on one side or the other, I would opt for the individual.

Q. Which individual — the complainant or the one complained against?— **A.** If the complainant is genuine, why would they not wish to sign their name, given that they are assured of confidentially?

Q. We have been talking about whistle-blowers legislation. Some pretty dreadful things can happen to people who make complaints?— **A.** What ICAC has to establish in the public eye is its credibility, that if you go and complain to them, you will not be revealed. I am not saying that the person who is making the complaint has to be revealed to the person complained about. I believe ICAC has to have access to that person so that they can ask a few questions about them in the first instance and establish the credibility of it. If people will not even indicate who they are, when they complain, that makes it very suspect in the first instance. That is my view. Deal with it at company levels. A company check does not require that the members of the company be contacted. If someone says 'Keith Johnson the Shire President is approving DAs for and on behalf of his mates', you cannot do anything about that. If you have a specific complaint that DA123 for company XYZ owned by Keith Johnson was voted on by Keith Johnson, then you can run the checks very easily.

Q. What about in a case like this where allegations concern family relationships rather than a matter of a company?— **A.** In this case the relationship is the basis on which an accusation with respect to pecuniary interest hinges. I guess the best thing they could do would be to check births, deaths and marriages. If someone has been in a *de facto* relationship for 17 years and there are children of that relationship they can soon find that out. You do not have to go near the person concerned.

Q. I am thinking also of the engineer's relationship, where the actual birth relationship is beyond doubt, but the personal relationship is in question, whether they get on and things like that?— **A.** That to me was not the central issue, as it was demonstrated to the extent that in any matter that came before council affecting the brother, the shire engineer always declared an interest and withdrew. There was never an instance of conflict. As it happens, the personal relationship is incidental to the issue. It does not matter what the personal relationship is, the pecuniary interest disclosure requirements remain firm.

Q. When the complaint was first received and the preliminary investigations were being done, the actual process of checking is going to be offensive to some people anyway?— **A.** Not necessarily. The starting point, if you have a signed complaint, is to sit down with the person concerned. I think this is normal police procedure. You ask them 'What is your basis for saying this? How do you know?' and so on. If you cannot establish a credible basis for the next leg of your inquiry, I do not believe you proceed.

Q. Is the answer not to deal with anonymous complaints, ever?— **A.** Yes, unless the complaint itself provides in the submission sufficient material for you to take those steps. I have instanced two particular ones. There are other examples where you cannot. But with a DA by number and a company by name and a relationship designated, these things can be verified by all of the documentation which is available from institutions and Corporate Affairs and so on.

Mr ZAMMIT: When you phoned ICAC and told them who you were, they assumed that you were the person that you said you were, and you discussed matters with them that were of a confidential nature?— A. Yes.

Q. How do you think they knew or could assume that you were the person you said you were?— **A.** You have got me too. I was in breach of the very same rule I spelled out myself, was I not? I used a non-secure form of communication. I endeavoured to be circumspect in the conversation, but you are right. It was not the standard procedure at all — 'Thank you very much for your call. I will now call you back at the number where you ought to be if you are the person you say you are, and we will get on with the conversation'.

CHAIRMAN: If ICAC is going to deal with anonymous complaints, I take it you are saying that there must be something within the complaint that corroborates or independently establishes the nature of the complaint. Is that it?— **A.** Based on my limited experience so far, I can look at complaints that are made, and people who have a working knowledge of public administration can dismiss some things like that. If I go back to the very first one, it made eight basic allegations and said things like 'The present shire engineer had total control over the shire's strategic development plan and as a consequence he was deliberately biased in such a way as to lead to the closure of the West Ballina sewerage treatment works'. Anybody who has been in local government for more than five minutes would recognise quite clearly that that is not a process that is a valid explanation.

The process of doing a local environmental plan, as you Members of Parliament would be aware, involves the Department of Planning, it involves the planning department, it involves all the councillors, it involves the community, it involves a very extensive process of local environmental studies, draft environmental planning, often going through several phases, the publication then of an LEP which is gazetted and in our case varied by the Minister, and so forth. It undergoes a whole cascade of scrutiny and

interaction, and this shows that anyone who would believe that allegation *prima facie* really does not know very much about public administration at local government level. If he did, he would know enough to be able to say 'This is nonsensical'. So when you are dealing with those sorts of things, experienced people exercising sound judgment and noting the absence of specifics, can quickly say 'Really, this is quite nonsensical'.

When you get down to specific issues like 'Here is a DA for rezoning or subdivision of land, which bestows a huge benefit on the individual named. The DA number is xxx, and there is this actual relationship between the proponent and a member of the council', then quite clearly you can deal with that. The complaint sets out the points one by one, independently of the people concerned.

CHAIRMAN: If Parliament does not accept your submission that restrictions be placed on ICAC's investigation of anonymous complaints, what would be your fall-back position? What else could be done, short of imposing those restrictions? Should there be sanctions on false complaints?-
— A. You relate a charge. Are you Mr Anonymous or Miss Anonymous? A complaint made by an anonymous person cannot be dealt with. You can have all the safeguards under the sun, but they are not safeguards in practice. It seems to me the fall-back best position is that ICAC makes it quite clear to complainants and would-be complainants that they can give their name knowing full well that there is no risk of public disclosure of their name as a source of information. It can be treated with great confidentiality, but in the interests of fair play they can expect that ICAC would sit down with them and do sufficient interviewing to satisfy themselves that there is a basis to the accusations made, and it is not just a repetition of gossip. I do not know how much information of that sort goes through their office, but I see the numbers on their documents — C 913013 was the most recent one. The one before that was in the 2000 series and it dates back to June of last year. They had something like 2000 numbered documents coming in as at the middle of last year. That is a huge volume, and if any of them are remotely like the stuff I am seeing, then the cost of public administration must be huge.

CHAIRMAN: Thank you very much indeed, Mr Johnson.

(The witness retired)

WARREN FRANCIS HART, of [redacted] Director of Human Resources for the Water Board in Sydney, sworn and examined:

BRIAN DOUGLAS LENNE, of [redacted], Manager of Audit and Review, Head Office Building of the Water Board, sworn and examined:

CHAIRMAN: Mr Hart, you have received a summons under my hand to attend this hearing today?— **A. (Mr Hart)** I have indeed.

Q. Mr Lenne, you have received a summons under my hand to attend this hearing today?— **A. (Mr Lenne)** Yes.

Q. Mr Hart, does your colleague wish to give evidence, or to give instructions?— **A. (Mr Hart)** He may even assist me by giving evidence. Mr Lenne is the manager of our Audit and Review area and has been responsible for putting in place a number of initiatives which go to lifting the whole debate on issues of integrity and the possibility of corrupt conduct, and depending on where this Committee may wish to take the issue, it may be of value if he is here to assist.

Q. There will be no objection to that assistance from Mr Lenne as a witness. Mr Hart, what is your position in the Water Board?— **A. (Mr Hart)** I am Director of Human Resources. I have held that position for a period of about five years, and I work in the Board's head office complex situated at the corner of Pitt and Bathurst Streets, Sydney.

Q. Mr Lenne, what is your position in the Water Board?— **A. (Mr Lenne)** I am the Manager of the Audit and Review Unit, and have held the position for four years. I am located in the Head Office building of the Water Board.

Q. I think that the Water Board has prepared a submission which you would like to table as part of your evidence?— **A. (Mr Hart)** That is correct.

Q. Have you an opening statement or further material you would like to put before the Committee?— **A.** Not so much an opening statement as perhaps some information in addition to the submission. In the Water Board we believe that the issue of ethical behaviour is something that is simply good business. We are here and have made this submission primarily in relation to a particular matter involving ICAC and the GREAT tribunal that we became involved in through one of our employees. I would like to say at this stage, and see where the Committee will take this, that we believe there needs to be consideration given to a link between GREAT and ICAC under some sort of umbrella legislation. We also believe that unlike

GREAT it might be instructive to look at the federal arena, where under the Merit Protection (Australian Government Employees) Act, there is due regard to the efficiency of the relevant authority, and without particularly going — unless the Committee particularly wishes to go — into the case in relation to our organisation, which is pretty well covered in our submission, we believe there are perhaps elements of the Commonwealth scheme that serve public sector interests better than GREAT at the moment. We believe there is a need for a co-ordination of these issues by the Government, which may fall outside of just the ICAC legislation. I guess in terms again of my organisation's experience with this particular issue that we became involved in, we would say that it seems to us that 14 months of investigations and many weeks of hearings can be reversed by three days of GREAT hearings. We have taken some additional actions, apart from seeking to appear before this Committee, and one of those actions was to write to the Director General of the Department of Industrial Relations Training and Further Education with regard to the GREAT Act. We have also asked that the particular problem that we see with the GREAT legislation be discussed at the next meeting of Chief Executive Officers within the State sector. We are interested also in adding some information should you wish, through my colleague Mr Lenne, on items 6, 7 and 9, and in addition for the benefit of the Committee we have a compilation of documents which are all aimed at improving the performance of the Water Board by better management and specifically control for the prevention of corrupt conduct. Those documents I can leave with you.

Q. There is no objection to their being tabled.?— **A.** In essence, the initiatives really go to the fact that the organisation has recently put in place a motion for organisational change which will make the organisation more accountable. One of the facets of that organisation change is the setting up of a separate contracting and supply division. That contracting and supply division recognises that the Water Board spends more than $400 million a year in procuring external services and material. In this latest restructure I think we have certainly focused on the fact that organisational restructuring can assist in relation to the issues of fraud and behaviour that would flow from fraudulent behaviour.

We have also put in place a **Fraud and Corporate Ethics** programme which over the past twelve months has allowed us to discuss issues dealing with conduct of the sort covered by the ICAC legislation. We discuss that with all levels of management.

In conclusion, we have implemented a series of business ethics meetings trying to help senior managers with ethical issues. They are round table discussions and they focus on issues such as the commercialism which one would expect in government behaviour and on the other hand ethical issues that might flow from that. We have had people such as Paul Finn and Hugh Mackay come and address these meetings. As a matter of fact the fourth

meeting will be held next week in the regular series of meetings that I chair. Professor Tony Coady from the Melbourne University will be coming up to join us next week. The thrust of my organisation's submission, whilst dealing with the case that we were involved in which flowed from an ICAC hearing, is simply a recognition that we in the Water Board intend to take these issues seriously. There are many things that we are doing, and many things that we will need to do in the future.

CHAIRMAN: I take you to the Water Board's submission, paragraph 3.1.3. Can I ask you to outline the differences between appeals and decisions from GREAT and the Industrial Commission?— A. As I understand the situation, the appeals from GREAT are limited to appeals against errors of law in the actual decision, and appeals against a decision from the Industrial Commission also have a provision for an appeal against errors of law, but also against other errors such as errors of fact or other errors that could have occurred in terms of the hearing. Might I say that over many years, as you and your Committee Members may be aware, there has been a tendency in the public sector for appeals against dismissals to go to the Industrial Commission, particularly where the employees were members of registered trade unions.

With the changing of the Industrial Relations Act it meant that the ability to lodge an appeal with the Industrial Commission was broadened to cover all employees, with the exception of those that were covered by the Government Senior Executive Service legislation. But we simply put the view that it appears inconsistent to us as the employer to have two appeal rights which are mutually exclusive, and the appeal for an employer or indeed perhaps an employee group against those two tribunals involves different appeal rights depending on which tribunal is chosen.

Q. Dealing now with 3.3.1, I am wondering why the Water Board is obliged to accept the findings of ICAC. I am sure the main message from the GREAT decision is that government agencies are to make their own analyses of ICAC's findings and come up with an independent view rather than automatically act on ICAC's findings, just as the DPP has to come to his own judgment about recommendations for prosecutions?— A. The comment there really goes to the individual case that we are involved in, and we find it difficult to accept, certainly I did, that a hearing could be held before ICAC with people who appeared before ICAC in relation to the Water Board case. There were a number of witnesses called, many more than were called in the GREAT matter. There were many more days of hearings. I am not suggesting for one moment that quantity is quality. Also I would have thought that the way in which the ICAC proceedings were conducted, and in fact the findings from ICAC, were such that it was totally legitimate for our organisation, based on that information, to make some decisions which we quite properly made and which were appealed against.

I do not say that GREAT is not obliged itself to accept those findings, but it seems to me that there is something inconsistent, and certainly to my organisation, that we have this process which goes for such a long period of time, with so many of the facts looked at, and yet another tribunal simply says 'Notwithstanding all that, we believe the employee should be reinstated and certain things should follow from that'.

Q. I take you now to paragraph 4.5.3, and ask you to elaborate on the Board's proposal for reform?— **A.** The wording there when I first read the submission — I had some input into it obviously — may appear difficult to follow. We are saying that there should be a linking between the GREAT tribunal legislation under some umbrella legislation. In fact one of the easiest ways out of it would be to have appeal rights to one appeal body only. While you have a situation where, as it is at present organised, there are different appeals from the appeal bodies themselves and different grounds for appeal, and it would appear to us that that creates a difficulty for the employer in taking action without knowing to what particular appeal body an employee against whom action is taken is likely to appeal. The way a case is prepared may well be quite different, depending on the particular tribunal to which the employee appeals. In the name of good management I find that difficult.

Q. Could I take you to section 5.3 and ask you your view on the operation of section 11. Have you seen the guidelines issued by ICAC?— **A.** Yes.

Q. Would you make any comments you would like to make in relation to the practical assistance in those guidelines?— **A.** Thank you. I will ask my colleague Mr Lenne to comment on those.

(Mr Lenne) We would suggest that the reporting under section 11 needs to take account of four things. Our experience has been, in trying to set up our own investigation mechanism within the organisation, that there are four important things to know about. First you need to know whether or not the business of suspicions or concerns or allegations is being recorded effectively, and in our package of materials we will demonstrate some of the things we have done to achieve that. Second, you need mechanisms for actually investigating allegations. The difference between doing an audit and doing an investigation is considerable, and I found fairly quickly that experience in one is not transferable to the other. Third, there need to be procedures for recording outcomes of cases following investigation. In an organisation of the size of the Water Board with 9,000 people, a number of things are handled locally. Finally there is the business of using the outcomes from investigations to attack the causal factors.

It seems to me that going back to the issue of section 11 reporting, the dilemma for an organisation is to decide when to report something. That could happen at any one of those stages.

From our point of view I suppose that the most sensible time to report would be following the third stage, when there has been something done properly through a professional investigation,and we have some sort of result that can be reported. It seems to me that dealing with changes to section 11 needs to take into account the degree to which organisations are doing what we endeavour to do, that is the first two steps, recording allegations properly and dealing with them in a confidential manner, and investigating them effectively.

Q. Do the guidelines provide further assistance in that?— **A.** Yes, definitely.

Q. What sort of changes should be made to the guideline information?— **A.** That is a harder question to answer.

Q. Would you like to take that on notice, and come back to the Committee?— **A.** Yes.

Q. Is there a time frame you would like to have in doing so, perhaps coming back in 14 days?— **A.** Fourteen days is fine. The materials we have brought along as examples of what we have done might throw further light on it.

Q. Just if you want to add anything to that?— **A.** Certainly.

Mr HATTON: You are saying it was a waste of time. Is that because of fact or because of outcome?— **A. (Mr Hart)** In what context was that?

Q. You said that 14 months of investigation was reversed. In outcome it may be, but in fact were there valuable lessons learned by your organisation from that 14 months of investigation?— **A.** There were valuable lessons learned, but I wonder at the cost of the matter before ICAC and then the subsequent situation which was not the fault in any way of ICAC legislation. The person was in a very senior position, and certain findings were made from ICAC on which we took action: and then all of that can be simply swept aside.

Q. I suppose it comes down to two things. Did you share the view that the person should be sacked, irrespective of GREAT?— **A.** Most definitely.

Q. In your view the person should have been sacked?— **A.** Most definitely.

Q. So in that respect ICAC was not a waste of time?— **A.** Not at all.

Q. That puts a point on what you are saying?— **A.** Can I say this? One of the problems with GREAT is that the test or the standard that seems to be being applied in GREAT for somebody in a position of senior economist, as our employee was — and is, having been reinstated — appears to have been the same test that was being applied to somebody who had been in the place for three or six or twelve months. I have a real problem with that, because I believe that with somebody on a very high salary in a senior position you would expect a much higher standard of performance.

Q. What led me to those questions was page 25 of the decision of GREAT, at the foot of that page where it says in the last paragraph, 'Evidence was given by Mr Johnson, Mr Young, Mr Curtis and Mr Stratford, all senior managers, that they would find no difficulty in working with the appellant should he be reinstated. None regarded his conduct as found by the ICAC as requiring dismissal, none regarded the appellant as a corrupt person. Not only did they regard him as a person of integrity, they also spoke of his excellent service in the Board's employ and the valuable contributions he had made.'?— **A.** With the exception of the words 'did not regard him as a corrupt person' that is the view which is shared by the chief executive of the organisation, and myself. Neither the chief executive nor I agree with the comments of some of the people who were quoted there.

Q. So there is a problem there. The bottom line is that ICAC identified a problem within your organisation which you agree with, but which some senior people in your organisation do not see as a problem?— **A.** To be fair, we drew ICAC's attention to the problem. The matter went to ICAC, as I understand it, under our volition. We drew it to ICAC's attention. The matter was heard by ICAC, certain decisions were made by the employer body, and very high acknowledgment was placed on the views of the employee by a number of senior staff. Those views were not shared by myself in that I gave evidence at the GREAT tribunal, or by the chief executive.

Q. So the bottom line then is that it could be that the thrust of your submission is that the GREAT legislation should be amended to take account of ICAC legislation, rather than the other way round?— **A.** Most definitely. There is no question of that. It is incomprehensible that an employing body should be required to take back in his original position a person whose background you know probably as well as I do.

The Hon. J. BURNSWOODS: I think Mr Hatton has anticipated what I was going to ask, which is basically my impression that you are far more critical of the GREAT legislation procedure, but your purpose is not to criticise what ICAC is doing. You say that you and GREAT are out of step?— **A.** I could say that that is quite right, but it also concerns me as someone committed to public sector reform, where we have had a number of cases where certain information and certain conclusions have been drawn, and the matter has gone to some appeal area after action has been taken by the employing body, and particularly in our case it has been pushed aside as though everything that went before was immaterial.

Q. I still wonder whether ICAC finds in a relatively narrow area of performance that an employee has done things which warranted dismissal. That is still different I guess from the employer's role and GREAT's role in looking at 20 years of an employee's history and other things he has done. In other words, the onus would still be on the employer to take into proper consideration a range of things, whereas ICAC's role focuses on one thing

in particular. I suppose there will always be some tension between the two observations?— A. I have absolutely no difficulty in that. I do not think that any employer in a time of 10.5 per cent unemployment would have scant regard to the issues you raise, notwithstanding what happens in ICAC. But to me an appeal tribunal that can reinstate somebody to his original position with all that goes with it, that is the salary being paid for that position as it was before, and what you would expect from that person with all that has gone before, flies in the face of what would be good business. We have a problem in that the person concerned is by his own acceptance now working in a slightly different area, albeit at the same rate, because quite clearly we would not have that person — given what had happened — in the position of chief economist.

Q. We have had some considerable discussion about the South Sydney case, which is very similar, where the person it is felt could not do the same job, for similar reasons to what you have done?— A. It makes it extraordinarily difficult to manage such a large organisation. We purchase over $400 million worth of services. We cannot have somebody in that position where there has been so much history going before it. It is a problem with GREAT, and I think that the fact that GREAT is not required to look at issues of public sector efficiency, as I am led to believe happens in the federal arena, is a real problem.

Q. Could you be in a situation where someone could be reinstated in employment but in a different job?— A. Most definitely, or at a lower salary rate, in acknowledgment that Bloggs or Brown had worked for the organisation for a number of years and had been guilty of one indiscretion in an otherwise blameless career. But, acknowledging that and acknowledging the fact that the discretion was such that might in any other circumstances have warranted dismissal, and some degree of compassion being exercised, we would say to that person 'We are prepared to have you work in a lower capacity as X. Here is your choice.' But in this case we had no choice. The matter was run on appeal. There was not one bit of law in the decision that we could appeal against, and that is fine, and the employee came back to us as if nothing had happened.

CHAIRMAN: Have you access to the report of GREAT?— A. The GREAT decision?

Q. Yes?— A. No, I do not.

Q. At page 3 of that decision there is a sentence that commences:'The ICAC report was presented to Parliament at 2 p.m. on Monday, 18th May, and two advance copies were released to the Board on 14th May'. Then there are details of Mr Wilson calling in, the employee giving him a letter. At page 4 it says 'The appellant did not have the opportunity to read the findings contained in the report until later that afternoon, when he was shown a copy by Mr Stratford, who was his immediate supervisor.' Is it your understanding that that was the first time he saw that ICAC report?— A.

I cannot comment, because I do not know. I do not think he saw it until after it was officially tabled. Off the top of my head I think you are right.

Q. You can see the chronology there?— **A.** I can. Also I was cross-examined at some length on this at GREAT and the point I made was that we had a copy from the previous Thursday which had been embargoed. It was a matter that the chief executive and I discussed, and based on what was in the ICAC report with our own knowledge of the situation in relation to the person concerned, we made a decision that the termination of service was an impractical course of action. I might say that there were some issues there about ICAC issuing reports to the individual.

Q. I am not suggesting that it was your responsibility or the Board's responsibility to provide him with that report?— **A.** I do not think that, had the gentleman been provided with the report, and put any view back to the chief executive —

Q. I am not suggesting that it would have altered your course of action.

Mr ZAMMIT: I suppose you are not the only government department that has complaints about GREAT?— **A.** The answer is probably Yes. I have spoken to some other chief executives on this issue. The public sector has gone through a major reform process, which has moved at an accelerating rate in recent years. I have read back through the transcript and the speech of the Premier Neville Wran when it was introduced. I do not know whether the framers of the legislation in those days, or even the Opposition of those days, were fully cognisant of the impact of some of the changes in public sector management, and of the fact that perhaps the GREAT legislation may be a bit out of kilter with the speed of reform.

Q. How would you have handled a problem that would have come to your attention such as the one of Mr Bogeholz?— **A.** We have formal Committee of Inquiry processes in the organisation, which have been developed over a period of years, which allow for a person to be represented, to be afforded natural justice, and told what he or she has been accused of. Depending on the action suspected we may have put it in the hands of the police. There is virtually a two-tier process. I do not think anyone wants to go back to the days of organisations where with the most minor offence somebody was running off to the local sergeant and somebody who might have had a 35-year career, for a relatively minor matter that could have been handled with a lot more commonsense. Then it became a major case.

Q. We have procedures in place. In this case is it possible for it to be referred to the police or not?— **A.** Not in the Bogeholz's case. I can recall three cases — the sludge tendering case was referred to the ICAC because of the stage we got to in our internal investigations. Another one was referred directly to them, and there was another matter where an internal committee required it.

Q. Why was the Bogeholz case so different from the others that made you go to ICAC?— **A.** Complexity. The ability to be able to arrive at the facts, when part of the investigatory process involved interviewing private sector organisations and gaining information from them. It was clearly beyond the scope of an internal investigation and the powers of an internal investigation to do that, so the matter was referred. I might add that it was referred as the first referral that we are obliged to do under section 11, during the first internal investigation, and the second following advice to the ICAC.

CHAIRMAN: In relation to the advance copies furnished by ICAC, was that at the request of the Water Board or were they furnished voluntarily by ICAC?— **A.** My understanding is they were furnished on the basis that the chief executive would give an undertaking that they would remain privileged. I am not sure whether we asked for them or they were volunteered. I would like to think that they were volunteered, because we have a good working relationship. I am fairly sure they were volunteered.

CHAIRMAN: Thank you very much indeed, Mr Hart and Mr Lenne.

(The witnesses retired)

MARK JAMES FINDLAY, of Law School, [redacted] Director, Institute of Criminology, University of Sydney, on former oath, further examined:

CHAIRMAN: You have received a summons under my hand to give evidence today?— **A.** Yes, I have.

Q. You have prepared a written submission for the assistance of the Committee?— **A.** Yes, I have.

Q. Have you any further written material, or an opening statement you would like to make?— **A.** Certainly no further written material. A particular point I would make which is relevant bearing in mind some of the discussions that we had at the meeting this morning. I was at a seminar this morning on the unauthorised release of government information. It appears if the ICAC is to continue in its present position of being able to make specific findings, the issue of the definition of corrupt conduct becomes more specifically important. If we are to move away from that, and to recommend that those provisions in relation to findings be returned to what they were before the Balog situation and the amendments which followed, perhaps the debate about definitions is not quite so relevant.

Q. What was so significant about the seminar this morning?— **A.** It was clear this morning that both those individuals who attended the seminar and the people who made comment about the ICAC's findings, felt that by being specifically referred to in the report in relation to corrupt conduct, not only were their interests directly compromised, but they were not in a position to address the matters raised in the report. Also it seemed clear that interest in the issue of the release of government information was dramatically polarised by the fact that certain individuals and certain groups within that environment were named directly in the report. Now the report quite clearly identifies individuals and organisations that were involved in the illicit traffic of that information, and rightly so in terms of the legislation as it stands now. It was clear from that meeting that through the naming process and the impact of the report in the form it is, the interest in that scenario had become quite clearly polarised because of that process.

Q. Turning to your submission on page 6, could I ask you to elaborate on the removal of the distinction between public and private sectors?— **A.** I think I mentioned the difficulty with this before. Although the ambit of the legislation obviously does cover the private sector, the private sector also can be involved in some transaction which involves the corruption of private officials. The distinction between the public and the private sector is an unfortunate and unnecessary one. Also I think that to some extent it exaggerates or provides the opportunity for the problem to arise as it has arisen following the decision of the Court of Appeal in the Metherell affair.

Within the public sector, unique as it is, there is a potential to develop different levels of corrupt behaviour and different levels of accountability under the legislation because of the effect of section 8 and section 9. My suggestion would be that there is not only a need to broaden the impact of the legislation and to generalise its effect and to bring it back to community standards, but also I think it is a suitable time to reconsider the direction of the legislation purely towards the public sector at least in its initial impact.

Q. Your reference there is to section 8 (1) and to section 9?— **A.** That became clear in the seminar that was held last week. The importance of the definition of corrupt conduct is highlighted by the consequences of making that finding. If the consequences are such as to allow the ICAC to make findings of corrupt conduct and all that flows from that, then the nature of corrupt conduct is particularly important. It was suggested by some people at that session that it may be better to move away from specific definitions and go towards a more generalised approach in discussing corrupt conduct in terms of its relationship to criminal offences and other categories, and not so much get into a discussion of what the consequences of that might be in terms of section 9. If we were to move in that direction and rely on section 8 and also to look at the phrases used in section 8 of the legislation such as those that relate to breach of public trust, impartiality, honesty and the like, it may well be relevant to develop the interpretation section of the legislation so as at least to attempt some broad definitions of such terms.

It is unfortunate that the legislation uses terms such as 'breach of public trust' for example, and does not venture into trying to make a definition or interpretation in the legislation of what that might mean. I know it is a difficult issue to deal with when you are drafting legislation such as this, but it is not helpful to have people speculating on what that might mean in common parlance, when it has a fairly specific effect in relation to section 8.

Q. Can I ask you to elaborate on the last paragraph — 'If the Legislature wishes to limit the nature ... which can be based on corrupt behaviour'?— **A.** There is another way of approaching the definition problem, and I think to some extent it goes back to the Hong Kong experience, and that is that it is possible to make broad statements in the legislation of what corrupt conduct might be, or broad statements to cover those forms of behaviour which the legislation is directed against. Then more specifically, either in a schedule to the legislation or in a regulatory form, to identify the forms of behaviour that it is meant to cover. This does not have to be an exclusive identification, but an identification broadly of the areas in which corrupt conduct might relate. This would be helpful. It would be helpful also because we now have the experience of the ICAC over a period of years — an experience which has identified forms of behaviour which it considers to be either corrupt or not corrupt. There is a wealth of information in ICAC reports now which identifies those forms of behaviour

that would be considered to be corrupt and those forms which are not. Obviously you cannot develop a foolproof index of corrupt behaviour from the investigations by the ICAC in the recent past, but I think there is enough information certainly in the reports I have received that would allow us to put forward in some form examples of the behaviour to which the legislation should apply.

In the prevention of bribery ordinance for example in Hong Kong, what the legislators have chosen to do is to identify broadly what bribery is, and then in a schedule to the ordinance to indicate those forms of behaviour which the Governor deems not to be an advantage that comes within the ambit of the Act. So all giving and receiving of advantage would come within the terms of the Act, except for those matters which are identified in the schedule to the legislation. The Governor regularly amends that, but it might be something such as the identification of the giving of a gratuity to a civil servant as part of his contract. That is common in the Territory as part of their commercial practice. The Governor identifies that as not being the giving and receiving of an advantage within the legislation.

That schedule is regularly updated, and in NSW it might be helpful either in schedule form to the legislation or in some more broad form, operational guidelines or whatever. It would indicate forms of behaviour which the Commission has identified as being relationships which are corrupt or otherwise. It would be helpful to those who are for the first time facing the inquiries of the ICAC, to know something about those forms of behaviour beyond just the simple wording of the Act, which would indicate the interest of the ICAC.

Q. Turning to page 7, can I get you to expand on your comments about problems associated with degrees of conduct exemplified in some of the hearings?— **A.** The difficulties that I think exist are the rather uncomfortable distinctions between unprofessional conduct and professional misconduct. You will see for example in the Metherell report the Commissioner has identified those forms of behaviour which are clearly criminal and those which might he considered to be improper, or those which are outside the behaviours that would come within some other form of offence type. The further we move from those behaviours which are criminal, the woollier the definitions get. In the situation at the bar there is this distinction between professional misconduct and unprofessional conduct. It is quite a difficult distinction to strike, irrespective of the case law, but it has significant impact depending on which category you come within. If we are going to start making these degrees of corrupt behaviour or degrees of corruption outside that which would quite clearly come within the terms of criminal offence, then we are going to proceed into these artificial distinctions which seem to have plagued the case law in relation to disciplinary hearings against the bar.

It would be unfortunate if we find that the definition, because of legal interpretations, of 'corrupt conduct' as it exists in the legislation, is becoming

more and more technically distinguished. My feeling is that we want to move against that, rather than talk about degrees relating to the benefit received as being the distinguishing factor.

Q. In your covering letter dated 29th, you mentioned that if you had time you might make comment on certain other issues?— **A.** I did not have the good fortune to be here earlier in the day to hear what you have been addressed upon previously: I imagine that you would have heard *ad nauseam* discussions about findings about individuals. There are a number of commentators who have a particular viewpoint concerning that issue, so I will not labour my comments on that issue, beyond saying that it is important, when one reflects on comments made by Mr Roden in the Institute's last seminar, as to the discussion paper. If findings are to be made which relate to corrupt behaviour or corrupt conduct, then the consequences of that are such as to make the definition of corrupt conduct an important issue. If we go to the High Court's position in the pre-amendment scenarios defined by the High Court, if we have the ICAC as being limited to making findings of fact, then perhaps the consequences of the definition of corrupt conduct are not going to be quite so significant. It would be foolish to suggest that if the ICAC is limited to making findings of fact, assumptions would not be drawn on the basis of those findings.

I think it is important that the Committee keeps clear the impact of those two paths of decision-making. If we have the pre-Balog situation, then there is less significance in the definition, at least from the statutory point of view. If we are in the situation where we exist now, which quite clearly the Metherell inquiry identified, it is important that we get right, and get specifically right, what the definition of 'corrupt conduct' is, so that the impact of a finding of such can be tied down. I do not agree with those who say that we can keep the finding situations as they are and we can simply have a very woolly definition of what corrupt conduct is. I think the consequences are as the High Court suspected they would be in that situation.

In relation to judicial review and appeal mechanisms, I do not have a particular recommendation to make or advice to give, beyond that, unlike the experience in Hong Kong, the ICAC here is not subject to automatic review through criminal prosecution or necessarily having matters referred on to other agencies or to the court. Most of the ICAC investigations in Hong Kong, or the principal investigations end up in the courts. In that respect there is an automatic review. We do not have that automatic referral process and therefore there might be a greater argument for some formalised process of review beyond that which is provided through judicial review and the limitations that it provides.

On your point about action on the ICAC reports, I think this is a matter of crucial importance, and one which is particularly difficult to address. To some extent it might be remedied if there were specific requirements on

those organisations, right up to the level of Ministerial office, to respond formally to recommendations made by the ICAC. Those formal responses might be examined by the Committee. I do not know what procedures are in train, but it is unfortunate that we have already a fairly sizeable body of recommendations which sit uncomfortably in terms of the lack of action that one might see. It is necessary that recommendations be designed so as to make those organisations in particular which are the subject of recommendations accountable at least to respond in a formal way.

On the suggestion of a profile of corruption, you will notice the comments I made about getting back to some assessment of what the public feeling is about corruption. If we are going to assess the public feeling about corruption, it is necessary for us to review what the ICAC has said and what the ICAC has determined. Although I note in the discussion paper the Commissioner's expression that such a profile would be a difficult exercise, I think it is an extremely important one if we are to invite the public to express their view, or as the Chief Justice has done recently in the Court of Appeal decision, to say that the ICAC through the Act is making definitions which are at odds with what the public would hold or believe.

Then we must establish at least as part of that distilling process of what the public does believe, a profile for ourselves of what has developed; the forms of corrupt behaviour, the types of corrupt acts, the types of corrupt individuals which have come before the Commission. I think perhaps it would be a co-operative endeavour, not resting only with the Commissioner and the Commission. Perhaps the Committee as well could join in the process. It would be a timely process now, in which the public also could be effectively involved in determining what a profile of corruption might be, under sections 13 and 76.

The last issue I would like to comment on is the Committee's entrenchment of recommendations. It is important that the recommendations made by this Committee, detailed and significant as they are, be addressed and responded to specifically. They are responded to in part in the Commissioner's annual reports, but I suggest that there is a need to identify the Commission's response to the Committee's recommendations in a particular and specific fashion, and it might be necessary that in the annual report format there be a specific section which addresses the Committee's recommendations and the Commission's responses to them. I am not aware of that existing in the annual reports as they stand now. If they do, it is essential that there be a public indication of the Commission's responses in detail to the recommendations made by the Committee.

Mr ZAMMIT: On the matter of bribery, as I understand it are you saying that there should be included in the definition the words in the terms of reference, specifically the word 'bribery'?— **A.** No. What I am saying is that those who argue that the definition of 'corrupt conduct' is one that can be generally used, and we can rely on the power of already existing

offence structures, in New South Wales we are particularly poorly served if we do that. The legislation in relation to issues such as official misconduct and the common law as it relates to bribery in this State are out of kilter with the other States and particularly behind the times in terms of the usefulness of that legislation.

I was more than surprised, I was alarmed, that the Royal Commission into the Building Industry did not make specific recommendations in relation to the revision of the offence of bribery and the creation of legislation such as this. I am told that the Criminal Law Reivew Division of the Attorney General's Department has been pushing a draft on bribery for some time, and yet it has had little success in getting that settled. I do not know at what stage the draft might be or how useful that draft is. I would think that if we are going to have a definition of corrupt conduct which to some extent relies on the already existing offences within the criminal law of this State, bribery is an essential element of that armoury if we are going to use the criminal law as a mechanism for controlling corrupt conduct. I do not think that in this State we use it enough. We might overcome some of the criticisms that have been made about the use of the definition of corrupt conduct without the protections of the criminal courts, if the Commission and other law enforcement agencies were able to utilise that offence more effectively.

In the Hong Kong situation, the ICAC there almost entirely uses the offence of bribery as its principal tool for investigation and prosecution. They have a reasonably broad and fairly clear definition of what bribery is, and bribery becomes the focus. I think the Commissioner as well as Royal Commissioners such as on the building industry would have been greatly advantaged by having legislation which was specific and clear. It is not a dreadfully difficult task to come up with something that would complement the present legislation and would be useful to the police and to other organs as well as the ICAC in prosecuting a variety of offences which might come to the attention of the ICAC.

Q. That was page 2,not page 5. Can I take you now to the bottom of page 5? In regard to paragraph (b), 'ICAC legislation could be amended so that in cases of unusual complexity or significant public interest the Commissioner might empanel or be required by Parliament to empanel a jury'. I am a bit concerned about that. Can you elaborate on that? Are you turning ICAC into another court?— **A.** No, I am not. I am considering a situation and considering a jury as a model one might like to use. If we are to accept first that there appears, following on from the Metherell inquiry a belief that there is a dichotomy between technical notions of corruption and what the public thinks corrupt conduct is. I do not follow that view, but it is a view that was put by the Court of Appeal in its judgment. If there is a division it is a public division based on personalities rather than a public division based on what we think corrupt conduct is and what the Act says it is.

The Court of Appeal seemed to rely, and the Commissioner also relied, on this notional jury or the ordinary man's commonsense views about corruption. I do not think that, well skilled as it is, the Court of Appeal or necessarily any collection of lawyers is going to be well versed in what the ordinary man's view of corruption is or anything else. If Parliament considered there was an issue which required the input of the ordinary view, then they might wish to consider some form of panel assistance or panel advice that could be given to the Commissioner, in no way necessarily binding, which may assist the Commissioner in determining what the public feeling is. I think it is particularly difficult, skilled as the Commissioner is, for him or any commissioner to reflect broad public opinion on an issue which again is not defined in a way that is tight enough to allow him, or her, to return to the Act entirely.

We are invited by the Commissioner in the Metherell Report, and we are invited by the Court of Appeal, to consider this notion of the ordinary common man's view. I was putting this up as speculation, to suggest the consideration of some mechanism which Parliament might invite the Commissioner to utilise to assist him in his deliberations if they believe that the matter at hand is such that it required the view of the ordinary man or some commonsense appreciation. The time is ripe, when we look at what the Court of Appeal said, to confront this invitation, to see whether there is a division between what the Act says and what the ICAC is utilising and what the community feels is corrupt conduct. Perhaps we need to institute some advisory mechanism whereby the Commissioner can be assisted in determining what that general view might be.

Mr HATTON: In the inquisitorial position in some countries such as Sweden they have a bench where the judge is assisted by two lay people. Is that the sort of model? I am not suggesting you jump in and say 'Yes' to that, but you do have an opportunity for somebody other than a judicial officer to hear the evidence and express a view?— **A.** That is right. Obviously we do not need in this situation, or perhaps it would be inappropriate to have, a collection of individuals or lay assessors or interpreters or advisers to be making findings of fact in a process which is not judicial. It is quasi-judicial but not a judicial process and we do not want to give it the trappings of a court when it obviously should not have them. But there are obviously occasions when the Commissioner would be assisted by the view of community represenatives in making broad statements, if we are going to continue to require him to make findings of corrupt conduct, and if that interpretation or definition of corruption is to rest on a broad public feeling.

I do not think necessarily that it is fair or appropriate for that to be simply tied to the confines of the hearing and that the responsibility be given to a single individual.

Q. It could be someone as well known or famous or notorious, whichever adjective you choose, as Dr Metherell. It would be difficult to find a jury

that did not know of Dr Metherell and therefore it would be difficult to empanel one. One might say the same of lay assistance. It is a very difficult case?— **A.** That is true, and yet it might have been the case where the grapplings or struggle of a group like that to come up with a broadly consensual position would be useful. Perhaps they could not assist the Commissioner in that situation, but I do not think it would have been improper or useless to have several individuals attempting to do that. My feeling was, particularly at that time, that when you believe that persons were corrupt or could be corrupt, there was some consensus about the propriety of the behaviour involved. That may have been useful, if simple questions were put to a small group of community representatives.

It also to some extent relieves the Commissioner of what I think is quite an onerous responsibility, and that is to make statements of what the notional jury would do. Perhaps it was unnecessary for him to make that statement, but he felt that he should. If he is making statements about what the common view was, and the Court of Appeal later follows that line and makes statements about it, it would be useful if the Commissioner or Parliament could avail themselves of the process of having that sort of advice. It also in some situations brings the ICAC closer to the community, and that might be a very good thing.

The Hon. J. BURNSWOODS: As a comment on that last point, an earlier witness today referred to the danger of making law for exceptional cases. I must admit that the last point sounds to have those dangers. What is your opinion of the suggestion put forward in other contexts about more community input into ICAC's operations in general, in the sense of advisory panels and that sort of thing? It does seem to me that to bring in people in exceptional cases would not be likely to produce results, but there may be a case for a more ongoing community involvement?— **A.** I suggested in another part of the paper, and this is consistent with what I said about profiles on corruption, that because of the experience of the ICAC it would be useful, either through their education arm or through some other arm, to invite in a structured form the involvement of communities in New South Wales, to indicate responses to broad issues that relate to defining corrupt conduct and to discuss the impact and the influence of the ICAC throughout the State. Whether that be restricted to their public education function, or whether it also overlap with their investigatory function or their prevention function, I am not quite sure. In the model of the ICAC that we now have, the reliance on the community is there. At least in rhetoric the reliance is there. We believe that the ICAC's activities are not only to identify corrupt individuals but also to create broadly an anti-corruption consciousness.

If the Court of Appeal is correct in stating that there is a dichotomy between what is happening in some exceptional cases and what the public generally views, then it is beholden on the ICAC and Committees such as this to familiarise themselves with some structured form of what the

community is thinking, and perhaps that does facilitate the later work of the ICAC if it has the information of which that could produce.

I think that panels could be formed to discuss issues that relate to corruption prevention and relate to corruption investigation, and the results of those discussions could then inform the development of legislation or the development of the ICAC's practices in the future. It certainly happens, both here and in Hong Kong, in the complaints function. I think the complaints function is a very unbalanced way of picking up public attitudes. I would be surprised if there were not a number of individuals in a variety of walks of life who would be very interested in giving some sort of structured view on corruption and corruption prevention in a broad way, but do not necessarily have a personal axe to grind or an issue that they want to present. I think you are right in suggesting that there is a useful potential for community involvement, and I think that needs to be structured. It might be something that needs to be structured for only a short period, to assess what it is that the ICAC is doing in relation to the community more broadly.

Mr HATTON: I think the question that follows from what the Hon. Jan Burnswoods says is how to do that. I do not expect you to answer that now. Have universities or schools a role? What public organisations do have a role in bouncing that off into the community to see what comes out?— **A.** I think that to some extent we can learn from the private sector in the way it markets concepts or products. It does it quite effectively. I did suggest at the bottom of page 5 in (a) that it might be useful to establish some community panels on how you can do this, in quite an informal way. But to put to those panels a series of case studies of corrupt behaviour or corrupt conduct and to try to get a general feeling, in a small seminar situation, for what the community is thinking, does not have to produce binding results. It is certainly the way that a cereal manufacturer would test a new product — to get it out to the community in small representative groups and see what they think about it.

Q. Let's us compare the results?— **A.** That is right. I think we are encouraged to do that, particularly by the constant reference from the Court of Appeal and also the Commissioner in his report on Metherell, that there is a notional jury and there is an ordinary commonsense view, which to some extent might be different. I do not know what it is. I do not think this is a very effective way of determining what it is, beyond the realm of lawyers' speculation.

The Hon. S. MUTCH: I am interested in what you said about the ICAC in Hong Kong and its reliance on criminal statutes. Do you think it would be appropriate basically to enact some bribery legislation which is separate from the ICAC legislation and incorporates a definition of corrupt conduct, and then use the ICAC to establish facts in situations that might arise? Things might arise in the future that we do not have today. We could then look at adding to that legislation. That might tie up with the Law Society's

suggestion that the ICAC have an investigative role and then submit a brief or paper to a hearing that would be conducted by an independent person from outside the ICAC, and that person would control the hearing and then make findings based on the submissions put to him by ICAC, and then you would get a joint report coming out. That report might make findings but they would not necessarily be of a criminal nature. It would also provide for us a window on what is going on, which is what we are looking for under ICAC now. What do you think of the Law Society's proposal?— **A.** I will deal with that first. I have not read it in detail, but the principal problem in what you recount to me is that it seems to create another level of bureaucracy which might make the process a little more complex and difficult to deal with than it already is. The problem, if you compare what goes on in New South Wales with what happens in Hong Kong, is that the investigatory process in Hong Kong is carried out nominally outside of the public view. It is an investigation that is done like a police investigation, only with the purpose of producing evidence, upon which the Attorney General will then determine whether he or she will prosecute on that basis. The Hong Kong ICAC is reliant on the Attorney General's fiat to prosecute, and they produce information only for that purpose. They have ways in which they can throw their weight around, and they do so beyond what the Attorney General would perhaps like, but that has something to do with the way Hong Kong operates. It would not be appropriate here.

In the situation we have here it is different. It is on two levels. First the ICAC is invited to examine conduct well beyond criminal conduct, and that is part of the problem when we face the definition. Then at least in most situations the hearing is in public. If you put over the top of that another independent body that is required to assess the information and determine what it is that should be done with it, you might to some extent be forestalling the criticism of the ICAC now.

Q. I do not think the submission was that it was a hearing on top of another hearing. There is still one hearing?— **A.** You pass the facts on then to an assessor or someone who looks at the brief and determines what is to be done.

Q. The idea was that the ICAC's investigation would be written up and presented, as well as orally, before an independent person appointed by the Attorney, and that person would not have been involved in the investigation and therefore would not only give the semblance of impartiality, but would be impartial in that respect. That is one of the concerns of people who have come before this Committee. You have the assisting commissioner and so forth appearing to be too closely involved with the investigatory process?— **A.** It goes back to the inquisitorial system to some extent. That problem arises that the investigating magistrate then has to make determinations in terms of guilt and innocence, so he carries out the investigation as well. To some extent that is going to be a problem with any organization like the

ICAC which is required to make certain determinations on the basis of facts that it has investigated. But if you were to say to the ICAC 'Okay, you identify the facts and then pass it on to an independent individual for the next stage or the assessment of those facts', it avoids the consequences that will flow from the determination of the facts themselves. I do not think you can get away from the issue that if the ICAC has determined a series of facts, the notional jury or Blind Freddie or whoever would say 'That is corrupt, or that is not'. There is going to be some consequential assumption that flows from it. The only way that could be neutralised is by somebody further down the track saying 'No it is not', or 'Yes it is', or whatever. Perhaps that is in keeping with the Law Society's suggestion.

The difficulty is that here you have an organisation which is investigating and making findings of fact in a public way, through public hearings. The consequences of those findings will go on after the findings are made, and then you are relying on a secondary body or an independent person to say 'No, this is what it actually means', or 'This is how it should really be interpreted'. I am not too sure whether that would have the effect of defusing, if you are trying to defuse, the adverse consequences of a finding by the ICAC on the issues after an investigation of the facts. I do not know whether that necessarily would have that effect.

It is useful to say that this would be an independent determination of what we do with those findings of fact, but if we go back to the courtroom analogy the jury is required to do just that. They are required to participate to some extent in the investigation through the trial, and they are required to make determinations on the basis of what they find. I think the ICAC will always be accused, by those who have had facts found against them, of creating an atmosphere where assumptions can be built into an actual finding. I do not think that putting another body between the ICAC and the public hearing will necessarily overcome the problem of what we actually do with what the ICAC finds.

In terms of your first question, which relates to the Hong Kong situation, it was in relation to the prosecutorial process, was it not?

Q. It was concerned with the ICAC's admission that in a number of cases they end up saying that there was no criminal offence which dealt with that conduct, and it involved no criminality, and yet the conduct perhaps should be something that should be sanctioned by the criminal code?— **A.** That certainly goes back to the point I was making earlier. That if you look at the legislation we have on official misconduct, and if you look at the common law in relation to bribery, it is so unhelpful and it is so limited in its scope, even by comparison with Queensland and Victoria. Then the ICAC finds it very difficult to say 'Yes, this is clearly something which merits prosecution'. In the Metherell situation for example, counsel assisting recommended that there were enough grounds to launch bribery proceedings, and the Commissioner was not attracted by that submission. Two quite

senior legal minds came into a clear oppositional position on the simple question of whether it was a crime or was not. That does not show necessarily that one was right and one was wrong. It implies to me that there is a real woolliness in the way those offences are defined.

The situation in Hong Kong is that they are working towards criminal convictions and the legislation is fairly specific on bribery which is what they use. It is extremely important for the Parliament now to realise, as a result of what has been going on with the ICAC and also with Royal Commissions, that bribery has to be addressed if we are going to utilise the potential of criminal convictions as part of the armoury against corrupt behaviour.

Q. It seems to me crazy that the ICAC can say 'This conduct is corrupt', yet you might not be able to take it to a court to prosecute?— **A.** Particularly where it might not look to the notional common man as being bribery.

The Hon. J. BURNSWOODS: I wonder whether there is not a common woman's view out there that there is worth in that distinction, a feeling that they are not in common understanding criminals. I think there is a distinction made between those two sorts of terms. It may be hard to pin down?— **A.** It is important that the ICAC should have the power to investigate matters which are beyond criminal offences, because the Hong Kong situation is far too limited. Also I agree that there is a clear distinction, not necessarily in the mind of lawyers, but in the mind of the notional member of the community, that things can be criminal and they can still be corrupt if they do not have the potential to be successfully proceeded against through the criminal courts. What I am saying however, is that we need to clarify those instances where there might be a case because there is a warning from that side as well. There must be a number of instances where the ICAC might have been more happy with a criminal prosecution if it were possible, but believed that it would not have been successful.

The Hon. S. MUTCH: Overall, if you are going to try to define some sort of conduct within the ambit of the ICAC Act, would you not be better picking 'improper' and working on that aspect, because it does not have the same connotation, and if that 'improper' conduct could also be deemed to be corrupt, that should be taken care of by a bribery and corruption statute?— **A.** The problem with re-interpreting and using other words for 'corrupt' is that if we want to broaden the definition or make the definition one that is more generally accessible, eventually you come back to some form of definition at the end of the day. If we think there is a distinction between corrupt and improper, it might be necessary that we have to identify what it was and whether corruption came within the broader notion of improper. I think you would also find — we heard it argued at the seminar that I mentioned — that there might be some situations, particularly in political life, where activities which were improper might not necessarily be appropriate for the ICAC to examine. I do not necessarily hold that view.

There might be situations where improper conduct might exist because of the nature of past traditions or past behaviours which were improper in one circumstance but not necessarily corrupt.

I think you can fit impropriety, certainly the impropriety which should be the focus of the ICAC's concerns, within a definition of corrupt conduct which is broad and acceptable, but I think we need to grapple more distinctly with what those words mean, and to give them more impact which certainly will not be criticised in the way it was criticised by the Court of Appeal. I do not know that we can say that improper is at that end of the scale and criminal is at the other end, and we can slot different phases between here and there. To do that is an invitation, if you are thinking about putting in appeal mechanisms, for endless litigation on what is improper and what is not improper and what is the distinction between improper and corrupt, and where one merges and one does not. Improper conduct is known over the years as being a minor sort of conduct that people do not need to be too worried out. Everyone who comes within the purview of ICAC's findings is going to be angling for that sort of admonish-and-discharge type situation.

Q. If you enabled the ICAC to make a finding of improper conduct you might then need an appeal mechanism from those lesser admonishings, provided that you have a means of taking those things which are more serious into the courts and prosecuting under another Act?— **A.** If you are thinking of a progression between criminal, corrupt, and improper, and they all come under the umbrella of 'corrupt', you will still face the definitional problem of where the distinctions lie. It will be an invitation to litigation to argue that the finding was wrong, it should have been 'improper' in the face of the evidence.

Q. The public view I think is that 'corrupt' is 'criminal', or it should be?— **A.** I think there is a division on that. If it is the Committee's view or the view of others that there should be graduations in the definition, and if we are going to make up those graduations we are going to identify them, then we have to confront the need for definitional clarity.

Q. That might not even be necessary. You might just have this statute that defines 'corrupt' conduct and bribery and so forth, and basically it would be clear to the ICAC to make findings, leaving the words up to them, provided they do not use the words specifically set out in that statute?— **A.** A definition will arise over time if those words are being used in relation to particular forms of behaviour. It is a *de facto* definition process. The other problem is that you will have people saying 'There is a broad definition here against which we cannot argue, and the consequences which flow from it are quite specific. We are broadly being called 'corrupt' and it is difficult to argue against that, and the consequences here which we suffer as a result of that label are specific'.

Q. If you read reports of ICAC, sometimes they say 'I think this behaviour was wrong'. They could say 'I think this behaviour is improper'. You might have one person saying 'wrong' and another person saying 'improper'. Does that necessarily lead to the situation where you have to get down to the nitty-gritty of definitions? They are giving you their subjective view of a process. It is subjective?— **A.** I think you will eventually, if you take this generalist position, end up with the same unfortunate quandary that has resulted out of the interpretation of the Metherell inquiry. You have in the report, and the judgment, words like 'partial', 'bias', 'unfair', 'bad faith' 'improper', all used in relation to different forms of conduct, without talking about what that conduct actually was, and what the consequences of that conduct would be.

There is a strong argument by some that the definition should be left very broad and that it should be used as it applies to particular situations. The instance arises that the situation defines itself. That is all very well, if the consequences of that finding are not such as that which the High Court identified in the Balog case as being something which is quasi-judicial in their effect. The consequences that arose out of the Metherell inquiry indicate quite clearly that you have this difficulty. You have identifiable consequences that relate to the holding of office and other things that come out of the use of this general term 'corrupt conduct'. Again the whole position is that they ignored that problem. They said 'We are not going to look at corrupt conduct. What we are going to say is, 'All we do is deal with something in the investigation forum which relates to criminal offences. Everything else that we talk about in terms of corruption in a broad sense we will leave to public education and we will leave it to corruption prevention." That is similar to what we are used to, without the public inquiries of it in the ICAC. It is always directed towards proving criminal offence, and that is the other way to go.

Q. We could take the half-way house and just say 'wrong conduct'.

CHAIRMAN: You have probably not had an opportunity to read the Commission's response, but you can be shown a copy of it. I refer to pages between 40 and 42. On page 42 I want to direct your attention to the second paragraph, which begins:

> 'There are many reasons why the Commission should not be given an additional statutory function of preparing such a profile. However the Commission accepts that if resources are available and information which is useful can be reported, it should do so. Such work could be valuable but it may be more appropriate when the Commission has existed for a longer period and has accumulated more information'.

Those pages are summarised:

'The important but difficult and resource-consuming task of preparing a profile of corruption in New South Wales may be appropriately performed by the Commission when the Commission has been in existence for a longer period. The Commission's investigation reports and annual reports deal with the conduct investigated by the Commission, and to a lesser extent annual reports deal with the subject of complaints received. Neither can be used as a reliable measure of corruption *per se*.'

A. It is a statement, I would imagine, used by people who anticipate an increased workload in a situation where they consider themselves already overworked. I do not think it is a fair reflection of the task, because investigators generally, and particularly police investigators, are involved in profiling in every investigation that they undertake. To some extent the process of stereotyping and profiling is the first stage of any criminal investigation. I imagine that in the determinations that the Commission makes as to whether to proceed with a complaint or whether the investigation should take a particular form is to some extent doing their own in-house profile. I believe that there is enough information available as the result of a large body of investigations inquiries, both those which are published and those which have been not proceeded upon, and that therefore the process of profiling is possible.

Profiling is also a dynamic process, and I would think that it would be of assistance to the Committee, the Commission, and the public, if the template for this profiling was being worked on, and each year or at some other nominated period of time an attempt was made to update and to measure.

This goes back to a point I made earlier, that this is the time for certain statements to be made about behaviours which have been considered through the reports of the ICAC to be corrupt or not corrupt. This would not be an exclusive process, nor would profiling be an exclusive or final process. Certainly profiling to some extent must go on as a part of ICAC investigations at the present time. It may be something which it would be useful to formalise.

CHAIRMAN: Thank you very much for your evidence.

(The witness retired)

WJ&RG

CORRECTED

MINUTES OF EVIDENCE

TAKEN BEFORE THE

JOINT PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

At Parliament House, Sydney
On Monday, 26 October, 1992

PRESENT

Mr M.J. KERR (Chairman)

Legislative Council	Legislative Assembly
Ms J. BURNSWOODS	Mr B. GAUDRY
Mr S. MUTCH	Mr J. TURNER
	Mr P. ZAMMIT

Proceedings recorded and transcript supplied by:

Judith Sears (Ph. 533-2359)
Elaine Airth (Ph. 337-5553)

ERNEST PAUL KNOBLANCHE, of [redacted] (retired), sworn and examined:

CHAIRMAN: I think, judge, you received a summons under my hand to appear to give evidence here today?

Mr KNOBLANCHE: I have, I acknowledge that.

CHAIRMAN: You are a former district court judge, and Queens Counsel?

Mr KNOBLANCHE: Yes.

CHAIRMAN: I invite you to make an opening statement with such comment as you think fit in relation to any of the submissions, or your own submission, in relation to the Committee.

Mr KNOBLANCHE: Thank you, Mr Chairman.

Mr Chairman, madam and gentlemen, when I was invited to make a submission to this Committee, I settled on paper the submission, and it was lodged. Since then I have found the need to make some corrections and additions, and the office of the Committee has facilitated that.

There are in fact two editions to my written submissions, the second one is somewhat different from the first but not a great deal. I am told that the members of the Committee have before you the second edition. It too, as I go, will suffer a little correction, and so I will tell you where that is.

I have found this a very complex matter and time consuming. My mind has wavered from place to place as I have considered the matters in it. In the end, on the way in on the train this morning (I can't say a "humorous thing happened on the way to the forum"), but, it was a bit of a disturbing thing, because looking at it all over, my overall general impression was that the quick, easy way of reaching some compromise in the problems was to go back to the Balog situation, take section 9 out and make some adjustments throughout the Act.

In that way there could be no finding that someone had been corrupt, there could be no finding that someone had committed an offence, and they seem to be two of the major criticism of the Commission that have arisen in recent time. By taking section 9 out altogether, the problems and difficulties, the legalistic delays that might arise out of the definition of corrupt conduct would be gone.

I now go to my paper, on the very first page there needs to be an amendment, in the third paragraph.
Delete "if it can be practically done".

In my journey through all of this, being a recent arrival on the scene, I have come to the conclusion that there is probably a good deal of misunderstanding, or non understanding, in the legal profession and in the public generally about the functions and purpose of the ICAC. I think it an error to regard it as merely being an investigative, fact finding body with only those two functions. It has functions over and above its educative function. I am satisfied in the community it has effected a strong deterrent effect upon official misconduct - upon corruption.

It is said that public servants nowadays who meet the public are more careful about which lunches they accept. It was said to me by a former

attorney general a couple of days ago, that the case of wine is now being sent back. I think that arises from the public official's reactions to what the ICAC has been doing, to the media reporting of what happens - and one gets that sense in the market place or in the morning tea room.

I would wish to emphasise that what I say in this paper before you, is to be looked at against what I say here, verbally, today.

The amendments I suggest are referred to as being in an annexure, entitled "Amendment Directions" and they concern the amendments I put forward for consideration to sections 7, 8 and 9. I will quickly explain those and the purpose for which I put them forward. That annexure appears at page 15 of the paper.

My first suggestion is that s.9(1) and (2) be deleted from the Act altogether. I suggest that subsections (3) be shortened and moved into the definition section. It defines a "criminal offence" and a "disciplinary offence", for the purposes of the Act.

Then s.7 is moved about a bit, and s.7(2) I would take out and substitute, "conduct knowingly comprising a conspiracy or attempt to commit or engage..."

In the other amendments I have made to the other subsections of s.8, they remain the same, I have inserted the words, "knowingly and seriously", and a little later in the paper I give the reason why I do so; I will come to it straight away.

Key issue 1.3 in the Discussion Paper, the last sentence of which reads, "The Committee seeks submissions in relation to amendments to sections 8 & 9 to ensure that the definition of corrupt conduct reflects the community's understanding of this term."

In the second report of the Metherill matter, the Commissioner at page 13 talks about general criticism over a period. He says that "...most of it is emotive in tone and anecdotal. The most frequent statements are along these lines; corruption should mean corrupt as ordinary people understand it, corruption means taking money, corruption should mean a criminal offence" and lastly, the one I emphasise, "corruption only covers deliberately, knowingly, wrong conduct".

My reaction in my place in the community and the people I speak to and I meet, is that that is what the majority of citizens, reasonably well educated but not specially informed in this area, feel it covers - that corruption only covers deliberate knowing wrong behaviour. So in answer to that request - amendments that ensure the definition of corrupt conduct reflects the community's understanding of this term, if the definition in the act (if there be one) is to reflect that, in my submission, it should in definition confine that to conduct which is seriously wrong and known to be so.

Page 4 of my submission, last paragraph, I say, "I submit that the word "corrupt" and its derivations should be retained in the Act. It is further my submission that to remove it and replace it with something softer would be to diminish the standing and power of the Commission as it is seen in the public eye. I submit that it is correct that the community holds the view that for wrong conduct also to be "corrupt" it must be seriously wrong and known to

be so by the offender." So in the amendments I suggest to ss.7 and 8 I have written in "knowingly serious".

I have not put in there terminology which would make it plainly a subjective test to be applied, and I do that in deference and respect to the Parliament where, on a previous occasion, terminology that made it plain it was to be a subjective test for the Commission to apply was in debate, discussed and withdrawn specially. It is a matter to which I indicate in passing p.2, 3, 4 and part of 5 are concerned with the Key Issue 1.3, that I have summarised as "corrupt or some softer description"?

I have read all that has been delivered to me in this area and I remain convinced that there is a special attachment to the meaning of corruption used in this context. That is "seriously wrong conduct which has an element of perversion of the system of government or public administration".

The Commission has been running for some years now and it has had a great deal of publicity, and been in the public eye. That word "corruption" has been there, underlined, in all areas. I think it is probably too late in the day to remove it altogether. Much of the distance made in recognition of the Commission's work, its acceptance by the public and the respect with which it is held would be diminished if that word were taken away.

With the removal of s.9 it is clear that what some commentators have called "the filter" is taken away. That is the filter which screens out wrong conduct which is corrupt conduct under s.8 which should not be dealt with so seriously. some suggest that the filter function can be performed by the Commission's use of its discretion to cease investigating or refuse investigating a matter which it regards as "trivial".

I have to suggest that to s.23 there be added to the words, after "trivial", "or insufficiently serious", leaving the filter to be applied by the Commission if it comes to the conclusion that the complaint or subject matter of the investigation is trivial or insufficiently serious. It is a fairly wide discretion, but one which I think the community should be willing to grant.

In an addendum to my original paper, I say,

> I have read the submission of the Hon. A. Roden QC. With unfeigned respect I am very much impressed with his reasoning and conclusions and in particular those at pages 7 and 8.
>
> I think that the new section he suggests in the italics at page 8 has very much to recommend it. Mr Roden observes "no doubt it can be improved" and has applied a precursor, "Why not something like this".

There is a typographical error in the next line, substitute "When in its final..." for "When it its final..."

This is not in the addendum, but I would suggest to the Committee that the polishing of Mr Roden's section should be attended to and it would be necessary that its interconnection with other sections be looked at and the machinery of drafting legislation correctly and properly be put to work about it. As I say in this addendum,

> I still am of the opinion that "corrupt conduct" definition as it emerges from the deletion of s.9 and the amendments to ss. 7 and 8, as I have submitted they be amended, has some valuable advantages.

It seems to me that there should be within the Act, somewhere, a description in some not so wide terms of the "knowing and serious" wrong conduct which can constitute "corrupt conduct". Such information allows any public official who looks up the Act to acquire a good idea of what the Commission is "on about". Further, it seems incongruous not to have in the Act some such definition of "corrupt conduct", when the word "CORRUPTION" appears in the title of the Act and in the title of the COMMISSION and has been in saturation quantities in the media.

I continue to advance the amendments to ss.7 and 8 and deletion of s.9.

I would borrow from Mr Roden's style, the precursor, "something like" the amendments I have suggested to 7 and 8, and acknowledge that what I have suggested, no doubt, can be improved upon.

That brings me to findings about individuals, which I have found the most difficult part of the problems associated with this matter. If you would please open my paper at page 6 there are additions and amendments I need to make there.

After the first paragraph I add:

I suggest s.74A(2) be changed so that "must" is taken out, and "may" be substituted.

The reasons for this, which I respectfully adopt, are those appearing in the Commissioner's submission at p.18 and p.19.

I have read, with respect and acknowledge, the masterful paper of Mr Athol Moffitt - and I can see him sitting there now, and the article in the newspaper. The strong underlining of civil liberties and democratic rights in our community militate against decisions, and findings that are personally, seriously damaging to a citizen and his reputation without (as the Americans call it) due process of law - without appeal. But as a citizen, as well as an ex judge and a lawyer, it seems to me that if the community is in such straits, and things happen so frequently in a corrupt way, if this community's quality of life is to be what it ought to be for my grandchildren, then the compromise must be made. The forces of investigation and deterrence in the community must be given a wider field to operate in than that which is defined and limited by the classic civil liberties rights.

I make the compromise in my submission by amending, I suggest, 74B, for it is my view that there ought to be a clear statutory prohibition on the Commission making any finding of guilt in respect of a specified or identifiable person of any criminal, or disciplinary offence, or any conduct warranting dismissal, or "corrupt" conduct.

The way I suggest that is to be achieved, if the Parliament decides to follow that course, is something like this, if I may again inject Mr Roden's precursor:

"Notwithstanding any other provision of this Act, the Commission shall not include in any report made under s.74, or communication made under s. 13(1)(c):

(a) a statement, finding or opinion that a specified person is guilty of, or has committed a criminal or disciplinary offence,

or

(b) a statement, finding or opinion that a specified person is guilty of "corrupt conduct or has committed "corrupt conduct"

or

(c) a statement, finding or opinion that a specified person is guilty of, or has committed conduct, which in the opinion of the Commission justifies the termination, in any manner of the services of that person."

That, no doubt, will have to be polished up so it picks up "dismissal of a person who holds an official post, as well as termination of services of a person who is in the relation of master and servant with the Crown".

And finally,

(d) a recommendation or opinion that action be or should be taken against a specified person for a criminal, or disciplinary offence, or "corrupt" conduct -

and I would there add:

... or for dismissal or to terminate in any manner, the services of that person.

Mr Chairman, there is a typographical error in the first line of the next paragraph of my submission, it should read:

"It is my opinion that in practice it will probably be found that there is room for the Commission to make observation, comments and recommendations which will attack the "culture" without labelling or branding any person as having committed a criminal offence or disciplinary offence or having been guilty of such conduct as warrants their dismissal from office or labels them as having committed corrupt conduct or being corrupt. The findings of these things in these terms should be left to the courts, or where appropriate to the public authority who has the lawful jurisdiction to discipline or dismiss in the instant case.

I think it is a worthwhile exercise to return to the judgment in Balog, there is so much paper, and so much has gone under the bridge, that I suppose those who are in this constantly might lose sight of it. The last paragraph of that judgement, of five justices of the high court is:

"We would allow the appeal. It is important that the terms of any declaration not be too wide. It must be clear that even if the material elicited by the Commission in the course of its investigations is such as to establish or suggest that the appellants, or either of them, have been guilty of criminal or corrupt conduct, the Commission may set forth or refer to that material in its report, pursuant to s.74. Notwithstanding that it cannot state any finding of its own. Of course, depending upon the nature of the material, for even to deal with it in that way may inevitably implicate the appellants, or one or other of them, in criminal or corrupt conduct. The Commission is nonetheless entitled to report upon the results of its investigation; it is merely precluded from expressing any finding, other than one under s.74(5) in relation to the appellants."

It is important, I think, to look again at those words. S.74(5) as it then stood was, "a report may include a statement of the Commission's findings as to whether there is or was any evidence, or sufficient evidence, warranting consideration of prosecution of the specified person". Taking action for a disciplinary offence.

I shorten these in the statements I now make, "Taking action with a view to dismissing, dispensing or otherwise terminating the services". It would seem to me that the high court's drawing of the boundaries in the Balog judgement, left to the Commission (as it then was) ample room for its investigation, for its recording of the information it acquired, and they are available for use by the prosecuting or other authorities in the ordinary courts.

It also left to the Commission the ability to put in a report that there was evidence which warranted consideration of prosecution or dismissal. To put it shortly, it would seem to me that the exercise of that power and the inclusion in a report of that opinion, in a practical sense, would be to serve the deterrent purposes and aspects of the Commission's existence.

Please amend p.7, second last paragraph to read: "Whether appeal should be provided on pure questions of fact, or the merits of fact finding, is a decision requiring resolution of issues of philosophical and fiscal content". What I mean is, no doubt Parliament must consider the cost to the community of allowing full appeals from fact finding, by the Commission.

I set out in short form the sort of appeal procedure that might recommend itself, if it is decided to provide for a right of appeal as to merit decisions, questions of fact, by the Commission. I would add today orally that I would also support a requirement by the rules that might be made as to that appeal, that the grounds of appeal and the material to be argued be verified by affidavit.

I have not yet finally concluded in my own mind whether there should be an appeal granted or not.

It is very clear from the Commissioner's submission that with all his experience and knowledge the prospect of a full appeal on questions of fact, (and I think the quote is accurate) is "daunting".

At p.10 I would ask that there be an amendment made, last sentence of the fourth last paragraph to read; "..within the time set or further time allowed by the Attorney-General they would be stayed forever", rather than have "forever" splitting up the entire construction of the verb.

I don't think there is anything more I want to say about what is in the written submission. I would, however, like to draw attention respectfully for the consideration of the Committee and the Parliament to some observations made by Miss Schurr at p.18 of the transcript of the proceedings before the Institute of Criminology.

> "Also ICAC is another example of the problems of expanding, the expansion of investigations agencies in New South Wales. We have ICAC, the New South Wales Crimes Commission, the National Crime Authority - all sorts of bodies are getting funding and getting extraordinary investigation powers. Perhaps we would be better off by putting these resources back into the hands of a properly conducted police force".

In my view that would be ideal. But, I suppose, the right to silence and such other things as the unsworn statement from the dock in our criminal law, are matters that make investigation, even for a "properly conducted police force" extremely difficult and prevent the discovery of much of the secret clandestine activities of those involved in corrupt conduct - giving it the meaning of conduct which contains a perversion of the public administration and system.

What Miss Schurr draws attention to is the ideal, that probably, in our time, can never be recovered.

Mr Moffitt, in the article in the newspaper, refers to the success with which Mr Fitzgerald in Queensland was able to conduct an inquiry and successful prosecutions followed for corrupt conduct. I do not know of that system, but I would recommend that the Committee might ask Mr Moffitt to explain it to you. If they have something in Queensland, that is working there, and hasn't got the difficulties we have in New South Wales, we ought perhaps take a pleasant trip over the border and have a look at it. When it comes recommended from such an eminent and experienced personality as Mr Moffitt, then the pleasures in the northern climate are all the more attractive.

There is nothing more I wish to say to my paper. It is all there. So, Mr Chairman, if there is anything special anyone wishes to ask me, I will do my best to answer.

CHAIRMAN: I formally table some additional material we have received from the Auditor General, a submission by Mr Gary Camp, a further submission by ICAC, by Mr Ian Johnstone, a submission from the Local Government Association, from the Royal Australian Planning Institute and also a paper on addresses on the seminar on Local Government, Public Duties and Conflicting Interest, held on 13 August, 1992.

(Documents tabled without objection)

CHAIRMAN: Perhaps, Judge, I might ask you in relation to s.9(1) of the ICAC Act and the Court of Appeal decision, it has been suggested that Ministers and MPs are in effect not subject to s.9(1)(c). Do you believe that this is a real problem? I noticed that Mr Brezniak and Mr Dowd, speaking at the Institute of Criminology on 8 October, suggested there was no real problem with Ministers and MPs not being subject to s.9(1)(c)?

Mr KNOBLANCHE: I looked for that in the report of Mr Dowd and frankly I could not find precisely that.

CHAIRMAN: Even without the sourcing anyway, just in terms of the general principles enunciated in the question?

Mr KNOBLANCHE: If the amendments to the Act that I suggest are adopted, s.9 would go, and so that problem goes with it. I will just put my hands on the Act, it ought to be answering to a whistle by now, but it's not. Could I have your question again please, now I have the Act.

CHAIRMAN: What has been suggested is, as a result of the Court of Appeal decision that MPs and Ministers are not, in fact, subject to s.9(1)(c) and whether or not you believe that is a real problem. I appreciate if the reform you are proposing is carried out s.9 would go away, and any problem (real or not) would go to.

Mr KNOBLANCHE: It seems to me that the Court of Appeal decision acknowledged that the Governor has the power to dismiss a Premier or Minister in unusual and very rare circumstances. So, I find it difficult to follow why it could be suggested that s.9(1)(c) could not apply, as to its first few words anyway, to a Minister or to a Premier.

Dispensing with the services, or otherwise terminating the services of a public official, I think the Commissioner, in his report, took "services" there to mean that area, in which on one end, there is a "master" and the other end, a "servant", and there is the relationship of employment. I would think it probably would be correct that the Premier or a Minister could not be referred to as being "employed". "Or otherwise terminating the services of a public official", it is only if you use "services" in that sense. That could not apply.

The amendment to s.9 that could possibly meet that situation is one that says something like - no doubt needing to be polished, "There were reasonable grounds for removing by lawful means the person's authority to perform public official functions or to act in a public official capacity". Removal by lawful means of those things from a particular person means he is no longer a public official. One of the lawful means that may be available to remove from a Minister his authority to perform public official functions, or acting in a public official capacity, would be for the House to propose a vote of no confidence.

I am no whip on parliamentary procedure, but if such a resolution was carried, no doubt there is one further behind that, that the Parliament could decide to expel him from the Parliament and so remove his power to perform official functions or act in a public and official capacity and he would cease to be a public official, and so s.9(1)(c) could apply to him, if applied in that way.

CHAIRMAN: Thank you for that. I know you have elaborated on right of appeal, but just turning to pages 7 and 8 of your submission, could you elaborate on such an appeal on pure questions of fact, or merits of fact finding and how that would work in practice. Should there be a right of appeal on findings of fact.

Mr KNOBLANCHE: Let us suppose the Commission is investigating an allegation of serious knowing dishonest conduct in an office of State administration in the bush somewhere and the allegation is the $10,000 has disappeared out of the safe over the weekend. The Commission could find that, in fact, the $10,000 did disappear, that there was no lawful authority from the administration for it to go away. That X and Y were there last on Friday night, and Y had a key. This impinges on the problem of primary facts constituting a criminal offence, which was referred to by Mr Moffitt.

One can understand that the junior clerk who looks favourite for the prosecution, and when the news goes around the town for the local newspaper, he would be labelled as the fellow who took the $10,000 from the safe on Friday night. The Chief Justice in the Court of Appeal decision drew attention to the movement towards protection of reputation other than by defamation action these days.

X, the junior clerk, may well want to have those findings of fact of the Commission upset. He may want to say they were reached on a complete misunderstanding of what Mary said. "She never said that at all". Should such an appeal be allowed? It begs the question, but let's leave it at that.

Suppose that it should be. That is the sort of thing I had in mind that can seriously adversely affect a person's reputation, and their family, and their means of earning an income and the quality of life of themselves and those of others. If an appeal is granted, the appeal, in my view, should be stripped so far as it can be of all legal technical and narrow procedures. I would suggest it not be a re-hearing.

It is difficult to see, though, how such an appeal could run and not be a re-hearing when the end result (the finding) by the Commission, is dependent upon the Commission's view of the credit of somebody. It is an area of appeal which, if granted by the Parliament, should be (in my view) strictly limited, with respect.

Does that answer it, Mr Chairman, is there anything else?

CHAIRMAN: Yes, it does. That is the sort of situation - one doesn't want to see injustice occurring.

Turning to page 10 of your submission, could you elaborate on the suggestion that there be an obligation created in the statute to commence proceedings within six months of the tabling of a report?

Mr KNOBLANCHE: That recognises this, that if a body of the standing and strength of the ICAC reports that consideration should be given to the prosecution of X, for a criminal offence or for a disciplinary offence, that is in the press, and it is spread about. In fact, I heard on my car radio, only a couple of days ago, a private inquiry agent saying a recommendation had been made in respect of him, so he was not going to have anything to say until the proceedings (if they were going to come) had come. It seems to me a great burden to carry for the rest of your life, a recommendation that you be prosecuted, and that prosecution does not occur.

Here at the heart of the law of New South Wales it is dangerous to say, I suppose, that the recommendation could be lost, or be under the too hard bundle in the bottom drawer somewhere, and so I make that suggestion with a view to limiting or terminating what I see as an injustice. That is, a man or woman recommended by a responsible body, much respected, to be considered for prosecution, and the prosecution hangs there over their head forever.

I would submit that fairness and justice requires that that be brought to an end within a reasonable time, and the figure off the top of my head of six months was just put there. It could be longer. There is power for the Attorney-General to extend it. I did not put it in my paper, but I would support the requirement by regulations, or amendment to the Act, that after the elapsing of the statutory time the citizen so affected could make an application to the DPP or Attorney-General, or ICAC for a certificate that the recommendation had been considered and he was not going to be prosecuted.

CHAIRMAN: Turning to pages 11 and 12 of your submission. Could you elaborate on the suggestion for a "statutory cause of civil action

sounding in damages available to a victim of false complaint against the person who made it". How would that procedure work in practice, particularly when the person is a victim of an anonymous false complaint?

Mr KNOBLANCHE: Madam and gentlemen, your Chairman has just chaired a committee which has produced a voluminous report on defamation in New South Wales, and I must not be taken as saying that has been put in the too hard basket, but it has been sent away for a further survey in another place. I was never a defamation lawyer and always had it fixed in the back of my mind it is all too difficult, that area of law, and I am sure I share that feeling with many practicing practical lawyers.

I know enough about it to be aware that a person who wilfully publishes to the Commission a report of corrupt conduct, or an allegation of corrupt conduct which is untrue, is liable to a cause of action by the subject of the allegation which sounds in damages after all the special pleadings and interrogatories and pre-trial hearings by judges who are specialists in defamation. What seemed to me here to be worth the suggestion, and so I made it, is, the victim of a false allegation of corrupt conduct to the Commission - that is a wilfully false allegation as my papers says - should have available a quick, non expensive means of bringing the wrong before a court where the wrong c an be attempted to be remedied by the order for the payment of a sum of money.

I would think it likely, although after looking at the case decisions on the ICAC Act, one cannot be confident in saying that it is likely anything could be drafted, including legislation, which is without argument.

I think it probable that a fairly simple cause of action, which for instance might say, "where the plaintiff has been damaged by a wilfully false allegation of corrupt conduct, upon proof of that he may be awarded compensation in a sum not exceeding X or Y dollars. The matter shall be heard in a summary fashion before a judge or magistrate". Perhaps it is an over-simplification but I think it would be providing a speedy useful remedy in vindication of character, and attempting to put the hip pocket nerve back into silence and quite for many people who may be wronged, not in a tremendously serious way but wronged in a serious enough way by wilfully false allegation to the Commission.

Anything further on that, Mr Chairman?

CHAIRMAN: No. Thank you.

Mr GAUDRY: Just a very general question. Very early on in your address to us Mr Knoblanche, you said perhaps within the public and judicial bodies as well there was not a full understanding of the ICAC role, and the extent of its role. Would you expand on that please?

Mr KNOBLANCHE: I have never been to a sitting of the Commission. I suppose that means a couple of things; one, no allegation or within my terms, no allegation of serious knowing misconduct has been made about me, or I would have had a visit there, I suppose. I read with interest Mr Tobias's recounting of his single visit there in his paper to the Institute of Criminology, and so f rom my experience as a practicing lawyer for a long time and on the bench, I have no direct experience. I knew about ICAC, what I read in the press, until I received a request to make a submission here.

I confess the Act came to my hands when I asked the secretariat of this Committee to provide one to me. It has been in my hands a lot in the last three or four weeks, that is why I said, facetiously, I expected it to answer to a whistle now.

From what I have read, in the other submissions I have read, for instance, in the *Leader in* and the *Herald* not too long ago, that "it should not be emaciated" - that a commentator, and one should not forget that he had been a judge and he might have had some interest in protecting the jurisdiction of the court.

I think that was plainly wrong and miles of the course. Many times one sees in these submissions, and what a case is saying, "the Commission is a body set up to investigate, to find facts, and to leave it to others to enforce the discouragement". (In fact the word "enforce" appears in the judgment of Priestley J).

Again and again "ICAC, a body to investigate and gather facts and leave it to others to take the action".

I am sure that over and above that there is a further function that is more than the formal function of educating, that one sees in the Act as one of the functions. S.12, terms are a good thing to remember, "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".

I think in the work of the Commission, a spin-off if you like, although it hasn't been intended, there has been a very strong deterrent effect against corruption. Some remarks of this kind appear in that masterful paper of Mr Moffitt, and that is the reason for that observation. It is really in effect in relation to maintenance of the word "corrupt" in the Statute. There are many people who don't do things now that would have been acceptable generally in the system three years ago. They don't do it because there is now a knowledge that if this happens you could end up in that witness box before the Commissioner or Assistant Commissioner with the papers pouring out what you have done, or have not done.

That is one of the reasons why I say the word "corrupt" should be retained. I know Mr Adrian Roden said it could be "gaa - gaa - gaa" that could have been there, and so it could have been, but the Parliament picked the word "corruption". There might have been a happier choice but it has gone a long way now and it is recognised by the man in the street. That is what the Commission is, and I make no apology for taking from his mouth these words, what the Commission is "on about". I think the Commission and those who direct it and the Legislation which provides its grounds should have regard to that deterrent aspect.

Is there anything else, sir, on that matter?

Mr GAUDRY: Yes, actually following from that, given that it has a preventative role, and you have highlighted in a way that there would have been officials who, until recent times, were perhaps unaware of their involvement because of the culture in which they were operating. I am wondering whether that has any impact on the words "knowingly and seriously". It has been demonstrated in the view of at least the Commissioner in some of his reports that there was a level of amorality, perhaps, existing, not

only at the lowest levels but up to the highest levels so that people may not in themselves knowingly consider their activities to be corrupt?

Mr KNOBLANCHE: Sir, with great respect to the Commissioner, from the market place, in my life as a citizen, I find it very difficult to see how X, a public servant, with the authority to grant contracts worth a lot of money can give one to his brother or his uncle and feel that "that is all right, - there is nothing wrong with that". Unless, of course, he has made full disclosure to his superiors and it has received approval.

Mr MUTCH: That was mentioned in the ICAC submission. Case studies of actions by public officials that the average person would think would be criminal actions, and yet they said there is no grounds at law to take prosecutions. Would you agree with that, that there is no grounds in that particular instance you just mentioned?

Mr KNOBLANCHE: I cannot identify the facts of the particular instance.

Mr MUTCH: You just s aid if you were a public servant and you give a contract to a firm in which you have a financial interest, a brother or whatever?

Mr KNOBLANCHE: Well, after a lifetime now, I have grown to be careful of expressing opinions without seeing the facts on paper and having a chance to check whether they will stand up to ordinary scrutiny. However, let me do this, in abstract. The extent of crimes that have an element of corruption within them has only recently received some examination by the Commissioner.

In the second report the Commissioner mentions it, but leaves it to be examined in the appendix at some later date. If you have an old edition of *Archbold* about, you could look it up. You will find that in England it is the suggestion that there are common law offences where corruption is regarded as one of the essential facts. Interestingly enough, in passing, it has been held that corruption means knowingly and intentionally wrong.

Of course, there is a great field of law as to what "knowingly" means. There are special areas like "intentional or culpable blindness", you don't know because you don't have a look at what you reasonably ought to have a look at. But surely, I would think that a man in public office with the power to grant contracts ought to have at least some fairly strong suspicion that you cannot grant them to your brother or your sister.

Mr MUTCH: You said you put "knowingly" in the definition in the Act. Are you really saying that for the Commission to term certain conduct "corrupt" it really then should be passed on to the courts for prosecution because it really is criminal? Either under common law or some vague and old Statute?

Mr KNOBLANCHE: No. What I attempted to say was this: This Committee asked a specific question in its Discussion Paper, page 2, 1.3, "The Committee seeks submissions in relation to amendments to sections 8 & 9 to ensure that the definition of corrupt conduct reflects the community's understanding of this term."

My view, right or wrong, but I advance it, is, if we went out to Macquarie Street and said to the first 40 people we stop, we say to them, "Corrupt conduct - does it have to be seriously wrong?" I think they would all say, "Yes". And the next question, "What about it, can it be done accidently, or do you need to know when you do it, before, it is corrupt". I think of that 40 there would be 37 that would say, "Yes, you have to know it".

Mr MUTCH: You really have to be a crook to be labelled corrupt?

Mr KNOBLANCHE: That's a bit wide, I think. The culture talked about here, in some terminology in some places I have read is, "A little corruption is all right, so long as it is little, and it is not involved in ripping off widows or cripples".

Mr GAUDRY: It is good business practice?

(Interjection)

Mr KNOBLANCHE: Well, that interjection from the floor, I accept that too. It is within the bounds of what is slickly called commercial morality.

Mr MUTCH: It seems to me the idea of ICAC is to suss out behavioural patterns that might not be against the law at the present time, but which the Commission has approved, but the community might. The Commission might be found to be a bit over-reactive. The Commission might make these suggestions that perhaps it should be criminal. If you have a word "corrupt" and you are able to make a "finding" of corruption, it seems to me that basically you are calling someone a crook.

Would it be better to take all of this corruption definition and put it over into the law where it belongs, or the courts, and say, "this is the definition of corruption". So if the ICAC finds conduct that falls within that definition, all we have to do is refer it to the police for prosecution. It then falls under a definition that is either codified, or comes before the common law and so forth - it might be better to be codified by the sound of it. Then the Commission is not then making these findings of corruption and your amendment will enable them to continue to make findings, using the word "corrupt".

Then you will have a lot more appeals and so forth, interpretations, before the supreme court?

Mr KNOBLANCHE: The amendments I suggest are to remove s.9 from the Act, leaving s.8, telling John Citizen and public officials what corruption is in a very wide way. The Commission is called the Commission Against Corruption - the Act has "corruption" in it. As Mr Roden has pointed out "corruption" appears many times in the Act.

In the end, I come to a compromise situation. Section 8, as it remains under my suggested amendment, retains, in the Act, a definition of what it was that faced the Commission, and is generally taken to be understood by most citizens as involved in the Commission's activities. It is in Mr Roden's paper, to which I refer, as having the, if I may say so with respect to him, the "Roden Section" which I humbly support and recommend. He will tell you about it himself later, no doubt.

Mr Roden says there is no need for a definition of corrupt conduct at all, but you define the jurisdiction of the Commission and what the Commission can look at, in this manner: Page 8 of Mr Roden's submission, in italics beginning at the bottom of the left hand column,

> "why take two steps when one would do. Why not let so much of S.8 as may remain be used to describe the circumstances in which the Commission may investigate. Why refer in one section to corrupt conduct or corruption, and then explain it another, what it is intended to be. Why not something like this: "following receipt of a complaint, or a report of its own motion, the Commission may investigate any facts or circumstances, including the conduct of any person, whether or not a public official, which in the Commission's opinion may impinge upon or adversely affect the honest or impartial exercise of the official function of any public official?"

If the Committee were to find favour with that and the Parliament were to find something in the Committee's report that said, "this is the way it ought to be" and adopted that, my remark about that in my addendum is, with great respect to Mr Roden, I find that to be a provision of a clear, simple all in one place, overall statement of the reach of the investigative jurisdiction of the Commission, without reference to "corrupt conduct". So what corrupt conduct means, doesn't really matter. Under Mr Roden's section the Commission has power to investigate anything that falls there.

In Mr Roden's paper at s.13 (he will be able to go fishing this afternoon, because I have presented his paper for him), at page 4, "subsection 3 of section 13 makes such interesting reading in this regard it is worth quoting in full". He quotes it in full, but underlines the words "whether or not findings or opinions relate to corrupt conduct". That gives the Commission a very wide area for investigation. Whether Joe Blow who is being investigated thinks, or knows it was wrong or dishonest or not - if the allegation is it was dishonest, and the Committee is of the opinion it should be investigated then they investigate it.

Under the amendments, I suggest, I have changed s.74B by putting a prohibition on the Commission, making a finding or determination that anybody is guilty of "corrupt conduct", so "knowing" has to be tidied up. It is there in response to a question in the Discussion Paper, - how do you amend sections 8 and 9 so it reflects what the ordinary people think corruption means? I am satisfied that the ordinary citizens who pay their taxes and vote in this community, feel that corruption is wrong conduct, but it must have two other qualities. It must be seriously wrong and to be wrong conduct in most citizen's judgment and conscience, it needs to be done knowing it is wrong. That is why I say "knowingly, seriously".

Mr MUTCH: I would have thought also if you are applying the objective test, that the Court of Appeal found you had to apply, it would have to have some criminality about it.

Mr KNOBLANCHE: No. "Wrong". There are many things which John Citizen feels are "wrong conduct", but not criminally "wrong". Indeed many of the submissions that have come to this Committee talk about removing the label from "non-criminal corrupt conduct". I left s.8 as it was in

an endeavour to make it meet what the ordinary citizen means by corrupt conduct, and that is, seriously wrong and knowingly done. It may be a crime, it may be a disciplinary offence. It may be a breach of morality, and it was said, I think, by the Premier when he introduced the legislation, or the changes, that ICAC was not going to be a court of morality.

Public morals and public standard of life and the quality of life, in my view - that is the deterrent theory side - is important to all of us, and my grandchildren. I think the Commission has made a great contribution to the increase of this quality and the maintenance of it in the future. Anything else, sir?

Mr GAUDRY: Yes, I am still on "knowingly and seriously" wrong. When the prevention area of ICAC is moving into perhaps tendering, and processes like that, there has been a culture within areas of the public service where tender splitting took place. Due to the cyclical nature of Government spending and the need to spend that money within a timeframe, quite a few public sector employers involved in giving quotations of tendering involved themselves in the process of tender splitting, so that they could handle the tender below sending it to one of their senior people. This was said to be an accepted practice but often led to problems because it meant you had a flow-on of the same contractor, rather than it going back to the tendering process.

I have been told that was an entrenched process and the people involved in it would not have knowingly thought it to be wrong. all they were doing was speeding up the process so money could be spent within the financial year. Under your definition that would not be in any way corrupt.

Mr KNOBLANCHE: Could it be seen reasonably as a breach of public trust?

Mr GAUDRY: Certainly a breach of regulations, in public trust.

Mr KNOBLANCHE: Right. Section 8(1) on my amendment, "any conduct of a public official or former public official that knowingly constitutes or involves a serious breach of public trust". You must ask yourself what the man who was splitting the contract up, was that in breach of the trust of the function he had been given. If it was, to make it corrupt conduct for him under my definition it would have to be shown that he knew it was. I would personally find it difficult to see how a person in public administration at that level handing out contracts, or deciding where they go, or what value should be put on them, would be able to say that he didn't know that it was contrary to the regulation. If it is contrary to the regulation that is good enough.

So that is the "knowing" part in mine. It can be subjective or objective. As I said when I opened the paper, I had not put it in there, but I was t empted to include the words that made the decision of whether it was "knowingly serious", a decision to be reached on subjective grounds - that is "in the opinion of the Commission".

Those words have not found favour in the Parliament, on another occasion they have been withdrawn and those words appear in the judgment of the Chief Justice. They take on great significance, they have been taken out by the Parliament.

The junior clerk, when he hands over to somebody on a Friday afternoon, a parcel that has been handed over for months, from the office. He should not be handing parcels over, unless somebody told him to, he has just fallen into the practice. If the parcel is full of kickback, you can't say that he is knowingly involved in any breach of trust, in my view.

The "knowingly and seriously" I put in, is to take the place of the filter that had been s.9 beforehand. My filter has a coarser mesh. I respectfully suggest my filter, particularly if left to the subjective decision of the Commission, would work better.

I have added, of course, and refer to it in that context, a suggested amendment to s.20(3) and the effect of that is:

> The Commission may, in considering whether or not to conduct, continue or discontinue an investigation .... have regard to ...
>
> (a) "the subject-matter of the investigation is trivial",

and there I add the words, "or insufficiently serious". It is not an attempt to recognise and make acceptable the part of the culture that says "a little corruption is all right, provided it doesn't rip off widows and cripples. Anything else, sir?

CHAIRMAN: It might be appropriate to put further questions on notice, in view of the time.

Mr KNOBLANCHE: Sure, I will stop now. Whilst I am under subpoena, I have to be released from further attendance, as I understand it. I did not realise that until I got here. I am happy to take further questions on notice.

CHAIRMAN: After we have read the transcript, would you be happy to take further questions in written form and respond in written form?

Mr KNOBLANCHE: Certainly.

(The witness withdrew)

(Short adjournment)

ATHOL RANDOLF MOFFITT, QC, CMG, of [redacted] (retired), on former oath:

CHAIRMAN: Mr Moffitt, you have received a summons from me, is that correct?

Mr MOFFITT: Yes, I have received a summons, some time ago, some time in the past. I acknowledge it.

CHAIRMAN: Could I invite you to make an opening statement, if it is a prepared statement copies could be made available.

Mr MOFFITT: Yes, it is in the most part. I have done that so I could speak in a fairly compact form. It has been typed up for the most part and I thought I should deliver it orally, having regard to the stage we are at and so people can make any comment they wish.

Might I emphasise at the outset that any statements which may appear to be blunt, made by me, on the written material or later, are certainly not intended to be personal to anybody. I am dealing with ICAC as an institution, and how it is operates today and that should be clearly understood.

I should also emphasis a view which I have expressed elsewhere that ICAC has done most effective and commendable work towards changing the climate of corruption. That doesn't mean that there should not be blunt criticism of matters which may help to improve the institution. I think, Mr Chairman, you would realise from other things I have done here before that is my objective from beginning to end. I think that only blunt comments and a little devil's advocacy can help a Committee such as this to perform the important task it is now confronting.

What I would like to do, and this appears in the document now before you, is to try and draw together what seems to me to be the emerging issues on 1, 2 and 3 which seem to be the critical matters which this Committee is really looking at. I have looked at some of the written submissions, I can't say all. I have certainly looked at those by Mr Temby and Mr Roden and I have read some of the panel material.

If it would help the Committee, I can express what I think seems to be the emerging issues, I will go to what I have prepared.

(Document of Athol Moffitt tabled, as follows)

PARLIAMENTARY COMMITTEE ON THE ICAC

Issues 1, 2 and 3

The Emerging Issue

ORAL COMMENT OF ATHOL MOFFITT

It may be helpful, if I distil and then discuss what appear to be the points of difference on issues 1, 2 and 3 expressed by Mr Temby and Mr Roden on the one hand and myself on the other. For convenience I will refer to their views as the ICAC view. In order to understand what Mr Roden is proposing, it is necessary to go beyond his written submissions to what he said in his recent report (The Unauthorised Information Report) and to particular passages in the transcript of what he said as a panel member in the 15th October discussion. Although not apparent at first sight, the substance of the views of Mr Temby and Mr Roden are almost the same.

All three of us agree on the importance of ICAC and of its ability, by virtue of its special powers, including the right to override the privilege against self incrimination, to flush out the true facts which otherwise would never see the light of day. All agree there is no need to define "corrupt conduct" and to do so satisfactorily is difficult and produces artificial results.

All agree that jurisdiction to inquire can, without such a definition, be adequately defined by the present s.8 alone or by some variation of it. I think some suggestions by Mr Roden have considerable merit. All agree there is no need for a right of appeal but here there is an important difference. I think it would be a great disadvantage if ICAC has powers which meant we have to necessarily accord a right of appeal. I think a right of apepal alongside other criminal processes would be a disaster, but if the power is given which justifies a right of appeal, so be it, and that is my view. If you adopt ICAC's proposal it is absolutely necessary, unfortunately, to have a right of full appeal.

In my case, that view depends on the power to make findings adverse to named persons being strictly confined to findings of primary facts. On ICAC's proposals, I am of the firm view there must be a full right of appeal.

The critical difference between the ICAC view and mine is that the ICAC view is that it should retain the power, with respect to named persons, to report, either as its

"finding" or "opinion" its determination of the quality of conduct which it finds proved. On this view there would be no limit on the terms open to be used in making these pronouncements. I will later enlarge on this. On this view, none of the words used to describe or categorise the conduct would be defined by the Act, so that any words selected by ICAC would have their ordinary meaning.

It is at this point that the ICAC views and mine are fundamentally opposed. The relevant part of the schedule to my written submissions would apply to any significant adverse pronouncement about a named person which the ICAC view would empower to be made. As stated I would strictly limit adverse findings concerning named persons to primary facts. There are some limitations (see pp. 1 and 22 of my written submissions).

That then appears now to be the real issue between us. It could well be the real question which confronts this Committee on issues 1, 2 and 3. Should ICAC have an unlimited power to find and pronounce judgmental findings, on whatever terms it wishes, to pronounce what, as I will explain, are judgemental findings concerning the conduct of named persons? It is very simple to give the populist answer "yes", without digging deeper to consider the possible consequences. That has been basically the ICAC approach. Why shouldn't we say what we have found? That naturally will be the media approach driven by a little self-interest.

To consider this question, one must dig a little, because there lie hidden great and real dangers. Further the question needs to be considered on the context of the package of reform according to the ICAC view which would make ICAC power more absolute than at present.

I should at the outset say that in my view the issue I have isolated raises a question of critical importance, so much so, that I foreshadow that if the ICAC package view is adopted, then in my respectful opinion, a situation far worse than at present would be produced. ICAC's power would be far more absolute than at present. There would be a very real potential for serious injustices to be done under the authority of an Act of Parliament by an institution of State. Errors which inevitably will occur and the consequential injustices, perhaps ruinous of the careers of public officers, will be beyond the reach of any review process and of the narrow confinement of the prerogative powers of the courts. In the end, ICAC will be the victim of its own absolute power.

It is axiomatic that ICAC, set up to inquire into conduct which may be in breach of public duty, should be able to reveal the truth of what it finds. The real question is what it and others should do with what it finds to be true - what it finds to be the true facts. It is easy to substitute the axiom when answering the real question. As to the future the answer is easy. It is only by knowing what goes on and why and how it occurs that other functions of ICAC and the powers of others can be directed to make things different in the future. The question as to what is to be done about individuals in relation to past conduct revealed is difficult and complex. It is far from axiomatic. This is the point where the real issue arises. The ICAC view is close to treating the answer as axiomatic, carried forward by axiomatic media support.

To answer the question, I suggest it is necessary to inquire into how the power given by s.74A(1) with the Act shorn of other provisions in accordance with ICAC proposals could be used. Attention must be given to what the terms "findings" and "opinions" open to be given may include in respect of past conduct. The Act does not limit "findings" to findings of primary facts. As Mr Roden contends and has done, it can be a finding concerning the quality of conduct inferred from the primary facts found. Such a finding will be judgmental in character. Likewise to state an "opinion" as to the quality of past conduct based on facts found is to make a judgmental pronouncement. Mr Temby says s.74A(1) should stand as it is and that ICAC should have the power "to express conclusions applying ordinary language" and "pass strong comments on a person's conduct without seeking to classify it by referring to some defined term" (ICAC submission p.21).

A close look at what Mr Roden has done and said makes it clear that by reliance on ICAC power to make "findings", his view on s.74A(1) coincides with those of Mr Temby. This is well illustrated by his report on the Unauthorised Information inquiry and what he later said on 15th October as a member of the discussion panel (see generally but particular at pp. 23-24 and 32-33.)

His recent report referred to warrants a close study by the Committee, because it illustrates what could happen, even become the usual practice, if the ICAC proposals are accepted.

In the Report on Chapter 3 under the heading "summary of principal findings of fact" there is a summary of specific findings concerning a very large number of named persons. Very frequently added to findings of primary facts are added the word "corruptly" (ie. "corruptly sold" or "corruptly purchased") and in some cases there are added "in breach of his duty as a public officer" or an "abuse of his position as a public officer". As to the use of the word "corruptly" this, surely, is not other than a finding or judgement that the sale (or purchase) found to have occurred was corrupt or that the receipt of money for giving the information was corrupt. In his panel speech, Mr Roden made it clear that by using the adverb "corruptly", it would have its ordinary meaning and not be tied to the definition "corrupt conduct", of which he was highly critical. He said nobody had "taken him to court" over the use of the word "corruptly" because in its context it clearly "means what it says" (panel p.33). Of course, the word, so used in its ordinary sense, would be understood in the context of the particular primary findings of fact to mean the conduct was in fact criminal. That was that money had been received in breach of duty of the officer.

If it had been used in accordance with the statutory definition, this would not be a finding of criminality, but only that the conduct could be one of three things, one of which is not criminal.

Of course, as we all agree, this definition is unsatisfactory and misleading. However, the point is that Mr Roden in effect (but not by use of the direct words criminal offence) has pronounced a large number of named persons to be in fact guilty of a criminal offence.

In his panel speech (p.41) Mr Roden, even in respect of findings of "corrupt conduct" (ie. as defined) has described them as "thinly disguised convictions". Surely the disguise in the "corruptly" findings is so thin as to be almost non-existent. It is not for me to say whether the "corruptly" findings would survive a challenge that they infringe s.74B(1) as being a finding of guilt of a criminal offence. "Corruptly" as a lay word is indefinite in meaning as we heard this morning, and I think everybody would agree, and normally no error of law arises from the use of a word not defined by statute. Any error is treated as an error of fact.

The "corruptly" findings were not forced on ICAC by any provision in the Act. Under s.74(1) it had a discretion to make or not make findings such as these. That is the provision which both Mr Temby and Mr Roden want left unchanged. Mr Roden's panel speech makes it clear that it is the definition of "corrupt conduct" to which he objects, and the possible challenges in the court that it leaves open. That he sought to do in a way to prevent legal challenge by the use of the word "corruptly".

The consequence of the use of the power under s.74A(1) to make such findings, as "corruptly", as Mr Roden did, is worse, in that such a finding of criminality thinly disguised can be made on any material before ICAC, and according to Mr Roden upon evidence extracted under compulsion, which under s.37(3) would be inadmissible in a criminal trial. That provision does not apply to restrict the use of such material to base a judgemental pronouncement under s.74A(1). This Mr Roden accepts (report p.189) and it seems clear he did this in making his "corruptly" judgments. As the ICAC Report on the Azzapardi Inquiry says, "... findings by ICAC are on the balance of probabilities".

Both Reports were prepared by different Assistant Commissioners but each were the reports of ICAC under the hand of its Commissioner.

I add that I wish it clearly understood that I am merely using this as an example which I think the Committee might anxiously look at to see what could be the position, so far as power is concerned. Assuming the definition has gone and there is an unrestricted power, under s.74A(1). I think it warrants consideration as an example.

Of course it is necessary to expose what goes on in secret and of course with care override, for the purpose, the right to silence. I suggest these are very serious matters which this Committee, looking into this matter on behalf of Parliament, needs to think about. Of course use what is found to base future action, so it can aid the DPP, whether by way of indemnities or otherwise, to present a case for trial and convict in accordance with law those who have done what has been exposed as apparently criminal. People who do the things apparently exposed in an inquiry in that way exposed should be convicted and dismissed. But are we in this country prepared publicly to convict people by back door methods and, in order to do so, ignore the right of silence and the safeguards of a trial? This is one of the blunt statements that I said I proposed to make, and it should be understood. Are we prepared to give the power to an administrative body, not subject to the review process, the power to conduct what is a thinly veiled criminal trial and pronounce what, in Mr Roden's

words, are thinly disguised criminal convictions and do so on the balance of probabilities and ignoring the right to silence? Applying what the Chief Justice in the Greiner/Moore case said, if there are no criminal proceedings (as well there could be because of proof difficulties) or there are acquittals, the findings - the thinly veiled convictions and the "corruptly" tag will stand and continuation in office will be difficult if not impossible.

There are other serious and different problems if the ICAC package of reforms is looked at as a whole. I have then set out those which appear to me to arise from the ICAC submission by Mr Temby.

The only submissions Mr Temby makes as to any amendment which should or should not be made which is relevant to issues 1, 2 and 3 are: -

(1) S.8 as it now is and on its own should define the jurisdiction of the ICAC to inquire.

(2) S.9(1) should be repealed because it unnecessarily confines jurisdiction and gives rise to various legal complexities and consequences.

(3) There should be no definition in the Act of "corrupt conduct". It is not necessary to do so in order to define jurisdiction under s.8.

(4) S.74A(1) and S.74B should be retained (This must mean S.74B(1) and (2)).

(5) S.74A(2) should be amended so there is no duty (obligation) but only a discretion to make statements (positive or negative) concerning criminal or disciplinary offences or dismissal in relation to an "affected person".

(6) There is no proposal made that s.13(1)(a) and (c) taken together or taken with s.74A(1) should be amended in any way.

(7) There should be no amendment which provides any right of appeal (eg. by a person against whom an adverse opinion has been reported and made public). It is contended that resort to the prerogative powers will suffice.

What Mr Roden has said if the extra material is to look at, I suggest accords with (1) to (7), except that as to (1) he submits that s.8 should be in simpler terms and as to (4) does not mention s.74B.

I will return to consider the consequences of these amendments. First, however, some precise examination needs be made to what is being submitted.

It appears that what is being dealt with at p.20 of the ICAC's submissions is the undesirable nature of the power to pronounce conduct corrupt as defined by the Act. This is so because it does not accord with the ordinary meaning of the word "corrupt", so a finding of statutory corruption in respect of conduct which is not criminal has unacceptable and "devastating" consequences. There is no objection expressed to lay

words being used to define conduct found as corrupt. The objection stated is to the artificial definition. That this is the limit of the objection expressed appears when he adds (at p.20) "It also forces the Commission in any report to seek to classify conduct by reference to complicated and difficult legal concepts". Then (at p.20) reference is made to the "opportunity for subsequent legal debate" concerning "finding of conduct corrupt". This is an obvious reference to there being available a challenge on a legal bases, as there was in the Greiner-Moore case, because there was a finding based on a legal definition. Then at p.21, the preferred option is stated to be that ICAC have the power "to express conclusions applying ordinary language". It is then added that ICAC could then "pass strong comments on a person's conduct without seeking to classify it by reference to some defined term" (emphasis is mine). Then at p.21, it is said "... provided there is a capacity to determine the facts and characterise the conduct of participants using ordinary language, as would a Royal Commissioner, it may not be necessary to have a power to determine whether conduct is corrupt in any defined sense".

Then in the Second Metherell Report (p.15) Mr Temby concludes "putting the matter simply, it would be necessary to retain s.74A(1) and s.74B". In his submission a month later (p.1) he expressly confirmed as still his views, what appeared in his earlier Report. Accepting that Mr Temby speaks precisely, s.74B refers to both s.74B(1) and (2). As to s.74A, this is specifically limited to s.74A(1). This limitation was deliberate because, as appears in the submissions, the view is that s.74A(2) should not be retained but amended (see later). That is, this is action which places an obligation to make positive and negative statments about criminality. Thus, what is being said in both the Report and the submission is that the wide powers of s.74A(1) to report opinions concerning conduct should remain and so should s.74B(2) (and also s.74B(1)). In itself, s.74A(1) would be wide enough to cover an "opinion" that conduct was corrupt.

The terms of s.74B(2), by its reference to "corrupt conduct", which on his submission would remain would confirm this and s.74B(2) would mean that such a finding would be deemed not to infringe s.74B(1). With there being no definition in the Act of "corrupt conduct", as Mr Temby submits, then the reference to "corrupt conduct" in s.74B(2) would be to it in its ordinary meaning, whatever that may be. The problems earlier referred to arising from a statutory definition and the "opportunity for subsequent legal debate" quoted earlier would be gone. This of course would mean that the possibility of any legal challenge in the Courts (under the prerogative powers based on error of law) would be gone.

Even if s.74B(2) and s.13(1)(c) were not retained in their present form, but s.74A(1) is and there is no s.9(1) and no definition of corrupt conduct, then, under s.74A(1), ICAC would have power to report any "findings" or "opinion" concerning the conduct of a named person. There would be no limitations. An opinion concerning the past conduct of a person is of necessity judgmental. Thus ICAC could report its judgement that the conduct was dishonest, improper, grossly improper, scandalous, unwise, misconduct, partial or corrupt, using those words in their ordinary meaning.

As will later appear, the package of amendments proposed by Mr Temby, on analysis, are capable of permitting and producing some extraordinary consequences.

Mr Temby, to justify the proposals for unlimited power under s.75A(1), seeks to draw a parallel from the unlimited powers of Royal Commissioners to express opinions.

I suggest there is no real parallel and that in any event what should be done should be related directly to ICAC as a very special type of permanent institution. A Royal Commission is set up to perform, on a single occasion, a specific task in accordance with specific terms, set by the authority responsible for constituting it. They are limited to some subject considered to be of such great national or public importance, that special means to investigate and pronounce judgemental opinions are given. The revered Salmon Report which deals with commissions of inquiry summed the matter up by saying these inquiries;

> "... should never be used for matters of local or minor public importance, but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crises of confidence. In such cases we consider that no other method of investigation would be adequate" (The report is set out in the schedule to this Committee's report on the Rights of Witnesses pp 312-352).

The Western Australian inquiry was such a case. Where they made comments to a whole lot of matters is secret and sent them off to be dealt with in accordance with the ordinary principles of law. Surely, those terms do not apply to an inquiry into any private complaint such as one concerning the conduct of a clerk in a Shire office or in some county traffic office.

ICAC is a permanent institution constituted by detailed legislation, which defines its functions and powers. It can deal with the low or the high. Some functions are novel. For the most part the functions look to the future (see s.12). As to the past conduct of individuals, it sets up a precise mechanism whereby past conduct revealed can be dealt with in accordance with law by external bodies. ICAC, and its revelations and its statements provide a spur and aid to such action being taken. To this intent, s.75A(2) imposes not a discretion, but a duty, the purpose of which is exculpation or setting the law in motion according to which is appropriate having regard to revelation in inquiries aided by the exceptional investigatory powers of ICAC. With respect, the Royal Commission analogy is inapt.

Let me now turn to the consequences of the amendments (1) to (7) set out earlier proposed by Mr Temby.

In what follows, I emphasis that in any debate on the terms of a legislative grant of power, the critical question is what does it permit and could possibly be done within the terms of the power, rather than how it is hoped or expected the power will be exercised. This is more so if the power can be exercised by different persons and there is no factual review process.

Some of the possible consequences of the suggested amendments which warrant consideration are these:

(a) Under s.74A(1)(a), ICAC would have an unlimited power to report and make public any finding or judgmental opinion concerning the conduct of a named person. By reason of s.74A(1)(b), ICAC would have the power, but no obligation, to give reasons for such a finding or opinion.

(b) It would be open to ICAC to express the judgmental opinions using the term corrupt conduct (which would be according to its "ordinary" meaning, whatever that may be taken to be). Other equally damaging terms could be used, such as grossly improper, deceitful, dishonest or scandalous.

(c) Whatever the basis for reporting conduct corrupt, and reasons may not show this. S.74B(2) would allow it to stand and deem it not to infringe s.74B(1). Although its usual or ordinary meaning implies criminality or dishonesty, it is an inexact term and may carry for different persons a wider meaning.

(d) Opinions (and hence judgements) about the conduct of named persons, even that it was corrupt, would not now be limited to conduct in breach of an existing law or standard imposed by law. An opinion, what ever it is, could be based, rightly or wrongly, on the view of any commissioner on matters of morality or what he personally considers ought to be the standard. The Greiner/Moore decision depended on the corruption findings being of that defined by the Act and hence tied by s.9(1) to a criminal or disciplinary offence or a dismissal, which, of course, tied it to breaches of existing law. To delete any definition of corruption and to repeal s.9(1) and not replace it with any substitute would free all findings, including one of corrupt conduct, from the Greiner/Moore decision. A judgemental finding could ignore the fundamental philosophy to which I referred in my written submissions at C(11).

(e) If follows from what is said in (d), that as no finding, even of corrupt conduct, would be subject to any legal definition or legislative constraint it would not be open to challenge as an error of law. A principal basis of Mr Temby's objection to the present position is that there is "opportunity for subsequent legal debate". His proposals seek to remove what ICAC finds from legal debate in the Courts. The exercise of judgmental power would be absolute and unchallengeable, no matter how wrong.

(f) There should, on Mr Temby's submission, be no right of appeal. He claims that the prerogative power will suffice. However, as appears from (e), the amendments he suggests would avoid, as they are intended to avoid, any challenge in the courts to any ICAC findings, because they will not involve any error of law. Where a word is defined by statute its meaning is a question of law, but if it is not so defined it is a question of fact, so no finding under the ICAC package and hence even a finding using the word corrupt or corruptly would be open to challenge, no matter how wrong or unfair the finding in fact is. A challenge such as was made in the Greiner/Moore case would no longer

be available. The comments of both Mr Temby and of Mr Roden regard such a challenge as an encumbrance on the exercise of ICAC power. Nowhere is there an acknowledgment of the important construction limiting ICAC power or the philosophy inherent in it, which I set out in my submissions C(10) and (11). The back door result of the ICAC reform package would be that a limitation on ICAC power to make findings and that philosophy would no longer be imposed on ICAC power. Nowhere does the ICAC package or supporting argument that prerogative power will suffice make reference to the court's comments on the extreme narrowness of that power, listed in part in my submissions at C(12). Now, the only error made in findings would be of fact and not law. The only challenge would be on the narrowest of basis, namely procedural unfairness. Prerogative intervention on the bases of a failure to give any or adequate reasons would be unavailable against ICAC, because, by s.74A(1)(b), ICAC is given the express power not to give reasons.

The mere presence of a right of appeal serves to induce a more careful exercise of power. In my experience, it is otherwise when an appeal is limited to errors of law. Absolute power with no review process becomes in time unrestrained and less careful and hence arbitrary, particularly when reasons need not be given. History tells us that.

(g) To remove any obligation under s.74A(2) to make any positive or negative statements concerning the need to consider criminal or disciplinary proceedings or dismissal could, and in many cases would, have very serious adverse consequences which include: -

(i) In some cases an ICAC adverse opinion could be the only judgement, perhaps without reasons, about the conduct of a person. It could be in severe and crippling terms. The spur and the aid to outside action open to lead to contrary conclusions would be missing. Lessening this chance of external action to try the issue would make more serious the absence of any means of the finding being reviewed. There would be no appeal and no s.74(2) statement. Mr Temby, regrettably, is proposing a step to complete absolute power. There will be no new Greiner/Moore type of case revealing ICAC error.

(ii) Habits are inclined to form. In time, the practice could easily develop in some classes of case (the less serious) where in effect ICAC would set itself up as the sole judge in place of the Courts and dismissal authority. In time the pattern could be that adopted in the recent Unauthorised Information Report with thinly veiled ICAC criminal convictions, but standing alone with no ICAC statements concerning prosecutions. It will be recalled Mr Roden complained that having to make such statements was a waste of ICAC time, that he only made the statements because the Act compelled him to do so and that he recommended that the Act be amended, so ICAC would have no duty and only a

discretion to make such statements. In the end on the ICAC package, ICAC findings or opinions whether right or wrong but unappealable and on whatever material they may be based, and with or without adequate reasons could become the reasons for resignation and dismissals.

(iii) There would be no obligation to give the negative exculpatory statements at present required by s.74A(2). There could be ICAC criticism of a named person and earlier allegations against him but the matter of exculpation on the three s.74A(2) matters could be left in the air.

(h) If a judgmental opinion of any type is reported by ICAC concerning a named person, then whether or not statements are made under s.74A(2), as it is or as amended, exactly the same type of problems that I have listed in the Schedule to my written submissions would apply. In considering what I am now saying, I ask the Committee to go back to the detail of that Schedule. It applies to any of the situations where ICAC makes a serious finding adverse to a named person.

(i) In respect of all the foregoing and the judgemental opinions in particular, there is nothing to prevent the opinion being based on inadmissible or hearsay evidence or evidence given under compulsion. The latter has already happened.

(j) In summary, some judgements open to be made under s.74A(1), taken with the other amendments proposed could cause immeasurable damage and make continued office untenable, yet their making is not subject to any due process requirements, and error is not reviewable. Such absolute power just cannot be acceptable in our democracy.

(k) The amendments proposed could well produce some unacceptable possibilities concerning the exercise of power extending into or on the fringe of the Parliamentary and judicial fields (and perhaps others). These need to be understood. Some inquiries in some of these areas would be affected by s.112 concerning Parliamentary privilege, but political pressures or numbers could lead to it being waived, as it was in the Metherell Inquiry, extending into casting of a Parliamentary vote. If s.112 privilege were claimed and not waived, it would be said there was one law for members of parliament and another for more lowly public officers, such as aldermen. On the ICAC package, on a mere complaint of partiality, perhaps politically motivated, ICAC could inquire, using its compulsive powers, and make any unappealable finding it wished. It would no longer be confined by the Greiner/Moore decision to conduct which is in breach of some existing law or standard imposed by law. Take a few examples:

(i) partiality of a Speaker

(ii) partiality in the appointment of a chairman of a Parliamentary Committee

(iii) partiality in the appointment of a judge

(iv) partiality in the casting of a parliamentary vote

(v) partiality in favour of a particular group of persons in a vote cast by a member or members following some general deal done say with independent members, the deal being investigated by the compulsive powers of ICAC

(vi) partiality of a judge in giving a particular decision adverse to a woman, a migrant or an aborigine (even where there is an available appeal.)

In any of these cases ICAC could judge the conduct, for example as, partial, improper or an abuse of power.

I emphasise again that the only legitimate approach to a consideration of the terms on which legislative power is given, is to consider how power could be exercised. It is no answer for ICAC to say we would not do that or give us absolute power and we will exercise it wisely. ICAC is a permanent institution. So are the courts. With courts powers are carefully defined and constantly refined and limited. Judges are not given absolute powers on trust. An appeal is not denied because it may delay the execution. Some judges make errors. All do at some time. A few are maverick. Above them all, good, bad and trusted there is a double appeal system.

Those who from time to time exercise ICAC power will be no less human than are judges so as to be no less prone to error, and so there never will be one who has no hidden prejudice politically or otherwise and so there never will be a maverick. If a permanent institution, as is ICAC, possessed of such extreme powers, is given a power to do what in reality is to pronounce judgments capable of doing great damage and making the office which is the livelihood of a person untenable and permanently tarnish his or her reputation, perhaps wrongly or unjustly, can we afford not to define the power and make it subject to adequate review, as we do the court system. It we do not, some errors and injustices in the exercise of absolute power will in time on some spectacular occasion emerge to wreck the ICAC. We cannot take that risk with this worthy and necessary institution.

I believe the matters at issue can only be resolved by reference to some detail. I trust the responses to my written and oral submissions are not confined to claims "we would not do that" or populist generalities or by resort to what I described in a *Quarter to Midnight* in the Chapter entitled "Side Swipes" (pp.92-102) by condemning the whole by an attack on one particular.

Mr MOFFITT: It is a matter for you, Mr Chairman, if I left the other issues, for a later stage in case somebody wants to ask me some questions on what I have said on 1, 2, and 3.

CHAIRMAN: That would be convenient.

Mr GAUDRY: Are we able to have Mr Moffitt back before us at some time later as this is fairly weighty stuff?

CHAIRMAN: The question is if we might have you back before us at some other stage?

Mr MOFFITT: If you want to, yes.

CHAIRMAN: Before 1988 we had a situation where there was an Assistant Police Commissioner with allegations against him for corruption who has subsequently been gaoled; a Chief Stipendiary Magistrate who went to gaol over corruption; a former Corrective Services Minister who went to gaol, so in terms of the judiciary and the legislature they were all fairly well represented. Having regard to that could it be argued that the problem with public corruption was such as to provide the need for a permanent Royal Commission with substantial powers of investigation and the power to make some specific findings against individuals?

Mr MOFFITT: First of all as I have said on many occasions whatever you call it, whether you call it a
permanent Royal Commission - I would prefer not to use that term for reasons I have given you - but I have always thought that ICAC was necessary if we are going to meet the problems we have. That's point no 1. I wouldn't want to debate that.

It all depends on what you mean by findings. I think that there is an exposure process by Royal Commissions and by ICAC. I have debated this elsewhere in front of this Committee but it is important that the sittings be open so people hear the facts no matter how they have been procured, with some exceptions. That is part of the exposure process that you hear the evidence and the press hears the evidence and they can comment on it.

The second thing is that as you may have a conflict as to whether or not what someone says in true or false, it is very important that ICAC have the power to make findings of primary facts. The next question is the difficult question.

Can you go beyond the finding of primary facts? The difficulty is you get a confusion which seems to be perhaps between Mr Roden and myself as to what you mean by findings of primary facts. You can make all sorts of findings and find all the elements of criminality and so on and make findings of fact. Are you asking me about the findings of primary facts or findings of facts which I have said are judgmental opinions?

Mr CHAIRMAN: It was more in the vernacular. As I said there was a perception that there was a great degree of corruption in N.S.W. and conventional law enforcement wasn't able to cope with that. In fact, we set up and anti corruption body and it should be given the powers to make findings of corruption even if that be criminal because the problem was so great that you had to suspend the normal safeguards.

Mr MOFFITT: I don't think that is acceptable. There may be some very extreme cases, like a Royal Commission which is of great national importance, where the Commission should come out with the finding. It is a different question whether Joe Blow who works in the Nowra Office should be subject to the same thing and you drop everything and say "We've got to nail him." It depends upon, first of all, an examination of the alternatives. What are you trying to do? Are you trying to convict him publicly of criminal conduct so the public will see it? What's the object of it? If it is, in fact, criminal the Court should be deal with it. If it is a serious matter there is the mechanism that the courts can deal with it.

If it is not a serious matter, and it might be understood, why put a label on it? If, on the other hand, you have a climate which has existed in this State - and it goes right back to the very beginning of the colony, I believe, to the days of the rum corps, and so forth - if you have that and you have got to attack, which we certainly have, what's the alternative?

The alternative is if you can convict the person in accordance with the criminal law, that is the right place to do it to give him a proper trial. If the position is say, you want to call up the player, first of all there is the exposure by the facts being exposed, then the proper course is for action to be taken in the future to prevent it. If a report is made without naming the whole ten different people involved, that report in the strongest terms can make any statements it wants about the general course of how it has happened and everything else, as in The Unauthorised Information Report. If some things aren't at present covered by any criminal law then the more important thing is to make sure that the exposure produces results, so that because it is criticised in the strongest of terms, the powers that be will alter it.

The very matter you raised earlier in respect of certain classes of conduct where you prefer your brother in granting the contract, okay disclose what's happened without necessarily convicting a specific individual with something which isn't an offence. Expose exactly what's happened, how it has happened and do it in the strongest terms and then ICAC has a duty to make recommendations of what's got to be done in that class of case. If it isn't done, it is put back before Parliament in six months' time.

What do you achieve really getting rid of the climate of corruption by going beyond just exposing the facts? If you nail somebody in effect with criminality, what does it achieve? It punishes that person. Is that what you are aiming to do? Are you aiming at cleaning up the climate of corruption? Are you going to make an example where you are not using due process of law? Those seem to be some of the considerations.

Mr GAUDRY: We recently went to a small country town, Kyogle, where hearings were held. If you made no findings and just laid facts out in the hearings, wouldn't you still suffer that damage to reputation?

Mr MOFFITT: I dealt with this in the written paper. There are various classes of cases. If it is a case where you have revealed where there is criminality, as in the case of a Coroner, why is it necessary to publish to the world including potential jurors what the findings are and the findings of corruption?

In that case I say there shouldn't even be the public statement of the primary facts. They can be sent to the DPP, may be it might be published later for some reason, but what purpose do they serve at that time? If its criminality involved and a statement is made under s.74A(2) that consideration should be given to prosecuting, what is it doing except complicating the whole process? You are going to have the DPP saying "this man is a pretty important bloke, he should be tried locally and the *Sydney Morning Herald* says he has been pronounced corrupt, am I now going to put him on trial?" "Can I give him a fair trial?"

That's one of the problems and I have suggested that although you make findings of fact you don't even make those if there is a trial pending, or if you are making a statement under s.75A(2). I don't know whether that answers your question.

Mr GAUDRY: You would, in fact, withhold the findings and furnish them to the DPP but the process of the hearing creates difficulties, doesn't it?

Mr MOFFITT: Yes. I just asked the question, what purpose does it serve? You are trying to clean up the climate, but what does it serve to pick out Bill Smith and you make a public statement as far as he is concerned? The facts are revealed. If he is guilty of a crime he should be tried by the courts. You shouldn't do the equivalent by even stating the facts which is the proper thing for the ordinary courts to determine.

The philosophy of everything I have said here means that you run into innumerable difficulties if you give a powerful investigative body and tell them to investigate and don't worry about the laws of evidence, override the right to silence and so forth, if you combine that power and mix in with it what is a judgmental power, then you run into some difficulty of some description. The question this Committee really has to look at is: Can you satisfactorily deal with corruption by making findings; by doing things openly; by not making findings if there is going to be a criminal trial; by looking to the future and compelling things to be changed? Is that sufficient or, do you want to nail people in public and are you going to have to do it by avoiding due process. You are going to say "Due process in this country doesn't matter." A very serious question, I think.

Mr GAUDRY: You create another difficulty. You have this hearing in a small country community. There is, perhaps, in it an affected person with some criminality. You make your reference to the DPP of your findings without publicly airing them. There are several other affected persons who have appeared before the ICAC, surely they would bear some of the odour of no findings being made: it has gone off to the DPP?

Mr MOFFITT: I suppose that's a particular problem. It might depend on the particular circumstances and it might be a very difficult question to resolve. I would suggest if the ICAC came out and said "Consideration should be given to the prosecution of 'A'." As to 'B' and 'C' the ICAC comes out and says "The circumstances are such that it doesn't warrant consideration to be given to take any action against 'B', 'C' and 'D'" It may depend on the particular way you do it; that may be sufficient to meet that problem.

Mr GAUDRY: That wouldn't be a finding?

Mr MOFFITT: No, in fact, I don't see any difficulty, but for the complication you have given, to come straight out and say "There is no evidence. This man is completely honourable." I think that's what ought to be able to be said. If it is going to complicate the trial of 'A' you might have to suspend it and issue that at a later stage. I think there are ways and means of meeting every problem.

Mr MUTCH: To look at that Kyogle example can you really have a public hearing? A lot of the evidence we have received from one side, admittedly, was that it was a circus, things were splashed around in the paper every day, anybody could make any allegation, but the other argument is that you need that "circus" to elicit public responses, to get people to come and join the circus so that all these things can be revealed.

What would you do? Would you have a hearing at all in the Kyogle matter? People are identified in the town anyway. If you said Mr "A" said such and such, everybody knows that Mr "A" is the Town Clerk and so forth, so you can't hide in the public hearing who he is.

Mr MOFFITT: This question is how far you go? If you are going to have ICAC the very purpose of a National Crimes Authority, and I think we have gone wrong there, and ICAC is that there must be some exposure. The real question is how far do you go by way of compromising the exposure? I believe that you have got to go this far, it is a compromise, the sittings, subject to exceptions, have got to be open. Even though it is around Kyogle you have got to accept that.

The second thing is I think you have got to accept that as there may be a difference of opinion and some fact might be fought, ICAC should be able to make the findings of primary fact. Beyond that, if it is a serious matter, it is a matter to be properly dealt with by the courts

Mr MUTCH: What's a finding of primary fact?

Mr MOFFITT: A finding of primary fact may, in some cases almost amount to the very question that the jury would have to decide. If you say in respect of a murder "Who done it?" and the fellow has three bullet wounds in the back of his head and you say "X was the fellow who fired the shot" that's a primary fact. If there is a dispute as to what happened where in some other matter you are saying "This man is guilty of manslaughter" it's something different, its not a primary fact. If that man is going to go on trial you wouldn't let a Coroner come out and find that this man caused the death of the other person, he was the man that fired the shot and hit him in the back of the neck but it would be a primary fact.

So you do the compromise and it may be that you do in Kyogle expose some facts and expose some findings of facts but that's the compromise. What I am putting is a compromise. I think ICAC has to be a compromise. The question is where you draw the line.

Mr MUTCH: You wouldn't try to limit in the first place the matters that would be raised in the public hearing?

Mr MOFFITT: That comes back to the question of suppression orders which is really a different subject which we dealt with at an earlier sitting and I had a lot to say about it. There are a whole variety of different

cases where suppression orders should be used, perhaps only temporarily, but it depends very much on the circumstances. That is a different question.

All these things, the question of what evidence comes out in public; the question of what statements are made; the question of whether or not there is going to be a criminal trial; the question of whether there is going to be a suppression order, those have all got to be melded together. My objection here which I have raised is you take the extra step: you give the power, and there is no control over it, to any person who happens to be a Commissioner to say what he wants and it may be the most devastating judgmental finding.

Mr MUTCH: Can he say "A" without identifying - the trouble is "A" is going to be identified anyway. If you say "A" has gone through this course of conduct, can the Commission say "We think he acted improperly"?

Mr MOFFITT: No, it all depends. If it is a question that I acted improperly, it is a matter which looks as though it ought to be dealt with by the courts, that matter is handed over to the courts.

Mr MUTCH: What if it is not a matter that should be dealt with by the courts? For example, some practise involving tendering which we talked about before which is not unlawful?

Mr MOFFITT: I think in those circumstances there is no reason the facts shouldn't be stated in relation to a named individual. I would suggest the remedy there is for ICAC to say "These are the facts that happened. There seems to be no law governing them and it is a matter we put on our list that the law should be amended in this way." In fact, I would have a duty imposed on ICAC to do that and it be put before Parliament every six months until its fixed up.

Mr MUTCH: What you are really saying is that the ICAC doesn't make any findings or recommendations about individuals unless they say "If its not unlawful, it should be"?

Mr MOFFITT: They find the facts. "[T]his was a tender and there were no other people considered, the facts are these, the tender was awarded to his brother, no inquires made", just state the facts. The ICAC say's "It doesn't appear there is any offence and we suggest that this matter should be urgently considered by Parliament and this is the recommendation we make." What's the point in nailing him as being dishonest if it is not in breach of any law at the present moment? The important thing is to get the law fixed up.

Mr MUTCH: So they can't use any perjury term, they can't say "We think this is wrong". "We think this is improper." "We think this is impartial" or whatever. You can't use any of those terms?

Mr MOFFITT: No, I don't think so.

Mr MUTCH: You can't use any of those terms?

Mr MOFFITT: I don't think so. If you get a whole course of conduct that's going right through like you did in respect of quite a few of the Local Government inquiries which I think Mr Temby did -

Mr CHAIRMAN: The driving example is a good one.

Mr MOFFITT: That climate has changed by revealing in a general way exactly what has happened without saying to a particular person "I'll put you up on a pillory."

Mr GAUDRY: One of the problems with the whole ICAC, of course, is that out there in the public there is a perception that there ought to be some people pilloried and hung up and generally dispensed with?

Mr MOFFITT: You are exactly right, if I might say. The public attitude which is wrong, and I think the public have to accept it, is that you judge success of an institution according to the number of convictions you get. This is the attack made on the National Crimes Authority. They said "How many convictions have you got that the police wouldn't have got if we hadn't had the National Crimes Authority?" And there was great argument whether they would have got those convictions anyhow. But that's more valid against the National Crimes Authority because the National Crimes Authority doesn't have all the functions of exposure and reform of events in the future which is the great value of ICAC. It is a great pity to get away from that function and start to say ICAC can nail this dreadful fellow here, there and everywhere. You don't need to do that. I think the ordinary courts have to do that. If a fellow is guilty so to be proved in the ordinary court, deal with him in that way but not convict him by the backdoor.

Ms BURNSWOOD: Some people would argue that public concern and cynicism if directed more at the courts than it is at ICAC. It is the failure of the courts in broad public opinion to get convictions of people, like entrepreneurs, for instance -

Mr MOFFITT: Of course people say "Yes, but the laws don't convict people" and then as soon as they convict them wrongly, they are the story of the week in the media. You can't win really. If you don't convict them you are criticised and if you do convict them, if you find something wrong years afterwards, then the law is in disrepute then. We have got to take a balanced view of it.

(Luncheon Adjournment)

Ms BURNSWOOD: I am interested in the distinctions you draw between questions of fact and legal findings. We had Michael Burnston before us last hearing and he actually suggested that he would not draw the same distinction as you would.

Mr MOFFITT: I don't think I read what he said actually.

Ms BURNSWOOD: What he was saying which I found myself in agreement with, I must admit, that both facts and legal findings can damage individuals and that many of them may damage individuals. In other words decisions on so-called facts or reportings of facts as well as reportings of findings, either of them may can damage people or neither of them may, depending on what they are. I wonder how you would distinguish between the two. I am not sure whether Mr Gaudry or Mr Mutch had finished their questions before lunch but it seemed, I think, to several of us that the Kyogle matter was a good example of the problem distinguishing between judgments on facts and judgements on -

Mr MOFFITT: I am trying to use the words "primary facts." I can have two primary facts; somebody fired the shots and some other fact and then I can draw an inference from that. That may be what you call a factual inference but the factual inference is usually the final conclusion. If you put the two together you may, in fact, be making a finding of criminality or whatever it might be. You might well argue "Why not go on because the finding of primary fact, that will do just as much damage" -

Ms BURNSWOOD Or be illuminating, I mean, we are not necessarily talking about damage.

Mr MOFFITT: If the question is, as it was in the Azzapardi case "Who was it that made the 'phone call?" Whoever made the 'phone call would be probably guilty of a criminal offence because one of them said "I'm coming up to root your wife" and the other said "I'll be up to shoot you". They were intimidating and they had to be because they were on tape. It was really a finding of primary fact to find out whether "X" made that 'phone call. If you put that together with the tape to make that finding was really to wrap the whole thing up with criminality.

Against myself I must say, in those circumstances, to make that finding was really to pronounce the person a criminal which is the very point that you are, in effect, making. Then I go on to say "Look, if this is a criminal offence, this man should dealt with by the criminal courts." If there was evidence he made the 'phone call and it has to be proved beyond reasonable doubt, well that's a matter for the criminal courts. I use my expression, like the Coroner's court, I would say in those circumstances what purpose does it do except usurp the function of the courts, to then say "He's the man that made the 'phone call."? "He's the man, if he made the 'phone call, of course he's guilty of the crime.

Ms BURNSWOOD: With some of the examples at Kyogle it was not a question of whether or not the behaviour was criminal but a question, as we have already pointed out, statements of so-called fact did as much damage, or through as much light on what was happening
as -

Mr MOFFITT: Were they statements of fact or were they statements of more than fact? You would have to give me an example because I'm not too sure exactly what you're referring to. It may be that some conduct, like we spoke about earlier of a person who gave this contract to a person and he was the person who made a large contribution to the political party. You might say the primary fact is that he gave money to the political party and then after he got the contract, and that nobody else was consulted. I am not saying that happened there. You might have all those primary facts and that wraps the thing up, in which event it should be dealt with by the courts, you should do the Coroner thing and lay off making findings of fact, until the court's do it.

If it is not a criminal offence but its the kind of thing which the law should be changed and made it a criminal offence - the point I made earlier - why not state the facts, if harm is done to a person, that's the compromise you have to accept. At the same time you say "In these circumstances this seems to be nothing wrong under the present law" - that will

ameliorate the statement of facts - but "We think something should be done about it to correct it in the future." I don't know whether that answers your question?

Ms BURNSWOOD: No, it doesn't really because what concerns me more is I just wonder whether the distinction you draw between facts and findings is really a very useful distinction?

Mr MOFFITT: If you open the door and give a discretion which is not given any legal limitation which is s.74A(1) now, that instead of making some comment, it opens the door wide to say you can make any finding you like which is completely like the judgment of the most serious character either corruption grossly improper, whatever you like it to be. And although there is no criminal offence it is a much more effective terminating the career of that person rather than fixing up the law for the future.

You can't just pick an isolated example. We are looking at a case whether you are going to give ICAC a power to say whatever they want without appeal. There won't be an appeal and there wouldn't be any prerogative interference because it would be a question of fact which could be of the most devastating character.

If you are not going to do that are you, a bit like what Mr Knoblanche has said, going to amend s.74B which is an alternative to prohibit in your finding certain things beyond - you say you can't make a finding of direct criminality and you can't make findings of certain other objectionable things: that's another alternative.

With respect I don't think the question is whether it is convenient to state some other things which, strictly speaking, form a border line between facts and non primary facts. You have got to look whether you are going to give ICAC the power, in effect to now, still find conduct corrupt which might be quite a doubtful meaning on a destructive career in which there could be or could not be criminality which in time everybody forgets. I don't think I have persuaded you but I have given you my answer.

Mr ZAMMITT: I refer to the Metherell diaries, those that were printed, and what's happened has happened and you can't change that but I just want to ask you what guidelines, if any, should be instituted to ensure that that does not happen again where people's names are mentioned in a diary, printed in the paper of people who have got nothing whatsoever to do with the inquiry.

Mr MOFFITT: You will find in my paper is a suggestion of what should happen and that is what I suggested to this very Committee differently constituted in 1990. There should be some express provision in the Act in respect of the suppression power, an obligation on ICAC when a matter comes up which reasonably my affect the reputation, etc. etc. of some named person, that there should be a temporary suppression order until that person can be heard.

Mr ZAMMITT: Even if that person is not to appear before the Commission?

Mr MOFFITT: Either the ICAC puts a suppression order on that part straight away. I would say it should be bound to put at least a

temporary suppression order even though the person is not a person affected. I think what should happen is that ICAC should immediately put a permanent suppression order on it because of the question is what is its relevance to be published to the world? If that person is not concerned otherwise in the inquiry are you going to hear him? Are you going to give him an opportunity to be heard to say that that's wrong, its completely false but, gee, its damaging to me? ICAC would immediately say, as it did in the Preston case, "Look, that's irrelevant. We are not concerned with whether its true or false." But why publish it to the world? "Its relevant because the person who wrote the diary, it may reflect on him." All right if it reflects on him, o.k. in your final report say what you want about it but not publish all what I call tittle tattle which Costigan would never have. Costigan, you will find in his material, he would not have tittle tattle. He would receive it but he would suppress it and that's what I suggest here.

So far as legislature is concerned I think the best you could do would be to compel a temporary suppression order until the person could be heard. That would discourage, I would think, ICAC from lifting the suppression order once it got some objection from the person.

The same thing happened, in fact, in the Fitzgerald Inquiry which is one thing I always thought was wrong in respect of Fitzgerald. Fitzgerald let in the Police Commissioner's diary. There were all sorts of people mentioned in the diary and somebody would say "Oh, you're mentioned in his diary" and immediately everybody around the place is looking and saying "Oh, you're mentioned in his diary" and immediately there was a smear on that person. That, in my opinion, was wrong.

Mr ZAMMITT: I was the brunt of Metherell's diary.

Mr MOFFITT: I am also talking about the same thing happened in the Fitzgerald Inquiry where the whole of the Police Commissioner's diary, true or false, with all sorts of names, and all sorts of people were saying "You're in the crook Commissioner's diary."

Mr ZAMMITT: Let us assume that a person is named in a future diary and ICAC feels that they want to print it despite the fact there should be some sort of suppression order. They still feel its relevant in the sense that if they don't leave it in the public may think that they are concealing or hiding. What recourse should be available to the person who is mentioned in the diary without any bearing on it?

Mr MOFFITT: First of all it is something that shouldn't be done. If the fact, as distinct from the fact that it is in the diary - you might say the writer is a bit mad or something, that might be a bit different- is not relevant i.e. "X" member of the Liberal Party had a fight with someone in the dining room, that fact as a fact is utterly irrelevant. First of all it obviously should be suppressed. If, in fact, it is relevant to the inquiry, whether it is true or false, in that circumstance the person about whom it is said would have some status to come and disprove it.

The difficulty is when it is not relevant. That happened in the Preston's case: the thing was published, some kind of statement about this young lawyer on the news that night, and when he came to say "Look, I want to give evidence." "You can put it on affidavit, its not relevant to our inquiry.

We are not inquiring into whether you did it because you're not a public official" but the damage is done. It is in the same category.

I don't think you can do anything. You've got to give ICAC a lot of discretion and you have to trust ICAC but you can make it more difficult. I would want to make it more difficult by saying once you have something, and ICAC is obliged to form a judgment whether it could be reasonably taken to affect the reputation of a person such as material like that, then there is an obligation for a suppression order put on to give a reasonable opportunity to a person such as you to be heard whether it should be continued. If it is decided to continue it, that's a bit of a bad luck.

Mr ZAMMITT: Can I turn to the matter of legal representation? I get the impression, rightly or wrongly, a very strong impression that anyone who appears before ICAC who doesn't have the very best of legal representation could place themselves at a very distinct disadvantage during the course of the hearings. Do you agree with that?

Mr MOFFITT: Yes, I think so. I would think a great run of persons who appear as witnesses, no worry at all, ICAC would handle the matter and there is no problem. But if you are uninitiated before ICAC and you don't quite know what is to come - you may be given some short reference to what the inquiry is about and what you will be asked about but there is no charge; you are not too sure whether you might finish up in the end with some adverse finding, particularly if this s.74 power exists ad lib. I would think any person in a public position would be anxious, if I were in that position myself I certainly would, to have legal representation.

Mr ZAMMITT: I suppose the next logical question is this. As members of Parliament - I am referring specifically to members of Parliament - a lot of pressures are on us from the point of view of threats of defamation or defamation which is a very expensive process if one is unlucky enough to get collared and this happens more often than not in our political lives. On top of that we now have the risk of ICAC for whatever reason calling us to appear before them as members of Parliament relating to something that we may or may not have done, or been accused of doing or forming part of within our normal every day course of events. If what you say is right, and I think it is, that you need the very best legal representation, on top of our normal stresses regarding defamation we now have the risk of ICAC which is extremely expensive, would you be advocating some sort of a scheme being made available that would have a Committee that would recommend Legal Aid being provided for members of Parliament?

Mr MOFFITT: I haven't thought about it. I am a little inclined not to venture into a field which I haven't thought deeply about. In the matter of a person, particularly a member of Parliament who might be caught in some way as a witness without quite knowing what could happen, I think it is a very serious question that needs to be looked at because it can affect his career, even a thing which is just on the side. Just take a person - not a member of Parliament - in respect of something he may have done which is a little bit wrong but not nearly as bad as somebody might find against him. He is the person who has got difficulty - he knows he hasn't done anything terribly wrong but perhaps he has been ill advised. When he goes in if he gets a lawyer, he is

entitled to this advice. "Although you say you are in the clear, I think it would be advisable for you to formally take the objection to giving evidence." He is then protected by what he said being used in the criminal trial later. Why he shouldn't he have that?

I am not sure whether it happens before ICAC now but at one time a person is given by the Judge a very clear warning "You don't have to say anything because it could be used against you." In some cases you would have Judges saying "I think you should think very seriously about this because it is very serious. Perhaps you would like to go and get some legal advice." That has happened. It has happened to me.

Mr GAUDRY: Under your system there wouldn't be a finding but just matters of fact?

Mr MOFFITT: By the way if you have a look at what Mr John Dowd has said, if I remember rightly, he comes very closely to what I have said.

Mr GAUDRY: Is there anything in the procedures of ICAC at the moment in the investigative process coming to the hearing process that's prejudicial to people appearing before it in terms of protection of their rights and the fact that they can't cross examine and they don't have a right to call their own witnesses?

Mr MOFFITT: This is the basic problem. If you have an investigating process I think the investigator should have a pretty clear run and not be interfered with by people who want to take legal objections and people who want to slow the whole process down. If they can be put in the hot seat, if there is this power, then it is quite legitimate they may need some protections.

My whole theme really is this rather than us on this narrow question of findings of primary fact, I have been saying throughout, the real thing is that you can't really mix such a powerful investigative power as ICAC has with making findings against an individual which can be of enormous impact. If you try and mix the two at every point you are going to strike problems; the point you are mentioning now. If it is purely investigative give them free rein, you are not going to ask any questions. "I'm investigating" that's all. The moment you say "Look under s.74A how do I know. There is no charge, something might be done against me? I demand the right to cross examine." Even now I think you have to rely upon the common sense of ICAC and I'm sure they mostly see it the right way. The fact is though they may not and you get this problem.

The real problem is you can't mix an investigative process with a new function which is creeping into what is the province of outside bodies, the courts, dismissing authorities or the reform of the law. That is the principal point that really runs through everything I have said.

Ms BURNSWOOD: On p.10 s.(g)(1) of your oral comment I must admit I find your logic a bit hard to follow. You are disagreeing with the ICAC proposal to remove that obligation under s.74A(2) and then you seem to be saying in (1) that making a statement under that section is a good thing because it can serve as a spur for some external body acting against it. That

seems to me to cut across what you are saying about the inadvisability of ICAC making findings.

Mr MOFFITT: This is not making a finding.

Ms BURNSWOOD: I know its not making a finding but what you seem to be saying here is that an expression of opinion by leading to some other body acting contrary to that, is a good thing and, therefore, it would be a bad thing to stop ICAC expressing an opinion. It seems to me to go against the tenor of what you are saying in other sections of your argument.

Mr MOFFITT: What I am saying is it is not a discretion it is a duty that ICAC has got a picture - they might have gone on for six months, they're the ones who have got the picture; and they're the ones who can make a statement. Under this Act they don't make a recommendation they make a statement and this is very carefully drawn. They make a statement that in their opinion consideration should be given to prosecution. Now if you don't have that you would lose the benefit of the great global view that ICAC has after six months' inquiry as to what ought to be considered.

Ms BURNSWOOD: Isn't that the argument of those who propose that the power to make findings should continue to exist?

Mr MOFFITT: No, it doesn't make a finding. It could be -

Ms BURNSWOOD: No, what you said about the global view after six months' investigation -

Mr MOFFITT: The global thing is after having seen it it has got to say to the DPP or whoever it might be "Over to you, I think you should have a look at it." Rather than putting that in the report there is an alternative and my approach has been not to mess around with this Act too much. The alternative would be as was done in Western Australia simply to bundle up all the papers and say "I will make a private recommendation to the DPP that I recommend prosecution should be considered." If you don't do that I think you must make a statement.

You ought to have to make a statement if there is an adverse allegation against a person and then you have a look at it and you find there is nothing in it, why shouldn't that be said. The objection I have is to making an adverse statement which can have all sorts of crippling effects. If it is one that is exculpatory that's a different category but if you take away an obligation on ICAC to even make a statement that the matter should or should not be considered, then you can finish up with ICAC doing nothing else than making a s.74A(1) statement. There is no appeal against it; there is no putting the DPP on the spot where he has to consider it; or perhaps, as Mr E. Knoblanche has put, put a limit on the time in which something has to be done about it.

I don't think it is inconsistent with what I have said. It is not stating an opinion it is merely saying "This matter should be looked into." Once again you have got to the compromise situation. I still haven't persuaded you.

Ms BURNSWOOD: No.

Mr CHAIRMAN: We haven't got that long.

Mr MOFFITT: Its a very valid inquiry you make. I don't belittle it at all.

CHAIRMAN: Having outlined the problems of the ICAC position, would you take this question on notice and I wonder whether it might be possible to briefly summarise the solutions you would seek?

Mr MOFFITT: The solutions come if you look to my statement of proposals. To get those you need to do two things: one is you need to see my summary of the amendments, as I understand them, in full on pp 1,2 & 3. The same things are stated in more detail on p.23, s.C(17).

In effect, first of all I am saying there is no need to define corruption as such. The critical question is to give ICAC jurisdiction and to give it in wide terms, as wide as possible so nobody can challenge its jurisdiction to inquire. I say you use either s.8 just as it stands or some variation such as Mr A. Roden has suggested or I have suggested some other possible addition. I have suggested there should be a specific power like going into other things like organised crime and other matters which have turned up in the course of the Inquiry so we have a complete inquiry.

For jurisdiction purposes you don't need a definition of "corruption". Like the National Crimes Authority Act does, but not quite the same, I say for convenience you could say "relevant conduct." If you want to substitute something for s.9(1), I would see it go because its hopeless in every shape, you could put that it could be relevant corrupt conduct if, in addition to s.8, it is conduct which is in breach of any existing law, etc. etc. The complaint can be of more than corrupt conduct, that's under the new s.9(1), and the jurisdiction to inquiry wouldn't be limited. It can inquiry into anything that comes under s.8.

Having said that I will pass on from that. I then say the definition doesn't really matter, it could be as wide as possible, it is only for jurisdiction. It does become critical if you start to come to what ICAC can pronounce. I would say in respect of that it is really not possible if you try, and I have tried, to get any satisfactory definition of corrupt conduct which would suit the functions of s.74A and s.74B and I then arrive at the same conclusion as ICAC does, just get rid of it as a definition completely.

You finish up then with what you do about s.74A and s.74B? I say s.74A should be limited to the power to report findings of primary facts. I then give some exceptions to that and I use the Coroner's analogy and say that if the matter is going to be considered by the DPP or for criminal prosecution, it is only going to complicate matters and he won't be given a fair trial if you find some primary facts. It is a bit like you make the finding that he was the man who made the telephone call which is the very thing that the jury has to do. In those circumstances you can't really make a finding of primary fact, at least at that stage.

I say for all the reasons we have ben discussing here that you can't retain s.74A in respect of adverse findings or opinions against a named person in its present form because that will give an unlimited power. I am concerned with not what you hope ICAC will do but what it is empowered to do. I say "No, you can't do that." There are still some exceptions to that so far as s.74A is concerned.

First of all it should be able to make findings against a named individual which are not adverse - there is no restriction on that, do what you

want. There shouldn't be any restriction on making general findings. If you go and you find a general climate you can make whatever findings you want provided you don't, in effect, name an individual about a corrupt culture that's going on.

In addition, I say, in order to supplement that there are going to be areas where a matter is not touched by the present law, any crime, and it should not only be a power but a duty in ICAC in respect of its reports to put the various authorities on notice as to where the reforms should be. This question of preferring your brother on a tendering process. It is no good just leaving that, because people will only put it in a pigeon hole. You have got to have a procedure that something happens quickly about that. Therefore, the person in authority who gets it needs to reply in a limited time and if they don't adopt, they have got to give their reasons. There is a whole procedure that ICAC then passes all that off to Parliament and Parliament itself has it. Then the Opposition can get up and say "What's been done about this?" That goes to Parliament and either a reasonable decision is being given not to go ahead or the recommendation is adopted.

Mr ZAMMITT: Just to put it on to the record, regarding the guaranteeing of legal representation -

CHAIRMAN: Don't put that on the record -

Mr ZAMMITT: What would you say to people who say "No, no-one needs legal representation because, after all, you are compelled to answer the questions and you are compelled to tell the truth so why must you have
have legal representation?"

Mr MOFFITT: I can only repeat what I have said really that because you are put at risk and you don't know what the risk is, your whole future may be at stake and you can't take a risk. If it is purely investigation that's different and I think that's all I can say on that.

CHAIRMAN: Would you briefly outline in relation to a couple of issues in the discussion paper. Issue 5.2 contempt and issue 7 corruption?

Mr MOFFITT: Yes. I have made a few notes about the contempt issue because I believe it is a matter of very critical importance to ICAC. I think that when you create an Institution such as this with such powers it is very important you don't prevent people from criticising it. If you set up an Institution such as this one of the most important things is that it be accountable, it can be criticised, not just in this Committee - I am speaking under privilege, I hope nothing I have said would have attracted it if I hadn't been. But if I am outside here why can't I, if I feel I am badly done by ICAC, I feel they haven't act fairly towards me, why haven't I got the privilege to say so? There may be some limits on that but I think any restriction on the ability to say those things is a problem.

I think the matter is of such importance that it can't be just dealt with here "What do you think about the contempt power?" I think you need a special discussion paper and I will develop that in one moment.

Important questions are raised by my submission that s.100 should be repealed and s.98(h) amended. s.98(h) is the one which gives the

general power of contempt in respect of ICAC. I think the first one should be repealed and the other one amended. To properly consider these issues requires consideration of some concepts quite fundamental, particularly when applied to an institution of a special character like ICAC.

In order to properly deal with all of these questions this Committee will need to consider a great amount of relevant material, which needs to be assembled in some ordered way, for it to be debated and considered. I don't think the confines of time on me now or the confines of this Committee in this general inquiry in which at the moment more attention has been focused on other issues, that this can really be properly dealt with. In any event if I put submissions now, it is not satisfactory: they haven't been developed, other people haven't had a chance to deal with them and so forth. It is necessary in support of my view that the matter needs to be critically looked at, needs a little further development which I will do.

The first fundamental question is whether the freedom of people to criticise administrative bodies should be curtailed by the exercise, or even the possible exercise or the mere existence of an unspecified contempt power such as s.98(h) provides.

The second is whether the right to criticise ICAC or its structure, which is so novel and so powerful, should be suppressed either directly or indirectly.

The third is, assuming there is to be some general contempt power such as s.98(h), whether ICAC should, by virtue of s.100, be the one to exercise the power and make findings of contempt. Should it have a power which enables it to compel its critics to appear before it and publicly justify their criticism, on pain of being publicly pronounced guilty of contempt, in a proceeding of which one officer of ICAC is the prosecutor and another the Judge? That is a very serious question.

It is, I suggest, no answer that the power has been or will rarely be used. The mere existence of a power and its use already with great publicity against one critic, is a powerful deterrent with the prospect of expensive proceedings and a doubtful outcome, in which he is put into the public witness box before two ICAC officers, and then is offered a chance to withdraw the criticism or pain of being found guilty of contempt, and then sent up to the Supreme Court to be punished.

I suggest the mere existence, particularly in view of what has happened on one occasion, makes it a very real question. How dare anybody, not quite knowing what his criticism will result in, offer any criticism, even a general criticism or out of frustration say something about ICAC's finding against him?

I make this general comment. It is important that nothing be done, or be seen to be done,, to suppress or discourage, or not to be given the opportunity, criticism which may be right or wrong, about the structure or performance of so powerful body as ICAC. It can only survive if it stands on its own feet by the soundness of its structure and performance. Citizens must be free to say ICAC should be abolished, if they want to, or do so in strident terms, or that decisions are unfair or that cases selected are one sided. Compared with the traditional silence of judges, ICAC is free to make public

replies, as the Commissioner has not hesitated to do, and, in fact, did in the Moppett case immediately after Mr Moppett's press release and even before the s.100 proceedings were commenced.

In my view s.100 should be repealed and s.99 redrawn. To accommodate this repeal, there would have to be some provisions substituted. There may need, with the repeal of s.100, to give ICAC some power concerning unacceptable but specified conduct in the face of the inquiry, as distinct from newspaper comments or comments made outside. S.98(h) should be repealed and replaced with some specific powers.

It is difficult and productive of great uncertainty to endeavour to transpose to an administrative body, particularly an investigative one, the concept of contempt worked out at common law in relation to the unacceptable interference with the administration of justice, particularly in the field of what is known as scandalising. Unless kept under a tight rein, it can easily degenerate into suppressing criticism. To give an administrative body such a task, that's of itself dealing with this question, a task which is confusing of itself, inevitably will produce uncertainty and error and arguably it has already. There needs to be debate on this issue in the light of modern law, and there is a whole lot of learning of modern law in this field, and many comments on the right to criticise.

In my view criticism of ICAC functions and their exercise should never provide the basis for inquiry into those criticisms leading to the possible imposition of quasi criminal penalty, which could include imprisonment. The DPP, on its own initiative, could have some lesser power properly defined in relation to insults and malicious comments.

Any review of the ICAC Act in this field would need to extend to ss.80-100. I have just forgotten which one it is, but I might point out there is at least one offence for which there are two different penalties provided under those sections.

The issues to which I have referred are of sufficient importance and complexity to be dealt with separately from the present general review of the Act. I suggest there should be a separate and detailed discussion paper followed by an inquiry of some kind in which the legal profession, civil liberties groups, the media, the Press Council and others including those who may wish to criticise, to be invited to make submissions. Such a discussion paper could, and as I suggest should, extend to the prior exercise and use of s.100 by ICAC.

I express these views as one who has been deeply concerned over many years with the contempt issue. As a Judge I dealt with the widest range of contempt cases over ten years and I have delivered papers to a judicial conference and a Media Law Conference on contempt. I wrote the foreword to the leading text book Australian edition, *Borne & Lowe on Contempt*, and I have also made submissions to the Australian Law Reform Commission of Inquiry into Contempt some years ago. That is an inquiry which dealt with a lot of these subjects and I think needs to be looked into. I must say, so far as I can recollect, in the ten years that I dealt with most of the cases that came before the Supreme Court of N.S.W. for contempt, I don't think there was ever a case in which anybody was ever found guilty of contempt in respect of criticism of the court or a judge.

I think that is an important matter because this power has been exercised pretty severely by ICAC already in one case, and perhaps used in another case as well.

Reference will need to be made to comparative legislation such as the Australian Royal Commission Act and the National Crimes Authority Act in neither of which is there an equivalent of s.100. For example, under the NCA Act the only action that can be taken has to be on the entire initiative of the Australian DPP. In other words, the question of criticism is left entirely to the authority which has created the body, not the body which may use it to protect itself from criticism.

Reference would also need to be given to a lot of the modern law and comments on this including a recent High Court decision concerning the Industrial Commission. Although it involves a different constitutional set up, there are a whole lot of statements which would be relevant to this issue.

If I could just extract what I have said in one of my papers:

> "We as judges exercising public functions should be open to criticism even unfair criticism and to bear it in silence. Silence and reputation must be our defence."

and I also then quoted what Lord Denning said:

> "Let me say at once we will never use this jurisdiction as a means to uphold our own dignity, that must rest on surer foundations. Nor will we use it to suppress those who speak against us. For there is something far more important at stake. It is no less than the freedom of speech itself."

Lord Aitken said:

> "Justice is not, of course, a virtue. We must be allowed to suffer the scathing and respectful, even outstanding comments, of ordinary men."

I think these are very pregnant words in respect of the present situation.

The other matter I would refer you to, and I will hand this up to you. The Press Council dealt with this question during the Combe inquiry conducted by Mr Justice Hope in 1983. The Press Council said this:

> "It is important that royal commissions should be as fully open to public discussion and criticism as any other feature of executive government activity, before, during and after the appointment of a commission, and this includes how the commission works, the choice of commissioner or persons associated with it, the evidence and arguments expressed and the conclusions reached."

There is some other material apparently emanating from this Press Council cutting by The Officious Bystander. (Bulletin)

I think it may also be relevant to such a consideration of the contempt power, to look at the exercise of s.100 and for this Committee to

examine what occurred in the exercise of s.100 in the Moppett case and the ICAC statement. Consideration should be given to its reference to its possible exercise in the case of the Alan Jones' criticism of the public release of the Metherell diary. A similar course of examination was taken by this Committee in the Preston case. The Committee may well find that there was an unjustified reliance or use of s.100 in each case. I suggest it will appear that the substance of what Moppett and Jones were respectively saying was a valid criticism or, at least, one they were entitled to make concerning ICAC power or its exercise. In one Moppett was led to withdraw his criticism which originally he declined to do and in the other for Jones to be silent.

Almost all the matters of criticism by Moppett in his press release, if examined, will be seen to be the very matters which this Committee later anxiously examined. The substance of his primary criticism which was directed to ICAC's counsel's final submissions was not only justified, but by the inquiry of this Committee, has been rectified. This major criticism, in effect, concerned the unfairness concerning the ICAC final submissions being in public and there being delay until opposing counsel could reply and delay in ICAC issuing its findings. In the meantime the ICAC submissions imputed the truth of what was alleged and were treated as preliminary ICAC findings - those were the words used by Moppett. This is what, in fact, happened. Submissions by ICAC are treated by the press as ICAC preliminary findings. There were, in fact, over two weeks before opposing counsel were given an opportunity to reply. To remedy this Moppett made his own reply which, admittedly, was in somewhat positive terms.

I raised this very type of problem in the discussion which was had on the issues paper prepared by me for this Committee in 1990. I criticised the lack of use of the suppression power and what I referred to as the "day one" problem, based on what had been said in the *Salmon Report.* Following discussion on that paper ICAC, in fact, changed its practise, so now a temporary suppression order is placed on counsel's closing submissions pending the release of the report, as was done in the Metherell inquiry. This was expressly done for the very reason given by Moppett.

The assertion by Moppett that the inquiry was one sided, so one political party is exposed to adverse publicity for five months was also examined by this Committee and it did appear at that the inquiry ICAC did concentrate on one or two parties to a greater degree than the other. This was explained by one party producing its party donation documents while the other had its documents out of the jurisdiction and did not produce them.

The Committee may wish to consider some matters to which I suggest call for consideration. I won't say anything further in respect of the Moppett proceedings but you may wish to look at the findings in the certificate issued under s.100 by ICAC. The view is open that what was found contempt, in law wasn't contempt at all. I don't want to go any further in that except to suggest that if this issue of contempt comes to be looked at, separately, the Committee may feel that it may wish to look at what has happened in respect of the exercise in one case, or the indication that it would be considered in the other. In one case it led to the critic withdrawing his

criticism which was later rectified by ICAC itself and in the other case, with Jones making no further comment.

I can only say what I have said before that I think this is a most critical matter concerning ICAC. It is on the fringe of the general matters being considered and I think it deserves separate treatment.

Anything else on that you want me to say?

CHAIRMAN: It is a big issue. Are there any pressing questions?

Mr GAUDRY: If we repealed s.98(h) would that, in fact, just make s.100 a procedural matter in relation to the more prescribed matters s.98(a) to s.98(c)?

Mr MOFFITT: So far as the other matters are concerned I haven't thought deeply about that one and I would need to have a closer look. I wasn't thinking of repeal of s.98(h), but simply reconstructing it. You would give specific powers, which has been done in other legislation by the way, in which you say you can't make malicious comment. I am not too sure about your question. I would need to look at it a bit more closely.

By and large I do think that the contempt powers should be separated out to be dealt with only by the DPP. This was the trend which I think comes up from the Inquiry of Australian Law Reform Commission. I haven't read it for sometime but that's my impression.

If you are minded to adopt what I suggest in a general way, perhaps it can be left to be dealt with that way.

(The witness withdrew)

ADRIAN RODEN, Queens Counsel, of [redacted], under previous oath, was examined:

CHAIRMAN: You are a former Assistant ICAC Commissioner?

Mr RODEN: I seem to remember having been one at one time, yes.

CHAIRMAN: Would you like to make any opening statement to the Committee? Perhaps you might like to respond to what has been put to the Committee?

Mr RODEN: Could I begin with an opening question as to the hour that the Committee is likely to be sitting?

CHAIRMAN: 4.00 o'clock.

Mr RODEN: That is probably within context a very short time for the things I would like to say. I will do my best and perhaps there should be a continuation on another day.

A lot of things have been mentioned today to which I think it appropriate to direct my attention. It seems to me that the most important questions are what the functions, powers and duties of the Commission should be. I think, particularly in the reduced time available, that those matters are best addressed in general terms, rather than by looking at what amendments to particular sections of the Act might be necessary to give effect to whatever the Committee thinks is the appropriate course to follow.

Mr Moffitt described his own comments as blunt and I am sure he will understand if mine earn the same description.

On the question of the Commission's powers his last words before the luncheon adjournment were "it is a matter of balance." I don't think, with respect, that there was sufficient balance in Mr Moffitt's approach. I would categorise his approach this way.

We have in this State a traditional investigation and criminal justice system with the police and the courts involved in it. There are certain rights and privileges which people have under that system. It is, as I understand his submission, almost automatically to be accepted as wrong if any other procedures are devised for particular purposes which do not correspond with what applies under the regular police and court system.

The short answer to that is that within the system we have Royal Commissions as well as police investigators and courts. Mr Moffitt said that you only have those for, to put it shortly, important purposes. My understanding is that the purposes for which the ICAC exists are important within that context.

It might be appropriate to refer to the opening part of my written submission to the Committee in that regard. Beginning at p.2 under the heading "Introduction" in that paper I refer to the original purpose of the Commission. Despite the time I will follow the practise that has been adopted of reading certain passages. They begin in this instance:

> "The Commission was created to meet the challenge of corruption in the public sector of New South Wales. It was recognised that the conventional police and court system is not always effective in getting to the truth in such matters. The

> decision was made to establish a body invested with special powers to enable it more effectively to investigate allegations and reasonable suspicions of corrupt conduct involving public officials or public institutions."

The decision to create the Commission was based, as I understand it, on precisely the same considerations as those which lead to the establishment of a Royal Commission.

If it is this Committee's view that corruption in the public sector in N.S.W. does not call for such a body, then by all means do away with the Commission. If, however, it is the Committee's view that corruption in N.S.W. in the public sector is a matter that calls for such a body, then I ask "On what basis is it appropriate to say the Royal Commission analogy is inappropriate and this Commission should not have similar powers to Royal Commissions?"

In approaching the problem a number of critics of the extensive reporting powers presently enjoyed by the Commission concern themselves with what is called unfairness in there being findings which can have an adverse effect on individuals without the regular court procedure having been followed. Of course, that is no different from Royal Commissions in any other context. But I pose the question "Where do these people find their concept of fairness?"

It is naive in the extreme to suggest that if something is done under the court system it is fair; if it's different from that, it is unfair.

Let me give a very simple illustration. A police officer appeared before me in the last ICAC investigation I conducted and in consequence of the exercise of the Commission's coercive powers he, after an initial false denial, reluctantly admitted that for some years he had been accepting payments from a private investigator for the improper and unauthorised release to that private investigator of information from police records. He made his admission over a s.37 objection. It is, therefore, not available to be used against him in a court.

In the report I reported his admission which was supported by some other evidence that may well be insufficient on its own to warrant a prosecution. I have told the public of New South Wales that that policeman, in the vernacular, has been "on the take" for some years. He has, and he said so himself. I pose the question "On what basis do people say it is unfair that that fact be made known?"

It is my understanding that the Commission was established because without such a Commission that fact would never become known. I have no doubt that without a body such as the Commission, that fact would never have become known.

Sure, if there were no Commission; if you relied on the police with their investigative powers, limited as they are by the right to silence, this fact would not have been known. That police officer would have still been in his job. Is it unfair to him that his corrupt conduct - and I use the term deliberately and advisedly - is it unfair to him in any real sense of the term that the appropriate consequences have flowed from his corrupt conduct, simply

because they wouldn't have if the community had been limited to what the police and the court system can do?

That is a very, very serious and very important question. You don't dismiss it,in my view, by saying "It's unfair because the matter being criminal, it should be decided by the criminal courts." How do the criminal courts determine a matter when there is insufficient admissible evidence? If you want to say "We will adopt an attitude that if you can't prove guilt beyond reasonable doubt on admissible evidence before a court, then you can't say anything about the conduct", that's fine; that's an attitude that can be adopted.

I think it is a matter that has to considered realistically and not on the basis of saying the starting point is that the rules that apply in court are right and anything else is unfair.

There has been talk of the Commission being both prosecutor and judge. I say here, as I have said elsewhere, that is doubly wrong. It is neither prosecutor nor judge. You have prosecutors and judges in courts where you have an adversarial or accusatorial system.

What the Commission does is investigate and report the result of its investigations. It does not prosecute in the sense of presenting a case. It does not judge in the sense of deciding between two competing cases. It investigates, it finds out and it reports.

I would like to ask, rhetorically of course, each of the Committee members "What would you do if in your household, or your business, or your electorate office or anywhere else where you live or work, you found that there was pretty clear evidence that someone had had sticky fingers in the till, and money was missing, and you wanted to find out, if you could, what had been going on and who had been doing it?" You either conduct the investigation yourself or you ask somebody to come in and do it for you. Would you say, if there is anyone that you think might have been responsible, before he answers any of your questions you must tell him or her that he or she need not answer, unless he or she wishes? I don't think you would.

One could go into the historical reasons for the right to silence and the privilege against self incrimination. One could think in terms of all the disabilities that a person used to suffer if convicted of a felony. One could think in terms of deprivation of liberty by being sent to gaol as a consequence and providing a reason for all the safeguards that exist. But there comes a time when society says "Look, it seems that things are going on that are serious. We want to find out whether they are going on or not. We cannot afford, if you like, to fight someone who uses a knuckle duster with kid gloves on. We can't afford the fox hunting niceties of the common law approach to allegations of crime. No-one is going to gaol as a direct consequence of what this Commission establishes. We want the facts. We want to know what's going on. We want to find out and we don't want to have our hands tied behind our backs."

It seems to me that that's a perfectly normal and reasonable approach. I believe it was the approach that was adopted when the Commission was established. I believe that that's why its there. It's there because the traditional police and court system is incapable of effectively dealing with this problem.

I think that's all I want to say about the philosophy behind the establishment of the Commission, as I understand it.

The Commission having been established, there are, it seems to me, in broad terms, three approaches that could be adopted to its powers. The first, which would be the weakest position, would empower the Commission to investigate, gather evidence and do no more than pass its evidence on to other authorities

The second position which, I believe, is the strongest and correct position, is one in which the Commission is empowered to report the results of its inquiries including the conclusions at which it has arrived. That means findings of fact. Mr Moffitt, as I understand it, would stop short of that and say "Only findings of primary facts." I am never quite sure, I don't think anyone is, where you draw the line between what is a primary fact, and what is a secondary fact or an inference. Its something like the problem between means and ends. Something is a means to something which is called and end; but when you get to that end, you find its only the means to the next end.

The distinction I draw is between what I call findings of fact - I will come back in a moment to what I mean by that - and what I call rulings of law and they are the so-called findings of corrupt conduct, the things which I say the Commission should not be burdened with which I believe would effectively weaken the Commission.

The expression "finding of corrupt conduct" is used to describe a conclusion that the facts found fit within a particular legal or legalistic definition. I think I used these terms in the report in the Unauthorised Release of Information. The facts that can be found are, in effect, what happened, who did it, in what circumstances it was done, what circumstances enabled it to occur.

In that particular report the facts found included that certain people purchased information from others who sold it. I used, and very deliberately used, the word "corruptly" in recording several of those findings. I said that public officials corruptly sold information to private investigators who corruptly purchased it.

It has been suggested that that was inappropriate because it necessarily implies criminality. I take the view that criminality is totally irrelevant to what is found by the ICAC. It finds the facts. If they happen to amount to a criminal offence, they happen to amount to a criminal offence. The Commission doesn't say so; it doesn't say the person is guilty of a criminal offence. It states the facts as it finds them just as Royal Commissions do.

One of the benefits of the Commission and the exposure of corrupt conduct by the Commission is that it operates as a deterrent. Not much of a deterrent, I would suggest, if people know that if their corrupt conduct is also criminal, the Commission will not be allowed to name them and say what it is that they have been doing.

You can get to an odd situation on what has been suggested. As I understand it it goes this way. The Commission finds that a public official, or somebody dealing with a public official, has acted in an inappropriate way, to use a neutral term. Certainly in a way that would make the community think

less of that person. Sometimes that conduct would constitute a criminal offence, sometimes it wouldn't.

As I understand what is suggested, what the Commission should do is this. If the conduct found proved amounted to a criminal offence the Commission says nothing about it but acts like a Coroner and tucks it away for the DPP to prosecute within six months, presumably have the committal within another two years, and the trial within two years after that, if you are lucky, and then, I suppose, an appeal if there is a conviction. Some people might cynically say that appeal in some respects would resemble a lottery.

Be that as it may, as I understand it, the Commission would have to say "These facts that we have found proved, happen to amount to a criminal offence, so we are not allowed to say that we have found them proved. We can't say that the Sergeant of Police in charge of the Detectives at Mount Druitt for years has been corruptly selling confidential information to private investigators. We can't say that because it also constitutes a criminal offence and maybe, if admissible evidence is there, and he agrees, the DPP will prosecute him for that, so we've got to keep silent."

On the other hand if the offending public official does something which, in the eyes of the law, is less serious and doesn't amount to a criminal offence, it's all right to say so. That seems to me to be totally illogical.

I don't believe that the prosecution of people is the all important consideration, the be-all and end-all of it. It may be that the disclosure is regarded as so important that even if it is regarded as preventing a fair trial, so that there is no trial and no prosecution, that's better than saying nothing and waiting for a prosecution.

Way back in 1989, Mr Chairman, as you will remember well, I addressed an International Anti Corruption Conference in Sydney and said that such Commissions should be established only for the purpose of dealing with serious matters and only when a situation arises or exists where it is believed;

(a) that conventional investigative means cannot be relied upon to get to the truth of the matter, and

(b) that establishing the facts is more important than securing the conviction of particular offenders.

There is another thing to remember too when it comes to the question of the possibility of spoiling a good conviction. In the vast majority of these cases prosecution would have been out of the question had there not been investigation by a body such as the ICAC.

With the exception of the one private investigator whose matter was referred to the Commission by the police, and the police officer who had been selling him information, I do not believe there is one person named in the report on the Unauthorised Release of Government Information who would have been prosecuted without the ICAC investigation taking place. No-one would have known anything about it.

I think what is disclosed in that report is of value. I think that the work that I did on that investigation is of value, not only in showing the type of thing that has been going on; not only in indicating what might be done to prevent a continuation of it, or at least to minimise the prospect of it, but also bringing to light names of those people who have been behaving corruptly in that context.

So that people know that in the event of their doing, so they run the risk of being involved and of being named also.

Mr Knoblanche said this morning that a former Attorney General said, (I heard it, and it was Mr John Dowd who said it) "People are very careful these days who they have lunch with." Why are they careful about who they have lunch with?

There are ICAC reports which refer to people having lunch in circumstances in which the propriety of that conduct was questioned by the Commission. It wasn't labelled corrupt. It wasn't, in fact, criminal, but it was reported on by the ICAC as conduct which people ought to look at and question and decide whether that's the sort of thing that they regard as acceptable.

I used an expression in the North Coast Report "Its for the community to decide" and I think that's an expression that the Commission might well use over and over again. These decisions are for the community and that is why I say it is for the Commission to make findings of fact rather than characterising the facts that have been found.

It has been said that it is as damaging to the individual to state the facts that have been found as it is to put some pejorative label on them, and it probably is. But then is it wrong if a police officer who has been "on the take" for four years suffers when that fact is disclosed? Is it my fault? Have I been unfair in telling the public about that police officer and his conduct? Is it my fault if he's lost his job because I told people what he has been doing? Or is it his fault because he did it? I think they are serious and important questions. I think those that talk about fairness and unfairness ought to think along those lines.

The word "corruptly" has been used in findings of fact and it has been said that that's tantamount to saying that the person committed a criminal offence. It might be, but that word "corruptly" is used within the context of findings within which it seems to me that that is the appropriate word. If a public official sells to a private citizen information which it is his duty to keep confidential, is there anyone anywhere who is going to say that that is not corrupt? I suppose I could have said he wrongly sold, he improperly sold, he naughtily sold, he corruptly sold - all those words, in my view, are appropriate.

It is so easy to say it's no answer for ICAC people to say "Oh, we would not abuse the power." Mr Moffitt said "They mustn't have it in case they do." Our society, unfortunately, is made up only of human beings. Judges have enormous power which they can abuse in a way in respect of which there is no appeal, or other procedure available.

I recall a judge fairly recently in a case in which - I think I have the facts right, if I don't, they are very similar - a young person was the victim of an assault and the judge was highly critical of the young person's parents for lack of supervision or some other circumstance. Those parents weren't party to the proceedings; they weren't represented; they had no right of appearance; no right of response. I am not saying the judge was wrong, I am saying that's what he did and that's what judges from time to time do. They use their position on the Bench under privilege to express opinions which go

well beyond the issues that they are called upon to determine. I don't say "Take that power away from judges because they may abuse it."

What about the members of the Committee, members of Parliament? You've got enormous power. You know what you can do when you stand up and speak under privilege in the House. That power is not taken away from you because you can abuse it.

You've had more than three years of ICAC. You've seen the results of its investigations, the way in which they are conducted. The Parliament has power over the Commission. It can put an end to its existence as and when it chooses. Some regard must surely be had to the way in which the power has been exercised in determining whether it is to continue.

There are all sorts of checks and balances in the community that ultimately have people with power. The High Court decided whether the Franklin River could be dammed and there was no right of appeal from their decision. The decision was reached by four votes to three, among seven people, none of whom was elected, and none of whom was put there to determine questions of development versus environmental considerations.

The High Court made a decision recently on whether there could be electronic advertising of election campaigns. No right of appeal from that - final decision.

I think that those people who talk of too much power, who talk of unfairness to individuals are excessively influenced by their familiarity with the court system and with the presumption on their part that anything which is any different from it is inappropriate and wrong.

I have said all that, Mr Chairman, with a slight degree of emotion which I hope hasn't impeded the logic or the appropriateness. I have made dozens of marks alongside things that have been said this morning and said in various written submissions that the Commission has received. Time is getting on. I don't think I can go through all those matters of detail.

I would particularly draw to your attention certain observations that I made in certain chapters in the first volume of the report on The Unauthorised Release of Information because they were written with a view to stimulating debate on the way the Commission should go in the future. In particular in chapter 7, I have looked at differences between the way courts proceed and the way the Commission proceeds. I have looked at questions of fairness and unfairness. I have quoted the words of a witness who complained of unfairness. I raised those issues so that these questions can be considered in a real and not an artificial or theoretical context.

It may be more valuable if, in the remaining 15 or so minutes remaining, I were to invite questions rather than develop matters that I could develop for an hour or more, based on what's been heard earlier today.

CHAIRMAN: I wonder if I could ask you to identify any areas in the ICAC submission with which you are in disagreement, particular references to which you can point us.

Mr RODEN: You may ask, Mr Chairman, and I will reply. May I say I don't particularly want to approach this on the basis of saying what I disagree with in the Commission's submission. I would rather express myself in my own terms. There are matters there which I would certainly express

differently. There are matters there where I don't agree with what is stated. May I make one general observation?

There are places in the Commission's submission where it may be a matter of defect of expression, but in the absence of that explanation, there seems to me to be some confusion between the power to make findings in the sense of findings of fact, with which I agree, and the power to make findings that the conduct disclosed fits within a particular definition. I would rather call this rulings than findings because it avoids this confusion.

I don't know that I can do this in any way other than go through the submission and pick on points one by one as I come to them. For example, on p.3 under the heading "Definition of Corrupt Conduct" the submission says:

> "The definition of corrupt conduct was designed to meet at least two policy objectives. Importantly it defined "jurisdiction", that is, what the Commission can investigate."

That, I believe, is correct. The next sentence is:

> "It also provided the criteria for findings about a person's conduct."

I don't agree with that proposition. I believe that the Commission was intended to be free to make its findings which are that the conduct was *X, Y, Z* whether it falls within or outside the definition of corrupt conduct.

On the same page the statement is:

> "Not only was criminal conduct to be within jurisdiction, but so also was conduct which involves partiality, dishonesty, misuse of information or breach of public trust (s8)."

Those in the latter category, i.e. partiality, dishonesty, misuse of information or breach of public trust, ought not to be described as something distinct from criminal conduct. There would be considerable overlap.

I don't think that what the Commission was empowered to investigate and is empowered to investigate should be described as not only criminal conduct but other conduct which fits a certain description. I don't think there should be a reference to criminal conduct at all.

I am jumping several notes that I have made. I go to p.5 where it is said, among other things, and this really involves another question: what the Court of Appeal said about s.9. The Commission's submission says:

> "Currently the interpretation of s.9 means that some, if not much, conduct of certain officials such as Ministers, could not be investigated by the Commission."

I doubt if the judgment has that effect because I believe that at the time a decision is made to investigate one can not tell what the position is in regard to

s.9 and that's a point that's made elsewhere in both the Commission's submissions and in mine.

I am sorry that this is so scattered. There are matters of substance to which I should refer under this head. If you go to p.13 of the Commission's submission under the heading "The Definition and Findings of Corrupt Conduct" that is one case where I am not sure what is meant by findings of corrupt conduct, whether the meaning is findings of fact, where the fact, the conduct found, would amount to corrupt conduct, or whether it means what I call a legal ruling that the conduct falls within that particular definition. If the latter is meant then I agree that Balog said you can't do that. I understood Balog to allow findings of fact even if those facts would amount to a criminal offence. That is my understanding of judgments which are not particularly easy to understand.

The Commission says that it has the power to make findings of fact, to state reasons for those findings and where necessary to describe the conduct in ordinary language. It says in respect of that "No-one has suggested otherwise." I understand Mr Moffitt to have suggested otherwise in fairly strong terms.

The Commission goes on to say:

> "Different considerations may apply to findings of corrupt conduct."

If the reference is to what I call rulings, i.e. if the conduct falls within the definition then clearly different considerations do apply.

I disagree with the view that if the power remains to express opinions that consideration should be considered in respect of certain people, the opinion should not be expressed when the contrary conclusion is reached. I think the paper says it is somehow unfair to say of a person that consideration should not be given to that person's prosecution. I, of course, am of the view that that type of opinion would almost certainly be better not in the report at all, but if there was going to be an expression of opinion in certain cases that consideration should be given to prosecution, I think there also should be the scope for expression or statement of the contrary impression.

I disagree with the statement in the middle of p.20:

> "As to a power to make findings as to corrupt conduct, it is obvious that there is significant justification for it."

I don't believe there is justification for it in the sense of a categorisation or classification of the conduct.

The submission goes on:

> "It is strongest in the case of a person who has been wrongly accused of corruption. A power in the Commission to dispel the allegation in terms may be important."

It is important that it is dispelled, in my view, and properly dispelled by a statement of the facts as found. The Commission should say "There is no evidence justifying the assertion that this man did that thing" or "The evidence satisfies me that he did not do that thing", whatever the particular allegation may be.

Could I just interrupt myself to say that this reference to a person having been wrongly accused of corruption reminds me of something that Mr Moffitt said when he referred to a person against whom an allegation has been made.

In general, in my experience, the Commission is not involved in situations where one person makes an allegation and another person denies it. In the matters in which I have been involved what has most commonly occurred is this. The Commission, perhaps on information received or for whatever reason, has reason to suspect that some corrupt conduct may be going on involving certain persons. It then conducts investigations. The execution of search warrants has always been an important part of those investigations.

As soon as there is sufficient material to warrant it, at least in my experience, the next step is to call on that person. Perhaps in private if the material is insufficient to justify doing it in public; perhaps in public; perhaps first private, then public. But that person is called upon at a much earlier stage than in court proceedings and that person is simply asked "Have you done *X, Y, Z*?" Maybe he says "No" and that's an end to the matter. Maybe he says "Yes" and that's an end to the matter in another sense. Maybe he says "No" and further investigation justifies calling him in and asking him again.

The point I am trying to make is that you are not dealing with a court case situation. You haven't got an allegator and an allegatee with one person saying "He punched me on the nose" and the other person saying "No, I didn't". What the Commission does is investigate a matter seeking the facts. It is not there overseeing a contest between an accuser and an accused.

This reference to a person who has been wrongly accused of corruption can be relevant on some occasions but, in my experience, that is not what the Commission is generally concerned with.

CHAIRMAN: Could I just interrupt there? Reference was made to Mr Preston and that was a matter which you dealt with. There were an accuser suggesting that Mr Preston tried to solicit a bribe and that evidence was made public. Mr Preston, forgive me if I am wrong in relation to this, wasn't provided in the first instance with an opportunity to refute that?

Mr RODEN: I think you are wrong, with respect. It is a pity this has come so late because the Preston thing has been the subject of misrepresentation in a number of places.

CHAIRMAN: That may be something you would prefer to write to the Committee on?

Mr RODEN: Yes, perhaps it's assumed an importance out of all proportion. Let me just say this and it is a point that I have made and the Commissioner has also made from time to time.

In an ordinary court case, conducted under all the rules and all the niceties that the Law Society and others would like to see associated with

the ICAC, people can be mentioned adversely in evidence. If they are not parties to the proceedings, or being called as witnesses for another purpose, they have no right of reply whatsoever. With the ICAC if a man's name is dropped in passing by a witness there is a great clamour of unfairness if that man is not given the opportunity the following day, or at a time of his choosing, to say "Oh, what they said about me isn't true."

There has been reference today by Mr Moffitt in what sounded like an attempted justification for the conduct of his near namesake, Mr Moppett, with regard to a matter that led to contempt proceedings. There was a reference to the fact that submissions were made publicly towards the close of an ICAC investigation and some time elapse before the person, in respect of whom they were made, had the opportunity of having his counsel's submissions heard.

What happens in an ordinary court case? I will tell you what happens in an ordinary court case. I will tell you what happens in a criminal trial that might take six months. On the first day, or for the whole of the first week, the Crown Prosecutor without leading a word of evidence tells the world, including the press, precisely what is alleged against the accused, chapter and verse. "This man raped that woman." "This man then shot the victim three times through the head." He says that. That is freely reported. Over the ensuing, perhaps, several months, witness after witness is heard saying it was his gun from which the bullet came, "I saw him there." "He told me he had done it." All the papers have got it. Months later the defence is called upon.

I've not heard anyone say "Isn't it unfair" to that accused that all the material available against him is heard, publicly heard and publicised, and weeks and months go by and he has no opportunity of replying until after that time. That's what happens.

But if before the ICAC Mr Toomey Q.C. says "I submit that this person was influenced by that political donation" and its two weeks or two months later before another gentleman who, if he appeared elsewhere, would be wearing a wig and gown, said "I submit that he wasn't", that, we are told, is grossly unfair. Why is it unfair, I ask, if it happens before the ICAC and not elsewhere?

Mr Preston: A witness was asked by a consultant to pay him (the consultant) a very large sum of money as a fee which the witness, not without good reason, thought was, in fact, intended to be used as a bribe to a public official. When that occurred Mr Preston was present, and that is fact, acknowledged by Mr Preston and others. Mr Preston was then, I think, a solicitor acting for another party in the same matter.

He did have a conversation with the witness. The witness said he got the impression from that conversation that Mr Preston was in on the joke or whatever expression he used to mean that Mr Preston was involved. That's all he said. He got that impression from what Mr Preston said.

The next occasion on which the Commission sat senior counsel for Mr Preston, having earlier approached me and sought permission, and having been granted it, appeared for the purpose of saying on Mr Preston's behalf what Mr Preston wanted to say in reply to that statement.

No-one ever suggested that Mr Preston's conduct was under investigation or consideration. If that had happened in a court case Mr Preston would have had no avenue of redress other than the making if he wished of a public statement by a letter to the paper, or in some other way. Before the Commission, although he wasn't a party and he wasn't a witness for any other purpose, the opportunity was afforded and advantage was taken of it, for someone on his behalf to say "That's not what occurred." It was Mr Tobias who was the senior counsel who appeared and then Mr Tobias went beyond what I had indicated it was appropriate for him to do; he was stopped; he was told that further material should be put in the form of a statutory declaration and that was done.

I think Mr Preston got very much fairer treatment than he would have got in a similar situation from any court. That's the end of my response to your interruption, Mr Chairman.

There are other things I would like to say about the Commission's submission which I was in the process of going through.

At the top of p.21 there is a statement:

> "The Commission could pass strong condemnation of a person's conduct."

I don't personally think that's a main function of a Commission report. I still prefer the reporting of facts.

I am not particularly impressed by the suggestion that corrupt conduct and improper conduct both be provided for in the Act with separate definitions. I believe that would invite litigation and it is the very sort of thing that I don't think the Commission should be doing. There is an enormous difference, in my view, between trying to fit conduct within a legalistic definition and describing the conduct in words chosen by the Commission.

That is a totally inadequate answer to your question as to whether there are aspects of the Commission's submission with which I disagree. It is totally inadequate because it would take a lot more time and a much closer analysis than I have given it.

As I have said, I would rather my views be considered on the basis of the way in which I have expressed them than on the basis of a response to views expressed by somebody else. I wouldn't like it to be said that I was in agreement with those submissions and then individual words or sections taken out and virtually attributed to me. Nor would I like it to be blazoned over the front page of tomorrow's papers that Roden and Temby are at odds as to what the future of the ICAC should be. I think it is much more appropriate for each set of views to be considered on its own basis.

I do feel, Mr Chairman - I don't say this by way of complaint or criticism, simply by way of fact - that I have really been pushing to try to condense into the available time the very considerable body of material that I would have liked to have been able to put in a more leisurely fashion, particularly in response to what was heard from Mr Moffitt today.

I made notes as he was speaking and there are a number of matters to which I think a response is called for and I just haven't been able to

do it in this limited time and we are already five minutes past the hour that you indicated, although our starting time was rather more than an hour later than had been indicated to me.

CHAIRMAN: The Committee will be hearing evidence on 9 November 1992. We might start at 9.00 o'clock and make available another hour to you before we start at 10. o'clock hearing further evidence.

Mr RODEN: I would be grateful for that opportunity.

CHAIRMAN: I will seek to do that Mr Roden.

Mr RODEN: If the Committee had time for a snap question and a snap answer, if they think I am capable of snap answers, then I would happily receive it. I would actually like the opportunity of replying to some of the questions that were put to other witnesses.

CHAIRMAN: What may be a way forward is for you to provide written material to the Committee and then elaborate on that before then. That would allow the Committee to be familiar with your response when you come before it.

Mr RODEN: Yes, I will seek to do that.

(The witness withdrew)

The Committee adjourned at 4.10 p.m.)

CORRECTED

EVIDENCE

TAKEN BEFORE

THE COMMITTEE ON THE

INDEPENDENT COMMISSION AGAINST CORRUPTION

At Sydney on Monday, 9th November, 1992

The Committee met at 9.17 a.m.

PRESENT

Mr M. J. Kerr (Chairman)

Legislative Council	Legislative Assembly
The Hon. JAN BURNSWOODS	Mr B. J. GAUDRY
The Hon. D. J. GAY	Mr J. E. HATTON
The Hon. S. B. MUTCH	Mr J. H. TURNER
	Mr P. J. ZAMMIT

ADRIAN RODEN, Q.C., of [redacted], on former oath:

CHAIRMAN: Mr Roden, do you wish to put further matters before the Committee?

Mr RODEN: My intention was to say that if members of the Committee had read my two written submissions I would be content to pass straight to the question stage, but you were good enough this morning to give me—

CHAIRMAN: Before we pass to that stage, you would be happy to table your further submission?

Mr RODEN: Yes. This morning you were good enough to give me a copy of a further comment by Athol Moffitt which he describes as "Comment on Issues raised by Mr Roden's Oral Comments", meaning no doubt my evidence of 26th October.

CHAIRMAN: You would have no objection to that being tabled and made available?

Mr RODEN: None at all. Indeed, I am delighted to have the opportunity of responding to it. There are certain things in it which seem to me to misconstrue the position I take, and that should be made clear to members of the Committee. At the foot of page 1, going over to page 2, referring to me, he says:

> As he put it, ICAC findings would mean that the person condemned by the ICAC "finding"—

I find it difficult to determine why "finding" is in inverted commas:

> —would be got rid of by being dismissed.

I do not understand the basis of that. I have never recommended the dismissal of anybody in an ICAC report. In the particular instance to which he refers in his previous paragraph, of the police officer who admitted that he accepted bribes and who is now out of his job, the police officer resigned. He was not dismissed. That resignation, I assume, was the result of shame at the matters

he had himself admitted. The next paragraph goes on, again referring to me:

> In the example he gave from his recent inquiry, he did not add that he also made a positive statement concerning criminal proceedings (for accepting a bribe) and dismissal.

The positive statement referred to was a statement of opinion that consideration should be given to criminal proceedings and dismissal. That is a statement I made because I was required to do so by the terms of the Act—indeed, by provisions in the Act which I have recommended should be repealed, because in my view those statements should not be made. On page 2 he then goes on with some numbered paragraphs. Paragraph (1) states:

> Accepting that the purpose of findings, of the type referred to, is to get rid of the officer promptly by dismissal . . .

I have never suggested that that is the object. The latter part of paragraph (2) states:

> What Mr Roden contemplates is that a general provision, such as S74A(1), which is a power consequent on an investigation, can be used adversely to a person to do what the courts cannot do.

Instead of saying "what Mr Roden contemplates is that" more accurately he might have said, "what the Act provides is that". It is not that I contemplate that findings be made; it is that the Act empowers the Commission to make those findings. He ends paragraph (2) as follows:

> Surely s.74A(1) was not to provide a back door way of evading the important policy of s.37(3)

That is a proposition that I do not think anyone has ever suggested, or would. Section 74A(1) gives the Commission the power to make findings and express opinions and to make recommendations. They would, of course, be based on all the material before the Commission, including material that would be inadmissible in a court. Section 37(3) deals with an entirely different proposition, namely, the admissibility of material in any civil or criminal or in any disciplinary proceedings. Of course the Commission hearing is none of those things. In paragraph (4) Mr Moffitt asks:

Why cannot and ought not these objectives be achieved—

They are the general objectives of the Commission:

> —by revelations in open hearings, followed by findings in strong but general terms concerning the practices, the areas where they occur and the climate which enables them to occur and do so effectively, without naming persons by ICAC findings in relation to specific conduct in effect criminal . . .

There are all sorts of problems with that. I take it that what he says is this. You have an open hearing. People hear Constable Hedges say, "I admit that for four years I have been taking bribes". And then in the report you say, "Police have been taking bribes. That is terrible". But you do not name Constable Hedges. It seems to me to be the type of artificiality which is typical of a lawyer's approach to these matters to say that although the facts may be well known and well disclosed, including the involvement of individuals, the Commission for some reason does not name those individuals although they have themselves made admissions that have been publicly heard.

He makes that applicable only to conduct which is in effect criminal.

That of course would require the Commission to make its own determination as to what was criminal and what was not, and that is something which as I understand it the Commission is not and ought not to be empowered to do. What is overlooked in all of these paragraphs, or I presume is overlooked, is that the sort of thing that Mr Moffitt says the Commission ought not to do is the sort of thing that is done regularly by royal Commissions and other similar Commissions of inquiry.

On page 4 he refers to questions which he says might be put to the ICAC with a view to obtaining its official views, whatever that may mean. He asks:

> Is it accepted that in the discharge of its functions, ICAC should <u>or</u> has the power to include in its reports findings in opinions that the conduct of named persons was done corruptly or in breach of duty, or like expressions?

I would say the answer is yes. I do not know whether the intention is that in any amending legislation a number of words will become taboo, whether the

Parliament would be asked by Mr Moffitt to go through the dictionary and select words from it that the Commission is not allowed to use. These words are freely available to, and of course used by, royal Commissions and Commissions of inquiry in general. I remember that on the last occasion when Mr Moffitt gave evidence he took exception to my use of the expression "in breach of duty" where in findings I said that a police officer had released information in breach of his duty. He said that it was all right for me to make findings of what he called primary facts but I ought not to draw a conclusion that something was done in breach of duty. Let us look at what the findings are in such a case. It is a primary fact that the police officer released the information to a private investigator. It surely is a primary fact, or known fact, that there is a regulation which says that it is his duty to maintain confidentiality in respect of that information and not release it. So according to Mr Moffitt—and again you get this artificiality—I am allowed to say, one, that the police officer released the information to the private investigator; two, the police officer is under an obligation not to do so. But I cannot say he was in breach of that obligation or duty when he did so. That seems to me to be quite nonsensical. Mr Moffitt goes on to ask:

> (b) In making such a finding or other findings adverse to a named person, should ICAC or has it the power to do so on material which is inadmissible in external proceedings under S37(3)?

The answer is: Yes, of course it is. That is what it is there for. I have dealt with the question of the standard of proof in the second written submission that I have made. I have dealt also with the use of terms such as "corruptly" and "in breach of duty". I do not think there is any purpose in going through the rest of what Mr Moffitt has said. What he has written, though, reinforces the position he took when he gave oral evidence on 26th October. I think I have responded fairly fully to that in my written submission of November 1992. Unless there is anything particular that you would like me to deal with I would rather now invite questions on the submissions I have made.

CHAIRMAN: In your further submission you reiterate your opposition

to the right of appeal against ICAC findings of fact?

Mr RODEN: Yes.

CHAIRMAN: I think you suggest that the common law right to seek declaratory or other orders from the Supreme Court is adequate?

Mr RODEN: Not to deal with questions of fact.

CHAIRMAN: No, but it is adequate for an appeal, remedy or redress?

Mr RODEN: Yes.

CHAIRMAN: If the ICAC makes an error by applying the ordinary meaning of the term "corruptly" to an individual, would this not be an error of fact and, therefore, not subject to any review?

Mr RODEN: With respect, I do not understand what is meant by an error in the use of the word "corruptly". As I said a moment ago, I do not know whether the intention is for the Parliament to comb the dictionary to determine that certain words are taboo. There are 186,492,614½ words, or some such number, in the dictionary. Most people, in their every day dealings, have all those words available to them. Some will use them in a sense with which other people will not agree and some will use them wrongly. I suppose you can pick on words such as, "the Commission", "the Parliament", or "this committee". Mr Moffitt or anyone else might, on occasion, use words wrongly. I do not really see what you can do about it. The Commission has its powers. People can disagree, and disagree publicly, with what the Commission says. I have used the word "corruptly" in connection with a number of findings. Even though Mr Moffitt has attacked the use of the word, I do not think he has pointed to an instance where the word was used where he says it should not have been used. I did not use all 186 million words in that report, but I suppose I used many thousands. If there is any use of any word that is wrong, I suppose people are entitled to say, "I do not agree with the way you have used that word".

But I just cannot see how the use of a word such as "corruptly" or a phrase such as "in breach of duty" can properly be the subject of an appeal on a question of law, because no question of law is involved in using it. A

question of law is involved in a finding that conduct constitutes corrupt conduct under the Act as it presently stands because that means it falls within the terms of a particular definition. Whether it does or does not is a question of law. Perhaps I can take this one step further. Unless the Commission acts irresponsibly—and I do not think there is any indication that it has done so; and you cannot guard against anybody acting irresponsibly anyway—I do not think you will find the word "corruptly" used as a normal word as distinct from having a technical, legal meaning in the expression "corrupt conduct", except where it is abundantly clear that it is appropriate. Where there is questionable conduct—the sort of thing Mr Moffitt and others would refer to as non-criminal, or probably non-criminal but nonetheless possibly having a corrupting effect so that something must be done about it—in my view the Commission should draw attention to that type of conduct, explain the way in which it could have a corrupting effect and, where there are different attitudes, explain those different attitudes.

That is what I have tried to do, and indeed have done, in each of the two major reports for which I have been responsible. I have used the expression—and I have referred to it several times—"It is for the community to decide". That is because I have seen something which it seems to me could have an adverse effect on the operation of the public sector and I have said, "Here is the problem. This is what might result as a consequence. That has got to be looked at by the community or the Parliament". Someone has to have a look at it to determine what has to be done about it. I drew attention to the practice of property development consultants having long liquid lunches with strategically placed public officials. Recently we heard John Dowd say that people are much more careful about who they have lunch with. I am not saying that the public officials who accepted lunch and grog from Cassell were corrupt. I am saying, "Here is a practice that needs to be looked at". In connection with solicitors wittingly or otherwise assisting the illicit trade in government information, I have presented the facts of what was done by the solicitors and I have presented the various attitudes that they have expressed.

And there is a matter which is open for consideration by the Parliament, by the Law Society and by the solicitors. It may well be that, without any of that conduct being described as "corrupt" solicitors are not now as readily paying private investigators for information that they should know could not have been properly obtained. That is the sort of thing that I think the Commission should do in this doubtful, grey area. But to say that the Commission cannot use particular words, or to say that, if it does use particular words there should be a right to approach a judge to get him to say why those words should not be used in that circumstance, is to my mind quite absurd.

There are possibilities always that something will be done that will have an adverse effect on a person and that person will consider it is unfair. Look at what has happened in Western Australia. A former Liberal Premier and a former Labor Premier have both said, "The royal Commission got it wrong. It has made findings and statements about me that are wrong". People regularly do that with royal Commissions. But if the report is a decent report with proper reasons people can read it and make their own assessments. There are many people in New South Wales who have been named by the Moffitt royal Commission or by other royal Commissions—and this has been reported in newspapers—as having been heavily involved in organised crime and they have never been convicted and have never been charged with any relevant offence. I find it difficult to understand why it is all right for Moffitt, Street, Woodward and Nagle but somehow or other it is not all right for the ICAC.

Mr MUTCH: Perhaps in those cases the terms of reference are limited to specific cases or areas whereas the ICAC has a standing brief. We always have to guard against different cultures developing within the ICAC.

Mr RODEN: You say that royal Commissions are governed by terms of reference. Of course, that is correct. But governments are not bound by anything in determining what terms of reference they give to a royal Commission. At least the ICAC is restricted, by its Act, in the areas of

reference it can give itself. If a royal Commission determines that its terms of reference should be extended—we all know that that frequently happens—it can be difficult for a government to refuse to extend those terms of reference. I remember a royal Commission which was concerned with the naming of Federal electorates. This Commission was designed to investigate a particular allegation concerning a particular member of Parliament. If I recall it correctly, the royal Commission stumbled upon some improper interference—which is what the royal Commission decided it was—by a different member of Parliament in respect of something that was not referred to it in the first instance. I find it difficult to see the significance of the distinction you are drawing.

Mr MUTCH: In that circumstance would a royal Commission refer that matter to the appropriate law enforcement authority rather than write a report which publicised that matter?

Mr RODEN: It did write a report publicising that matter and I think shortly thereafter a Minister was no longer in office.

Mr MUTCH: Generally parliaments are fairly circumspect when giving royal Commissions their terms of reference. Parliaments should have some idea of where a royal Commission is going before they give terms of reference. You said earlier that people can disagree, and disagree publicly, with what the Commission says.

Mr RODEN: Yes.

Mr MUTCH: So I presume you would encourage a fairly robust debate?

Mr RODEN: I always encourage robust debate everywhere.

Mr MUTCH: Do you have a view on whether we should relax the contempt power?

Mr RODEN: I am in full agreement—I am sure the Commissioner is also in full agreement—with Mr Moffitt that the contempt power should never be used to muzzle criticism of the Commission, either in respect of its general powers or in respect of particular findings. I do not want to go into the Moppett matter, but I do say that Mr Moffitt's analysis of the alleged

contempt for which Mr Moppett was proceeded against was incorrect. I am not now referring to the Moppett matter or any matter in the past—I am referring to contempt in general—but I think there can be occasions during the course of a Commission investigation when a public allegation is made that the Commission is prejudiced. In certain circumstances that matter could properly require the exercise of the contempt powers. It should be borne in mind that the Commission has no power to deal with a person who is in contempt; it can merely institute proceedings which go nowhere unless the Supreme Court says that it is appropriate to proceed. I do not really think there is a worry. I have always been an anti-contempt proceedings person. If someone stood up and poked out his tongue and put his thumb to his nose during my period as a judge I would not call in someone else to cope with the situation. I did not believe that I needed to use my almighty power as a judge, or a court, to handle that sort of thing. There is an interesting story about a barrister who was asked on one occasion by a crabby old judge, "Are you trying to show your contempt of this court?" to which the barrister replied, "No, your Honour, I am trying to conceal it". I think that is a reasonable response to people who prick too easily.

Mr HATTON: Would you agree that, with the onslaught that followed the Greiner-Moore-Metherell matter, the ICAC has shown that it can withstand a strong attack. Therefore, the contempt power is not really necessary except where it may prejudice the course of an ICAC hearing.

Mr RODEN: I do not know that that is a particularly good illustration, because I do not think that anything I can remember that was said after the Greiner-Moore thing would be regarded by anybody as an appropriate basis for contempt proceedings.

Mr HATTON: I would agree with that. Would that be the case in the North Coast inquiry, so far as you recall?

Mr RODEN: I think so. My attitude to some of the things that were said after that was that I would only concern myself in any event with criticism that I thought that anyone would take seriously, and I doubted if

there was any on that occasion.

Mr GAY: I go back to the definition of corruption that you were speaking about before. You mentioned that royal Commissions have used at various times someone who is an organised crime figure or something like that. Would you not agree that there is a difference between the ICAC and a royal Commission that is set up on a one-off basis to look at something? The ICAC is there for a long time and is looking at public officials over a period. Surely if anyone needs to get a proper proceeding in place, it would have to be the ICAC. You can excuse that happening in a one-off Commission, but over a longer period that the ICAC has operated and will operate there is a responsibility to enunciate these divisions within corruption.

Mr RODEN: I find that very difficult to agree with. Once you have definitions—and I can probably say this more easily because I am a lawyer myself—you get lawyers playing lawyers' games. Ultimately what is going to determine a matter is a judge's opinion, or a number of judges' opinions—and they are only lawyers anyway—on the meaning of a word. I do not want to get into any of the controversy over the Metherell thing, but if I can just refer to one aspect of one of the judgments in Greiner-Moore, and this is Mr Justice Priestley who said that the word "could" in section 9 means "would if the facts were established". That is a different meaning from the meaning that anyone else I know has given to that word in that context. It is not to be found in the other judgments. I think Mr Justice Mahoney said something which involves express disagreement. Nobody outside that hearing has ever suggested it had that meaning.

If the ultimate fate of those two Ministers had depended upon the court decision, it seems to me to be, to use one of Mr Greiner's expression, a nonsense to allow it to depend on what a majority of those three judges happened to think the word "could" means in that context. That was not the matter that moved the majority, but it was the opinion of one of the judges and would have been enough on its own to support his conclusion, and the majority conclusion, if it was accepted by the majority. I have seen any

number of instances in which litigation, particularly on appeal, turns on that sort of question. When you are concerned with the quality of a person's conduct and whether it is appropriate for a person holding this public office to behave in that way, I find it very difficult indeed to accept the proposition that the answer is to be found in what a judge thinks a word in an Act means. That is the sort of risk that you run. I have referred, sometimes facetiously but always intending it to be taken seriously, to the Australian Broadcasting Tribunal. I made passing reference in one of my submissions to the New South Wales law relating to liquor licensing. They are matters that have a direct bearing, though they may seem to be entirely apart.

Let me talk about liquor licensing, because I struck some of that when I was on the Supreme Court. There are magistrates who determine applications for liquor licences, and they are supposed to take into consideration the reasonable needs of the community. When Coles want to get a licence, Woolworths can object and say that there are enough grog outlets in that suburb, and somebody else can come along and say that is not so, we need more because old ladies find it hard to cross the road to get to Woolworths, or whatever. You have magistrates there who are supposed to hear the local people, exercise discretion and decide whether or not the licence should be granted. You might think that is a pretty sensible way to go about it, if you are going to have restrictions on these things at all. But then there is an Act which says the matters that the magistrate shall take into consideration, include the reasonable needs of the neighbourhood. There is a whole host of appellate decisions on what is meant by the word "neighbourhood", on what is meant by reasonable needs. The decision on every liquor licensing application involving the major players in the game depends upon what the New South Wales Court of Appeal—or the High Court if they go as far as that—has had to say about the meaning of words in the Act, whereas it seems to me to be much more sensible to have a committee of local people who know what is going on and represent all the relevant interests decide by the exercise of their discretion. There is a great fear of

the exercise of discretion and judgment by people. I do not share that fear. I fear more the situation in which you have artificial rules and decisions turn upon considerations which are irrelevant to the matter which is really under consideration.

Mr GAY: I am not a lawyer. My law is very basic, from law one in accountancy. That is a preamble to what I think is a very important question. My understanding is that, first of all, ignorance of the law is no excuse, and second, something is either lawful or it is not lawful. It is a basic rule of law: you either break the law or you do not. If you break the law, you get a penalty. You raised the Metherell matter and I would like to use it and perhaps the North Coast inquiry where a penalty has been applied. The penalty in the Metherell-Greiner matter was a finding of corruption, yet there is no indication that someone broke the law. Someone has not broken the law, so they should not be penalised; yet they have been penalised by a finding of corruption. The same can be said of the North Coast inquiry. The two Ministers involved were not found guilty of any wrongdoing or corruption, yet there was a finding you made that they put the public interest at risk and created a climate conducive to corrupt conduct.

Mr RODEN: Yes.

Mr GAY: These people have not broken the law.

Mr RODEN: May I interrupt to say that I believe they were very sound and justified findings that I would be prepared to debate with anyone, but nobody has come to me and suggested that.

Mr GAY: I am just about to. First of all, in both of those cases people have not broken the law, so technically what they have done is lawful.

Mr RODEN: Yes.

Mr GAY: Yet they have had a penalty against them in a finding.

Mr RODEN: Yes.

Mr GAY: That is why I say that we need to look at the finding and the definition of corrupt conduct, so that first we can get the people who have been corrupt and the people who have done something wrong, and not penalise

the people who have not done anything wrong, people who have not broken the law. It needs to be tightened up, particularly in light of the Metherell finding and equally in light of your findings in the North Coast inquiry.

Mr RODEN: It is a long one. Let me start with the North Coast. The relevant facts in the North Coast start with the property development consultants. They had a policy of trying to get support for their clients' projects from people in positions of relevant power and authority. No one can complain about that; that is their job. There were some instances in which they had a relationship with such people that they used to their clients' advantage. This applied particularly pre-1988, during the term of the Labor Government, and a number of persons are named in the report as people who had a very close relationship with one or two of these consultants, and there was material suggesting—going further than that, indeed establishing—that the clients gained great advantage from that. I am using the Labor Government situation first to make clear, particularly in view of the source of the question, that there was nothing that was directed against one particular political party. Perhaps the most startling thing concerning the situation when Labor was in government and the conduct of these consultants was a letter that was written with regard to—I think I have these facts correct—the proposed Cape Byron academy. That was a letter which was actually drafted, I think typed, by the consultant, to which he obtained the signatures of I think four Labor MLCs. It extolled the virtues of the project in a way and in respects about which those who signed the letter, it appeared, did not have sufficient knowledge to warrant their signing it.

Mr GAY: That is a whole different issue which would take a long time. I would also like to come to that one at some stage. That is peripheral to the question I was asking.

Mr HATTON: Is it?

Mr RODEN: It is not.

Mr GAY: I think it is. That is on the partiality of members of Parliament.

Mr RODEN: No, it is relevant in this way: let me complete it by saying that one of the matters set out in the letter, and I think it was addressed either to the Premier or the relevant Minister at the time, was a statement of the proposition that if approval were given to the proposed development, it would cause a population shift which would be of advantage to the Labor Party, from the point of view of the forthcoming election. I questioned the propriety of a number of matters concerning that particular aspect of what had gone on, and I reported the concern that I had. It is that very matter, together with what followed, that led to that key paragraph, "It is for the community to decide", in respect of which I have castigated the Parliament for not initiating a debate on that very subject.

Then came the change of government and the consultants who had their way in with the Labor Party—because of their relationship with these people—did not have the same relationship with the people then in power and as you are aware both local members and Ministers happened to be of the National Party. So it was that that consultant who had advised and arranged donations to the Labor Party when it was in office had an apparent sudden change of political ideology or allegiance and made and advised substantial donation to the National Party. That was done also—and I do not have to go into the detail—with certain contact with certain members and officers, and attempted contact at least and actual contact with Ministers. There was every reason for the public to suspect that there might have been corruption in the sense in which everyone understands the term in that decisions might have been influenced by those payments. That made it, in my view, appropriate for the matter to be investigated by the ICAC.

It was investigated. The facts—and they are all related in the report—include that a donation was made subsequently, and not long afterwards a favourable decision was made. Ground for suspicion. The matter was investigated and a decision had to be made, if it could, on the evidence as to whether in fact Ministers or, for that matter, other members had been influenced in their decisions by the money that they received. The

evidence indicated that the payment of money had resulted in readier access to Ministers. The evidence did not warrant a finding that the Ministers had been influenced in their decision by the receipt of the money. That had to be explained and had to be explained in a manner which you might expect the public to accept and it was explained on the basis that what the Ministers had done was act in an over-enthusiastic fashion which had resulted in the proper safeguards and investigations not taking place so that approval to develop was given and an agreement to sell government land was made with a company which was a company of straw—if there are such things—with the Government believing that it was dealing with a company that had the financial support of a major financial institution.

The Government was wrong in what it believed and it was wrong because the proper inquiries had not been conducted. They had not been conducted because of the haste with which the matter was done because of the anxiety of those Ministers, as I found, to give effect to a pre-election policy and their allowing that to overcome the prudence and wisdom which, I am sure most people would agree, should be the basis of their decisions. As to this so-called finding that they were guilty of conduct or creating a climate conducive to corruption, in respect of which the Deputy Premier wrote a letter to the Commissioner asking him what the expression meant, that expression came from the Act of Parliament which the Deputy Premier's Government had introduced and he had supported. I would be surprised if he did so without knowing what it meant, but I have said what it means. Conducive to corruption means making it more likely or easier for corruption to occur. That can occur in a number of ways. If you take over a government department tomorrow and you decide that all this money spent on auditors is a waste of money, and you are going to do away with all spot checks and annual audits, and you find in consequence that people have their fingers in the till and they are getting away with it, I could properly say that your decision was conducive to corruption.

It is not a criminal offence, but the community surely—and I put this

back as a question—is entitled to know not only when people are crooks but also when, in decisions of importance in the public sector, they conduct themselves in a manner which makes it easier for corruption to occur. And it is not only that I think that, the Act says that. The Act said in section 13, that the principle function of the Commission was, number one, to investigate any allegation or complaint or any circumstance which in the Commission's opinion implied that (it used to say, conduct conducive to corruption) was occurring. Now it says, giving that word its obvious meaning:

> (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct;

Let me just point out this, if you look at section 13 now you will see that because someone was in an awful hurry to get rid of that word "conducive", because they did not like the way it had been used, they did not do it properly. Section 13(1)(a) now refers to:

> (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct;

which means conduct conducive to corrupt conduct. You go down a little further to 13(1)(d) and this is what 13(1)(d) still says:

> 13.(1) The principle functions of the Commission are as follows:
>
> (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;

Somebody saw what was in 13(1)(a) and said, "we have to get rid of that", but they did not see what was in 13(1)(d). Then you come down to 13(1)(f) and the expression there used, "which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct". They all mean the same thing; they are all in the Act. That finding which you say imposed a penalty on those Ministers was exactly the opposite. What they did was bring about a situation in which Crown land was sold to a penniless private company which

they wrongly believed was backed by a major financial institution. They had just received a substantial political donation for their party. There were two possible—

Mr GAY: You have not addressed my question.

Mr RODEN: I am addressing your question.

Mr GAY: You have asked me a question and you have given a great history of it but my question is quite specific, concerning the breaking of the law and a potential change of this finding of corruption and variations—

Mr RODEN: It is not a variation.

Mr GAY: The question is quite specific in that what they did and what Mr Greiner did was not a breaking of the law under the acceptance of the rules of law. Yet, we have a finding which gives a penalty to it and my question was, if you have not broken the law and you have a penalty given against you, that is against the law. What we should be looking at is making the Act better so that when a finding is given where there is a penalty against something it is specifically for breaking the law.

CHAIRMAN: I wonder if I could interpose for just a moment, to speak to Mr Gay. We may be getting into a re-hearing of the North Coast matter.

Mr RODEN: That is what I fear.

Mr GAY: No, I was not. I was on the broader area.

Mr RODEN: I do not want to be put in a position where a question is like a question in Parliament which is not asked with a view to getting the answer but so that the question will be heard which in effect makes a comment on something which I have done, without having the full opportunity of reply.

Mr GAY: It was you who did that. I asked a question which was quite specific.

Mr RODEN: You asked a question which referred to the penalty on two Ministers imposed by my finding in the North Coast report and I say there was no penalty. The alternatives open to me were to find that they did what they did corruptly or through overenthusiasm and, if you like, not doing their

job properly in the latter sense.

Mr GAY: But you accepted in my preamble that these findings do provide a penalty.

Mr RODEN: I did not accept that they provide a penalty. It may well be that they are worse off in consequence.

Mr HATTON: Is there a confusion between having done the wrong thing and breaking the law—I hope I am using Mr Gay's words correctly—and whether the conduct of the public official is acceptable to and in the public interest? Is that not the nub of what we are talking about?

Mr RODEN: I have said and I will say again, in my view it is no part of the Commission's function to determine whether what a person did constitutes a breach of law; that is for the courts. If you say the Commission is only to comment adversely on people that it finds have broken the law then you are requiring the Commission to do the very thing that everybody has said it should not do, namely, make findings of guilt of criminal conduct.

CHAIRMAN: If the Committee were to put questions to you in writing—this obviously will go on for some time—

Mr GAUDRY: I should like to hear more of the direction that Mr Roden is going down, particularly in terms of the contentious nature—

Mr GAY: I think it is a question that rightly has to be asked.

Mr RODEN: Indeed. I do not question that at all, but you will appreciate that nobody has ever invited me to debate findings in the North Coast report which I believe have been the subject of the most misleading and inappropriate public comment.

Mr GAY: But that was not my question.

Mr RODEN: It was a substantial part of it.

Mr GAY: It was to do with the Act. You came on to debating the findings.

Mr HATTON: Have you seen Margaret Allars' opinion?

Mr RODEN: Yes.

Mr HATTON: You have?

Mr RODEN: Yes.

Mr HATTON: You have seen Margaret Allars' opinion on the Greiner-Metherell appeal?

Mr RODEN: Yes.

Mr GAY: So as we are clear, my concern is that we had a situation, as I perceived it, of a penalty being placed on people, through a finding of the Commission— whether it is the one that you did in the North Coast or the one that Commissioner Temby did—who have not broken the law as such. My question was quite specific. In that situation they have not broken the law as it stands but there is a penalty through a finding which makes it hard for them to maintain public office or is detrimental to their public standing. Would it not be better to have the scope of the findings changed to allow a more realistic finding so as the ICAC is not giving a penalty to someone who has not actually broken a law?

Mr RODEN: Two answers: one, I do not think the ICAC should be required to say whether people have broken the law or not, and if it does not do that it is difficult to treat people differently according to whether they have or they have not broken the law. Let me give you a silly example because the silly ones are usually the best: supposing I had a job as tea lady to this committee and every time I poured out your tea I spilled it in your lap. That would not be a criminal offence. You might think it was sufficient ground for suggesting that I should be taken off the tea and perhaps do the sweeping instead. That is a silly example and it makes it a good one. There are thousands of things that people do that do not constitute criminal offences which are inappropriate for them in the job they hold.

When a person is a public official that person has a responsibility very much greater than that of a tea lady and if a public official behaves in a manner which facilitates corrupt conduct in the normal sense of the term by other people then if it is not the duty of the ICAC to point that out, I do not know what the duty of the ICAC is. It is not there to say, "that person is a crook", although in the course of conducting its investigations and making its

findings, it may well say something which makes it apparent that the person is a crook. Its job basically is to minimise corruption, to reduce it, to limit it and it can do that sometimes by saying, "look at what is going on". Those things I mentioned which are probably non-criminal—Cassell with his long liquid lunches for strategically placed public officials, you might think it is important that they stop; solicitors who say, "if I put blinkers on and do not ask the private investigator how he got this information, it is alright for me to pay him for it", I think you would want that to stop. There are so many things which are done which facilitate corruption which it is the duty of the Commission to point out.

I do not see the Commission as there primarily dealing with individuals. I think that, with respect, politicians are a little bit, maybe paranoid, but obsessed by the way individuals, particularly individual politicians, come out of the Independent Commission Against Corruption investigations. To my mind, that is incidental. I would not mind particularly if, short of really heinous offences, there were a rule that said if a person is the subject of an adverse finding by the ICAC he cannot be charged criminally with an offence in respect of the same matter. I do not think that charging with offences or the penalties are the important things; it is finding out. It is trying to get the public sector into better, healthier shape. If, in the course of doing it, you have got to say, "Ministers Murray and Causley went over the top in their haste to give effect to their policy", then you have to say it. If they are powerful politicians you have still got to say it. That is what the Commission is there for.

Mr GAY: I want to come back to a couple of things you said. First of all, I believe that everyone should be equal, and equally treated. Part of your premise was that there is special treatment for high-ranking public servants.

Mr RODEN: Not at all.

Mr GAY: That was the impression I gained from your preamble.

Mr RODEN: Then let me correct it straight away.

Mr GAY: Thank you. The other matter of concern is the detriment to

the Commission in findings of corruption which are not actually corruption. That is the very basis of this whole thing.

Mr RODEN: Could you illustrate those?

Mr GAY: It gets back to my first question, which was that the finding of corruption against someone is something public opinion would consider is unlawful, yet it was actually lawful.

Mr RODEN: Apart from the matter that went before the court, can you illustrate that; any finding of corruption—as you call it—against a person where it was inappropriate?

Mr GAY: No. I cannot illustrate it with an exact example. It is the perception and the concern I have for the Commission, that there is a feeling in the community detrimental to the Commission that, because of these findings and because you are limited in these findings, that it is not going well for the Commission. The perception is that no matter what you go in there for you are going to get this finding because you are limited to this finding of corruption, or the variation that you use.

Mr RODEN: With respect, it is not a variation. The difference between being corrupt and negligent is enormous. If I drive my motor car and knock you over, if I do it because I do not like you and I am trying to kill you, that is an entirely different thing from doing it because I happen to be a bit sleepy, or negligent, or I did not keep a proper lookout. That is the difference I am talking about between corruption and negligence.

Mr GAY: It still comes back to the penalty for someone who has not broken the law. That is why we need to look at that particular definition of corruption.

Mr RODEN: I am afraid I see no connection whatsoever between a penalty for someone who has not broken the law, and a definition of corruption. All I can see emerging from your line of thought is that the Commission's duty will be to determine whether people have committed criminal offences. I believe that is totally inappropriate.

Mr GAY: We not only have to protect the community against

corruption, we also have a dual responsibility to protect a person's reputation. That is the crux of the matter.

Mr RODEN: I would like to see an illustration of an inappropriate damage to a person's reputation by what the ICAC has done.

Mr GAY: Can you not accept that there is the possibility—indeed, the probability—of that happening, and certainly a public perception that it could happen?

Mr RODEN: No member of the public has approached me and said, "You are labelling people as corrupt who are not corrupt".

Mr GAY: Well, I am.

Mr RODEN: Who are they? Who has been labelled corrupt inappropriately?

CHAIRMAN: The question was: Is there a potential for it to happen?

Mr RODEN: Is there a potential that this Committee, for improper motives of its own, will make recommendations to the Parliament that it does not believe are justified? Is there a potential for a judge when sentencing a person to impose a higher sentence because he is black, or white? Of course there is, for anyone in public office. Is there a potential that a police officer will wrongly sell confidential information? Is there a potential that an ICAC Commissioner, because of personal prejudice against an individual, will improperly make an adverse finding against him? Yes. Wherever you give responsibility to anyone there is a potential for it to be abused. But why should there be, in the case of the ICAC, an assumption that there will be abuse when that does not seem to apply to anyone else? The answer to your question is: Yes, there is a potential for abuse. There is in respect of everyone holding public office.

Mr GAUDRY: I was interested in the pursuit of this question but I will ask one question. Would you think that the direction that the questions have been taking would lead to the removal of much of section 13, if we follow that line?

Mr RODEN: It would have to. All the—and I use the word with

apology, if necessary—conducive to corrupt conduct, all the conduct making it more likely, all that would go. It would just be: you go in there, tell us who have been committing criminal offences—and, of course, that is the very thing that Athol Moffitt, says the Commission should not do, and I do not think anyone says it should, anyway.

(The witness withdrew)

(Short adjournment)

IAN DOUGLAS TEMBY, Commissioner, Independent Commission Against Corruption, of [redacted], on former oath:

CHAIRMAN: I received only a short time ago the submission of the New South Wales Bar Association in relation to this particular inquiry. I certainly have not read it. Perhaps I might formally table it for the information of committee members and I will have copies made public. I take it that there is no objection to that. Are there any opening remarks you would like to make to the Committee, Mr Temby?

Mr TEMBY: Yes, Mr Chairman, if I may. The process of scrutiny of the Act under which we operate has involved the Committee seeking views from a wide range of people and organisations in order to stimulate discussion, and that is surely appropriate. It is also appropriate that the Committee recognise and give due weight to the experience of the Commission, over a period which now approaches four years, in considering what changes to the Act are called for, and, accordingly I welcome the opportunity to appear this morning.

To summarise the position so far, the Act passed by the Parliament in 1988 contained the present definition of corrupt conduct in sections 7 to 9. It also contained a requirement that the Commission must include in its reports findings as to whether there was any or sufficient evidence warranting consideration of prosecution, disciplinary proceedings or dismissal action in respect of specified individuals. Those provisions have been there from the outset. They were in the Act that I was called upon to administer.

The Act was amended following the High Court's decision in *Balog and Stait* v. *ICAC* to include the findings regime which is presently contained in it, and most recently the Court of Appeal in *Greiner* and *Moore* v. *ICAC* has interpreted section 9 in respect of Ministers of the Crown and has made some general critical comments about the potential operation of the Act. It is now for the Parliament, assisted by this Committee, to decide what is to be done in response to the Court's construction of the statute. I would wish to stress

strongly that the Court has construed and interpreted the Act. The Court did not purport to and cannot tell the Parliament what the Act should contain. The Parliament should not consider itself bound by the Court's decision, at least in the sense that it is bound to follow such philosophical views as the Court has expressed. The role of the courts is to interpret laws which the Parliament, as the ultimate democratic institution, makes.

From the beginning of the review process there has been consensus on two points. The first is that the Act requires change and the second is that the Commission must be retained as an effective corruption fighting body. I will be pointing out later that, by this stage of the process, there is, as I read it, consensus as to other matters.

Looking ahead, Mr Chairman and members of the Committee, what should the end result of this present process be? In my respectful submission, the Committee must produce a report which contains clear and consistent conclusions on the key policy issues. This review by the Committee should not be and cannot be a drafting exercise. Matters of principle and matters of policy have to be decided first, and the drafting exercise then follows. With respect, it is an exercise which is best left to the appropriate experts. Accordingly, the Commission's submission to the Committee did not deal with the particulars of drafting but rather aimed to contribute to consideration of the questions of principle and policy.

In my remarks this morning I will also be seeking to concentrate on what I regard to be the important areas. To some extent some other submissions to the Committee have devolved into drafting exercises, in one case to a very fine degree. I suggest that that is the wrong approach. Once the Committee has expressed its views in a report, it will then be necessary for government to decide its position, for the drafting exercise to take place, for appropriate amending legislation to be passed, and, ultimately, at the very conclusion of the process, the Commission will take the Act in its amended form and do its very best to administer that Act in a fair and proper manner, as it has always done. Naturally, we hope that the end result of the process

will be something which is clear and workable.

Before coming to what I suggest are the key issues I would like to take a moment to redress some misapprehensions and assumptions which have characterised discussions before the Committee. Firstly, the Commission is not a court; it is not the coroner; it is not an alternative police force. It does not have as its main function the assembling of prosecution briefs to forward to the DPP. Were that the case, it would become an alternative police force with all of the difficulties that necessarily flow from that, including territorial disputes. Close analogies with any of the institutions I have mentioned are bound to mislead.

I mean no disrespect to the courts, but to focus on them and the way they conduct their proceedings as a foil to consideration of the Commission's proceedings does not assist anybody. There has been criticism of the Commission and its accountability in comparison with the courts which has been overly critical in the Commission's direction and, it may be thought, overly sympathetic towards the courts. As you have heard me say time and again, we are a highly accountable organisation and certainly much more accountable than the courts. But, in any event, comparisons between the courts and the Commission are not useful because of the very different functions that each have to perform. As I have said, close analogies are bound to mislead. If such comparisons have to be made, it should be acknowledged that people can be named in court proceedings to which they are not parties. In those circumstances they have no right of appearance and no opportunity to address the court to correct the record, and all of these things can and are done in Commission proceedings. Furthermore, court judgements have a great capacity to be harmful to persons—

Mr ZAMMIT: Could I ask you to repeat the last two sentences in regard to what you said about people who do not form part of the proceedings, that they can be named and have no opportunity to address the court, and so on?

Mr TEMBY: In court proceedings, people who are not party to the

proceedings can be and are frequently named, and they may be dealt with in judgments of the court in a manner which is unfavourable and even harmful to them. They have no right of appearance; they have no right to be heard; they are not heard; they cannot be heard. Examples can be given. A judge exercising civil jurisdiction makes comments which are highly critical of a witness which may be, literally on some occasions, destructive of reputations. There is nothing that person can do about it. That person is simply a witness. Before the Commission they have a right of appearance. They must be heard. I take an example drawn from the criminal law. Frequently there are statements made and publicised in what are commonly called dock statements— the unsworn statement made by an accused person—which may be very damaging indeed to the individual to whom they are directed. There is no right of reply. There is not even a right to cross-examine the individual concerned. I do not think it is useful to enter into these comparisons, Mr Zammit. I say that because the core of what I am saying is that the courts on one hand and we on the other hand have very different functions. They are there to resolve disputes on the basis of stated issues. We are there to minimise corruption in various ways. They cannot do our job, and history proves that. We cannot do their job, and of course do not seek to do so. It is a matter of different functions and, accordingly, a different manner of functioning.

However, it is of some importance to emphasise that the assumption that some seem to make that the courts are paragons of fairness and virtue to everybody and we are in some way not is quite false. In some respects at least we are far fairer than the courts are. Certainly that is true in the way we deal with witnesses. It is my submission that the debate before this Committee has placed too much emphasis upon the courts being the only forum where findings have legitimacy.

The Commission's investigative function is not just a preliminary to other proceedings, whether they be criminal or disciplinary. The Commission conducts investigations which are complete in their own right. They have

terms of reference. They are conducted by and large in public. They are followed by public reports. The closest analogy is that of a Commission of inquiry, royal or otherwise. When such Commissions report their inquiries are regarded as complete and, assuming the report stands up, they are regarded as authoritative. There is no requirement in that case for subsequent proceedings in any court or tribunal to endorse the findings before they are accepted and, as appropriate, acted upon.

In the same way, the Commission's investigative proceedings are complete proceedings. Actions against individuals may follow in the wake of a report, whether they be criminal or disciplinary, where appropriate and where there is sufficient evidence for that to occur. As you know, that is something which we do not dictate or seek to dictate. But the focus is wrong if it concentrates upon what may happen subsequent to the Commission's investigations. Sometimes with respect to a highly successful Commission investigation nothing is done as against individuals following that. Countless examples could be given of highly successful, generally applauded Commission reports which are not followed by action against individuals. That sometimes happens and, where appropriate, it should happen, but it often does not happen. That does not have any invalidating effect.

To concentrate upon the subsequent proceedings is to invert the Commission's functions. Much of the discussion before this Committee over recent weeks has proceeded on the basis that the assembling and furnishing of evidence to the DPP is the Commission's primary function. It is not the case and it should not be the case. Our principal function is to investigate and make findings following the investigation process—findings which are the result of the investigation process. The other is simply a secondary function. That is how it has been from the outset and it is my strong submission that that is how it should continue to be. We cannot be judged as the courts are. We cannot be judged as the police are. The precise reason is that the Commission came into existence because the traditional institutions, police and courts, were proven to be failures when it came to fighting corruption—in

the case of the courts, because it was not their function; in the case of the police, because of the extraordinary difficulty which is faced in pursuing something as covert and insidious as public sector corruption is.

I come now to the key issues which there seem to be at this stage of the process. The first question relates to the Commission's jurisdiction or, if you like, its reach. In my submission it is clear that the Act must contain a description of what conduct or activity the Commission can investigate and exercise its prevention and education activities with respect to. So the first question is that of jurisdiction: how far can we go? There seems to be no debate that we should have a general brief in relation to the public sector and not more narrowly, say, just public servants. It must be accepted—I think some commentators have perhaps tended to slide past this—that there has to be a jurisdictional statement in the Act because the Commission must not become a roving general investigative body. It has no desire to do so. It has never shown a tendency to do so, and we do not want to do that.

It is not for us to roam around saying, "Tut, tut, tut. The moral sense in the New South Wales community is inadequate" or "Dear me, the political process does not stand up to the best scrutiny". It is not for us to take on some sort of wide-ranging role, at the extreme to become a sort of royal Commission into human relationships. That is not our job. We must be more focused than that and the Act must make us so.

There has to be a jurisdictional provision. As at present, we should be limited to the public sector. The definition of the public sector should be broad, as it is. That seems to give rise to no difficulty. There should not be changes made to the sort of conduct we can look at depending upon provisions such as whether the conduct in question was wilful or whether the individual concerned was knowingly misbehaving. They are questions that it might be appropriate to report upon ultimately—probably ordinarily will be—but they are questions that cannot be answered at the outset, and accordingly find no way into a jurisdictional provision.

To introduce a knowledge element, which is one of the matters which

has been pressed on the Committee, would exempt the amoral public official who did not recognise that what he or she was doing was wrong. That must be resisted. You can find examples in our reports of precisely that sort of person. Second—this is again a key issue—the conduct or activity which is to be the subject of the Commission's functions must be broader than bribery or conduct which is otherwise proscribed by the criminal law. To make such a provision part of the statute would be to effect a radical change. It would be unnecessary, unjustified and would serve the public interest poorly. If the Commission's capacity to investigate depended upon a criminal offence being capable of proof, then the matter should be sent to the police to be pursued through the criminal courts.

I do not know whether Committee members realise this but we do that almost daily. Occasionally we investigate and lay criminal charges without hearing and without reference to the police, because of special considerations, typically urgency. But generally, and practically, daily when we get something which may be capable of having a criminal brief built around it we simply send it to the police. It is their work. I hope the point I am making is clear: you cannot put into whatever jurisdictional test is important in the statute a requirement that a criminal offence can be made out, because if you did that there would be no work for the Commission to do; it would all be work properly to be done by the police and the courts. It would ignore the fact that there is a much wider range of work which necessitated the Commission being brought into existence in the first place.

Even if in some way, for some reason, it was not sensible to send it to the police, if there had to be a criminal offence committed before we had jurisdiction, then we would have to conduct a preliminary investigation as to whether a criminal offence could be made out, which would be clumsy to a bizarre extent. If the Committee wished to cripple the Commission there would be few more effective ways than defining jurisdiction solely by reference to criminal proceedings. If there be doubt as to serious public sector misconduct which goes beyond the criminal, then I refer committee

members to the various examples contained in pages 6 to 8 of our prepared submissions, which were lodged at an early stage. There is a whole series of examples given of misconduct, taken from Commission reports, which was not criminal in nature but which anybody would agree was conduct of the sort that should be exposed. Other practical examples could be given and countless notional examples could be given.

The next key submission—this is the third of them—is that the Commission must have the power to investigate all public officials as presently defined, including Ministers of the Crown, members of the Parliament and so on. This was the original intention of Parliament and in my respectful submission Parliament must renew and restore that intention. If that does not happen, there will be a loss of public confidence in the Commission, and perhaps also in Parliament and Government. Everything must be done by all of us to emphasise, and where necessary restore, confidence in public institutions.

That does not mean that those I would call constitutional office holders, those who can only be sacked by the Parliament, should necessarily be dealt with in a procedural sense in just the same way as other public servants are. In particular, it is for the Parliament to decide what conduct is appropriate to justify sacking a Minister or a judge or getting rid of one of its own number. Those are decisions which Parliament must make. We are ever mindful of the fact that members of Parliament are elected and we are not. Accordingly, it would seem appropriate that with respect to those constitutional office holders the Commission should report conduct and leave it to Parliament to decide what consequences will flow. Exactly how that is worked out depends upon the extent to which we are obliged to make findings. If the obligation to make findings or to recommend criminal proceedings or disciplinary proceedings remains in something like its present form, a case could be made out for an exception to be made in the case of constitutional office holders. If, however, the Commission is to be freed from the obligation to make the findings it must presently make, which Parliament presently

requires it to make, then no such difficulty would arise. I imagine anybody, present or future, writing a report concerning constitutional office holders would see it as being appropriate to report the facts to Parliament and leave it to Parliament ultimately to make judgments as to what consequences would flow.

My fourth key submission is that the Commission must have the power to report and make findings of fact beyond what are sometimes called the primary facts, even if on the facts as reported the conclusion may be available that a criminal offence has been committed. As I have said to this Committee in the past, the Commission has no desire to substitute itself for the criminal courts. It has no desire to make findings of criminal misconduct, and never has had. It is not for us to find guilt or otherwise. It is not for us to punish. We do not do those things. But it is submitted that we must have the power to describe the conduct investigated in ordinary language, as Commissions of inquiry do. I wish to make available to the Committee a four-page document which contains extracts from the report of Mr Justice Moffitt, as he then was, sitting as Royal Commissioner in respect of Allegations of Organised Crime in Clubs. That report was dated 1974. The learned judge expressed himself with respect to individuals in language which was plain; it may be thought even forthright. I do not say that critically. I make the point that what we are describing as the making of findings in plain language—

CHAIRMAN: Do you have any objection to the document you have tabled being made freely available?

Mr TEMBY: No. I do not want to give the impression that I have a burning desire to castigate individuals in extravagant language. For my part I believe that, if reports are to stand up and if the public are to have confidence in them, they must be expressed in language which is restrained. The word "judicious" comes to mind. The language used ought to be balanced. I hope that is the view which is held with respect to Commission reports generally. I know some individuals who have been adversely mentioned have

taken a contrary view, but I think as a general proposition they are accepted. So I am not urging the use of extravagant, flowery or pernicious language.

Mr ZAMMIT: In what way did you mention individuals?

Mr TEMBY: I referred to individuals who had been adversely mentioned.

Mr ZAMMIT: You then went on to say that it has been generally accepted. Accepted by whom—by individuals or by the Commission?

Mr TEMBY: No. I accept some individuals who have been adversely mentioned do not applaud the reports, their findings, or the way they are expressed.

Mr ZAMMIT: You then went on to say that they were accepted. By whom?

Mr TEMBY: It is my belief that the reports we have published have generally refrained from using extravagant language. We have generally refrained from taking a pugnacious approach and the reports have had the necessary support.

Mr ZAMMIT: You said they had been accepted. Could you expand on that? What do you mean when you say they have been accepted? Do you mean to say that those people who were mentioned in the reports in a derogatory way have accepted that?

Mr TEMBY: No, I am not saying that. I am saying that there are doubtless some who do not, and that is understandable enough.

Mr ZAMMIT: You said generally accepted?

Mr TEMBY: As best as we can judge it, generally speaking our reports have been accepted as being balanced and authoritative.

CHAIRMAN: Would you prefer to complete your statement or are you happy for Committee members to interrupt?

Mr TEMBY: I do not mind.

Mr GAUDRY: Is the paper you have tabled in the style of Commission reports or is it a comment on Mr Moffitt's submission to us?

Mr TEMBY: We are urging that the Commission should not be

restricted in the language it can use with respect to the conduct of individuals which, on investigation, is found to have occurred. We should remember always that individuals have to be heard and all the rest of it. Having heard the evidence and having reached conclusions the Commission should state those conclusions using ordinary language for the purpose. That document has been placed before the Committee simply to show that there is nothing novel in what we are suggesting. It is how it has always been so far as Commissions of inquiry are concerned.

Mr ZAMMIT: It is usual for opening remarks by any witness to be short in nature. It is hard to absorb any document that runs to 10, 12 or 16 pages. If that is to form part of your evidence it should be submitted to us so that we can read it and absorb it. I do not like interrupting because it takes up time and delays the process. However, I, and I am sure every other Committee member, will not be able to remember when you are reading from page 16 what you read out on page 2.

CHAIRMAN: How long is your statement?

Mr TEMBY: I am more than halfway through. Let it be said that I am trying to summarise that which is in the paper which we put forward. I do not think I have said anything new today.

CHAIRMAN: I understand that you are happy, if Committee members want to seek clarification, for that to happen while you are reading out your statement?

Mr TEMBY: Certainly. The only other point to be made is that the suggestion that we should be confined to what are called findings of primary fact is, in my considered view, unworkable. We do not want to make what are called ultimate findings—findings of the guilt of a criminal offence. We do not particularly want to make findings of corrupt conduct. But we have to be able to reach and state conclusions about the conduct of individuals, just as we have to be able to reach and state recommendations with respect to legal or administrative reforms. If we were not obliged to state that consideration should be given to prosecution action—which we have always been obliged to

do—I imagine that frequently we would refrain from doing so.

The next point which can be expressed in two sentences is that the findings which the Commission can make should, it is suggested, be specified in the Act for certainty and to avoid unnecessary challenges to findings. There is no point in having a Commission which is being dragged off to court all the time because of some arguable confusion as to what it is about. That is not to say that there has to be in the statute a long catalogue of the findings that are appropriate or that can be made. It is to say that the Act has to be formulated in such a way as to not invite another challenge as in *Balog* and *Stait*. That challenge was based on the fact that the Act did not state clearly what we could do and how far we could go.

Finally, it is submitted that there should not be a full right of appeal from Commission investigations. The first point is that Commissions of inquiry have never been subject to appeals as to their finding—that is the closest available analogy—nor is an Ombudsman or company inspectors who make reports.

If there was to be an appeal it would raise a series of questions which really cannot be answered. Is it to be by way of rehearing or is it to be conducted on the evidence in the Commission hearing? If it is to be by way of rehearing would the same witnesses and evidence be called? By whom would the witnesses be called? Would the Commission be a party to the appeal? Is it appropriate for the Commission to be a party defending its own findings? At least some doubt exists as to that. But if not the Commission, then who? There has to be a contending party. Who would contend against the appellant—some other State functionary? I suppose that is not impossible, but is highly undesirable and can hardly be appropriate. The Government of the day may well be greatly inconvenienced by an ICAC finding and have every reason to wish to throw in the towel. So there is something awkward about the Commission as an investigative body only—not a court—defending it own findings. But I cannot imagine who else would do it. If the appeal was to a court, as presumably it would be, the strict rules of

evidence presumably would apply. But, of course, they do not apply for the Commission and for good reason.

What standard of proof would the court apply? If the appeal was by way of rehearing the court could, even if hearing the same witnesses, form different views about evidence and credibility. Witnesses could give different evidence from that which they had given at the Commission hearings. If that happened or if the court heard different and further evidence the court would be conducting quite a different inquiry from that which the Commission had conducted. If an appeal was conducted on the papers the court could not form views about the credibility of witnesses and the reasons for preferring some evidence over other evidence. The Committee must not overlook the potential for mischievous litigation. A full appeal from each investigation of the Commission has the potential to debilitate the Commission in its functioning. Having thought about this to a considerable extent I am of the view that the practical difficulties are enormous and, in principle, the law confers on those who wish to challenge Commission findings the right of judicial review on the ground of excessive jurisdiction or denial of natural justice. Of course, that is essential. It is that right of review which the courts have created and seen as being adequate for the purposes of a body such as the Commission and it is submitted that nothing more should be granted.

The rest of what I have to say relates to subsidiary questions such as contempt, search warrants and so on. Perhaps I can leave those matters for Committee members to raise with me. In summary, the jurisdiction of the Commission must be controlled. The present section 8 neatly suffices for that purpose. If it is to be a jurisdictional provision section 9 is unnecessary. Jurisdiction must not be confined to criminal misconduct. The Commission must retain the power to examine the conduct of those I have called constitutional office holders. But in relation to them it would not be appropriate to recommend consideration of their dismissal; that should be left to the Parliament. Judicial review of Commission decisions is sufficient.

That is all by way of opening. Can I say that I have at some stage over the last few weeks read all of the various submissions that the Committee has received. There is a bundle of material, as you know better than I do.

CHAIRMAN: It is growing.

Mr TEMBY: It is growing. I would prefer, if it suits the Committee, to leave it on the basis that whatever you think might have merit and you would be advantaged by hearing from me on will be raised, rather than have me go through at length all of the various submissions. I do not want silence to be taken as acquiescence in the force of any submission that anyone has made, because there is much in some of the submissions with which I disagree. But we would be here an awfully long time if I had to argue against everything.

CHAIRMAN: I think you said—and correct me if I am wrong—that the Parliament should not be bound by the philosophical views expressed by the Court of Appeal in the Greiner matter. What is your interpretation of those philosophical views? What do you say they are?

Mr TEMBY: I detected in the decision of the Court of Appeal a preference for the courts and their procedures as against the Commission and its procedures, when it comes to considering questions of the sort which was under consideration in the matter that the Court of Appeal had before it. That is the first point. That is, of course, wholly unsurprising, given where they sit. I do not know. I would need to go back and read it more closely again. You might not share my view, but it seemed to me that there were some philosophical underpinnings there. The important point is that the court was construing and interpreting the statute, and that is the exercise that they had embarked upon. Obviously the Parliament's power to decide what job it will give to the Commission remains untrammelled by whatever the court might have said.

CHAIRMAN: Perhaps it is a question you might like to take on notice after you have read the appeal. You can see why it would be relevant to this inquiry?

Mr TEMBY: I do not know that my views are particularly relevant to this inquiry. To the extent that there are philosophical views expressed, I am no better fitted than anyone else to point them out. To the extent that they are there, you are not bound by them. That is the point I am making.

CHAIRMAN: I was wanting to get further particulars in relation to what they are, so that we can be clear as to what they are. In any event perhaps, I might go to another matter, and that is in relation to the dismissal of members of Parliament and Ministers. You have indicated that you do not think the ICAC should make a recommendation in that regard. Would that not leave the matter back in the political arena, for whoever has the numbers at any point of time?

Mr TEMBY: I suppose that depends upon your degree of cynicism. There are certainly, I believe, instances in which the Parliament in considering the conduct of members has not behaved in that way. I think if you examined history, it would show that.

CHAIRMAN: Not behaved in that way, in what sense?

Mr TEMBY: Has not behaved in a party-political sense in deciding who should remain fully functioning members of Parliament. I do not think that the Alexander case was handled in that way, although I do not pretend that I know the history of that in fine detail. I do not think the Mochalski case was handled in that way. With respect, I think it is an unnecessarily cynical view to assume that it would happen as you have said.

CHAIRMAN: I did not say it would. I said that was an argument.

Mr TEMBY: It is an argument that I would want to resist. It seems to me that there is every reason why, with respect to some classes of public sector officials—I do not say public servants, but public sector officials—it should be for the Parliament ultimately to decide. The case for that to happen with judges is, I would have thought, strong; similarly so far as members of Parliament are concerned and probably so far as Ministers are concerned. If that is right, the question is: how does the Parliament get informed as to the facts upon which it is going to make a judgment? That is a

problem that has plagued parliaments from time to time. You might remember it was very much a problem that plagued the Federal Parliament in the case of the late Mr Justice Murphy. I think there were three committees of inquiry convened. It was not a satisfactory process. A more satisfactory process was that which was followed in Queensland in the case of Mr Justice Vasta, where a committee of inquiry was established to report to the Parliament the facts as found. That is the sort of role that the Commission could adopt, and if it was not obliged to make findings, I am sure it is a role that the Commission would adopt, because the argument for not purporting to tell the Parliament what to do is surpassingly strong.

Mr HATTON: A supplementary question. I have not given this question a great deal of in depth consideration, but would you consider that a rule of thumb is that where an official is elected by the body politic, or where an official is appointed by the Parliament and dismissed by the Parliament, as defined in an Act of Parliament, then the fate of such an official should be determined on the facts by the Parliament?

Mr TEMBY: Yes. I think we agree, but let me put it in my words. If the Parliament has the power to dismiss, that is a power that should not be arrogated by others. It should be left to the Parliament. But there is a contribution to be made in providing the Parliament with information upon which it can exercise that judgment.

Mr HATTON: The Parliament as distinct from Executive Government?

Mr TEMBY: Yes. It cannot be right for Executive Government to sack judges, because from time to time judges have to make decisions that displease Executive Government. That is precisely the reason why Executive Government appoints, but only Parliament can sack. It is true, incidentally, with respect to ICAC Commissioners.

Mr TURNER: Following on what you said to the Chairman about Parliament being the ultimate to decide, and you used the example of Mochalski to show that parliaments do not necessarily have to operate on the numbers. In the latest matter of Mr Greiner and Mr Moore, there is no doubt

that the numbers did count. Parliament was not the ultimate body that made a decision in respect of those gentlemen. In fact they were not even allowed to put their cases to the Parliament because they were told that a no confidence motion would be moved and the Government may or may not fall.

Mr TEMBY: I understand that, and you will understand that once I had reported I did not seek any power in the process thereafter.

Mr TURNER: But it follows that in some instances the numbers will count and Parliament will not be the ultimate determiner of the conduct of a member of parliament. How do we get over that? How do we ensure that Parliament is the ultimate determiner and that the will of the Parliament will be listened to, rather than a minority group?

Mr TEMBY: I do not know that I can answer that, because frankly I lack the expertise. You know how the political process works in a practical way, as I do not. So I do not know that I can really answer that question. I run the risk of repeating myself, but all I can say is that there are some whose fate ought to be determined by the Parliament and a process needs to be put in place to enable the Parliament to have a factual basis for the making of that determination. Presumably, if the process does not then run in some orderly, settled and sensible fashion, if there are those who feel that what has been done is in some sense unfair, then the people will speak.

Mr TURNER: In this instance the people were denied the opportunity to speak. We are getting down to the basis of democracy emanating from a decision that you made. The ultimate determiner, I believe, in relation to Acts of Parliament are the people.

Mr TEMBY: Yes.

Mr TURNER: We did not even get to that level. There were some of us who may well have gone to an election on that issue, but we were not even allowed that.

Mr TEMBY: As I say, I had no control over the process after the report came down, and of course I did not seek any control over the process thereafter. It was clear that the report was suggesting that it was ultimately

a matter for Parliament.

Mr HATTON: It is also clear that the electorate could have decided, if the Executive Government had decided.

Mr TURNER: I am not having a slanging match with you, Mr Hatton.

Mr HATTON: I was just making the point about the people deciding. The people could have ultimately decided through an election.

Mr TURNER: This is a question and answer session rather than a debate.

Mr TEMBY: I do not want to buy into that.

Mr GAUDRY: There would be nothing in the Act that would cause you to have to take those matters into consideration in any hearing or report?

Mr TEMBY: Nothing in the Act as it is?

Mr GAUDRY: Yes, as it is.

Mr TEMBY: Yes. The difficulty is that at the moment we have to indulge in the exercise that some call labelling. So at the moment, because we are obliged to conduct our investigations with a view to determining whether corrupt conduct has occurred, we have seen it necessary to say so in relation to individuals; not with any great pleasure, but that is how we interpreted our own statute. We are obliged to make recommendations for prosecution, disciplinary or dismissal action. We are obliged to do so. To achieve the point that I want to get to—I am sorry, I do not matter—to achieve the point that I am suggesting is correct in principal, statutory amendment would be necessary.

Mr GAUDRY: To remove that?

Mr TEMBY: That is right. If you took away all obligation to make ultimate findings and recommendations as to what should be done with respect to individuals, if you took away the obligation to do that and left it as a matter of discretion, which is our preferred position, you would not have to say anything more about these constitutional officeholders, because it would clearly be appropriate to refrain from saying that X should be thrown out of office in circumstances where the fate of X rests with the Parliament. The

only sensible thing to do would be to find the facts and pass it over to Parliament.

Mr MUTCH: Is that not superficially attractive because, though it is a good idea not to label people corrupt, as it has a criminal connotation to some extent, you could still say that. Unless you are being very judicious, and what is to say you will be judicious, are you not saying that you can call anybody anything, so long as it is not "a finding"—but it could equate to a finding in the mind of the public?

Mr TEMBY: That might be right. In the end, ultimately, there has to be faith by the people and the Parliament, in the institution, or it should not be retained.

Mr MUTCH: Then again, if it really affects someone's rights and you are making a finding based on facts, there have been criticisms in the Industrial Commission about that insufficiently meticulous investigation of the facts and so forth. There can always be criticisms in different matters before the Commission. Should not the person whose livelihood, whose job and whose reputation in the community will now be seen to be criminal, or whatever, have a right to an appeal if there is that sense that it is equated to a criminal act?

Mr TEMBY: Yes, although you have got to remember that the appeal to the Industrial Commission was not against the Commission's decision. It was not an appeal. The application to the Industrial Commission was in respect to a decision to terminate employment. As it happened, that termination was carried out in a way that did not give the individual a right to be heard and the natural consequence flowed.

Mr MUTCH: You are really saying in that case there should have, under normal circumstances, been a right to a re-hearing—even before another body?

Mr TEMBY: I am not saying that at all. I am saying something quite different. That was in no sense an appeal against our report. It was an application to the Industrial Commission for reinstatement in employment

following termination. The Industrial Commission had a different function than we did and the case went off on a completely different point. The case went off against the employer because the employer had not given the employee a hearing. We had given the employee a hearing.

Mr MUTCH: But did the employer not rely on your hearing?

Mr TEMBY: I do not know, but I cannot be made responsible for what these people do. The fact is that they decided to sack without conducting a hearing. You cannot justify it.

Mr MUTCH: In that case there is a chance for the person to contest the facts that might be found in the ICAC; so really there is a de facto obligation for a rehearing in that sort of circumstance relating to employment.

Mr TEMBY: I do not think it was a rehearing because it was on quite a different issue. We did not have to decide whether the individual concerned should continue to be employed; we had to examine and report upon the conduct. The employer had to decide whether the employment should continue, decided adversely and in a manner which denied natural justice—they are two different cases.

Mr MUTCH: In a case where employment is involved there could well be a chance for that person to vindicate himself before another body.

Mr TEMBY: I do not think vindication is a very good description of what has happened in that particular case. You cannot read the Industrial Commission's decision as other than deploring the conduct of the individual concerned.

Mr MUTCH: I am more concerned with the principle that the individual has the right to contest the facts as found by the ICAC.

Mr TEMBY: Well, no, he did not have the right; he did not contest the facts, he applied to the Industrial Commission and was reinstated because the way in which the employer went about sacking him denied him natural justice.

Mr MUTCH: But if he had not been denied natural justice by the employer he would have had the chance to recontest the facts. I am also

concerned about someone who does not have that chance.

Mr TEMBY: That might be right, but you are assuming that the Industrial Commission disagreed with us.

Mr MUTCH: No, I was not making any assumptions about what you found. I am saying there is a chance that your findings can be incorrect; can be based on insufficient evidence and so forth.

Mr TEMBY: There is a chance that any findings can be—

Mr MUTCH: The problem is that it affects someone's reputation in the community. People say, "this person is a crook" because the ICAC has made findings, even if they are not specific findings under the Act; you can make ad hoc findings and say anything you want and your proposal, in that the person does not have a right to—

Mr TEMBY: That is not right if you understand the law of excess of jurisdiction. A finding that was made without any factual basis would be a finding in excess of jurisdiction.

Mr GAY: That is referring back to the law.

Mr TEMBY: That is right, it is called judicial review and I have no difficulty with it. Traditionally, to bodies like the Commission, judicial review has been the remedy that has been available. I do not go further and say, "judicial review should be precluded" and you know that this Parliament has passed Acts that preclude even judicial review, but I do not say that. But I do say that what has traditionally been given in the case of bodies like the Commission is judicial review. That has always been seen as adequate for Commissions of inquiry. Why are we different?

Mr GAY: You were in the room for most of my conversation with the previous witness, Mr Roden, and my concern is that if we go back to the basic law in this instance and look at the basic law in other instances, the basic law means that if something is lawful it is lawful and if it is unlawful it is not. Yet, with the compulsion at the moment on a finding of corruption, we find the possibility of a penalty being imposed on something that is lawful.

Mr TEMBY: With respect, I wonder if that is not simplistic. It is

certainly necessary to be very careful of the language we use. For example, when you say that something is unlawful or it is not, it sounds as if you are talking in terms of the criminal law. The law comprehends many things which are not illegal. To give an example, the law recognises that there are circumstances in which an employee may justifiably be dismissed from employment even if the employee holds a statutory office of some sort or holds a contract of employment for a defined term. The law recognises, first, in the case of public servants by saying they can be dismissed or disciplined for improper conduct; that is not further defined, that is a standard recognised by law. That is, at least in a sense, unlawful conduct because the conduct is visited for consequences that the law recognises. In the same way the law says that if I am employed by you for a fixed five-year term and I tell untruths about matters of central significance you can sack me. That is law which is stated in more than one of the Commission's reports. That is the law speaking. But I do not know if it comes within your definition of unlawful conduct.

Ms BURNSWOODS: I just wondered whether in the Metherell investigation the terms of actual parliamentary reference caused any problems or whether if it had been worded differently it might have overcome any problems?

Mr TEMBY: I am reluctant to say too much about the investigation or report in that or any other case because I think these reports have to, as best they can, stand up by themselves but I think that is a question I can answer without going too far. The terms of the reference were unsurprising and seemed appropriate at the time they were agreed upon, because they simply reflect the Act. It would have been possible for the parliamentary reference to be one which required the Commission to find and report facts and, in retrospect, I can see that may have been preferable.

Ms BURNSWOODS: My interest was in a retrospective judgment. I know at the time it was—

Mr TEMBY: I can see now that that may have been a better way for it

to be done because we did get ourselves into difficulties about section 9; the difficulties were clear enough on the face of the report, it did not need the Court of Appeal to say that there were difficulties and they would not have arisen if the obligation on the Commission was simply to find and report facts. So that might have been a better way to do it.

Ms BURNSWOODS: And yet I wonder whether, given what you and others have said about the need to report findings of fact which go beyond what people call primary fact, in the long run there is really much difference between the kind of statement that is made there and—

Mr TEMBY: Again, that is a judgment which you would be better able to make than me because you are part of the political process. I have heard it suggested that the label is of critical significance and it may have been, and if we were finding simply facts the label would not have been affixed. But the Act required it to be done.

Mr GAY: Just on that label, is it significant that subsequently when Mr Fitzgerald and others set up the Criminal Justice Commission and looked at ours they decided certainly not to use that particular label?

Mr TEMBY: I do not know what the answer is to that but there are two questions. One is: should there be a labelling provision of any sort? We say preferably not. The second separate question is: if "yes" then what should the label be? As to that second separate question, Committee members may find advantage in looking at the recent Western Australia Royal Commission report. The standard there adopted was improper conduct but unhappily that phrase was not defined for the Commissioners nor was it defined by the Commissioners and accordingly it is difficult to examine the judgments the Commissioners have made and form a judgment as to whether the labelling that they were required to embark upon was a proper one. Do I make myself clear? There is nothing in statute or terms of reference that said what improper conduct was and there is only one way to read the report. They said things about it: it has to be grave, mere negligence would not suffice, but they deliberately refrained from defining for themselves what it was and

accordingly their findings or labelling becomes unexaminable. That is not defined. But you might find it useful, particularly paragraphs 1.6.50 and following and 1.5 and 1.6. I cannot be more precise, I do not have the actual report with me. You might find it illuminating, but the important thing is that there are two questions.

Mr GAUDRY: Returning to the Industrial Commission's findings, I am wondering whether there has been, in your corruption prevention role, communication with that employment body in terms of the fact that they appeared to me to use a finding of the Commission as an actual judgment and then acted upon it without going through their own procedures.

Mr TEMBY: I do not know that we have talked to them. I have not done so and I do not know that we have done so down the line. There should not be any need to do so because the error of their ways has been very clearly pointed out. Others have done like exercises perfectly. The Roads and Traffic Authority, following the Driver Licensing report, did the job exactly as it had to be done; a whole series of decisions that were made have been upheld. It is not that difficult.

Mr GAUDRY: No, it is not, but I am wondering whether it points once again to a misinterpretation of the Commission's role?

Mr TEMBY: Perhaps it does. It is disappointing if it does. I cannot tell you whether there has been communication but it should not be necessary because they have been, one would have thought, adequately chastised.

CHAIRMAN: You have not had any communication with South Sydney Council?

Mr TEMBY: No, that is not right. We might be at cross purposes. I thought you were talking about the Water Board matter.

Mr GAUDRY: No. South Sydney Council went to the Industrial Commission and had it overturned.

Mr TEMBY: You are right, because the other matter went to GREAT. Sorry, I should have said when I was talking just now to Mr Mutch that I was talking about the Water Board GREAT decision. So far as the South Sydney

matter is concerned, yes, we have had discussions with South Sydney Council including a discussion I had with the Mayor, at his request, in which I sought to make clear that we had performed a function, they had a different function to perform. Nothing in our report could tell them what to do and we were not seeking to tell them what to do. They had to decide what was the right thing to do according to their obligations as an employer and, as I recollect it—and I am not quite clear of the time—that meeting was held after the Mayor had been quoted as saying something to the effect of, "what choice did we have?" and my answer was to make clear they had a choice. We did not make them sack the men and again so far as that decision was concerned you will understand that the finding, which was strongly adverse to the named individual, was not overturned because the Industrial Commission saw quite strict punishment as being appropriate, the loss of a third of a year's pay, and there was no room for doubt as to the seriousness of the misconduct in question.

The Industrial Commission said it was not enough to warrant sacking; the employer had said it was and the matter is now before the Full Bench but that is something we have not got into. It may be better if we do not say in reports that consideration should be given to sacking because when we say that people think we are saying, "sack the man"—which we are not, but people think we are—and then when an industrial Commission decides in a way which does not support the employer, it somehow seems to be some sort of a loss suffered by the Commission.

I am very clear in my mind that, on a proper analysis of both the GREAT decision and the Industrial Commission decision, that is not the case. But it may well be better—in fact, it is my submission that it will be better—if we are not obliged to make the section 74A(2) statements, as we now are. It might be that sometimes we should, so perhaps we should have the discretion, but probably generally it will be better if we do not. We have all the power necessary under section 14 to convey views to the employer. We report conduct in what we call plain language and then we write to the

employer saying, "We draw your attention to this", and express such views as we will—which is something we are entitled to do under section 14, in any event. I am sure we would always make clear that the decision is to be theirs.

Mr GAUDRY: I submit that if the Mayor of South Sydney Council can form such an opinion, many others in the community would do so as well. That will be dealt with by amendments to section 74, but it certainly points to the fact that many in the community misinterpret both the role of the Commission and its method of operation.

Mr TEMBY: I understand that and in that respect I think some in the media have not been helpful because time and again, despite best efforts, what we say under section 74A(2) is converted into a recommendation for prosecution. We all know we just cannot do that, but time and again that is the way it appears. It may be better that that be left for formal communication, and not form part of a public report perhaps.

Mr GAUDRY: Under that section?

Mr TEMBY: That is right.

CHAIRMAN: May I just clear up one matter. Taking the Metherell inquiry by way of example, if the ICAC had applied the term "corrupt conduct" in its ordinary meaning to an individual but, for the purposes of argument, made an error in doing so, that would have been beyond the reach of the prerogative powers of review?

Mr TEMBY: I suppose if the evidence was there, the answer to that question would be yes.

CHAIRMAN: The premise was that a factual error had been made.

Mr TEMBY: I suppose that is right. I do not know that we would ever, in a practical sense, get to that situation because we are not obliged to label.

CHAIRMAN: But you were obliged at that time?

Mr TEMBY: Yes, we were but if we were not obliged to label, I do not know that we would.

CHAIRMAN: If you had discretion to do so and you did, it would be

beyond the prerogative power of review?

Mr TEMBY: If the evidence was there, yes. You are postulating. You have to postulate that the evidence was there but somehow we got it wrong. You are into some fairly extreme postulance.

CHAIRMAN: It is only speculative, that is all.

Mr MUTCH: In relation to that, in the Horiatopolous case there were some factual mistakes made about addresses and so forth. That is really an example of exactly what could happen. You could just make an error and, because of the way that evidence is obtained by the Commission, perhaps there is more likelihood of that sort of error being made than in a court of law.

Mr TEMBY: No. If anything, there is less likelihood. It is always unfortunate when it happens and we have had the good grace to correct it in the annual report. We cannot do much more. Of course it is unfortunate and of course we cannot claim to be error-free, but it is less likely to happen than before the courts. We try our very hardest to ascertain and record the truth, which as the Committee would know is not the function of the courts, which have to proceed on the basis of the pleadings even if those pleadings depart from objective fact.

Mr ZAMMIT: I would like to touch on the philosophy of the Commission, leading to the possibility of a preamble to the Act, and then touch briefly on the Metherell diaries. My impression, and I am sure it is not correct, is that when the names of members of Parliament or the names of elected officials come before your staff, there is great glee and the wringing of hands. I want to ask whether your staff have been instructed—or would you consider instructing your staff—that members of Parliament and elected officials are not corrupt? I have been involved in politics for a long time now. I have been a member of Parliament for almost nine years and can say with truthfulness that I have never ever met anyone who was an elected official who was corrupt, in the criminal sense.

I wonder whether you would be willing, if you have not already done so,

to instruct your staff that all members of Parliament and all elected officials, by and large, are not corrupt? Secondly, have your staff ever spent any time working with a member of Parliament or an elected official in the line of duty—that is, spent a day or even a week, which would be preferable—with a member of Parliament, to get a better understanding of the role we play and the type of people we come into contact with in our everyday lives?

Mr TEMBY: Some members of our staff have spent long periods working with senior politicians. We have a member of staff who was on the personal staff of Mr Peacocke for a long period—I do not know quite how long, but a long period; we have a member of staff who was on the personal staff of Mr Carr, again for a substantial if not a long period. There may be other examples. I believe there are other examples but the two come immediately to mind.

Mr ZAMMIT: Could I ask whether they are administrative people or investigative people?

Mr TEMBY: They both work in the corruption prevention area.

Mr ZAMMIT: In the administration or the investigation?

Mr TEMBY: Corruption prevention is not really either of those things. They are corruption prevention officers; they are not just support staff. I have detected no shouts of joy when the Commission receives a complaint against a serving or past politician. I think if there were any I would be aware of them. Although I am not omnipresent, I think if that were the case I would be aware of it. If anything, the contrary is the case—certainly at senior level—because to get into such matters is rarely either easy or pleasant. If anything, there is a sense of, I suppose, some regret and foreboding when such matters come up. The Committee will, I am sure, understand that the number of allegations we have had concerning present and past politicians is distinctly greater than the number of investigations which the Commission has pursued in relation to them. That is how you would expect it to be. Most of the allegations were without substance. It depends how far you go with your preliminary inquiries. They were either without

substance or appeared on examination to be essentially trivial and the Commission does not necessarily take them beyond that point.

There is no need for me to instruct staff as to the essential honesty of the majority of politicians. There is no need for me to do so because they know that most of the complaints we receive are devoid of substance. I do not know how I can effectively do that because I cannot direct people how to think. I can make clear that there is no prejudice or bias, whether favourable or unfavourable, towards elected officials. That is clear to all staff, because it is an approach which suffuses the place. We are unbiased. We have to be and everybody knows it.

Mr ZAMMIT: Are you saying that that view does not need to be reinforced?

Mr TEMBY: I do not believe it needs to be reinforced. I do not believe there is a contrary view which is in the air over there. If you think that or if any of your colleagues think that—and perhaps you would not be asking the question if you did not—that is certainly unfortunate. If there is something we need to do to persuade you or any of your colleagues that the impression you have is wrong, I would like to talk to you about what we can sensibly do. It may be that there are things we can sensibly do but I cannot tell people how to think.

Mr ZAMMIT: I am not saying you should, far from it. I did not imply that. What I said was: would you be willing to instruct your staff along the lines that I have mentioned, because the impression amongst members of Parliament and elected officials is that there is an "out to get them" attitude at the Commission.

Mr GAUDRY: That is a personal opinion.

Ms BURNSWOODS: An impression among some members of Parliament.

Mr ZAMMIT: My view.

CHAIRMAN: Mr Zammit, you only speak for yourself.

Mr ZAMMIT: Yes, I speak for myself. All right. You do not believe

there should be a preamble to the Act that says something along these lines, and I am paraphrasing, that elected officials are seen by and large to be beyond reproach and of a very high standard?

Mr TEMBY: No. Let me say clearly that I have no doubt about the standards of and instincts for propriety of the very great majority of elected officials of this State, present and past. I do not believe there is room for serious doubt about that. On the other hand, exceptions can be found. We all know that. Exceptions can be found in this State and at the Federal level. They can be found in every State and Territory of the country. To start with a prima facie rule which says that you leave the politicians alone—which is how such a preamble would be construed—would be a very negative thing.

Mr ZAMMIT: I said by and large.

Mr TEMBY: Because I would want to say the same thing about public servants; I would want to say the same thing about members of boards appointed by executive government. Of course they are mostly honourable but occasionally some of them are not. We know that. Otherwise the Commission would not be churning out reports. Occasionally some of them, whether elected or not, are simply crooks. There is no getting away from it. One can go back in history. There are some that history would judge to be crooks, although they were never convicted of any crime.

Mr ZAMMIT: By and large I have your assurance that the good name and reputation of all elected officials is going to be protected, to the best of your ability, by your staff?

Mr TEMBY: Yes, of the great mass of them. Let me add one other comment. The decision whether or not to investigate—that is to say to conduct a full investigation with hearings—is one that is made by myself. Accordingly, in the end it is the Commissioner you have to be concerned with. The important thing is to have faith in the Commissioner and to put in place selection procedures so that with respect to future Commissioners that faith will continue. For my part—and I have said this earlier today, so it is easy to say it again—I believe it is of prime importance that people generally should

have faith in the organs of government and in their elected members. To the extent that there is a certain amount of public distrust of politicians,—and I think there is— in this country it is excessive.

Mr ZAMMIT: I am pleased to hear that. Let us turn to the Metherell diaries. You said in your remarks that the role of the Commission was to root out or seek out public sector corruption. You said, "We are not the courts, we are not the Parliament, we are not the government. The courts and ICAC have different functions. In the civil and criminal courts people can be named with no right of response" and I think you said "frequently" and I am not sure that I agree with you that it happens frequently.

As regards the Metherell diaries, do you see your role as being different to civil and criminal courts? Names were mentioned of people who had nothing whatsoever to do with what was occurring, and yet those names were allowed to be mentioned. It could well be that not just Dr Metherell but someone else may have kept diaries that said certain totally false things about elected officials. At what stage would you have said, "This has nothing to do with this particular matter, and I will not allow these names to be bandied around"? Again there is no recourse for the person mentioned to be able to say, "Let me cross-examine whoever it is who may have said these things". You are talking about confidence in ICAC and then you are saying at the same time you have confidence in the elected officials, and yet you allow those names to be sullied in the press and if any of us dared to say anything you would cite us for contempt.

Mr TEMBY: Oh, Mr Zammit! That is false.

Mr ZAMMIT: I speak from personal experience. My name was mentioned.

Mr TEMBY: And you were heard. You were heard not before the Commission, but as I recollect it you said something—

Mr ZAMMIT: I had to defend myself. It is the same as my saying—

Mr TEMBY: We did not cite you for contempt. It really is a preposterous suggestion that we would cite for contempt somebody who was

saying something by way of defence of their situation—preposterous.

Mr ZAMMIT: Do you draw a distinction between a person's name being mentioned and that person having to defend his or her name in the press, and do you draw a distinction between that person then saying, "Why did they do it? They should not have done it"? Would you have then cited me for contempt if I had accused you of incompetence or negligence?

Mr TEMBY: On the basis of our track record, you know the answer to be that we would not have done so. We have proceeded by way of contempt, as memory serves me, twice only, once against a witness who had refused to answer questions and was dealt with and once against an individual who made statements in our judgment designed to undermine the authority of a forthcoming report, that is to say, not to criticise a report or to criticise the Commission, but taking steps which were calculated to interfere with the current investigation and hearing. That is all we have done. The suggestion that we rush around citing people for contempt is as false as one could imagine.

Mr GAY: Commissioner, do you mind if I come in on that from a slightly different tack? I was also mentioned in the Metherell diaries. As far as I was concerned, it turned out that politically it was advantageous.

Mr TEMBY: I do not remember.

Mr GAY: That is why you did not hear from me. You were not to know that. Yet the actual extract that was mentioned had absolutely nothing to do with the investigation; my concern is on the release of something that had absolutely nothing to do with the investigation under way.

Mr TEMBY: In what I am about to say, I will seek to summarise what is contained in the Report. The reason is obvious. The Report ought to speak for itself unless factual questions arise about it. So far as argument is concerned, the report has to be the prime document. The decision to admit in evidence the Metherell diaries, as they are called, was one that was reached after discussion with counsel involved in the matter.

Mr TURNER: Can I clarify counsel? Was that all counsel involved?

Mr TEMBY: All counsel.

Mr MUTCH: Only people appearing before the inquiry were involved. Some people mentioned were not there.

Mr TEMBY: You cannot pick between us and the courts in that respect. We all know that. I do not want just to take refuge in that. What happened before the Commission would have happened before a court, and there can be no doubt about that. But one can go further. The decision was made following consultation with counsel involved in the matter. It was made on the basis that the diaries contained material which could be of importance in ascertaining the truth, and the judgment that that could be the case was borne out by the fact that the diaries were used for cross-examination purposes. They were put into evidence because they were relevant, and that is a sufficient answer. Why did we not go into a more extravagant editing exercise? Why did we not admit them as a confidential exhibit? The answer is that editing would have been of quite extraordinary difficulty in working out the basis for doing it. Was it to be done because of personal niceties or because it was political embarrassing and, if so, to whom? It would have been terribly difficult, so we decided that that was not the way to go. Given the nature of the hearing, it seemed more than usually important that as much as possible be done in public because we had to get a result which the public would have confidence in and which would not be felt to be some sort of cover-up.

Mr ZAMMIT: Were any parts of the diary censored?

Mr TEMBY: There were some references in the diary which were taken out at the request of Dr Metherell's representatives which had no cross-examination potential and which were, as the report says, of an intensely personal nature. That is all.

Mr ZAMMIT: So any conversations one may or may not have had with Dr Metherell you would classify as acceptable.

Mr TEMBY: I really do not think I should be required to answer that.

Mr ZAMMIT: At the outset you said that you want to protect the good

name and reputation of all elected representatives, including members of Parliament. Supposing Dr Metherell had said about any of our colleagues in the Parliament that he was having an affair with his secretary, would you have allowed that?

Mr TEMBY: I think the answer is no. I do not know how far I should be taken down hypothetical examples. That did not happen.

Mr ZAMMIT: Getting back to what you said about citing for contempt, is it not a fact that there were veiled threats made—perhaps even stronger than veiled threats—to Alan Jones when he criticised ICAC for releasing or tabling the diaries and also Mrs Greiner?

Mr TEMBY: I do not remember anything of that sort in the case of either individual, but if there were I would be pleased to have it pointed out to me. Then I could seek to take it further. I have looked at the transcript in relation to Jones. I can find nothing by way of threat, veiled or otherwise. It was drawn to my attention by counsel for somebody—one of the counsel—and we said, "Well, I will see what he said". I do not see that as being a veiled threat.

Mr ZAMMIT: So you did not at any time say he should cease his criticism of ICAC?

Mr TEMBY: I do not know. In any event, if you can give me ground for criticism, I wish to respond to that. I am not being evasive. I just do not know what the ground for criticism is at the moment. Do you understand?

CHAIRMAN: I think we should leave it there. That is perfectly acceptable.

Mr TEMBY: If it is said we have done something wrong, I would like to have it pointed out and I can seek to answer it. I do not think I uttered threats, veiled or otherwise, towards anybody. I was constantly striving at the hearing to strike a balance. It is undesirable that witnesses before a Commission hearing, as before a court, should be castigated for the fact that they are giving evidence. On occasions, I have made that sort of point. I do not know that I even went that far in that particular hearing. I do not

remember doing anything that was an attempt to muzzle anybody.

Mr TURNER: To bring the discussion back to a different level, if you had a Metherell diary type instance again, where there was quite a deal of peripheral discussion in the diary which, as I think everybody can see—or I presume—was not relevant to your hearing, would you look at it a different way in view of the consequences that arose, for example, people being aggrieved? Naturally, it was a feeding frenzy for the press. I think that was the manner in which one journalist described it.

Mr TEMBY: I would bear in mind the concerns that have been expressed here today in deciding what course was the right course to follow.

Mr ZAMMIT: So you are conceding that—

Mr TEMBY: Concession is a very strong word to use on the basis of what I just said. Only a fool fails to hear what is said to him; if that is a concession, I make that concession.

Mr MUTCH: It seems that you have done some good work in relation to sussing out behavioural patterns that people might have thought should have been criminal. That is your job. Then again, quite often in the submission you have made to us you said there was no law against it. Do you think we need an official misconduct Act, which in a sense could help clean up what you can and cannot say in pursuing your own functions?

Mr TEMBY: We have from time to time made recommendations for change in the law. It is not for me to be impatient with the Parliament, but it seems to us that it has taken an awfully long time to make some fundamental and necessary changes to the law concerning bribery and cognate offences, which has been raised repeatedly over three years plus now. I cannot understand why it has not happened more rapidly. We have made recommendations for amendment of the law concerning the handling of confidential government information more recently, and I hope that will be acted upon. We do not think that to create some new criminal offence will solve that or any other problem, but there is a hole that ought to be fixed. We have made such recommendation, as memory serves me, for the creation

of an offence in the Maritime Services Board helicopter matter. So we have made recommendations for changes in the law from time to time, but I do not know whether it would be useful to bring down some sort of mini-criminal code in relation to public officials.

The danger is that there is sometimes a tendency evident to create an offence and then say, "Well, we have solved the problem". I think we all agree at least with one thing, which is that the multifaceted approach to these very complex problems is absolutely necessary. I would think that more positive benefits would be likely to flow from members of Parliament agreeing in a bottom up way that there was a need for better induction procedures and a conduct or ethical code than would be likely to flow from some new offences in relation to members of Parliament, for example. I am not sure as to that.

Mr MUTCH: You might not have seen the submission of the New South Wales Bar Association. It discusses a definition of official misconduct based on the Queensland model. You would be able to make findings under that definition. It seems to me that, if you were to have that definition, making it an offence and allowing you to make findings, you might as well put it in the law so you could concern yourself with matters that are not necessarily criminal but should be commented upon because they might not be good practice.

Mr TEMBY: There might be something in that, but I have not looked at the submission.

Mr HATTON: Following on from that, is it not a fact that, just as a judge's findings express an opinion as to what is and is not acceptable behaviour, you are in a similar position irrespective of whether particular words are defined in the Act?

Mr TEMBY: Yes, I suppose that is right, although it all depends upon the shape of the statute we are given in the end. It is a very general question. We are a statutory body. We have such powers as the Parliament confers upon us. Having said that, it all gets down to the statute.

Mr HATTON: The point I make, however, is that no matter how many times we try to define things—there are some things said here today that could be better defined—it is going to come down to a point of whether the Commissioner is of the view, on hearing of the evidence, that behaviour is either acceptable or not acceptable, whether it is defined or not. You are dealing with something you described earlier as covert and insidious, and that was why judges could not deal with them. Because you are dealing with that sort of thing in a public climate there will be comments of judgment which you will make, as does a judge.

Mr TEMBY: Perhaps I can answer it in this way: it does all depend upon the statute but unless the statute is drawn in such a way that our reports are no more than a publication of the evidence before us, which means we perform no useful function—any clerk could do it—it is just pointless. If we are going to be empowered to deal with the evidence and reach conclusions in relation to the evidence doubtless from time to time we will do so in a critical manner. I certainly think the public interest requires no less and it is certainly something judges do. I cannot see what objection there can be to that.

CHAIRMAN: At page 28 of your submission you refer to the need to apply objective standards Greiner v. ICAC so mandates. If section 9 is removed, would this mandate not be removed as the Greiner and ICAC decision concerned operation of section 9? If section 9 is removed, would you oppose the entrenchment of a requirement to apply objective standards established and recognised by the law when making findings about individuals?

Mr TEMBY: I do not think there could be any objection to such a provision so far as findings about individuals are concerned. We have to be free to say what we will about systems. But it needs to be stressed that what the law says about the conduct of individuals is not narrow and it is not confined to the criminal law.

CHAIRMAN: But in relation to what you said about systems, you should be free to say what the law is at the moment and what the law should

be in the future.

Mr TEMBY: Mind you, I think we would want to say that there should be an offence created. You would want to be able to say, "Here is the conduct. Anyone would view it as deplorable by any standard. There is no offence and there ought to be". I suppose that is pretty strong language but if you want to fix up the system you might have to say that. That is the sort of thing we have said in a couple of reports without demur. In fact, it would not be going too far to say there has been no demur except from the individuals concerned until politicians have been involved. Then there has been a lot of demurring, but you cannot think of much otherwise.

Mr GAUDRY: I am particularly concerned about section 11 and whether in your view its provisions ought to be written in to the Act a little more prescriptively. When I questioned you on this last year you were somewhat concerned that there was non-observance by some public authorities. There does not appear to be an improvement this year. I know you give guidelines. I am not sure whether they are in any way prescriptive or whether public authorities are just saying, "We really do not have corruption. We do not put in a nil return but it should be assumed that is the case".

Mr TEMBY: There has been some improvement with respect to section 11 reporting. I do not get the impression that we are just being humoured. I have no doubt that we are not being told all that we should be told. I have no doubt that however section 11 was cast you would not have perfect compliance with it, even if you made it a criminal offence not to comply, which I would not urge. Section 11 is a critically important provision and it must be retained. Weakening it so that there is no need to report things to us unless there is a reasonable suspicion or reasonable cause exists, which would mean we were told less, would be a seriously retrograde step. A great deal of the useful work we have done has flown from section 11 reports. Section 11 is critically important and should not be weakened. It is capable of being improved, in particular by enabling the Commission to say that which has not

been reported to us; that is to say, to impose a general obligation but entitle the Commission to exempt certain classes of matters. At the moment there is perhaps a difficulty with section 11 which is that it obliges people to tell us more than we would truthfully be interested in. Conceivably, if the absolute obligation was somewhat reduced, that would lead to a regime that was seen on all sides as being more workable and that might lead to better compliance with the parts of section 11 that matter. We might be told more of the things we surely ought to know about. That is the sort of change to section 11 that ought to be contemplated, if any. But there should be no weakening of it. It is a very important provision. It is one of the great strengths of our Act.

Mr GAY: Bar Association recommendation No. 9 is fairly similar to what you describe as a weakening. The Association feels that section 11 is too broad and that the subsection should be amended to require that any such officer concerned be required to report the matter to the ICAC only after forming a reasonable belief that the matter concerns corrupt conduct. I have a feeling that something like that would allow what you are hoping to get, not the peripheral things but the more important things.

Mr TEMBY: I understand that. The difficulty is that something which sets up a reasonable belief test or reasonable cause test gives more room for the public official who is disinclined to report an opportunity to say, "No, I did not see it that way". The strength of section 11 at the moment is that it is largely an objective test. To substitute for it a largely subjective test would lead to the situation in which those who do not want to comply have always got an out, and I think we would get less. That is the difficulty.

Mr GAY: I still see a difficulty—

Mr TEMBY: I concede we get more than we truly need. If section 11 were changed so as to change the present obligation but to enable us to lay down guidelines that excluded the obligation in relation to certain classes of matter—

Mr GAY: So you would envisage putting some guidelines out of the things that specifically are not required?

Mr TEMBY: Yes, I think that would be useful. For example, on the present test of corrupt conduct we have to be told about all instances of failure to disclose interests under the Local Government Act. Most of them are of no interest to us. We might decide that at least certain types of such allegations need not be reported. I would need to give a lot more thought to what we would exclude. We might decide that even that gives a feel for where the areas of concern are perhaps. I am sure we can come to some categories we just do not need to hear about.

Mr GAY: It is pretty important when we are reviewing this part of the Act. Speaking on my own behalf, not for the Committee, I feel we would need to have an idea of the kind of guidelines you would be putting into place to overcome this problem if we were to go along with your suggestion.

Mr TEMBY: It may be that we could usefully take that on notice and give a bit more thought to it.

Ms BURNSWOODS: What is the Commission doing about those authorities that are not reporting pursuant to section 11? I know we discussed that last year. I do not know whether the same authorities are involved.

Mr TEMBY: There has been some improvement. I cannot recollect the precise order but we have written, we have made observations in at least one annual report and perhaps a couple. I think the next steps would be a stronger warning letter followed by publication of some figures as to what we have got. If organisations are generally viewed as being moribund and not charged with integrity, if not corrupt—I can think of handful that could be so described—and they have reported nothing to us in 12 months and we report that fact, it might be thought there would be howls of mirth or indignation here and there and they might lift their game. I am doing this on the run. I think the next steps would be a sterner letter and then the publication of some figures. You will understand that I do not want to bring out the club until necessary because in a lot of what we do we have to work with those people. We see ourselves as being largely a help mate to the public sector. We are trying to work with them to improve standards.

Ms BURNSWOODS: Up to now there has been no public reference to those departments or authorities that are not complying?

Mr TEMBY: We have not named them. There has been public reference to imperfect compliance. However section 11 is formulated, there will be imperfect compliance. The desire to provide a report under section 11 is not universal.

Mr GAUDRY: It would seem to me there would be a period of time after which it ought to be the responsibility of this Committee and then the Parliament in terms of its own management function and referring on to the management functions of the various Ministers that those departments that were not complying ought to be referenced in some way. Section 11 and what we have been talking about, your ability not only to bring forward the facts but to make comments about public authorities, in effect work together—or I would hope they do—to improve accountability standards within the public sectors.

Mr TEMBY: Thank you for that suggestion. It might be worth while. I am not sure whether the tabling of figures here or in the annual report is likely to be the more useful. Perhaps the annual report provides a more dispassionate atmosphere. I cannot say with absolute confidence that those who have told us nothing are wrong. I can say that a number have told us nothing or nothing much and I cannot believe that they have all had nothing or nothing much to tell us. But as to the individual ones, I do not know. Perhaps the organisation from which we have heard nothing is a model of propriety and good management. Once the figures are published there will be those who can make their own judgment as to whether that is the case. If, for example, there is a view within the organisation that things are not working as they should be and it is discovered that nothing is being told to us it might be that we would be told more from within.

Mr GAUDRY: It is important for us to have some idea of the guidelines and reference material.

Mr TEMBY: I understand that.

Mr GAUDRY: Otherwise you might be floating a driftnet.

Mr GAY: It is also important for the officials in each department. Section 11 has a great potential to become an excuse for a lack of efficiency within departments.

Mr TEMBY: No one could do it convincingly at the moment. The figures are gathered by the New South Wales Police Service or by the Ombudsman. They have to tell us at monthly conferences, but they first have to gather the information. This applies equally with local government departments. Sometimes we do not hear much except from a handful of departments and agencies that really obviously care and who say, "This is part of good management". There is not just a negative side to this; there is the positive side of setting up proper internal reporting procedures.

Mr GAY: I accept that. That is why we have to be careful with section 11.

Mr GAUDRY: Is it possible for the present level of contact to have a deleterious effect upon the efficiency of public administration in New South Wales?

Mr TEMBY: I cannot bring to mind an occasion where that has occurred.

Mr GAUDRY: So it is not that onerous?

Mr TEMBY: I do not think so. It depends upon the attitude with which you approach it. If it is approached positively as being an aid to improving integrity there is a bit of work involved but you can get a lot of benefits out of it.

Mr TURNER: Do you think the Act was badly drawn up or have circumstances unfolded to such an extent that fine-tuning or massive changes are necessary? Or are you just going through an evolutionary process?

Mr TEMBY: I suspect it is the last of those things. You have to remember that there was nothing really like it. Even the Hong Kong body is at least as dissimilar as it is similar. So it was quite a bold initiative. Drafting was a matter of some difficulty. I think I have an idea as to how it

happened; not that I was involved in the process. I think sections 7 to 9 were intended to be jurisdictional. The requirement that we make recommendations about consideration of prosecution and so on—the so-called Hinze provision—I understand was put in there because of the insistence by that individual that, at the conclusion of the Fitzgerald inquiry, he be told whether or not his conduct was acceptable. You might remember that a lot went on about that. That provision was put there as a civil liberties provision. They came together and created difficulties. The definition of corrupt conduct has gone beyond a merely jurisdictional provision. I hope that is tolerably clear. I think things have got a bit mixed up. There has to be a jurisdictional provision. It was thought that fairness to individuals required that findings be made. We say, "You have to question that because the Commission has not demonstrated a disinclination to make findings where they are truly called for, so why make us do it?" I think this is an evolutionary process and we can finish up with a better Act.

Mr ZAMMIT: Going back to the Metherell diaries, I am not satisfied with your response in regard to members of Parliament, names in the diaries and future diaries. I understand that anyone appearing before the ICAC who provides you with diaries or anything like that is strictly protected under qualified privilege?

CHAIRMAN: It should be said that this is in relation to defamation.

Mr ZAMMIT: It is in relation to defamation. Should those people wish to publish a book they would be totally protected. They could say virtually anything that was in the diaries and state, "This was based on the diaries that were provided". Do you have advice concerning future cases or the matter of Dr Metherell, should he wish to print a book or have a book printed? If he stated in the opening preamble, "This is based on the diaries I submitted", he could not only print what was submitted to the ICAC but also expand on it. I have been informed that, provided he used certain words in the preamble, he could say what he wished about that episode and be protected against defamation. Is that right?

Mr TEMBY: We have not sought advice. I do not like giving horseback opinions, but it seems to me that the first part of the informal advice that you have received is sound and the second part is unsound.

CHAIRMAN: Pages 43 and 44 of your submission deal with legislative changes. When the ICAC reports to Parliament and those reports contain recommendations, whether for legislative change or for prosecution action, Parliament should be informed of any follow-up action on those recommendations. That is clear enough, is it not?

Mr TEMBY: Yes, that is clear enough. So far as follow-up action generally is concerned, I urge that this Committee, if the resolve was there, could do and should do more than it has done. To date, from where I sit, most of what the Committee has done in the Commission's direction has been of a critical, even negative nature. I do not say that that is an unimportant function because I think our activities need to be monitored. I think criticism, particularly constructive criticism, is a positive thing. I do not doubt that. I am not saying the Committee should not do that.

CHAIRMAN: The recommendations the Committee has made up to this point have all been unanimous.

Mr TEMBY: That is fine. I think this Committee could do more away from the role it has given itself today. That involves following up on the work the Commission has done; thus the Committee would become corruption fighters. There is plenty for all of us to do. I think there is a role for the Committee to play so far as that process is concerned.

Mr GAY: Are we not specifically excluded from that?

Mr TEMBY: You are not excluded from following up reports. That is one of your functions. Not much has been done by this Committee in following up reports.

Mr MUTCH: Are you talking about the Queensland situation where the Committee was actively involved in operational matters?

Mr TEMBY: No, I am not talking about that. We have discussed that matter previously. I think consensus emerged that that was highly

undesirable. I am talking about following up on reports and helping to educate. I say unblushingly that from time to time it would be nice to hear the Committee or a Committee member say, "The work the Commission has done in this respect is excellent; critically important. I am going to get on a bandwagon and pursue it". I have heard a bit of that from one member who was also a member of the Privacy Committee in relation to the unauthorised release of confidential information. But not much else comes to mind. I think we could do much more in partnership.

Mr TURNER: A corruption prevention unit of your Commission visited my electorate. I wrote a letter to the Commission asking whether I could be involved. I was told that in no circumstances could I be involved and I would not be told in future if the unit was visiting anyway. First, I did not know that the unit was visiting and, second, it would have been an opportunity for me to assist in some way.

Mr TEMBY: That was our assessment. The unit is not visiting any more. Our country visits now have a strong educational emphasis. So if there was anything contentious between us it is in the past.

Mr TURNER: Perhaps we have reviewed your reports. The manner in which we have conducted ourselves may be conducive to what is in those reports.

Mr TEMBY: I do not know. I am simply urging—I have done it before now—for consideration to be given to an expanded role for the Committee so far as follow-up action on reports is concerned. That is one of your functions which does not seem to have been exercised.

CHAIRMAN: You refer on pages 47 and 48 of your submission to legislative entrenchment leading to litigation and frequent legislative amendments. What would your response be to a proposal for a regulation-making power to be included in the Act to enable things such as hearings to be addressed by legislation?

Mr TEMBY: I think section 117 subsection (1) would enable that to be done at the moment.

CHAIRMAN: Do you have any arguments for or against the use of that, or are there any dangers or any benefits that the Legislature should bear in mind?

Mr TEMBY: As the Americans say, "If it ain't broke, don't fix it". I say that with respect to hearing procedures. I say that with respect to the contempt power. I say that with respect to search warrants. With respect to each of those the arguments are really the same. As to hearing procedures the great advantage of what we do now is that they can be changed as necessary. They can be adjusted to fit the circumstances of particular cases and they are published and everyone knows what is there.

One of the things we do not get enough credit for is our willingness to publish that and everything else, except what we are doing about current investigations. So it is published and it is available. If in any sense it turns up to be inconvenient you can move away from it in a way that everyone recognises. You do not have to go and get the regulations changed. So that is a considerable advantage.

While I am on the topic I will talk about contempt and about search warrants, as the arguments are really much the same. There is no cause for change because there has not been an abuse of the power and it may be useful to retain it. So far as search warrants are concerned, I have never issued a search warrant. If I did so, I would have to report that fact. So the fact would become known. The Committee then in power would naturally want to know the circumstances that warranted the exercising of that power. The general proposition that we should ordinarily go to a judge or to a justice cannot be doubted; it is obviously sensible. So the situation would come under scrutiny, as it proper.

I can visualise circumstances where it may be highly convenient for the provision to be there, although it might not arise for a decade. You can visualise circumstances of extraordinary urgency and isolation. Let us presume it is midnight, the telegraph lines are down and it is critically important to issue a warrant. It has to be done immediately because someone

is about to burn something. You can imagine that happening. It probably would not arise, but you can imagine it happening. One could imagine—I hope this is notional—a large scale conspiracy involving members of the judiciary, at whatever level or at several levels. It could be extraordinarily imprudent to go to one of their colleagues to seek a warrant. That situation probably would never arise, but you cannot say that it will not. There is no danger in retaining the present situation because we have not done it. If we do it, we will have to answer for it. It is therefore self rectifying.

The position is the same so far as the contempt power is concerned. I have mentioned the figures. It needs to be stressed that we do not punish for contempt; we cannot punish for contempt; we have to go to court. If we go to court in inappropriate circumstances, we will lose. The court will throw us out and no doubt then we would come under criticism from this Committee. In that way it is self-rectifying. The sort of restraint that is in any event appropriate and has been exercised has to continue to be the position, because otherwise the Commission of the day will be hit for a six. There is just no cause for changing it, because abuse is bound not to occur. If it does occur, the courts will throw us out, we will be chastened and the lesson will be learned. Two contempt citations in three and a half years, one of which was not proceeded with because the alleged contemnor was prepared at court to make a statement and we were prepared to accept it, is a very modest record.

Mr GAUDRY: There is an argument that it acts to suppress, its very existence.

Mr TEMBY: Suppress criticism?

Mr GAUDRY: Suppress criticism which might be justified and which might be in the public interest.

Mr TEMBY: I have not observed that and I do think that those who say that are speaking with remarkably forked tongues, because most of those who say it so contend and then immediately go on and criticise. So they are begging us to treat them as martyrs and we courteously decline the invitation. You would be aware that we have come under most stinging criticism, and so

far as it is aimed at reports I do not mind; it is a good thing. You would wish for a bit more temperance on occasions, but we are prepared to accept the intemperate. So long as it is aimed at our functions I do not mind. Even some of the things that are said by Mr Patrick Fair from the Law Society have been so far wide of the mark it is absurd. But let them be said. That is part of democratic debate. But there are other things which are rightly punishable as contempt. One hopes the occasion will not arise, but if somebody behaves in a manner that is going to flagrantly undermine a current investigation—a possibility that cannot be ignored with respect to the one we are commencing a week today—you have to be able to take steps. I do not want to keep repeating myself, but we say that we can stand on our track record and even if there is doubt as to that, if we overstep the mark we will lose and that will teach us a lesson.

Mr GAUDRY: How broad is the provision under section 98(h) that is available to you?

Mr TEMBY: I do not know if you are aware of the decision of the High Court in the Nationwide News case, which was fairly recent. That decision struck down the provision in the Industrial Commission, Federal industrial legislation which it was said went too far because it struck at any abusive criticism of the Commission, even if truthfully based. It was said that that went beyond the legislative head of power in the Constitution. I am informed that a provision which is, in effect and probably in terms, identical to section 98(h) has just been substituted for that, which is seen as being an appropriate reach. There is a lot of law as to how far one can go in criticism of courts. To summarise, there is no need to express oneself in temperate language; the intemperate is permissible. There is no need even to be precisely accurate in all that one says. The contempt laws are not to be equated with defamation laws. I cannot bring the cases to mind but I could give you examples of quite stinging rebukes of those who have brought contempt proceedings too lightly, based upon the proposition that in a democracy vigorous debate, which may have as a component criticism, is a good thing. I do not have difficulty with

that; but even if I did have, I would have to cop it.

Mr GAUDRY: Your reading of that would not prevent acrimonious criticism of yourself or the Commission, so long as it did not in some way impact upon a present inquiry?

Mr TEMBY: I would not want to quite limit myself so far, because as soon as you limit yourself in that way you find after the event that you can think of an exceptional case that does not quite come within that category. I certainly see the contempt power as being of much greater significance with respect to conduct which interferes with a current inquiry than that which relates to the past. I have said repeatedly that the time for criticism is after the report has been published; do not pre-empt it.

Ms BURNSWOODS: I want to come back to issue 6 on follow-up action on ICAC reports. I notice you actually have quite a number of specific suggestions to make, some of which involve the Committee doing various things. A couple involve a suggestion that the Commission might refer certain things for the Committee's attention. It seems to me that maybe the time has come, and may even be overdue, for some mechanism to be set up between the Commission and the Committee to do some of those things, to tabulate information, perhaps to look at ways of checking follow-up action. I wondered whether you had any comment to make on that.

Mr TEMBY: No comment apart from to express agreement.

Ms BURNSWOODS: Do you see any way in which it might happen?

Mr TEMBY: The way it needs to happen—and here I am thinking aloud—is for there to be discussion between officers on both sides so that we can come up with officers' proposals and then have a discussion, preferably an informal discussion, in which we can try to get consensus as to who might do what. You will understand that I can only request the Committee; obviously I cannot require the Committee to do anything. The Committee can require me to do things, so the discussion would be in a sense unbalanced. If it was entered into by both sides in good faith, I dare say we could find common ground. The way to do it would not be around this table, but rather in

discussions following officers' discussions and perhaps the preparation of a short paper, or something of that sort.

Again thinking aloud, then we could pick a matter concerning which this Committee would see how much it could usefully do, try it and see what we learn from it. We do a lot of follow-up monitoring work ourselves. So in that sense it is not absolutely necessary. I suppose the more hands that are on the pumps the better it is. But more important, it would be a positive signal that the Committee wants to help in this cause, which is a worthwhile cause, if not a grand one, rather than just having a shot at us when encouraged to do so. I do not think that is your inclination, but there is room for the impression that that is the area of the greatest activity. It seems to me that to demonstrate that there is an interest in doing the positive work would be very useful, of great symbolic and educational benefit.

Ms BURNSWOODS: It becomes a matter of making a clear statement as to things that have been implemented and things that have not. The longer the Commission's life is, the more balanced it will become.

Mr TEMBY: I suspect we would want to do the sort of monitoring of follow-up work that we generally do, and we may well want to suggest to the Committee that it assist in circumstances where there is a disinclination to take seriously what we have been saying. Let me stress that we do not dictate to departments and agencies what we should do. We talk in terms of suggestions, and most of them follow those suggestions, with variations—not blindly; we would not want them to follow them blindly because they have to run the show. Some of them perhaps go through the motions but do not take it seriously. The Committee might be able to be of considerable assistance in their direction.

Ms BURNSWOODS: I would like to hear about some of those which seem to be related to the questions about section 11, where some departments and authorities may need a bit of stick as well as a carrot.

CHAIRMAN: In relation to standards to be applied by the ICAC, there is a short passage in the transcript of the proceedings in the Greiner and the

ICAC case in the Court of Appeal. The passage appears at page 195 of the transcript. I would like you to comment, if you wish to do so, on the question that was posed by the Chief Justice. I will read out the conversation. It was an imaginary conversation or commentary between you and Mr Greiner:

> Q. How can you say I am corrupt when at the time you say I did not act unlawfully and a notional jury would not conclude that I was acting contrary to recognised standards of honesty and integrity. A. The Act contains a wide definition of corruption.
>
> Q. Well now, I have read the definition of corruption and I see that in these circumstances for my conduct to be corrupt it has to provide reasonable grounds for dismissal of me by the Government. So, how can you say there are reasonable grounds for dismissal of me by the Governor if you find that my conduct was not unlawful and a notional jury would not regard it as contrary to recognised standards of honesty and integrity? A. I am raising the standards of honesty and integrity. Recognised standards of honesty and integrity at the time you acted were too low.

My question is whether that is a fair commentary on the relevant reasoning process here?

Mr TEMBY: No.

Mr GAUDRY: Was that a totally imaginary conversation?

CHAIRMAN: It certainly was.

Mr TEMBY: You have my answer. The answer is no. It is not a fair summary of the reasoning process at all.

Mr GAUDRY: Some of the suggestions you have just been making did appear to be a more friendly and co-operative section between the Commission and the Committee in terms of some of the actions. I am wondering whether that compromises to some degree the more arm's-length role of monitoring and reviewing if we became involved in working co-operatively to ensure that the Commission's reports were implemented.

Mr TEMBY: I would be surprised and disappointed if it did. Any room for that contention would be met by two things: first, Committee members

making sure that they were not just being gulled. We would need to be good to achieve that, but I suppose we would not want to try to. I suppose you would need to be observant in that respect. Secondly, there is always transparency in the process, so that what was being done was, as appropriate, reported upon. I am not suggesting that I understand it to be a huddle in a smoke-filled room. What I am suggesting is that you can sometimes get results otherwise than in a formal atmosphere like this, particularly when it comes to trying to lend a hand. I do not think there is a danger of compromising the monitoring role.

(Luncheon adjournment)

CHAIRMAN: I formally table the questions and answers put on notice. Is there an opening statement you would like to make, Mr Temby?

Mr TEMBY: Yes, I will try to keep it quite brief. It is in two areas. First, as Committee members will have observed, a number of the questions asked are effectively answered in the annual report. By way of update, since what is contained in that report, there has been further work done on the prosecution front—see the answer to question 1.4 in our written answers. Two recent investigations have led to charges being laid and a number of other matters are working their way through the criminal justice process, not as rapidly as one would wish. There has been one further project completed on the corruption prevention front relating to police and secondary employment which is a matter of importance. I am informed it has been well received, I think it is true to say, both by the Police Service and by the union and its members. Since the annual report we have commenced one further investigation which means the total number of investigations approved from the outset now numbers 55.

We are deliberately keeping the new investigative work low because a lot of resources are being devoted to what we call Operation Milloo which commences public hearings on Monday next. That hearings will proceed by way of segments, each segment dealing with particular cases and conduct, and at a later stage we will hear evidence in one or more segments dealing with

policy issues. I hope in some of those cases we will do so after the issue of discussion papers. The terms of reference of the investigation are before the Committee and it will be noted that the investigation is not exclusively into allegations made to the Commission by certain known criminals, as some have contended. It also seems appropriate to say on this public occasion that those who are inclined to be critical of the use of criminal informers need not think that we are unaware of the need for scrupulous care in so doing. That is really by way of general update.

I should like now to come to the particular matter of strategic intelligence, which has been raised here on one or two prior occasions. It was first raised, as I understand it, by the Committee as a result of some work said to have been done by the National Crime Authority to give an overview of organised crime in Australia. At or about the same time the Committee's project officer delivered a paper to the Fifth International Anti-Corruption Conference. That paper contended that the Commission's work was narrowly focused on local government and land development, contracts and tendering. That focus was said to relate to some personal bias of mine. The paper stated that the Commission should be requested and, if necessary, formally required to prepare and publish a strategic assessment of corruption in New South Wales akin to that which was spoken of by the NCA so far as organised crime was concerned. So far as I am aware, that assessment by the NCA has never been published; I do not know if it has been done.

In this year's annual report we published an analysis of formal investigations and corruption prevention projects to date and you will find that at pages 32 and 33. That analysis was conducted in terms of issues considered, types of organisations dealt with and types of persons dealt with in published reports. The figures produced show that the spread of work is appropriately wide; indeed it may be thought significantly wide. That analysis shows the Amsterdam paper to have been unsound. The allegation of personal bias is not made out and should be withdrawn. I note that, to add insult to injury, it was delivered before an international audience. The figures taken

out by our corruption prevention people, which appear in the annual report, show that so far as issues raised are concerned about 20 per cent of them relate to tendering and land development; so far as organisations are concerned 25 per cent of the reports relate to local government. The basic difficulty encountered by the author of the Amsterdam paper was that in a most rudimentary analysis he combined issues and types of organisations and thus came up with an inaccurate picture.

I have now come to the firm conclusion that to publish the results of strategic analysis work would be wrong. The reasons are, first, practical and, second, principle. As to the practical, any such publication would simply warn off the ungodly. As to principle, to publish such reports would be tantamount to group or individual libel and would be grossly unfair. Let me give you an example: suppose the Commission conducted a strategic intelligence exercise which led to the conclusion that there was a grave corruption problem in relation to produce marketing—and I give that example because it is presently notional. If, as a result of a strategic intelligence exercise, we reach that conclusion, should we publish that fact? The answer must be no. If we reach that conclusion we should do something about it. If we did that, if we did tackle the problem area, we would obviously not want to signal or telegraph our punches in advance and at the end of the day we would publish a report which went beyond mere intelligence and stated conclusions based upon evidence. If we did not for any reason decide to pursue the matter, to publish the intelligence report would serve no useful purpose; it would simply excite the general populace to no good end.

The basic reason is that intelligence, by definition, is unreliable. Its level of unreliability may be variable; some of it is highly unreliable tending towards mere gossip, speculation and rumour. Some of it tends towards a fair degree of reliability but it must never be confused with proof and that which is published should be proven fact. To publish intelligence reports is also grossly unfair to individuals named in them. If there were any doubt about that, if that were thought to be theoretical, could I refer the Committee to

the Report on Gaming Machine Concerns and Regulations, published by the Criminal Justice Commission in May 1990, one of the first reports it published. As I understand it, the Queensland Government required the Commission to provide a report; the report became public. The report states that it is based in part on intelligence material and that is very clear when one goes through it. There is a lot in the report which is unproven.

It reached conclusions concerning individuals and in particular reached conclusions concerning a Mr Ainsworth and companies associated with him and he was never heard. It is wholly unsurprising that the High Court should have struck down that report and should have been critical of the Criminal Justice Commission and the Queensland situation generally by reason of that report. That makes perfectly clear the dangers that flow from the publication of intelligence material. We do not know of anywhere where intelligence material is published to the general public. It is absolutely wrong in both principle and practice and, having reached a concluded view, I thought it should be stated. The head of the Commission's intelligence section, who is a man of considerable experience not just with the Commission but previously, would be happy to provide Committee members with a briefing as to intelligence methodology and I would be happy to make him available for that purpose. I would ask that he not be requested to reveal actual intelligence material, but he would be very happy to talk about methodology.

While proffering invitations could I mention the mooted meeting between this Committee and our Operations Review Committee. The ORC last met on Friday afternoon and authorised me to suggest a meeting between the two committees on Friday, 4th December, at about mid morning. That is something we will come back to you about and check about availability. There is an anxiety that the meeting should take place. It is probably better that it take place this year and not next year, and that is a date we are suggesting in the hope that it will suit the majority of members of this Committee.

CHAIRMAN: Perhaps we might go through the questions and answers.

The first section, General Briefings, at 1.4 on page six: "The trial of Messrs Lynn and Poulos on charges of bribery ended in directed verdicts of not guilty". What was the basis for the direction?

Mr TEMBY: I think it has been mentioned before this Committee before now. Yes, there has been discussion at a level of this Committee as to a provision we wanted inserted in the law, which would give our transcripts evidentiary standing before courts. That is a recommendation which I think the Committee felt itself unable to go along with. In any event, it was certainly not enacted into law. At the hearing of the criminal charge, there were difficulties in proving certain tapes of the Commission hearing, which had to be proved in the absence of the transcript having evidentiary standing. As I am informed, those difficulties could not be overcome and the Crown case could not be made out.

Mr GAY: Just following on from that, was that to do with the technical side of the recording?

Mr TEMBY: I think it was. It had to do with turning over tapes. We are now doing it differently and we should not encounter the same difficulty—although I have to say it is a terribly tedious business to have to prove tapes. It is awfully difficult, in any event. All I can say is that I understand we have changed our procedures and we should not strike just that difficulty again but it is always an area of great difficulty, and enormous tedium you will understand. How a jury sits through it, I cannot imagine.

Mr GAUDRY: In terms of the Operations Review Committee, at 1.8 of the questions there is some indication that there is going to be a shortening of the time of status reports. I just wonder, within that whole process of bringing matters back before the ORC, whether there is any argument put forward in terms of the scarce resources within the ICAC, in terms of carrying through investigations; whether or not something should be revisited in that matter, or whether it is purely on the merits of the case itself?

Mr TEMBY: We are presently examining whether there should be some supplementation of the resources in the assessments area. The general

picture, as I am informed, is that we are eating into the backlog but what might be called a frontlog is building up, in the sense that we are not processing the newly received stuff fully as quickly as we might, and accordingly some additional modest amount of resources may be called for. It would be easy to say that we have not got the resources necessary to do all that could usefully be done—and that is true enough—but scarcity of resources is a thoroughly good thing and I am certainly not seeking more. We will make do with what we have by reordering. I do not want a bigger organisation. If we start growing, where does the process stop? It is best that we should impose the discipline on ourselves, by saying we will make do with what we have got and we will reorder priorities as necessary.

Mr GAUDRY: I cannot refer to it particularly, but the Operations Review Committee seems to have taken a more stringent approach, perhaps, in terms of its review of the matters before it.

Mr TEMBY: Perhaps a little more, although it would be incremental. But, perhaps a little more. We are trying to improve the way we service them all the time, with statistics and so on, I think with some success.

Mr GAUDRY: Does that mean a streamlining of matters coming before it? I notice you aggregate some particular areas.

Mr TEMBY: In that respect some small improvement, but also with respect to briefings, statistics and overview. I would not want to say there is anything dramatic but we are still in the course of getting things a little better on a half-year by half-year basis. That might continue forever.

Mr GAUDRY: There has been a recent change, I think in March last year, in the makeup of the ORC. Were the new members given a particular induction, in terms of the responsibility and role they would need to perform, or was that a matter of coming on stream in the Committee sense?

Mr TEMBY: No. They were given an induction. I spoke to them at some length and answered questions in advance of them attending a meeting; and at an earlier meeting or meetings, we gave presentations as to the assessment process and, perhaps, one or two cognate matters. So, there was

an induction process.

Mr TURNER: Was there any relationship between Miss Caroline Davenport and Mr Davenport who was on the ORC?

Mr TEMBY: If so, it was never revealed to me. I do not think so, no.

Ms BURNSWOODS: Still on the ORC, Mr Temby. The section on status reports, and the rule about doing those if something is still being examined 18 months after receipt, and you had to drop that—is it possible to say whether matters still outstanding 18 months later are more important or more trivial, given the backlog you referred to earlier?

Mr TEMBY: I could not say that confidently. There is a range of reasons why matters are not dealt with as quickly as we would hope; there is a range of reasons why matters hang around. It may be that they are of significant size and the ICAC preliminary examination process becomes protracted—that sometimes happens; it may be, and I think this is more typical, that we are waiting for a report back from somebody else before deciding on ultimate disposition, so that is almost accidental.

Ms BURNSWOODS: Is it possible to quantify that sort of thing?

Mr TEMBY: No, I cannot do so, but if I could request that you give us a reminder before next I come here, I can certainly come armed with figures on the next occasion, by which time it should be that the period has been reduced, because we are working to reduce that period. I suppose it would be fair to say that the matters outstanding for a significant period are unlikely to be the most trivial but not necessarily confined to the most important. Does that provide an answer?

Ms BURNSWOODS: Yes. I know it is probably hard to say. Further on the ORC and the matter you referred to where the Committee disagreed with the recommendation and persisted with that disagreement, is it possible for you to provide more information about that matter?

Mr TEMBY: Yes, it is—although I would like to do so in a way that does not identify it, but I can talk about the process without difficulty. We received information from another organisation, and a complaint of serious

criminal misconduct on the part of public sector officials. We tackled it quickly and vigorously. The conclusion Commission officers reached was that a hearing was unlikely to get closer to the truth than they had been able to get. A recommendation was made to the ORC not to investigate; they referred it back; I think it was discussed in total on three occasions; ultimately, and still contrary to the view of Commission officers, they said that we should conduct a formal investigation. The matter is one of complexity and their view point is sensibly available. I decided to accede to that recommendation, because it is important the ORC should not become a rubber stamp body.

During the time that I was away, the Acting Commissioner, Mr McClellan, invited Mr Stretton—who is one of the Commission's General Counsel—to examine the matter with a view to preparing terms of reference—which is the necessary next step, because we have to have terms of reference so that we know exactly what we are investigating. Mr Stretton prepared a minute which has again cast in doubt the question whether this investigation can be pursued with prospects of success and without the risk of failure which will entrench people who may be corrupt. The matter was discussed again at the ORC meeting on Friday last. I have made available to them the Stretton paper, and it has been agreed it should be discussed further on 4th December when next we meet. I have made it clear to the committee that if they remain of the view that we should carry through with the investigation, I will do so but I thought it was proper to provide them with this updated material.

The only other thing that need be said is that the matter is one of difficulty and the discussions have at all times been highly positive and co-operative. I would not want to give the impression that there is any sense of crisis abroad, but there are some differing views felt. I have expressed my views, which happen to agree with the views that the Commission officers have put—that is by no means always the case, but it happened in this case. I just do not think it is a winner. If they hold to their present view, we will

carry it through and, of course, give it our best shot.

Ms BURNSWOODS: In that context, when you refer to further investigation and also to a hearing, are they more or less synonymous? Is it not possible, for instance, to resolve that difference by means of further investigation?

Mr TEMBY: No. There is nothing more we can do. There is nothing more I can think of which can be done with prospects of clarification, short of a hearing. They are not quite synonymous because sometimes we conduct investigations which do not involve hearings. Particularly sometimes we commence formal investigations so we can exercise our coercive powers. To take an example, bank records may be produced under compulsion, interviews conducted and a criminal charge might be laid. That could happen. It is not typical, but sometimes has happened. More often than not, a formal investigation means hearings, but they are not synonymous.

Mr GAY: As a follow-up to that, if ultimately the Operational Review Committee has its way, this is pursued and there are hearings culminating in a report, in that report would there be comments that that was the situation? Have you addressed that situation?

Mr TEMBY: I think the answer is probably yes because I see no reason why that should not be the case. I would not say that critically because I say that the majority view on the committee is one which can be respectively held. I just have a pragmatic view that it is not a matter we will get far with.

Mr GAY: Also we could probably deduce from this that all the investigations so far have been with the concurrence of the ORC.

Mr TEMBY: This is not the first time that there has been an ultimate difference between a staff recommendation and an ORC recommendation to me, although much more often than not matters are referred back and ultimately there is no disagreement. There was one occasion when I did not agree with the committee recommendations, so it does not rubber stamp what it gets and I do not feel absolutely bound to accept its recommendations. I do

not remember the detail of that other matter. The difference between us was small. It was a fairly insignificant matter. This is an important matter. I cannot say dogmatically that I am right, and therefore I think I should listen to the committee.

Mr HATTON: I would like to try to get to this point: is the ORC equipped to take on, if it needed to, the ICAC? In other words, to what extent is the ORC an independent audit and equipped to be an independent audit of the ICAC?

Mr TEMBY: In a general sense, the ORC does not have an auditing function and would not be equipped to do it.

Mr HATTON: No, the audit I refer to is audit in terms of its requirement under the Act, that is, in operations and—

Mr TEMBY: I have no doubt that the committee could effectively audit the performance of the Commission's functions so far as complaint handling is concerned, which is its area of responsibility, and I have no doubt that the committee would do so if it saw a need.

Mr HATTON: But how well equipped is it? It is similar to the Police Board trying to audit the police department. You have the all the facts, as it were. What powers are there in terms of withdrawing the facts from your organisation, evaluating them, staff support and independent consultancy if necessary? What are the committee's resources?

Mr TEMBY: One of the best ways of finding out what has happened in a matter and whether it has been satisfactorily handled is to read the file. On at least two occasions in the last three months or so, in relation to major matters two separate members of the committee have called for the files. They have been made available; they have been gone through; and questions have been asked and answered.

Mr HATTON: Do they ever consult the complainant directly? Does the complainant come before the ORC?

Mr TEMBY: There is no instance in which a complainant has been before the ORC.

Mr HATTON: It may be a function of fact that the Commission is doing an outstanding job, but in the last annual report the Operational Review Committee considered 671 reports. There is no comment there as to how many times it disagreed. However, it just says that since 30th June this year of the 270 reports it has considered up to now it only disagreed with one, which was what Jan was talking about.

Mr TEMBY: That is an ultimate disagreement. The committee often expresses disagreement with initial recommendations. It refers matters back in about 10 per cent of cases. It is far from being a rubber stamp.

Mr HATTON: You have mentioned 10 per cent of the cases. In relation to this should you, as Commissioner, be a member of the ORC? In other words, should the ORC be separate, like this Committee, and when it wants to talk to Mr Temby should it ask Mr Temby to attend?

Mr TEMBY: That would be a matter you should probably take up with the committee. It would be presumptuous of me to express a view on that. I cannot see anything wrong in principle with the Commissioner being a member of it.

Mr HATTON: Does that apply to the Police Commissioner any disadvantages? For example, if it wants/ed to review matters of inquiry in the police force, would it be a disadvantage to have the Police Commissioner sitting there while considering that matter and should the Police Commissioner not be sitting there if they are considering this matter?

Mr TEMBY: Again, it is a question you should ask the citizen members of the committee, if I could so describe them. There are some advantages in having Mr Lauer present in the sense that he can ascertain progress with respect to matters within his own service that are coming before us and he can give matters a kick along. There are certain practical advantages. As a lot of the complaints we get relate to police, there is room for the view that it is not on balance the most convenient course to have the Commissioner present. I do not hold that view, but I can understand that there is room for that view. But there are practical advantages. The key membership group

comprises the four citizen members, to which you add an ICAC Commissioner, an ICAC Assistant Commissioner, a Police Commissioner and a nominee of the Attorney-General. The key group is those four.

Mr HATTON: I intend to pursue that matter with the ORC, but I also would like your view on that because I think it is important that it is well equipped, well resourced and completely independent because it is one of the mechanisms of accountability on which the citizen relies. We cannot look at operational matters. That is the last and only port of call.

Mr TEMBY: So far as resources are concerned, the great resource the ORC has is an absolute willingness on our part to make files available, to answer questions and so on. There is no separate secretariat. If you were contemplating perfect independence, you would need a separate secretariat, a standing body housed separately, and that would seem to be somewhat excessive. After all, you cannot find parallels with our Operational Review Committee and other organisations in the State. There is nothing of that sort with the Ombudsman, for example.

Mr HATTON: That does not necessarily say that it is not a good thing. When you invest organisations with very wide reaching, great powers, as your organisation is vested, you must have a couple of levels of accountability. We have the principles, as it were, looked at by this Committee and the day-to-day operations looked at by the ORC, which should be seen to be independent and well resourced to do so.

Mr GAUDRY: Following on from that, where the ORC disagrees, does it then call for a report in some structured way and does it have the advantage of perhaps bringing the principal investigator before it who is associated with that particular investigation, or is it a more distanced review?

Mr TEMBY: Typically, if the ORC is not satisfied with a report and recommendation it receives, the matter will be referred back and there will be a further report forthcoming. That is dealt with in the last part of page 8 following. That relates to a further report. As to the second part of your question, it has not been the practice of the committee to call staff members

before it. I would not resist such a request if it were forthcoming, but it has not been forthcoming.

Mr GAUDRY: So they deal with them by direct reference to reports.

Mr TEMBY: But they ask as many questions as they like and get answers until they are satisfied.

Mr GAY: Has there ever been an instance of bringing complainants in to speak to the ORC? We have a lot of correspondence from complainants who quite wrongly come to us. As a matter of course, we refer them across. We certainly have a lingering concern about whether complaints are being addressed properly.

Mr TEMBY: We have outlined, I think before now, the procedure we follow when we get a further approach from the complainant, whether direct or through this Committee. It is examined closely to see whether it contains fresh material. If it contains fresh material, the matter is resuscitated. If it does not contain fresh material, we might or might not, depending upon circumstances, enter into some further correspondence with the person. But we do not resuscitate the matter unless something new has been put forward. I do not want to sound unsympathetic because I do understand that from their viewpoint typically it is the most important thing around, but numbers of complainants have a different view than we are able to accord their matter as to its importance.

Mr GAY: Is it a definite policy of the ORC not to call in people and just to rely on the evidence, or is the situation that so far it has been seen to be unnecessary?

Mr TEMBY: I am not sure that I know the answer to that. If and to the extent it is a policy, it is certainly not one I have laid down. It may be a policy that has developed within the committee over three and a half years now. It may be that at some stage earlier on we talked about it. I cannot remember. I am sorry I cannot be more definite. It is certainly internally generated. It is not something the Commission has set to impose. I would not stand in the way of it. I can see inconvenient consequences if it became

habitual, but we are as far from that as you could imagine.

Mr GAY: It is not a definite policy that is laid down, but you are not sure how the principle has evolved.

Mr TEMBY: It is not a definite policy that has been imposed. Whether it has just grown up or whether there has been debate about it, I cannot now remember. For my part, if one or two committee members saw reason to bring in a complainant I would not say no to that.

Mr TURNER: The Greiner-Moore matter was your first parliamentary reference. Where does that sit in the Act as far as the ICAC's role in relation to references from Parliament?

Mr TEMBY: It is not the business of the ORC to deal with parliamentary references, and it cannot be because we are obliged to do them. I can however say that I briefed the ORC as a matter of courtesy upon that matter I think on each occasion we met during the course of—

Mr TURNER: On page 8 you have set out what the procedure is. In the questions and answers in your report you mention that you report to the ORC on a quarterly basis on those matters which are proceeded with. On a short matter, it would be feasible to commence and finish before you would report to the ORC. Would that be right if you started it a short time after the quarter had started?

Mr TEMBY: I think not because the practice that is followed is to report to the first ORC meeting after the matter is commenced and then at least quarterly thereafter. So the first mention should be within a month at most after the matter has been commenced. I cannot think of any occasion when I have failed to do that. I would be very surprised if one could be found. So it should be one month only. We would never finish anything in a month. It may be that with a short matter the committee may hear of the commencement of a matter and next hear of it a couple of months later when we recommend discontinuance on the basis that we have laid charges and there is nothing more to do. That has probably happened a couple of times. But, as you know, we tend not to take on that relatively straightforward work.

Ms BURNSWOODS: On the corruption prevention area, in relation to co-operation with the working party set up following the Royal Commission into the Building Industry, how does that sort of work come about? What kind of structure is in place to co-ordinate that work with those working parties? Are there any other examples?

Mr TEMBY: Yes, I can certainly help, although I have not been involved in the discussions. The work we have done has fallen into a couple of areas at least. One is in relation to matters such as tendering codes, concerning which the Task Force has sought, and we have provided assistance and advice as to the process best undertaken for preparation of documents of that sort and practices of that sort, the sort of consultation that is appropriate, and I think probably a certain amount of advice as to content, at least in the sense of certain areas that need to be covered. We have done quite a lot of work in that area with other organisations.

Ms BURNSWOODS: Is that the basis of it, that because you have previously done work in those areas it is not a project started from scratch?

Mr TEMBY: No, and we do not call it a project so far as I am aware. It is not one of our formal projects; it is advice and assistance. As a matter of practical certainty it is at the advice and assistance level, not at project level so far as the Commission is concerned. We became concerned about the adequacy of standing arrangements to ensure integrity when ad hoc bodies such as Commissions of inquiry and task forces were established, typically at short notice. We have been doing work which has certainly touched and concerned the previous Royal Commission and the Task Force. That work is being done perhaps more with the Premier's Department than with the Task Force into the development of a standard set of procedures to be followed in order to enhance integrity when these ad hoc bodies come into existence—the sorts of rules that should apply with respect to interest disclosures, recruitment procedures to be followed with particular reference to security and matters of that sort. So we have done some follow up work on the Royal Commission in that area as well.

Ms BURNSWOODS: Will that sort of material be made public?

Mr TEMBY: I do not know, I am sorry. If it can be, it will be.

Ms BURNSWOODS: It would be interesting to see. Certainly in that area concerns were expressed about some of the matters raised.

Mr TEMBY: I do not want to give the impression that I have the view that the Royal Commission into the Building Industry did that badly, because I have no real impression either way. It might have done it well. But its operations brought the need for some standing arrangements to light and we have been doing a deal of work in that area.

Mr GAY: You mentioned earlier that the terms of reference of your current inquiry will not be exclusive to the matters brought up by the informant. Could you elaborate on what areas may influence your inquiry and whether you will consider matters brought up in other inquiries?

Mr TEMBY: It would be fair to say that the genesis or, if you like, the precipitating cause of the current investigation was complaints of the utmost seriousness made to us by the man Smith, initially as a complainant and then as somebody who started talking to us. Other sources of information and material have included other law enforcement agencies, State and Federal, that had volunteered material or, more typically, that have been approached by us for assistance. We have had a wealth of material and some allegations from such bodies. We have gone back through all our holdings to see what we have by way of complaint, even formally written off complaints, which could be viewed as related to the allegations we had otherwise received. I could not tell you how many of them have been resuscitated as a result of that but I think it is true to say some have been. As a result of interviews with individuals we have obtained some admissions and we have obtained some allegations against others, all of which have been absorbed into the current inquiry. I hope that with the passage of time and as it becomes clear to all that we are serious about this matter there will be more information coming, because I have no doubt there is a great deal more information out there than that which has been received to date. We of course remain anxious to receive

such information as can be provided to us in good faith. I am sure more will be received.

As to areas, I would not want to go further than saying that we are actively interested in allegations concerning armed robberies. Our level of interest in the other specific area mentioned in the terms of reference is presently somewhat lower. We are actively interested in what is called in the trade blues fixing, which is perverting the course of justice. That is an area concerning which we have several allegations which have been pursued to a considerable extent. Certainly not all of them go back to the man Smith.

Mr GAY: I have not heard of blues fixing. Could you elaborate on that? Also, what is the significance of the date of January 1975?

Mr TEMBY: That date was selected having regard to the allegations made by the man whose name I have mentioned. It is very clear that this is a matter in which, if there is substance in the allegations, you have to go back in history to make sense of what has happened since. A series of continuing relationships are at the heart of these allegations. Let me stress that I do not know how true they are but that is the nature of the allegations. The illegal gambling area is mentioned. To makes sense of the current situation one has to go back in time to see how things have developed over a period. It is inevitable that in part it becomes serious historical research. I am no precise expert as to where the term blues fixing comes from but I think to receive a summons is to receive a blue—because of the colour of the paper on which they used to be put out. You fix a blue when you get rid of the charge in some way. The ways of doing that can be to—

CHAIRMAN: That explains the term.

Mr MUTCH: You say that the report is likely to be published towards the end of the present Commissioner's term. Are you committed to seeing the whole exercise through or, if your term expires before you finish the job, will you seek an extension or do you have somebody who is an understudy.

Mr TEMBY: There is no room for an extension because the Act precludes that.

Mr MUTCH: In relation to the one inquiry?

Mr TEMBY: If it became necessary to do so in order to pursue all those matters that ought to be pursued, I would approach government to have an assistant Commissioner appointed. It is certainly my hope that we can see it through by that time, whether or not an assistant Commissioner is appointed. There is a lot to be said for having to do jobs by particular times. I suppose all else that needs be said is that while I will be anxious to complete the job and go off and do something else, you cannot conduct hearings or exercise coercive powers unless you are a duly appointed commissioner or assistant commissioner, but the same does not apply so far as report writing is concerned. If it was absolutely necessary in order to do the job thoroughly for me to stick around for a month or two after my term had finished to complete writing the report, I would feel obliged to do that. I do not want to do that but I suppose I am saying that there are ways in which the report might be dated May or June, not March. But my term cannot be extended, and even if it could be, I would not want an extension.

Mr GAUDRY: Surely that would raise some matters about the legality of the report written by you after—

Mr TEMBY: No, we are satisfied it would not, because they are Commission reports. There must be a Commission; there must be a Commissioner. It is not a royal Commission.

Mr GAUDRY: But would you not have to be reinstated as an assistant Commissioner in order to have validity—

Mr TEMBY: No, I am satisfied that I would not. The report is put out by the Commission not by the individual author. That is the key distinction. But all that is rather notional. If we go well, we will finish the evidence next year, perhaps comfortably before the end of the year. That will give me plenty of time to write the report. If that is so, that will be good.

Mr GAUDRY: Given the nature of this particular area of interest, and in view of the Royal Commission in Western Australia or the black deaths in custody inquiry, surely what will occur is that, if things go as you say, in the

process a plethora of evidence will come forward which might extend the time considerably.

Mr TEMBY: This is more narrowly focused than the examples that you have just given and we are at pains to stress that this is not another Fitzgerald or Costigan or whatever you like. This is not in any sense a royal Commission into the Police Service, far less a royal Commission into the Police Service and its relation to government. The allegations are not confined to but they centre upon a particular squad and individuals who have passed through that squad. I do not want to simplify it by saying it is some sort of Commission of inquiry into that squad. It is broader than that. The terms of reference are deliberately drawn so we can examine relationships which I think to be not just enormously interesting but potentially of very great importance. But it is much more focused than what has been happening in Perth or in Queensland. I do not think there are compelling reasons for our not getting through it in 18 months. If we cannot do the job in that time, we will have to find some other way of doing it. We will get lots of allegations. We want lots of allegations. But by now I think we are fairly good at sorting out the pure ore from the dross. That is what we have to do. We had an awful lot of material to get through in the prison informants inquiry. We managed to do that in nine segments. That could have blown out enormously if we had allowed it to. I express optimism and all expressions of good luck are gratefully received.

Mr TURNER: You state in your submission that the assistant Commissioner should be provided, inter alia, with a standard of proof at Commission hearings. What do you mean by "a standard of proof"?

Mr TEMBY: The standard of proof in Commission hearings is what is called the Briginshaw standard of proof, that is to say, proof on a balance of probabilities. We always have to bear in mind that that which will be looked upon as a sufficiency of proof will tend to vary depending upon the seriousness of the allegations concerned. The allegations with which we are concerned are at a high level of seriousness. Accordingly, one is not easily satisfied,

even on a balance of probabilities. That is the standard of proof. But we do provide a document which accompanies a series of material. Accompanying that document are two or three prior Commission reports which deal with this question of the standard of proof.

Mr GAUDRY: You refer on page 17 of your submission to the ORC. Is it possible for you to provide the Committee with a copy of the standard letter you send out to complainants? I understand a pamphlet accompanies this letter. It might be of some advantage to the Committee to look at the standard letters the ORC uses.

Mr TEMBY: We will provide what can be provided. I am not sure whether a pamphlet exists at this moment. I last saw a mock-up, but I do not know whether it is being utilised.

Mr GAUDRY: You refer on page 19 of your submission to the way in which the Committee views its role in regard to complaints. You were somewhat critical of the Committee's approach. Could you expand on that? You did not have any favourable views of a recent letter sent out by the Committee. You seem to have a different view of the role of the Committee.

Mr TEMBY: I do not know that I do have. I believe there is room for enhancement of procedures in order to give rise to more satisfactory outcomes than we are presently achieving. I believe it would be useful if the Committee examined critically submissions it received both from complainants and from the Commission in order to distil them. At the moment the impression I have is that what the Committee receives is simply passed on to us. We provide a response which again is simply passed on. The ball goes backwards and forwards with no resolution being achieved. If we are not careful there could be increasing acrimony, with no good being done to either end of the process. Essentially, this Committee is playing no positive role. I might be overstating the case. I am not the one who has most of the dealings. But that is the impression I have, at worst, of how the process presently works. It seems to me that there is room for this Committee to be more critical, for example, in its identification of issues. As I understand it,

Mr Blunt and Ms Sweeney have been having discussions along these lines. I am not pessimistic as to the prospects of change on that. To send us a seven-page letter and to say, "Respond to this", without telling us what is really of concern is not a useful way to do it.

Mr GAUDRY: It appears to me that the seven-page letter is addressed more to the Commission than it is to the Committee. The Commission might have more direct contact with complainants than the Committee.

Mr TEMBY: That is fine. In those circumstances, if the Committee wanted to pass on a complaint to us and suggest that we respond directly to the complainant and let the Committee know when we have done so, that would take the Committee out of the loop. From our viewpoint, that is simple. With respect, it seems to me that this Committee should have a continuing involvement only if there are matters of concern as to the functioning of the Commission, rather than whether a decision not to investigate is essential.

Mr HATTON: This Committee is not an operational review committee. We take the view that we have no role in operational matters and complaints other than to refer them to the Commission or to the ORC and await a response. In different matters, such as the dispute over whether an applicant for a job got a fair go, or whether someone had to leave the Commission under proper circumstances, that is a bit difficult for the Committee in view of its role. I would have thought that, by handing the correspondence to you, the nature of your response would leap out of that correspondence. You should be able to respond to a matter accordingly, knowing our role in that regard. The Committee might distil the issues. Another aspect that we have to worry about is that the issues may not be the same as the issues as those referred to by the complainant. As you would know, sometimes complainants write us long letters. Sometimes they write us very short letters—usually after the long letters.

Mr TEMBY: I am reminded that, as the Committee has, by statute, no function in considering whether or not to investigate a matter, when

complainants are complaining of that and nothing more that is a good example of what we should be given with a request to deal with them direct. There is no role for the Committee and we should not be responding to the Committee. We do so as a matter of courtesy, but it is inappropriate. It would be much better if we got a request to deal direct with a complainant.

Mr HATTON: If a complainant writes to the Committee and you respond to that complainant, should a carbon copy of that letter be sent to the Committee?

Mr TEMBY: We have not got to that point. We would need to sort that out.

Mr HATTON: What I am trying to do is to add some sophistication.

Mr TEMBY: In principle the answer is no. We should let you know when we have written to the complainant. But, in principle, it is none of your business. We probably should not send you a copy of the letter.

Mr HATTON: We see it as being none of our business, but that is not the way a complainant sees it. That is the big problem for us. Without singling anyone out, let us say that a member of the Committee has a constituent who writes to him. That member refers the matter to the chairman of the Committee and says, "I want you to take up this matter", not knowing what is the role of the Committee. Are you suggesting that we should respond by saying that we have no role in this matter and that the avenues of response are the ORC or Mr Temby direct?

Mr TEMBY: I do not have a fresh view on that. The statute is there and we are all bound by it. We got ourselves into a degree of difficulty by being accommodating in the early days. We should have talked these matters through with the Committee. We should have sought to achieve a situation where we simply did not respond because there is nothing we can do.

Mr GAY: Both you and I understand that, but members of the public who write to us do not know of the delineation between this Committee and the Operational Review Committee. Effectively, we act as a post-box in those situations. Members of the community have certain aspirations when

they write to us. I think the current approach is the only way of doing it.

Mr TURNER: When you receive a complaint from a complainant you must send something to that complainant in response. In the early stages could you include a simple paragraph in your response detailing the role of the parliamentary Committee in regard to operational matters?

Mr TEMBY: It is worth thinking about.

Mr TURNER: I appreciate that complainants probably would not read it and, if they did, they probably would not understand it.

Mr TEMBY: I would be a bit shy about doing something that would discourage them from approaching a local member, for example.

Mr GAY: Even though the present system seems ridiculous it is probably the best way to go.

Mr TEMBY: That may be.

Mr HATTON: Let us say for argument's sake that this Committee does not believe it should act as a post-box. Individual members might well raise matters in the House, or other members of Parliament who seek to bring matters to the attention of this Committee might raise them in the House. That might involve you in more angst than it would if we simply acted as a post-box.

Mr TEMBY: I think you know the answer to that question.

Mr HATTON: I am suggesting we should no longer act as a post-box.

Mr TEMBY: You know the answer to that rhetorical question. Of course it would raise more angst. Naturally, that is a prospect we would not enjoy.

Mr HATTON: So it might be worth a bit of thought on both sides?

Mr TEMBY: Of course. You will understand that this has been worded in a very restrained fashion. We are simply asking for more thought to be given by both sides. It is not for us to dictate to the Committee how it performs its functions.

Mr GAUDRY: Earlier you were rather restrained when you gave us your impression of the workings of the Hong Kong ICAC. I take it you were

somewhat critical?

Mr TEMBY: If the Committee had seen fit to talk to us before it published its report it might well have published a more useful report.

Mr GAUDRY: You do not see it as being useful?

Mr TEMBY: Some aspects of it are.

Mr GAUDRY: We are not talking about a parallel organisation.

Mr TEMBY: Some aspects are and some are not. Some would have been more useful if there had been a full understanding of the critical differences between this Commission and the Commission in Hong Kong.

Mr GAUDRY: Do you not think this Committee could distil that information?

Mr TEMBY: I do not. I may be wrong. You could have produced a more satisfactory report if there had been consultation. We would have welcomed that. After all, we have to give everyone a hearing. It sticks in the gullet slightly when reports are handed down and we have not been given a hearing.

Mr TURNER: This Committee conducted a study trip to Hong Kong, which was quite independent from anything you were doing.

Mr TEMBY: It seems to me that a lot of the recommendations do not make perfect good sense because there is not a proper appreciation of those differences. To take the most critical difference, the Hong Kong ICAC is, at base, an alternative police service. We are not. That has to be realised because most significant consequences flow.

Mr TURNER: That was clearly spelt out. To be fair to the people in Hong Kong, they prefaced a lot of their remarks by saying, "Ours is an entirely different organisation".

Mr MUTCH: On one of our trips last week to Queensland I learned of something of which I was unaware. The Criminal Justice Commission Act requires the Commissioners to complete a declaration of pecuniary interests and political associations. I questioned a couple of the officers involved there as well, so this might be directed to Simon Stretton and Deborah Sweeney.

They said they would not be loath to complete such a declaration. In view of some of the speculation that goes around and also in view of the huge powers of the ICAC and the potential in any organisation such as that to possibly develop a culture or an agenda, do you think your officers would object to making a declaration of political associations, which might be more interesting in some respects than the pecuniary declaration?

Mr TEMBY: I do not know. I would need to think about it. Can I say that Commission officers do complete declarations as to financial and other interests, and they are very thorough. Queensland came to us to seek advice as to how far they should go, and I would be surprised if they have gone further than we have, and to the extent that they have got something, I think it may be more or less based upon ours. There is no obligation upon me to make such declarations, by statute, but I thought it was appropriate to do so, as I require everyone around me to do so. So I have made two such declarations to the Operational Review Committee, the most recent within the past few months, in order to ensure that there is no rational ground for criticism in that respect.

So far as political affiliations are concerned, I am aware of certain past political affiliations of a small handful of staff members. I mentioned two earlier who worked for Ministers, one on either side of the political divide, and there may be two or three others. I am inclined to think that you would get more negative than positive consequences from requiring formal declarations, because it might be that you would thereby send out the unintended message that you wanted staff who were entirely uninvolved and uninterested in the political process. It seems to me that is not what you want. Of course you want people who are capable of perfect dispassion, but experience shows that you can achieve perfect dispassion despite past political allegiances, even I would think current political associations. It may depend upon where the person is working. I do not know if I have members of staff who belong to political parties. I should think the numbers would be small, but I would not faint with shock if I found that they did.

The final point, and it is one that I made this morning, is that the ultimate decision as to whether we commence investigations, for controversial purposes the key decision is always made by myself, and I trust there would be satisfaction that I am politically dispassionate as well as uninvolved. I imagine it would always be the case that the Commissioner would reserve that key decision to himself or herself.

Mr HATTON: If we did weed out people with any party-political associations, it would have the satisfactory conclusion that none of them could deal with Independent members.

Mr TEMBY: I do not know. You will understand that I have not had a chance to think about that. I am always wary of unintended consequences, and I wonder whether there might not be some unintended consequences from requiring such declarations. I would be concerned if I knew I was heading a Commission all of whom had a particular political philosophy; but I know that I am not, because I know that I have got some people on both sides of a broad political divide, and I know I have got numbers who do not care. It is one of those things you need to keep an eye on in a general sense.

Ms BURNSWOODS: I notice your code of conduct calls on people to make it known if an inquiry or investigation involves people, if the employee is either a member of a political party or an opposing political party. I do not know where that leaves the Independents.

Mr TEMBY: I can say that on a couple of occasions that come to mind I have had discussions with staff members, or prospective staff members, in this general area in order to satisfy myself that they are capable of putting past beliefs or allegiances behind them.

Ms BURNSWOODS: Or present?

Mr TEMBY: Or present.

Ms BURNSWOODS: Your code of conduct is in the present tense.

Mr TEMBY: Yes. Thank you for reminding me of that. It is something we did think about. I am all for neutrality, but I am not sure that people who are neutered, in the sense we are talking about, represent the best bet.

Mr MUTCH: I do not think that was what was required. It was something I picked up on because I thought it was interesting. I saw the pecuniary interests but then the political associations jumped out at me.

Mr TEMBY: I agree it is interesting. Mr Stretton reminds me, and I do not think there is any reason why I should not mention it, that he was counsel assisting in what we call the Blackmore matter. I talked to him in particular about any present or past political associations he may have had before I appointed him to that role, as I did with the assistant Commissioner who was appointed, because they are delicate matters and if it was thought that somebody might have an axe to grind, even the appearance of that would be most unhappy. But a great deal of the work we do does not give rise to such concerns.

CHAIRMAN: If there are no further questions on that, we will move on to the section dealing with access to Commission reports.

Mr GAUDRY: You mentioned section 13(1)(c) and section 14(2) of the Independent Commission Against Corruption Act. Is there any particular hierarchy of release of your reports and hearings?

Mr TEMBY: No. I can say that the occasions upon which we have provided what was called here early access have been few, and they have been seen to be justified because of the nature of the particular inquiry. To illustrate that, in the Driver Licensing matter we were anxious to get as much active co-operation from the Roads and Traffic Authority as we could, or putting it more precisely, we were anxious to continue the active co-operation that we had been receiving. We were anxious also that the responsible Minister would have a chance to absorb the report so that anything he chose to say about it would be considered and we hoped positive. Putting those matters together it seemed to us best to make an advance copy available to the honourable Minister and to the organisation concerned. And I think that was right.

Mr GAUDRY: That would happen in parallel?

Mr TEMBY: To the two of them, yes. We could have given it to either

with more than one copy and known that it would have been passed over. In fact we approached both of them. It seemed calculated to produce good results and it seemed to be a proper courtesy. The reasons for making a copy available to the Water Board were not dissimilar. They had a very large, pressing tender process which had been held up. There was at least some room for the view that it had been held up in part because of the work we had been doing. We wanted them to know what we were saying about that process so that they could start thinking about what they could do in order to revive it—whether they had to go back three steps or back only one step, or start again entirely—a whole series of decisions that had to be taken. It was for that purpose that I passed a copy to the manager of the Water Board in advance, because it seemed to me that was likely to minimise delay. I am sure Committee members realise that the allegation that we made a draft copy available in order to get their responses was completely wrong and absolutely irresponsible. It has since been corrected. Unhappily the author of that allegation did not have the grace to withdraw it and apologise for it, but it has been corrected.

Mr GAUDRY: There is no negative connotation that you can see to having those reports out before you actually publicly make a statement?

Mr TEMBY: It has been made available on an embargoed basis at the insistence of the Presiding Officers. We did the same thing with respect to the key political figures involved in the Greiner and Moore matter.

Mr HATTON: I think it was raised by somebody at this Committee that it would be a courteous thing for those people involved in reports to receive a copy of the report prior to it becoming public, so that when the thing hit the deck at least they would know what they were responding to and would not be responding simply to a 10 second clip on television.

Mr TEMBY: There is a difficulty with that because at least once we have had grave fears of litigation, and we have not wanted to promote that prospect you will understand.

CHAIRMAN: I think Mr Hatton's point is right. It was discussed.

Mr HATTON: It was raised at this meeting.

Mr TEMBY: It has been raised.

CHAIRMAN: Let us move on to staff matters.

Ms BURNSWOODS: The turnover rate seems fairly high.

Mr TEMBY: I do not think it is. It is lower than in the last organisation I ran, considerably lower.

Mr GAY: What comfort is that?

Mr TEMBY: That was perhaps a bit flippant. Let me say these things. It depends what you compare it with. You have to remember that we do not employ people as public servants, which means there is no expectation of permanency, and as a matter of positive policy we do not seek to encourage people to stay for as long as possible, because sometimes for people to move on and become, so to speak, standard bearers elsewhere can be a very positive thing.

Ms BURNSWOODS: But the other side of that would be that the Commission would be losing experience?

Mr TEMBY: Yes, loss of experience. Balances are struck. I do not mind saying that in some areas I have concerns, in particular which are typical in operations. The operational people who have left had been with us for disappointingly short periods, and that is an area of some concern.

Mr HATTON: Is that because they do not have promotional prospects? The organisation is designed to give them promotional prospects, is it not?

Mr TEMBY: I think most of them would say that. I am not absolutely certain that is the real reason. Some have difficulty in adjusting to doing things in an ICAC way, and that is the class I talked about before. There are some who think that policing at base is the locking up of criminals; it does not have to do with community relations and it does not have anything to do with the major fraud work, which is broadly the sort of work we do. Some people who come with that sort of background cannot get used to a different culture and choose to move on.

Mr HATTON: Is the position of chief investigator in your view a

satisfying career prospect?

Mr TEMBY: I think the position of chief investigator is not just a very important job but a very satisfying job, and it is pretty well paid. I do not remember the figures but they are quite well paid by police standards; about $60,000, and that is good money by police standards.

Mr HATTON: You see the point of my question, without putting too much of a point on it. Let us stick to the general. Obviously it is important to have your top two investigating officers of the highest calibre possible and not to lose their expertise in too short a time, which is one of the things that Ms Burnswoods mentioned. Is there anything that can be done or that we can do to assist you in that regard? You might like to take that on notice.

Mr TEMBY: We will think about that. I do not think there is anything this Committee can usefully do. If I think of a solution to which the Committee could contribute, please be assured I will be the first to ask for that help.

Mr HATTON: A supplementary question on that is that for people who come from the police force and go back to the police force is the police force of sufficient maturity to see that that is of great advantage to the police force and to the career structures of the people involved? Or is there some problem?

Mr TEMBY: Attitudes on that vary. Some do not have that level of maturity, but some do.

Mr HATTON: What about the police department itself? We were pursuing this in the Ombudsman's committee. Does the police department see it as an enhancement to career prospects for somebody to be on secondment to ICAC, or do they see it as a disadvantage?

Mr TEMBY: I think I can say confidently, on the basis of a fairly recent discussion, that the Chairman of the Police Board sees it as being an advantage and a positively useful experience. I do not think there is any Police Service view to the contrary. There is not formally to my knowledge, and I do not think there is such an informal view at top level. However, when

it comes down to selection committees, as always there are varying views just as there will be varying views at selection committee level on questions of race and community policing and so on. That is just how it is and I have no doubt there are some on selection committees who feel the ICAC work is not proper policing and accordingly it is considered that the officer has just been marking time.

Mr HATTON: Is there a different culture in the ICAC than there is in the police, if we understand anything by the term "culture"?

Mr TEMBY: I would certainly hope so.

Mr HATTON: Consequently, this is a fairly subjective question, it should perhaps enhance their prospects of promotion because it does, as the former Minister for Police pointed out—that is part of another inquiry—look at this question of getting people out of the police culture, putting them somewhere else for a while, then bringing them back.

Mr TEMBY: I understand that. Perhaps one comment may be permitted and it is at least related. There are some officers who have served with the ICAC who return to the Police Service—and I do not want to exaggerate the numbers, which I think are small—of whom I am aware go back to the Police Service giving the ICAC a terrible bagging and I think that is because they perceive a need to indicate to the fellows to whom they are returning that they have not been taken over by this foreign culture. It is sad when one hears that but I think that is the typical reason. Do you know what I am saying?

Mr HATTON: Yes, I think so.

Ms BURNSWOODS: The next question, dealing with the 22 investigators it says that five were seconded from the New South Wales Police Service and 17 were ex-police. Were those 17 predominantly New South Wales ex-police?

Mr TEMBY: No. I do not know about predominantly but certainly not all of them. We have or had police from England, Hong Kong and at least two other Australian States and a number from the Australian Federal Police.

Ms BURNSWOODS: And further on in this group of questions when you say that the two positions for investigators in training have been filled by officers on secondment from the New South Wales public service, is that a specific attempt to go beyond the Police Service?

Mr TEMBY: No. I am not sure we put that as well we might. I am not sure that is the key point. The key point is that these are not people with a police background; they are general staff. They happen to be secondees from the New South Wales public service, but the point is they are non-police.

Ms BURNSWOODS: And that is the specific reason for doing that?

Mr TEMBY: Yes, it is to give something of a career structure so far as those who are support officers are concerned. We try and not keep people in streams that never mix. Accordingly, not long ago, an assessment officer became a corruption prevention officer and I was delighted—a senior corruption prevention officer indeed. We have had other shifts between streams within the Commission and that is important, as it is important that people should feel they have somewhere to move.

Ms BURNSWOODS: What kind of career path could there be if someone is an investigator in training and on secondment? They are likely to be with the Commission a fairly short time.

Mr TEMBY: No, because typically, except with the Police Service, seconding organisations do not much mind how long people are with us. We have two officers who have been with us from the beginning and I would not be surprised if they are with us for years.

Ms BURNSWOODS: They may have a problem of where to return, as their expertise as investigators grows.

Mr TEMBY: They might, but they might have the corresponding virtue of not having to return anywhere. They might go through the ranks and become chief investigators. There are two outstanding female members of staff who have risen from the ranks of support officers, are now taking on this more professional role and it will take time, but they are on their way. It is terrific.

Mr GAY: Did you mention that they were serving police officers?

Mr TEMBY: No, they are not.

Mr GAY: If you had someone on secondment for a long period of time, who was promoted within your organisation, their pay scales depend on their seniority and promotion within the police force as such. Do you do a recommendation back to the police force? How would someone stand?

Mr TEMBY: That is no longer correct and I will be corrected if I am wrong. There was a time when what you say was right but we now pay all the seconded people according to our pay scales and they, having been seconded to us, can seek a promotion within the Commission. Typically they are better paid with us than they would be with the Police Service. The only thing that happens during the time they are with us is that they do not move in a rank structure, to which we have to say, "Well, at your age you have a long career in front of you. Breadth of experience is good. It should not do you harm and may do you good so far as career is concerned. It certainly ought to do you good as a human being".

CHAIRMAN: I notice in answer to question 6.3 there is a reference to the Director of Investigators. Is that the same as a Director of Operations?

Mr TEMBY: No, the Director of Operations took up a position with the National Crime Authority. We have decided, at least for the time being, not to fill that position. His two deputy directors have assumed newly titled positions and they became members of senior management.

CHAIRMAN: I had not heard the term before. Having had the experience of three years, should the Commission be covered by the Public Sector Management Act or are there reasons it should not be?

Mr TEMBY: I would need to think about that, but let me try and give you an answer. I do not know why we are not. I suspect we are probably kept out of that because of the importance that was attached to not making us an organisation that appeared to be unduly close to government or too greatly a part of the public sector we were supposed to scrutinise. I think that was the rationale. From where I sit the benefit is rather different and it has more to

do with atmospherics than anything else. I am very anxious to keep the Commission fairly small, active and as best I can non-bureaucratic. I tend to discourage anything that would make it feel like another public service organisation. That is all a question of atmospherics. If you wanted the matter taken further I would need to get down to levels of detail, if that were necessary. In most respects we do follow the requirements that are otherwise imposed because we take the idea of being a model agency fairly seriously; so I am not sure it would have practical consequences if we were caught by the Act.

CHAIRMAN: I would like a considered answer in relation to any benefits or disadvantages.

Mr TEMBY: We can provide that, but we will provide that without detracting from what I have said today, which is the larger question.

CHAIRMAN: That is right. If we could move on to answers to supplementary questions. I appreciate what you said about Kyogle and that is certainly the view of the Committee so we will try and get something to you in that regard. Is there anything arising from that? Last time the Committee met Mr Mutch asked a question to which Mr Sturgess replied by letter. Is there any problem in that letter being tabled to correct the record?

Mr TEMBY: No, there is not.

CHAIRMAN: I will table that letter from Mr Sturgess. Are there any further questions by Committee members?

Ms BURNSWOODS: I have a question relating to the annual report, which we received too late for the questions on notice, unfortunately.

Mr TEMBY: We got it out as quickly as the Auditor-General would let us, I should say. We were a little held up by that process.

Ms BURNSWOODS: Page 20 shows a table on the Commission's use of its statutory powers. Search warrants and listening devices appear overwhelmingly under the heading "Other". I just wondered if you could tell us more about what "Other" means?

Mr TEMBY: "Other" is everything not dealt with previously and what

was dealt with previously were matters that have been reported upon.

Ms BURNSWOODS: So it would deal with inquiries that are under way?

Mr TEMBY: And most significantly I am certain at least in that sense what we call Milloo, which is the police matter.

Ms BURNSWOODS: I assumed that was the case.

Mr TEMBY: There has certainly been a large number of search warrants and a number of listening device warrants obtained in relation to that matter.

Ms BURNSWOODS: All listening devices and warrants there appear under "Other".

Mr TEMBY: I am not certain they are all Milloo, a couple were not; I am not sure of the precise figures but most of the search warrants are Milloo and some of the listening device warrants are Milloo. I do not think that table includes renewal of warrants. I am reminded there has been a lot of activity in the listening devices area since the end of the year. I do not have a precise updated figure but there have been a number since 30th June. We are very active in the field at the moment.

(The witness withdrew)

(The Committee adjourned at 3.45 p.m.)

THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

CORRECTED

TRANSCRIPT OF HEARING

At Sydney on Tuesday, 08 December 1992

The Committee met at 9.00 am

MATTHEW JOHN ROBERT CLARKE, Judge of Appeal, Supreme Court of NSW, on oath.

CHAIRMAN: Would you please acknowledge the receipt of a summons under my hand?

JUSTICE CLARKE: Yes, I have received that summons Mr Kerr.

CHAIRMAN: And I believe you appear here in the capacity as a person in considerable knowledge of the legal procedure in relation to supervision of the courts and not a supreme court judge.

JUSTICE CLARKE: Well I am here to give what help I can.

CHAIRMAN: I think you have prepared a letter dated 27 November which sets out the grounds upon which the court intervenes in the exercise of it so, in the supervisory role in tribunals such as ICAC and avenues which could be given an appeal.

JUSTICE CLARKE: Yes I know.

CHAIRMAN: I might also table at this point of time a submission we got from Tim Roberston and the response from the ICAC on that and also the Bar Association. In fact I think on Friday at a seminar on defamation you presented a paper on stopwrits and contempt. Would you have any objections if that was tabled.

JUSTICE CLARKE: No, I have no objection to it being tabled.

CHAIRMAN: Is there any opening statement?

JUSTICE CLARKE: No, I do not wish to make an opening statement.

CHAIRMAN: Could I just ask you whether the removal of section 9 of the ICAC Act would nullify the mandate established in the Greiner decision for the Commission to apply objective legal standards?

JUSTICE CLARKE: I do not know whether strictly I am answering the precise question but could I deal with it in this way and if it is unsatisfactory you could let me know.

Section 8 which defines corrupt conduct or perhaps more accurately the general nature of corrupt conduct is couched in very wide terms and would encompass on any view much conduct that couldn't be considered corrupt in any normal sense of the word. It also encompassed much conduct that would not be unlawful and would not perhaps be described as unusual or in breach of any duty

owed by a person. In saying that I am of course paying particular regard to section 8 (1) and the inclusion of the element of partiality and I will come back to that in a moment but my understanding is that s.9 was a recognition of the enormous width of section 8 and operated as a control mechanism as it were. Even with section 9 it is clear that the definition of corrupt conduct extends far beyond corruption as that word is usually understood. Nonetheless s.9 operated as a condition which controlled the width to a degree of s.8.

Now could I just give two examples or perhaps three because they are the ones that come to mind.

In the area in which I operate - judging there are always two parties and there is always going to be a loser and always a great risk that someone is going to say that the judge was bias or partial. Now, in fact he or she may have given one party a fairly torrid time because of any number of factors and that conduct on his or her part might be used as the basis for an allegation of partiality. Now I would venture to suggest that while there can be no doubt that a judge who is partial for improper motives such as the receipt of money or something like that should be dealt with and clearly should be dealt with, I think it would be appalling if every time someone cried out that a judge was partial it became the subject of an inquiry.

Likewise, every time a member of parliament reacted to some lobbying from the electorate and put a submission before a department which led to a change of a decision there seems to me, under s.8, to be room for a suggestion of partiality.

Again, if an Attorney General was going to appoint a judge and two names were put before the Attorney General but he or she preferred a third person who hadn't been put before him or her because that person was known to the Attorney there would be room for a suggestion of partiality.

And yet I do not think that any of those suggestions that I have spoken about would be unusual nor do I think that they would be regarded as involving corruption at all. I think this was recognised when the Act was passed and therefore s.9 was put in place to try and act as a brake or control.

Now if one simply removed s.9 one would take away the brake and one would bring within the range of corrupt conduct as it is defined much conduct which has as much relationship to corruption as walking down the street. So while I think there is room for arguing that one can find in s.8 a basis for objective standards, with some exceptions, the big problem of simply allowing it to remain without s.9 is that is opens the door so much wider than it presently is and would encompass within the concept of corrupt conduct much conduct that would have no relationship at all to it.

Now, could I then go a bit further, and this may be answering another question. I think that sections 7- 9 and the perceived need (and I think probably there is a need) for some amendment of those sections is very much tied up with amendments to other parts of the Act and perhaps to some degree a restructuring of the Act. I noticed that in his evidence Mr Temby used the expression that sections 7 -9 had initially been thought to be jurisdictional sections. By that I take him to be saying that those sections laid down the cases in which the Commission could investigate certain facts. Clearly, there is a need for a jurisdictional section in any act, and the Commissioner might be right when he says that these sections fulfil that function. And in a rather odd way, before the 1990 amendments, that was in most cases their major function, because they didn't bear upon the nature of the finding that could be made, bearing in mind the High Court decision in Balog. But after the amendments in 1990 it is quite clear that sections 7 - 9 fulfilled a much larger role. They set the jurisdictional limits. They did that by rather a strange mechanism of a definition of corrupt conduct. The second thing they did was to provide the definition.

And they laid the ambit of the inquiry out with particular relationship to the findings that then were likely to be made as relevant to those matters. So that from 1990 onwards sections 7 - 9 became generally, as well as being jurisdictional and definitional, sections which provided the grounds leading to the actual findings under s.74A. It seems to me that before one decides what the ambit of the jurisdictional section should be one has got to look to decide what the precise role of the Commission is to be in relation to findings.

I spent a deal of time yesterday contemplating that in a number of contexts. One is that the Commission has, or certainly is perceived to have, performed an important function in society. And there is a real need therefore, or perceived to be a real need, to keep the Commission. And I took that really as my starting point. The second factor, which can not be denied, is that the Commission acts on evidence which is not admissible in the court of law and which can be compelled which obviously is very different to a court of law. And it is the combination of the findings given in, usually, a glare of publicity and after much, what I would call, usually inadmissible evidence that has led to what is perceived to be the real problem with the operation of the Commission. It has been said (and I have seen the denials of this) but it has been said on many occasions that reputations have been gravely damaged. Although someone has not been shown to have done anything unlawful in any sense he or she has nonetheless been labelled as either guilty of conduct conducive to corruption or corruption itself.

In that context I have another problem and it has always worried me about this Act, that in s.74B there is provision for statements whether consideration should be given to someone should be committed for a criminal offence or a disciplinary offence. Now in a number of cases a finding of corruption could be made, and let me say properly made, in circumstances where there could never be a recommendation, or consideration, that criminal charges be taken because the

evidence upon which the finding was based would be inadmissible. And if a finding is made against a person of corrupt conduct in circumstances where there is not going to be any other proceedings and where that finding has been based and properly based on inadmissible evidence, or on what I have called inadmissible evidence, then the potential for extraordinary damage to a persons reputation is very great indeed.

Now having those things in the back of my mind and having wondered why there was a need for an investigative body performing a very important investigative function to label findings I conducted a sort of self inquiry as to why one needed labels and I was interested to see that, after I had been thinking about this for a while and I read a bit more, this word "labels" had appeared on a number of occasions. And in a real sense what happens when the Commission says someone is guilty of corrupt conduct is the Commission is putting a label on a finding, an ultimate finding that it has made. And I wondered what useful purpose that served, and if it did serve a useful purpose, whether the usefulness was not far outweighed by the potential area for damage to people who had never been guilty or shown to be guilty of any unlawful conduct. And it seemed to me then that there is much to be said for the fact that the Commission should focus on what I understand to be its two primary roles, that is to investigate cases in which there may be some reason to suspect corruption, or if one likes, official misconduct, and to make recommendations as to changes in procedures, and probably even as importantly if not more importantly, to make recommendations in regard to changes to the law.

Now, I think that this is really the fundamental question which faces the Committee. Does it maintain the full weight of the amendments in 1990 or does it take the law back to Balog and beyond in the sense that there should be no power to make findings which really amount to labelling conduct. For my part, and I do not pretend to have spent the time thinking about this, as probably the members of the Committee, or the Commissioner, Assistant Commissioner, or Mr Moffitt, but for my part I am having trouble seeing why there is any need to label conduct when it carries with it this grave likelihood of damage and where as I see it, it does not advance the matter at all.

Now could I give an example by reference to the Greiner case and Mr Temby's evidence. He said, as I understood his evidence, and you must appreciate that I didn't see his actual submission I saw only his evidence, but I think that it stands on its own two feet. He said that in relation to Parliament or to Ministers and I assume also the Governor it would be appropriate for the Commission to find the facts and to leave it at that.

I can see much usefulness in the Commission finding the facts and leaving it at that. But I wonder why that should only apply to Parliamentarians, why shouldn't it apply across the board. Why Public Servants or anyone who is investigated or is involved in an investigation should not be subject to findings of

primary fact, but not subjected to labels being placed on their conduct. Because as I see it the label simply does not advance the matter at all.

Now , I said that I regard this as fundamental because if there is a power only to investigate and find the primary facts sections 7 - 9 could be constructed purely as jurisdictional sections, that is, the sections which lay down the type of conduct which would lead to an investigation. And so that if we had sections 7 - 9, and one could have, if one needed it, a definition of corrupt conduct, but I find it difficult to see why one would even need it if this were the position, one could have a jurisdictional section and one could have a section dealing with the findings, and it may not matter that the jurisdictional section was somewhat wider than extending to corruption as it is presently known because all that the Commission would be doing is what I think they are there to do, and that is to find the facts. And if those facts reveal a need for change, there should then be recommendations for that change, either in the practice of the particular department or in the law.

And in order, if thought necessary, to avoid any suggestion that the recommendations for change put a label in an implied fashion upon some person's conduct there would seem to me to be no reason why, for instance, the recommendations couldn't be done privately rather than publicly. Whereas the perceptions, according to the report that this Committee issued, are, generally speaking, that inquiries should be conducted in public. The report on findings could still be given in public. I have some views about that but I think that would be re-hashing old ground and I do not want to do that.

Now the other consequence of determining what should be the nature of the function, or the limitation of the function of the Commission, concerns the nature of appeals. If the Commission operated as an administrative investigative body, simply making findings of fact and not putting labels on, not calling conduct corrupt, then I would myself think that there would be little area for appeals and there would be no reason for suspecting that the review procedures which presently apply would not be adequate.

But where, as here, as it is now, there is provision for very damning findings, given as I have said usually in the glare of publicity, there is a strong case to be made for those findings to be subjected like any judicial findings to appeal process. The nature of the appeal might depend upon the view as to how far it should go but I, for my part, can not see any problem in a statute laying down an appeal regime against ultimate findings made by a tribunal of this nature.

I read with interest Mr Temby's discussion on the difficulties in having an appeal and his reference to the problems, such as would the Court, which is bound the rules of evidence, re-hear the matter, and what would it do about findings on credibility, things like that. Frankly, I think those are non-existent dangers, and whether his view reflects an insufficient understanding of well settled

appeal procedures and the power of the legislature to lay down appeal procedures in clear terms in an act of Parliament I do not know. If, for instance, and I should say before I go on further there is a discussion of the various types of appeal procedures in a case in a judgement of the President which might be useful. It was the case of *Watson v Hanimex Color Services*, Court of Appeal and the judgement was delivered on 28 November 1991. At page 11, the learned President discusses the various types of appeal. But let me say that if ultimate findings are to be made, I would think it desirable that there be at the very least, appeals on question of law.

Now those appeals are given in the Queensland legislation. They are not difficult to give. They do not involve any of the problems about which Mr Temby spoke. And they do not involve any reworking of the evidence and they do avoid undesirable discussion as to whether the finding is in excess of jurisdiction or is an error of law on the face of the record and matters of that nature which are discussed in the paper to which I will refer. It simply gives right of appeal where there is an error of law. And I would have thought, if there were to be ultimate findings, that is the very minimum. But bearing in mind the great damage to reputations which can be done by findings, for my part, I would go further and allow an appeal on questions of fact.

Now if that suggestion were to be followed up I think there would need to be some exercise of care. Leaving the Commission totally aside, in courts of law there are well established principles under which appeal courts work and they involve accepting at all stages of the appeal process the findings of a primary judge on credibility. There would never be a re-examination on findings of credibility, except in extraordinary circumstances. Secondly, they involve a hearing, with one exception, on the record. The exception is a hearing de novo, a total, full, re-hearing such as the old appeal to quarter sessions which I don't recommend. I would never suggest that for one moment.

But they involve a hearing on the record, with a right in very limited circumstances, to adduce fresh evidence. Now let me make it clear that I would not be advocating any right in an appeal court to receive fresh evidence. When I say that I prefer an appeal against the facts, I would indicate with that preference an indication of the need for the legislation to spell out clearly that the appeal would take place on the record and that the Court would simply look at the record before the Commission and determine whether there were any errors of fact or law.

Now I think that against what I am saying is one of Mr Temby's arguments, and that is that it may lead to a lot of appeals. That may be so. Whether it would lead to a lot successful appeals is a very different question, but it may lead to a number of appeals. And I think that the committee would need to balance the prospect that there would be an increase in appeals against the benefit which would result from appeals in the sense that if the finding of corrupt conduct is made and is found to have been erroneously made, any slur

disappears, and if the finding if found to have been properly made, of course, it is given added credibility. But I would emphasise that if there is to be an appeal on a question of law, it is a simple procedure that doesn't involve anything other than the statute saying that. If there is to be a wider appeal it is necessary in my view for the statute clearly to spell out the limits and that is that the appeal take place on the record and that there be no right to adduce fresh evidence.

Now if, however, my preferred position is accepted, which is that there be only findings of primary fact made and the Commission operates as an investigative body and a recommendatory body in accordance with its charter and the object under which I understand it was set up, there would be no, or very little, need for any appeal process. The supervisory jurisdiction of the Courts seems to work well in relation to other investigative bodies and I can't see why it woudn't work well here. I think that really encompasses a number of areas but it reflects my feeling at the end of my consideration of the problems that are raised.

CHAIRMAN: Thank you judge I think you have probably answered a number of my other questions. My next question is would you like a cup of coffee or tea.

JUSTICE CLARKE: Yes I would thanks.

CHAIRMAN: Judge, I was just wondering if you had the opportunity to read a paper by Margaret Allars on the Greiner decision entitled "In Search of Legal Objective Standards: The Meaning of *Greiner v Independent Commission Against Corruption*", and whether you had any reaction to that paper?

JUSTICE CLARKE: Well, I read it, as well as I could in the time that I allotted myself and it expresses a point of view and I don't think I should be seen to be either criticising her point of view or her right to express that point of view. Could I just make these general comments about it, and of course they have to be made in the background of the Greiner case because that was the subject matter, really, of her report or her paper.

She is right when she says that the area of law can be broadly described as administrative law. And she is also right when she says a number of principles have been built up which are called principles of administrative law. But in the particular area with which the Greiner case was involved, which was essentially one of determining whether the Commission had acted in accordance with its charter or as the Courts say, exceeded its jurisdiction, and I have rather lost the thread of it, the area of the Greiner case was whether the Commission had acted in accordance with its obligations under the Act or whether it had exceeded its role.

Now it is fundamental and it is fairly obvious that the first thing that has to be done is that the Act must be interpreted. One must interpret the Act to

determine what it is that the Commission is to do and what it is it is entitled to do. Now that was the first and in a sense the really important task undertaken by the Court of Appeal in the Greiner case. It interpreted the Act and came to a conclusion that s.9 required the application of an objective test.

Now the next question was, did what the Commission do accord with its obligation to act in accordance with the statute as properly interpreted. And the majority of the Court said no it didn't. It didn't apply an objective test. And I think there is not very much doubt that the Court was right in that. The room for argument was whether the Act required the objective test. Now while you might call it part of the administrative law, as it undoubtedly is, it is a task the Court fulfils all the time, determining what legislation means, what Parliament is taken to have intended when it passed legislation.

Now, this paper doesn't approach the decision from that viewpoint at all, which is not to be critical. As I understand her, she is testing it against what she states to be principles of administrative law. And she, in a sense, leaves aside the interpretive process and then the fact finding based on the interpretation and comes at it from what she calls principles of administrative law and says the decision doesn't conform. To my mind she inverts the process and comes up with a rather strange view. But that is only to my mind. It is a view that perhaps a lot of academics may come to. What does slightly trouble me in this, is that she does two things that I have seen academics do on a number of occasions and when I have seen them do it in relation to judgements I have written, it has both irritated me and troubled me.

The first thing is, she focuses on an area of the law which was not dealt with in depth in the judgement, and says this is an inadequate judgement because it doesn't deal with that. The viewpoint is easy to understand and perhaps easier to understand if one appreciates that people might find it difficult to get hold of the record in the court proceedings. But every judgement is written against the background of a case in which adversaries are putting points of view. One side is putting a number of points of view and the other side is putting the contrary views on a number of points. There are almost always areas of interesting law involved in a case which are not touched by either argument, either because the parties are adidem or because they do not see it as being a material matter in the case.

Now, I do not know myself but I venture to think that very little time was spent in Greiner on argument on the question whether this was an error of law on the face of the record or an excess of jurisdiction. I would understand the arguments to have involved two major areas, and very important areas, one the meaning of the Act, and secondly the meaning of the report - what the Commissioner was saying. And the judgements all deal very fully with those two areas. They do not deal very fully with the excess of jurisdiction area. And my feeling probably is that there was very little discussion of it.

Now, I said I get irritated about this because academics often pick up a point like this up to tear a judgement apart, failing to recognise that the point may in fact have been conceded in argument, failing to recognise that a judgement reflects what the case was all about. And I think there may be an element of that there.

The second criticism, if I can call it this, is it Doctor Allars or Professor Allars, finds in the judgement things that I can't find in it and then uses those, which on one occasion she calls a hint, uses those as criticisms. Now the first one that interested me was that she said that both majority judges criticised the fact that there was no appeal procedure in the Act. Now whether or not there was an appeal procedure in the Act was not part of the case being heard, and while judges sometimes do criticise legislation along those lines I hadn't seen that criticism in this judgement. And where it was first mentioned at page 11 of the paper where she said,

> "Both judges in the majority express their concern that no statutory appeal on questions of law to the Supreme Court is provided for in the ICAC Act."

I was troubled because I hadn't seen that concern and I noticed that she didn't have any page reference to where this concern had been expressed. That is a small point. But later she came back to it at page 22 and again she referred to both judges of the majority and she then quoted from page 4 of the judgement of the Chief Justice. So we had a page number and it led me to the page which I understood mentioned the absence of an appeal procedure, and to me what the Chief Justice was doing was clear. He was saying that there is no appeal procedure and that reflects on the interpretation of the Act, it is a matter to be considered together with a number of other matters in the interpretation of the Act. I think you will find, if you read the judgement, he said so in so many words. I still haven't found where Mr Justice Priestly mentioned this or criticised the absence of appeal process so I have to leave that to one side. But she then picked up what she discerned to be this criticism to hit, putting it colloquially, to hit the judges over the head with it. For my part I didn't see that criticism and it is, as I have indicated, not unknown that academics do put their own gloss on a judgement and use that gloss to hammer the judgement.

A similar thing occurred at page 17 of the paper when she says there is a hint in the Chief Justice's description of errors of law. And she uses this hint, or she takes it a bit further by saying that if that hint is right and if this applies, that is that another hypothetical consideration applies, he has failed to take cognisance of what the Chief Justice of the High Court said. But to me it is a fairly unsatisfactory basis for a criticism of a judgement when a hint is seen purely by her and I do not think many other people would find it. But her writing is, as I have said, in line with what one often finds from academics who may not have understood the precise issues upon which the Court was addressed.

I think the paper is probably important because it stimulates thought.

CHAIRMAN: Yes.

JUSTICE CLARKE: I do not want it to be thought that I am highly critical of it. If I was going to be highly critical I would have had to do much more work. I think it is an interesting viewpoint looked at from the inverse position.

There was one question that you sent me which is number three and which I only mention because I have had terrible difficulty with it. That was the question related to whether there ought to be a better way of testing a report.

CHAIRMAN: That did appear actually not in the judgment I hasten to add, but in the proceedings of the Court.

JUSTICE CLARKE: Yes, you sent me the page of the transcript. It is a problem, that applies to a number of tribunals. I remember years ago appearing to assist the Statutory Committee of the Law Society in an investigation against a solicitor, and during the hearing senior counsel on the other side said that the Chairman of the Statutory Committee was biased. He made an application to disqualify the Charman of the Statutory Committee. It was dealt with in a similar fashion that a similar application is dealt with before judges. The submission was put and the Statutory Committee ruled against the submission, and then the Solicitor appealed and the Statutory Committee in a sense was a party and was represented, but it was in a very difficult position to put submissions that the Chairman is not biased and then, having made submissions of that nature, continue with the hearing of the reference.

Fortunately, the Statutory Committee had assistance from the Law Society and in that case the Law Society was able to take an adversarial role and put the other side of the picture. Here the only person who can put the other side of the picture is counsel for the Commission. And that may, in cases, lead to a very uncomfortable situation. But I have scratched my head about this and short of a substantial restructuring which would involve separating the Commission into two types of bodies, one the hearing body and one the preliminary investigative body, and having the latter one treated as assisting the Commission, and therefore appearing on any appeal process, a procedure which I don't really advocate and seems to me very clumsy and unhappy, I can think of nothing. Short of something like that, I think that with the Commission as structured, one has got to live with the fact that it will have to appear and put the submissions, put the other viewpoint. Frankly, I just haven't been able to come up with an answer.

CHAIRMAN: Perhaps just a clarification, but taking you back to your opening remarks, I just wondered if whether you were expressing the view earlier that the ICAC findings of fact should be limited to primary facts?

JUSTICE CLARKE: Oh yes, that is my preferred position.

CHAIRMAN: Right.

HATTON: I was just mulling over in my mind will you see differences in confluence between this Commission and a royal commission, in the fact that a royal commission comes out with statements of fact rather than findings against individuals.

JUSTICE CLARKE: There is a great similarity between the two and royal commissions have come up with very bad criticisms of individuals, and I think that has led to a lot of disquiet in relation to royal commissions. But I suppose the fundamental distinction is that here we have a permanent body doing it day in day out and royal commissions are constituted once and once only. And I think there is a greater recognition of the need to keep them under control more than perhaps, there was some years ago, perhaps I ought not to mention the particular one, but one seemed to go a bit out of control.

HATTON: That is all, thank you.

CHAIRMAN: I think you were quite happy for that material on contempt and stopwrits to be tabled before this Committee?

JUSTICE CLARKE: Yes, it is a very, as I said on Friday the subject is a fairly narrow subject, but I am certainly happy for it to be tabled.

CHAIRMAN: I think certainly contempt and comment on proceedings is certainly relevant to what this Committee is considering.

HATTON: Yes, my word.

CHAIRMAN: I would like to thank you very much on behalf of the Committee, that has been very informative.

(the witness withdrew at 10.00 am)

CORRECTED

MINUTES OF
EVIDENCE TAKEN BEFORE

COMMITTEE ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

At Sydney on Friday, 5th February, 1993

The Committee met at 10 a.m.

PRESENT

Mr M. J. Kerr (Chairman)

Legislative Council	Legislative Assembly
The Hon. J. C. Burnswoods	Mr B. J. Gaudry
The Hon. D. J. Gay	Mr. J. E. Hatton
The Hon. S. B. Mutch	Mr. J. H. Turner
	Mr. P. J. Zammit

TIMOTHY FRANK ROBERTSON, Member of the Australian Bar, of [redacted] affirmed and examined:

CHAIRMAN: Before you give evidence I might make an opening statement. Today's hearing is being conducted as part of the Committee's review of the ICAC Act. The Committee began this review in September last year when it released a discussion paper. The discussion paper identified 10 key areas to be covered in the review of the ICAC Act. The Committee received over 30 submissions on the discussion paper, including very late submissions from a Mr R. A. Hancock and Mr Evan Whitton which I will now table. The Committee conducted a number of public hearings through October, November and December last year. At a deliberative meeting on 18th December the Committee was able to determine its broad position on a number of the key issues under review. I subsequently issued a press release which identified the areas. These included: removing the requirement under the Act for the ICAC to apply labels to the conduct of individuals—the Committee reiterated that the ICAC is a fact-finding investigative body; changes to the definition of corrupt conduct to ensure that the ICAC can investigate all public officials, including Ministers, M.P.s and judges—this included the repeal of section 9 and maintaining section 8 in its present form to set out the ICAC's jurisdiction; retention of all the ICAC's coercive investigative powers; and measures to ensure there is proper follow-up action in relation to ICAC reports.

The press release also identified two key issues on which further work was required. These were: first, nature of ICAC findings. Now the Committee has reaffirmed that the ICAC is a fact-finding body, should findings of fact be limited to "primary facts" or should its findings of fact be able to include judgmental statements of opinion about individuals using ordinary language? Second, appeals. If the ICAC's findings are to go beyond "primary facts", should there be an appeal mechanism established so that the ICAC findings could be reviewed? Today's hearing is being held to help the

Committee resolve these two remaining key issues. I would envisage that this will be the last hearing the Committee conducts as part of the review of the ICAC Act. The Committee is due to hold a deliberative meeting on 9th March. I would hope the Committee will be able to consider a draft report on this review at that meeting.

The first witness today is Tim Robertson, Secretary of the Labor Lawyers Association and former secretary of the New South Wales Council for Civil Liberties at the time the ICAC legislation was passed in 1988. The second witness is Mark Le Grand, Director of the Official Misconduct Division of the Queensland Criminal Justices Commission. Before calling the first witness I would like to table some further written advice that I have sought and received from Athol Moffitt and the ICAC which deals with the "primary facts" issue. I should also add that the Committee has this morning received a request from a former member of this Committee, Andrew Tink, M.P., to give evidence later this morning. Mr Tink will therefore be appearing before the Committee at the conclusion of Mr Le Grand's evidence. Mr Robertson, have you received a summons under my hand?

Mr ROBERTSON: I have.

CHAIRMAN: That in no sense indicates your unwillingness to give evidence but is required for the purposes of privilege and other matters.

Mr ROBERTSON: Thank you.

CHAIRMAN: Do you have a written submission that you would like incorporated into your evidence today?

Mr ROBERTSON: Mr Chairman, I think I supplied to the Committee last year a paper based on the speech that I gave. The paper was somewhat provocatively entitled "The Romans Were Right" and is, I suppose, dated about November 1992. In so far as it canvasses matters that I think are of importance concerning the ICAC. I would like that to stand as my submission. I was also asked last week to produce some papers which I had drafted while secretary of the Council for Civil Liberties in 1988 on the original ICAC bill. My archives are in disarray because I have just moved but the two papers I

have been able to find are an exert from my report to the Council for Civil Liberties and secretary dated 24th May, 1988, which was some days before the Independent Commission Against Corruption Bill became public. The second document, which is just a 28-page or 29-page paper dated 30th May, 1988, which was written a couple of days after the bill became public, is entitled "The Independent Commission Against Corruption Bill". The second paper was circulated to all M.P.s and members of the media in 1988.

The first document I regard as a public document because I regard everything that I did as secretary of the council as in the public domain, but it has not been deliberately thrust into the public domain so far. I wish to tender it and the only matter I want to observe is that there is a deletion on the first page of the first document. I will read the sentence so that it is clear that I am not seeking to suppress anything. "Annexed to this report is an outline of the main features of the ICAC. I have discussed the details with" and then there is a deletion and the name which has been deleted is Gary Sturgess. I then say, "At the time of dictating this, I have not seen the bill. It is expected to be introduced on Wednesday or Thursday of this week". I do not think it is any secret that Mr Sturgess saw me, amongst no doubt many other people, in the course of the drafting process to canvass views and to seek opinions about the ICAC model and he was good enough to give me a briefing paper, which presumably was a document used by the Government in giving instructions to Parliamentary Counsel and that then enabled me to put before the Council for Civil Liberties the general structure of the beast before the bill was tabled in the Parliament. Sorry that is a rather long explanation but I thought I had better make it clear what that deletion was.

CHAIRMAN: Having regard to your personal explanation I take it you have no objection to that material being tabled?

Mr ROBERTSON: No.

CHAIRMAN: Is there any opening statement which you would like to make concerning the issues under consideration in the Committee's review of the ICAC Act?

Mr ROBERTSON: Yes. The ICAC has been asked to perform several important but essentially incompatible functions. It has a social engineering function, which is to expose corrupt conduct in public life so as to deter the future commission of such conduct and to raise general public awareness of the damage that such conduct does so that it becomes generally accepted that corrupt conduct is wrong and should not be tolerated. In theory, this should act as a further deterrent to the conduct as persons seeking to engage in it would feel ashamed to do so and hence less likely to act corruptly. The commission also has a policing function. This is to investigate allegations and, where there is evidence of the possible commission of a criminal offence, to refer the product of the investigation to the appropriate authorities, either for further investigation or for prosecution.

The first function is incompatible with the second function. The commission can only discover some matters by using a power of indemnity, which is the fundamental discriminant which distinguishes its public hearings from the course of an ordinary criminal investigation. The indemnity will usually prevent prosecution of admitted criminality, unless there is evidence otherwise than from the indemnified testimony to prove the crime. Even so, it may be an appropriate exercise of prosecutorial discretion not to prosecute where a public judgment has been made, in effect of criminality by the ICAC, and the malefactor has suffered most of the adverse consequences expected to flow from a conviction by a criminal court.

The statutory mandate encourages, if not requires, public hearings and hence a further conflict between functions arises. Most experienced criminal investigators will agree that it is much preferable to conduct a police investigation in private than it is to do so in the full glare of publicity. Although prior to public hearings there is sometimes an investigation conducted in private by the ICAC, that is not always the case and such investigation as occurs will often be geared to the public hearings rather than as a separate prefatory step to the public inquisition. As I understand the concept, the public hearing is part of the investigation. The public hearing

may have been intended as an aid to an investigation, but I believe that the investigation has become an aid to the public hearing and that the commission views the public hearing as the most important part of its process. This is largely because of the cathartic effect a public hearing is supposed to have, and perhaps also the didactic purpose which the first function of social engineering is intended to serve.

I do not believe it can seriously be contended that the public hearing is an aid to a criminal investigation having as its object the prosecution and conviction of persons who have committed serious crimes. If this is so, justification for the ICAC as a necessary antidote to the constraints placed upon the police investigations by the right to silence is false as most ICAC inquiries involving public hearings will not result in successful prosecutions, even though the public hearing and reporting process characterises the conduct in question as criminal in the strongest possible terms. If the purpose of the ICAC was to boost the State's ability to bring corrupt malefactors to book, then I suggest that it has achieved precisely the contrary—that is, a combination of a public rather than private investigation together with the investigative result being achieved from inadmissible admissions makes it less likely, or in some cases impossible, that a successful prosecution will ensue, at least for the crime under investigation. Sometimes the ICAC hearing will create crimes in the nature of perjury, but I have not heard it loudly suggested by the ICAC that its crime creation function justifies its existence.

None of the above is intended to devalue the importance of policing breaches of public trust or changing perceptions of the wrongfulness of conduct by public officials which is indirectly corrupt—that is, conflicts of interest, use of government funds for political purposes, et cetera, generally speaking conduct where there is no personal financial benefit flowing to the person committing the conduct. I have the strongest possible belief in the importance of openness and accountability in government. For example, I believe that the Freedom of Information Act 1989 is a deeply conservative law which serves to protect wrongdoing in government and bad political

decisions, as well as incompetent bureaucracies. It does not deliver information which ought to the in the public domain in a timely or comprehensive fashion and hence has failed.

Despite these strongly held beliefs, my experience in government (as assistant to the Solicitor-General of New South Wales between 1981 and 1983, that is, during a period where the criminal justice system was under concerted attack), my experience in representing the Commissioner of Police in administrative law proceedings in the courts, my experience in both prosecuting and defending criminal proceedings and as a citizen concerned about public policy, I recognise the critical importance of secrecy in conducting a criminal investigation. I am also concerned at the frequent, and in my opinion erroneous, suggestion that the ICAC structure is necessary because the right to silence militates against successful police investigations of corrupt conduct. I know of no evidence which sustains this proposition although I know that the suggestion is made frequently, even today, that this is the basal justification for the ICAC. I ask the question: "What prosecutions have been successfully undertaken as a result of coerced testimony from an ICAC public hearing which would not have resulted from a competently conducted police investigation using the coercive powers available to police?" So far as I am aware, there has never been an audit of the ICAC which has been undertaken with a view to establishing or rebutting this proposition. It is somewhat reminiscent of the argument concerning the alleged public health impacts of pornography. Those who oppose pornography on moral grounds (or perhaps accurately, those who oppose explicit pictorial or written descriptions of sexual matters) often allege that exposure to pornography causes violent acts of sexual aggression. This reasoning is usually affected by the post hoc fallacy, that is, because one event occurs after another, the earlier event must be the cause of the latter one. Policy makers must be very careful not to fall into the same error when assessing the success or failure of the ICAC.

My concern is that, having been in and around government between 1981 and to date, the climate of public opinion which produced the ICAC was

one of a complete lack of confidence in the courts and a lack of confidence in the police force. Some people call me a radical, Mr Chairman, but on these issues I am deeply conservative. I do not believe in jettisoning institutions because those institutions have failed; I believe in reforming the institutions and if they are then not successful after an attempt has been made to reform them you look for alternatives. The ICAC is an alternative to both the police system and the courts system because I think it is now well recognised—and the fundamental point that I made in my speech last year is—that, as it is currently written, the Independent Commission Against Corruption Act is a means of passing extra judicial judgment on the conduct of persons, and of punishing those persons by publicising that judgment under conditions of privilege where the judgmental comments can be repeated without fear of defamation action. As well—and this is frequently omitted from analyses of the ICAC—the very existence and prestige of a body such as the ICAC making those judgments, makes the judgments even more damaging in the public arena because they are seen to be more credible, more credible even, perhaps, than similar judgmental comments in the course of legal proceedings.

The only other matter I want to advert to is something that the ICAC commissioner said in his evidence before the Committee and has repeated on frequent occasions. It is said in defence of the ICAC's right to bring persons into public calumny that this power is also available to and exercised by the courts frequently in the course of legal proceedings in relation to third parties who are given no right to respond in the course of legal proceedings. Theoretically, that is so but in practice it is not. In practice it is a very rare occasion when a court makes a judgment which impugns a third party without that party either having a right to respond in the course of the proceedings or, alternatively, having the battle taken up by one of the parties to the proceedings. In normal litigation if the conduct of a third party is in question, then it is in question because it is a relevant fact in the litigation which one party wishes to establish and the other party wishes to deny. Very, very rarely would that not be the case. Accordingly, in legal proceedings the

conduct of the third party becomes subject to the usual accusatorial system or adversarial system and can be defended or promoted as the case may be; and usually the judgment, if a judgment is made on that conduct, is made in the context of all the trappings of natural justice and fairness.

Secondly, some questions from Committee members of Mr Temby in particular related to disclosure in the course of the ICAC proceedings—using the Greiner-Metherell matter as an example—of documents such as the Metherell diary, which contained a great deal of information that I am sure all of us were interested to read but much of which was apparently irrelevant to the matter before the Commission. Although as a lawyer I recognise that matters in the diary were relevant to Dr Metherell's state of mind, and in particular his credit as a witness if his credit was an issue—because matters such as bias or prejudice which might be disclosed by a diary entry are relevant in assessing a witness's credit, and accordingly the diary may have been relevant to those proceedings—it was a simple matter for a suppression order to be made, at least in relation to the material in the diary which fell within Mr Moffitt's expression, which I rather like, of "tittle tattle". As a practising lawyer I see, not on a daily basis but certainly regularly in the courts, suppression orders being made to protect third parties who are not present in the proceedings but whose integrity has been impugned by documents which are otherwise relevant to the proceedings. Frequently, private information—personal, confidential material—concerning third parties is obtained in the course of legal proceedings under subpoena. There are very strict rules, and it is a criminal contempt of court to breach them, which impose obligations on lawyers to deal with those matters only for the purposes of the legal proceedings. There are also very strict ethical rules on lawyers not to impugn the character of a person unless it is absolutely essential or critical for the purposes of the proceedings and to have some basis for making the allegations in the first place.

Those are very important constraints upon raising issues of character

or reputation against third parties to legal proceedings. In no sense is it proper for an analogy to be made between the ICAC and the court system and to say, look, the courts do it too, therefore we are justified in doing it. I thought I should draw that to the Committee's attention as a practising lawyer. I do not think the information you have been given about the role of third parties in legal proceedings has been accurate.

CHAIRMAN: It might be convenient to have that written statement photocopied if you have no objection?

Mr ROBERTSON: No—E & OE Mr Chairman.

CHAIRMAN: Having reviewed the key submissions and evidence taken by the Committee, do you have a concluded view on whether ICAC findings should be limited to primary facts? I might ask you to give your definition of primary facts before you give that view?

Mr ROBERTSON: I think this is a very difficult, but nonetheless important, matter. I accept the inevitable logic of Athol Moffitt's proposition that if you are to give a statutory remit to a body such as the ICAC to make personal judgments about people's conduct which amount, in effect, to judgments of impropriety and have the consequence of punishment because one his held up to public calumny, then you must protect persons from error; not just legal error—and there is a very limited protection of legal error at the moment because the ICAC does not have any privative clause in the Act protecting it from jurisdictional or procedural review in the courts, but that is a very limited review. With an organisation such as the ICAC—and this is the case with all disciplinary tribunals, and in Queensland, of course, under the Queensland legislation where such a power reposes in the body—it is usual to give a right of review on the facts and the law.

I see a considerable difficulty in undertaking a review of ICAC proceedings. The commissioner has adverted to some of those difficulties, one in particular being the role that the ICAC itself would play in the review proceedings. There is a kind of legal tradition in Australia that the courts look askance at bureaucracies whose decisions have been challenged in the

courts taking an active role before the courts and supporting those decisions. There is a High Court case, I think it is Hardiman's case in 1979, where the Australian Broadcasting Tribunal took an active role in the High Court in seeking to support one of its decisions. The High Court took a very dim view of that, because that was really a case of a regulator entering the arena, so to speak. But it is usual where a bureaucracy is challenged in the courts for the Attorney General to intervene in the proceedings and seek to uphold the bureaucratic decision and the Solicitor General or other Crown counsel are usually briefed to support it.

The commissioner points to the problem with the ICAC in that if the report which is under challenge is highly controversial and has criticised the Government, for example, or some favoured part of the governmental bureaucracy, then there may not be a great incentive on the Government lending its support to those findings of fact. So there is immediately a conflict. Perhaps that conflict can be overcome if you are going to have an appellate mechanism by having an independent, as it were, prosecutor appointed to run with the ball on behalf of the ICAC in the appellate proceedings. What we are doing, and something I counsel against, is erecting a parallel legal system to the courts, and I fear that by institutionalising it in this way through a right of appeal one is perhaps dignifying the ICAC with the trappings of a court, which it does not want and which it says it is not, and where I consider to do so would be an error because it would make any findings by the ICAC even more difficult to challenge, even though those findings may be wrong—and findings by the ICAC in some of its reports have plainly been wrong, as I pointed out in my speech. Horiatopoulos is a good example.

On the other hand, by restricting the ICAC purely to reporting facts, you run into this difficulty, that in finding a fact it will be necessary for the ICAC in some cases to assess the credit of witnesses before it. In assessing the credit of witnesses it may be necessary for the ICAC to investigate matters going to the character or reputation of those witnesses. For

example, it might legitimately be put, in relation to a person with a lengthy criminal record, including convictions for perjury, that that person's evidence ought not to be believed, and it will be then necessary to bring into evidence before the ICAC convictions for perjury, and I think most people would consider that would be a fair thing to do. If you can do that, then why should you be foreclosed from going to other conduct by a person who may have a spotless record, may have no criminal record but who has a reputation as someone who is a liar, is unreliable, perhaps has psychiatric difficulties or whatever. Then the ICAC would have to hear evidence—perhaps medical evidence, perhaps evidence from a dozen people who have had dealings with this person—and make a judgment, effectively a judgment on the repute of the witness. to assess the credibility of the witness's evidence. This is a very extreme example but it is not, I suggest, an unbelievable one.

So in actually answering the question what is a fact, it may be necessary for the ICAC to express opinions, to draw inferences and to make, in effect, the sorts of judgments that you may wish the ICAC to be constrained from making because the obvious problems of making those judgments involve the persons who have no right of review. On balance, I think the difficulties of restricting the ICAC to fact finding are less than the difficulties involved in creating an appellate jurisdiction. I think there is a great deal of wisdom in what Athol Moffitt has put to this Committee. I do not know Mr Moffitt personally, but I can say that if I could comment on his reputation, in my profession it is said of Athol Moffitt that he is the only royal commissioner since the second world war—and these were comments made, I think, before the Fitzgerald royal commission—whose royal commission did not go off the rails.

In other words, it was carefully constrained; it did the task it was asked to perform, which was affecting the confidence of the people in the then government and hence a very serious matter that justified a royal commission, and it was conducted in a conspicuously fair fashion. There is a great deal of respect for Athol Moffitt because of that, in my profession. He

is, of course, a very experienced judge and lawyer and the Committee would do well to find the wisdom that Mr Moffitt has expressed in his submissions, and I must say I think that it is not beyond the wit of the drafters to produce the definition of primary fact, although I do not like the expression myself.

CHAIRMAN: What do you understand by the term "primary fact" at law at the moment?

Mr ROBERTSON: It is effectively a description of what has occurred. The problem arises whether that includes the intention with which things have been done, and if the expression is to include intent as an element, then you might as well not have the restriction, because the question of intent in criminal proceedings is pre-eminently a matter for a jury to consider, and one is never privy to the jury's reasoning processes. The jury on ICAC reports is really the public of New South Wales. Hitherto, the jury has been the ICAC itself, and I do not think that is an appropriate role for the ICAC to perform, for many reasons, but principally because I think there is a conflict of interest.

In our system of justice we say of the Director of Public Prosecutions that for all his merits he ought not to be an investigator. As a prosecutor, prosecutors ought not to be investigators because investigators are really in the arena and tend to lose the appearance, or indeed the substance, of objectivity, which is very important when making finely balanced decisions, whether or not the prosecutor. The ICAC is an investigator; it is not the prosecutor but it is also a judge at the moment. I am happy—I am not happy, but I think within the confines of your question it is appropriate—that it be, as it were, an investigator, a finder of facts, but if it goes into issues such as intention, then it is making judgments; it is performing the function essentially that a jury performs. The jury answers the ultimate question—is a person guilty or not—not by answering a series of questions: does this person have this intent or that intent, or has the person done this or that; it just gives you the answer, guilty or not, but it has no difficulty. Well, the system works. Juries obviously have difficulty on some occasions, but generally

speaking juries have no difficulty in drawing conclusions from primary facts that are expressed in court, through the system.

Mr HATTON: Except where there is a lot of forensic evidence involved and a lot of specialist evidence involved, and the courts have not been able to solve that problem?

Mr ROBERTSON: I think my answer to that would be that our system of evidence has developed over 600 years from a wilderness of single instances, so that the way in which evidence is received in the course of a trial which might have been appropriate in seventeenth century England is not necessarily, in my opinion, appropriate in twentieth century Australia. We are very much constrained by the common law rules and by the failure of the Parliaments to change them, in the way in which evidence is received in the courts, without completely abandoning the system of legal precedent on which partly the rule of law depends, and of course certainty in other matters in our system of justice. There is little that the profession and the courts can do to solve that problem.

Mr HATTON: I would like to get some clear points here. You have told us why we should not create an appellate jurisdiction in the matter of the ICAC making findings. On the other hand, you have told us the problems of the ICAC finding primary facts, so is the conclusion that we should not have an ICAC, or what conclusion do we obtain from this first part of your evidence?

Mr ROBERTSON: I think my preference is not to have an ICAC as presently structured. I think my point is that as it is presently structured there are a number of irreconcilable conflicts in what it does, and the Greiner case and the Metherell case has really pointed that up. It is recognised on the one hand that the ICAC is not infallible and that its findings can cause significant damage to individuals, in fact be treated as more credible than court findings, and hence have the consequence of punishing people. If that is the case, and if the ICAC is not infallible, then you have to have an appellate mechanism, otherwise you are stripping people of their rights. May I say that

one of the problems that I see in the present situation, Mr Hatton, is the fact that with legal aid being denied to people for civil matters in New South Wales, only the rich or the Government, the servants of the Government who are indemnified for their costs, will be able to even challenge legally erroneous findings by the ICAC.

Mr HATTON: But is that not the present situation in the court? The essential problem we have to come to grips with as representatives of the people is, has the court system failed to deal with the corruption problem because of the nature of the court system and the nature of corruption, and was this the reason why the ICAC was formed? If there is any truth in that, then by simply abolishing the ICAC and attempting to reform the court system, we will be embarking on an extremely lengthy process in which, in the meantime, corruption may continue to flourish. I might ask you to comment on this by saying is it not a fact that the abuse of process relatively common in courts where matters are complex and this involves corruption, it involves fraud, it involves forensic evidence, it involves highly technical evidence and this extraordinary cost, really means that the court system has failed to deliver justice to ordinary citizens, so the sorts of things you are talking about without contesting them as problems with the ICAC may be even more problems with the court system and one of the reasons why we have an ICAC?

Mr ROBERTSON: Can I confess and avoid. I confess and I agree substantially with what you say about the court system as a criticism of it, although I take issue with the proposition that it is the court system that has prevented the investigation and scrutiny of corrupt conduct. I think what has happened historically in this State in the last decade is that there has been a loss of confidence in the police force.

Ms BURNSWOODS: And in the courts?

Mr ROBERTSON: Well, let me deal with the police force first, because I think the police force is the critical element here. That loss of confidence in the police force has extended from Joe Blow in the streets to the Minister for Police at various stages in the last decade and various

Premiers in the last decade. That is an extraordinary thing, that an institution which is so central to protecting the citizen from public and private criminality is not regarded as capable of dealing with particularly public criminality. There are several reasons for that loss of confidence. One is the apparent corruption within the police force itself, I think established corruption because a number of police officers have been dismissed and convicted of offences of corruption in the last 10 years. Secondly, it is an institutional problem in the force itself because of its system of promotion on age not merit. Thirdly, it was an organisational problem within the force because of the lack of regionalisation for many years. Fourthly there was a lack of leadership in the police force. Fifthly there was a lack of political will to deal with those problems until Peter Anderson became Minister for Police. Then there has been political will on both sides of the Parliament to deal with the problem.

However, it seems to me that the problem in the force has been here for many decades and the ICAC is a very extreme reaction to that. I do not attribute it to the courts. I think the courts very much process what is served up to them and criminals of the justice system by the police, and the police are not prosecuting and not properly investigating public criminality then the fault lies in the police force. At the same time there is conduct that does not amount to a criminal offence, conduct, for example, involving conflicts of interest or involving the misuse of public moneys for political purposes. One example might be the use of public moneys for advertising particular government programs immediately before an election, where the conduct can be described as improper—I would not describe it as corrupt—and where there should be some system available to expose that conduct. So a public auditor—I do not mean the Auditor-General because his role is to deal with financial matters—but a public auditing process is important and that process ought to be conducted in the full glare of publicity.

So whether you call it the ICAC or some other institution, I think it is important to have that institution there. Secondly, I consider it critical to

have an institution that gathers information concerning the level of criminality in public office by public servants or public officers. The ICAC performs that essentially statistical function. That tells us what the level of criminality is in the public service. Thirdly, I consider it essential to have an organisation that can conduct inquiries such as the local government inquiry, pecuniary interests, conflict of interest inquiry, and the inquiry into the misuse of confidential information, and, indeed, I see those inquiries as bolstering the civil rights of individuals in our society because the result of those inquiries was to demonstrate the way in which public power has been misused or taken advantage of for improper purposes. I want to make it very clear that I do not oppose and indeed I support having an agency independent of the Government with all the trappings that the ICAC has to investigate those important matters so that the law can be adjusted, or changed where weaknesses are detected, so that we know what the level of criminality is in Government. I think those are very important. Once the ICAC goes in to the purely criminal stuff, it is doing work which the Parliament has decided it does not have any confidence in the police force to do. I think that is very unfortunate. I do not see the ICAC as continuing in the long term to do that work. I consider that we must get to a point where we regain confidence in the police to perform that work.

Mr HATTON: Do we get to the point in this discussion, which is the point of the hearing, you have just made a submission that the ICAC has a role. Is that role to find primary facts despite all the difficulties that you have outlined in depth, that that does involve? Has it a role and therefore should the Act cater for that role?

CHAIRMAN: In addition to that, and the Committee can object if I am wrong here, but the Committee and all sides of politics are committed to the continued existence of ICAC and do not want to see it disarmed, and the question is whether its investigative powers would be effective if its findings were limited to primary facts.

Mr ROBERTSON: I appreciate that. I think its role can be limited to

public reporting of primary facts without neutering it. Indeed, to restrict its role in that way does not affect its investigative powers one wit.

Mr HATTON: Is it a more efficient organisation than a royal commission in determining primary facts and therefore a good reason why it should exist?

Mr ROBERTSON: My experience of royal commissions is limited to the royal commission into the efficiency and productivity of the building industry in New South Wales, apart from reading royal commission reports and I have read most of the major royal commission reports in the last 15 or 20 years. I think the answer to your question is, it very much depends upon the commissioner and the degree of organisation. I think the Fitzgerald commission is a very good example and I have a quite completely different view about this to Brian Toohey. I think the Fitzgerald commission is a very good example of a commission that did not go off the rails. It did what the ICAC cannot do when the ICAC investigates allegations of serious criminality. It was able to expose primary facts to public view without making judgments about those facts.

Mr HATTON: So you think the ICAC could do that?

Mr ROBERTSON: Yes, thereby enabling the persons who had committed the crimes to be prosecuted in the court system without so prejudicing the trials or so protecting the evidence through a system of indemnities that any prosecution, any subsequent prosecution was hopeless. If you look at the strike rate of the Fitzgerald commission against the strike rate of the ICAC it is a pretty telling comparison.

Ms BURNSWOODS: Some might say that has something to do with the levels of defences in the different States too.

Mr ROBERTSON: I am not sure that is right. The ICAC has investigated a huge variety of conduct at very low levels of bureaucracy, I mean Horiatopoulos or something like that, the Kyogle investigation, and it has also investigated matters right at the upper echelons of the system, whereas the Fitzgerald inquiry was really restricted to the police, and through

those investigations, to dealings with a couple of Ministers. Although its terms of reference were gradually expanded during its life, it did have that narrow focus. The point I am making is that you cannot set up an institution like the ICAC and make it appear as if it is a court making judgments about people's conduct, and in getting that evidence, indemnifying the witnesses so the evidence cannot be used against them in subsequent criminal proceedings, and then expect people who committed serious public crimes to be successfully prosecuted. It will not happen. It does not happen. We will get to a stage even where there is admissible evidence against those persons and they can be prosecuted, the High Court is going to say there has been so much adverse publicity that there is no way these people could get a fair trial.

Mr HATTON: Should we be looking at the ICAC in terms of a standing royal commission with an ever changing focus, in other words a standing royal commission mechanism which is given particular references or decides its own references. We should be looking at it in those terms, or should we not be looking at it in those terms?

Mr ROBERTSON: I think that is what has operated. A decision was made in 1988 that it could generate its own reference and, as you know, there are other models in existence. I think the Crime Commission is one good example which tends to be very much a reference-based body whereas the ICAC is perhaps a concepts-based body. The investigations it conducts are not ever regarded as being limited by the terms of reference because it can always change or expand the terms of reference overnight so to speak.

Mr HATTON: So, if what you say is a fact, you feel that if it were of a mind ICAC could embark on a royal commission into the police force-type investigation?

Mr ROBERTSON: Yes, there is no doubt.

Mr HATTON: And therefore, to that extent, become a Fitzgerald inquiry?

Mr ROBERTSON: There is no doubt that it could. The jurisdictional fact is a suspicion that there has been a lack of impartiality, to put it at its

lowest, and that is not difficult to say of any bureaucracy. In fact, the ICAC could investigate the whole of Parliament, it could investigate each of the political parties because political activity, by its very nature, is a lack of impartiality. The words used in section 8 are words of the greatest generality—and intended to be so—cut down only by the requirement in section 9 that ultimately someone has to be disciplined or dismissed.

Mr HATTON: Would that apply to corruption within the court system; ICAC could similarly be involved in that sort of an investigation?

Mr ROBERTSON: I do not think the court system is exempt. I think the intention was that it would not be exempt, despite the fact that in 1987 the previous government, under the Judicial Officers Legislation, set up a system for investigating the judiciary.

Mr HATTON: The point of my questioning is this—?

Mr ROBERTSON: I am sorry, to answer your question specifically the definition of public official includes a judge, magistrate, or the holder of any judicial office.

Mr HATTON: I will come back to the tension that that has created between the court system—which may be a part of the basis of the criticism of ICAC—and the tension between ICAC and the court system itself. But you have cited Fitzgerald and Moffitt as good examples of royal commissions.

Mr ROBERTSON: That have not gone off the rails.

Mr HATTON: We have established that ICAC, in your view, can function as a revolving royal commission; therefore, when you look at Moffitt, Williams, Woodward, Costigan, Giles royal commission, Fitzgerald and so on, you would have to conclude that ICAC could and should continue as a royal commission-type function and could do that job a lot more efficiently, in terms of dollar cost, than most of those other royal commissions. Would that be a statement of fact?

Mr ROBERTSON: The answer is, I do not know. There has been no cost benefit analysis done of ICAC. There would have to be a cost benefit analysis and I do not think a financial analysis would be efficient.

Ms BURNSWOODS: That is not quite true. If you refer to the appendices in their annual report, they have made an attempt to cost each inquiry.

Mr ROBERTSON: That is a financial analysis. It is an input-output analysis. I think if you are talking about a sophisticated examination or an audit of a statutory body—to answer the question is it giving dollar value to the Government—you must undertake a cost benefit analysis. That includes not just strictly the cost to the Government of the organisation. Can I just take you up on that? The ICAC costs—

Ms BURNSWOODS: No one has done one, say, of the Giles commission or any other royal commission.

Mr ROBERTSON: I will answer that in a second. One of the costs not counted by the ICAC, when it looks at the costs of these inquiries, is the cost to the people appearing before it of hiring lawyers or getting advice on the inquiry. Some witnesses have had, because of stress, nervous breakdowns and have had significant medical costs as a result of their appearance in the witness box. That has to be costed, that is a cost—or perhaps some people might regard it as a benefit, I do not know. It is undoubtedly something that has be counted in the calculus. When one looks at the effect of the report, for example, if you look at the disclosure of confidential government information you want to ask the question whether the report has had a beneficial or adverse effect on the operation of government and private industry, which depended on the receipt of private, confidential information in order to recover debts and do various other things. I am not justifying that, of course, by the way; I am just saying that is a cost, perhaps, of the inquiry—a cost private industry. That is what I mean by cost benefit analysis, you have to look at the areas of market failure as well as what you get purely in government financial terms.

To take up the Giles example, that cost some tens of millions of dollars; but if you make inquiries of the Commonwealth and State governments and ask them how much money they have recovered from

building contractors in collusive tender fees—which were paid without the knowledge of those governments to unsuccessful tenderers and to industry associations—you may well be very surprised.

Mr HATTON: But you would have to admit that the very structure of ICAC itself, compared to a royal commission, is far more cost effective. Giles himself, if it is true, was paid more than $2 million for less than a year's work as the royal commissioner and you would have to look at the cost of legal counsel in all of those royal commissions that I cited—and one really wonders what many of them achieved. If you are looking at $12.8 million compared with what would be tens of millions of dollars to run individual royal commissions you would have to say that the structure is efficient.

Mr ROBERTSON: No, I do not agree with that. You want me to compare it with Giles—and I am the last person to defend whatever monies might or might not have been paid to legal practitioners for that inquiry. As you know, I have strong views about the way the legal profession rips off consumers—including governments—but if you look at Giles, he was inquiring into an industry which, in 1988 and 1989, was worth $7 billion in GDP alone, about which allegations had been made that it operated terribly inefficiently, and indeed, on the Darling Harbour Convention Centre alone produced a product at 213 per cent of the cost of almost precisely the same building built in the United States at almost precisely the same time. In other words, the New South Wales Government, the taxpayer, was paying several hundred million dollars more than it should have paid for Public Works in living memory over the past four or five years, whenever the convention centre was constructed.

Mr HATTON: I will limit my comment to one more question because I think I am probably leading us away too far, but we are not just talking about cost benefit, we are talking about actual cost of the structure. If ICAC were to tackle the building industry in the same way, with the same terms of reference as Giles, it would certainly do it at less cost for the commissioner himself than $2 million and certainly at less cost, in my view, than it actually

costs. Would you agree or disagree with that—because of the actual structure—irrespective of the fact that it might be cost efficient to do that because it is a $7 billion or whatever industry?

Mr ROBERTSON: I have to preface my answer by saying that the Giles commission investigated matters in the building industry which it would be unlawful for the ICAC to investigate because it concerned matters which did not affect conduct of public officials. With that reservation, if you are asking me to address merely the matters Giles did investigate which did relate to public officials—such as collusive tendering or Public Works projects—I would have to say that certainly employing people as ICAC does and having the infrastructure there makes it more cost effective than setting up a royal commission every time there is something the Government wants investigated. On the other hand a lot of the infrastructure that was very expensive for the Giles commission was highly specific to its inquiry and could not be replicated for other inquiries, for example, the computer system.

Mr HATTON: There is a role for ICAC that the courts do not handle and for which the royal commission structure is very expensive if you are going to get it to handle the same area?

Mr ROBERTSON: Yes, there is no doubt about that, but with the reservations I have made that when you are undertaking cross-comparisons it is a very specific inquiry. A lot of the cost of Giles was in consultancies to experts where the ICAC, if it had wanted to do the job properly, would have had to have done in any event because this is a very arcane and complicated industry and a lot of the money went into computer systems that were not going to be useful for any other purpose. I am not seeking to defend the allegation of cost overruns of the Giles commission. But I would not want it to be thought that I was critical of it on cost benefit grounds because if, on one project, an investigation of the structure of an industry can save this Government $100 million or $200 million and it costs $20 million to undertake that investigation, on any view that is a cost effective inquiry. It may have been able to have been done at a lesser cost—some people could say that the

building industry could have been investigated by someone sitting in a back room for six months and end up with the same result that Giles did by way of a report. But I think much of the impact of the Giles commission was not in the report which is, in my view, not a particularly good report, but it was in the process of exposure and of having looked at international comparisons for international best practice in the building industry which showed that New South Wales was woeful.

CHAIRMAN: I think this is a very important issue, the costing of these inquiries. You are basically contending that the ICAC is simply providing a financial costing. What could be in a cost benefit analysis? You mentioned pain and suffering, which I do not think is a quantifiable sort of thing.

Mr ROBERTSON: Medical expenses are. If I wanted to do a CBA on the Pacific Highway, not only would I look at the cost of accidents on the highway, I would be looking at what the State has invested in the education of the people who had become victims of that road. That is just a completely separate example.

CHAIRMAN: Let me give you a concrete example, driving examiner's inquiry by the ICAC which is regarded as a successful inquiry. If you wanted to do a cost benefit analysis of that, what would it consist of?

Mr ROBERTSON: I think you would need to examine the loss of moneys by the Commonwealth Government because of the evasion of tax which very simply resulted from the taking of secret commissions and their non-disclosure to the Tax Commissioner. That is one benefit of the inquiry.

Ms BURNSWOODS: But at a cost, because that income will not exist any more, so the poor Commonwealth will not get the money.

Mr ROBERTSON: Presumably it was not being disclosed in the first place, but that is true. Prostitution, for example, or the stopping of prostitution, would probably have a significant cost to the Commonwealth. Drug trafficking, for example, the Tax Commissioner issues what are called in the business million dollar assessments. When someone is accused of drug trafficking in the courts the commissioner usually trots out an assessment,

assuming that that person has gained $1 million income in the last seven years, and then seeks to strip him or her of those assets. I am sorry, I am moving away from the topic.

CHAIRMAN: Perhaps I could ask that question on notice and you could give a response, say, in 14 days?

Mr ROBERTSON: Yes. If you are interested in cost benefit analyses, the best work done in Australia, at the leading edge, is in the Bureau of Industry Economics, which is the independent economic policy unit in the Department of Industry, Technology and Commerce of the Commonwealth Government.

CHAIRMAN: Would you be able to provide the Committee with an answer in, say, 14 days?

Mr ROBERTSON: Yes.

Mr GAUDRY: I have not had the chance to read the 1988 paper which you provided, but on a quick glance it looks like almost a self-fulfilling prophecy of the matters you raised there as concerns prior to the bill actually going before the Parliament, particularly with reference to the report and the impact of reports. You said right at the beginning of your speech that we have this conflict between the investigatory role and the social engineering role of the Independent Commission Against Corruption. Do you see that as a fundamental conflict that really does have to be resolved if the ICAC is to continue as a reputable organisation or, if that reform does not take place, that that in fact could destroy it?

Mr ROBERTSON: I think that is right. I think there is a fundamental antagonism because on the one hand you wish to expose conduct that is "evil" and deserves criticism, because you want the community to condemn the conduct, you want to deter people from committing the conduct in the future, and you want to seek to prevent the conduct occurring in the future by making institutional changes. If I could use the emotive expression, that is the show trial function of the ICAC. To a considerable extent the public hearing is a show trial and the point I make in the speech is that it is intended

to teach us things. It is a morality play, it has a didactic function, and this is the justification advanced by some people for it, for publicising matters that might be more easily dealt with privately. Well that function is inconsistent with the purpose of bringing criminals to book because I think the public hearing process is antithetical to efficient criminal investigations and I believe that the—

Mr GAUDRY: Just interrupting you there, is this because of the fact that you have non-transactional evidence?

Mr ROBERTSON: Partly because you have to indemnify witnesses and partly because it tends to be a clumsy process. It tips off people if there is further evidence to be obtained. It has become stylised and, frankly, if I were investigating a crime, I would rather do it in a non-hearing framework. On the other hand, if the purpose is to bring criminals to book, you do not achieve that purpose by giving indemnities to the very people you want to prosecute. Although the ICAC does not give indemnities in that sense, the persons you would want to prosecute are presumably giving evidence in the public hearings and their evidence is indemnified, as is the evidence of perhaps their accusers.

Mr HATTON: On indemnity?

Mr ROBERTSON: Yes.

Mr HATTON: The nature of secret commission, the nature of bribery, the nature of much of corruption and, for that matter, involvement in drugs, dictates that unless somebody is given indemnity you are not going to break into that closed circuit of evidence. Is that not a fact?

Mr ROBERTSON: That is the case in some circumstances. There is no doubt that indemnities facilitate criminal prosecutions, Mr Hatton, but of course the police use the process of indemnities too in the course of investigation, or hold out the promise of indemnity, and once they do that they receive an admission from a criminal suspect. Subsequently that admission cannot be used in court because of the provisions of the Crimes Act which says that admissions to criminal offences cannot be used if they have

been induced by hope or fear.

Mr HATTON: In other words, that is actual corruption by the court or investigative process pre-court—the very criticism that you are levelling at the ICAC?

Mr ROBERTSON: No, no. Presumably the police hold out the prospect of indemnity to a person they are investigating in the course of, let us say, a drug operation, to people they believe are lower down the rung so that they can prosecute and convict people higher up. That is the traditional use.

Mr HATTON: That is the theory.

Mr ROBERTSON: Well, that is the theory. To some extent we are all talking theories because one of my complaints is that no one has undertaken an audit. No one has sat down and said of an ICAC report: could this have been done by the police; if so, why was it not done; should someone have been convicted as a result of the ICAC inquiry; have they been convicted and, if it had been done by the police, would they have been convicted? Those sorts of questions have to be asked. Whilst you and I, Mr Temby, Mr Moffitt and all the others—and Mr Roden; I won't forget my friend, Mr Roden—can come along and give our opinions about these matters, but until there is a sophisticated audit of the process I do not think Parliament is ever going to be informed one way or the other.

Mr GAUDRY: That audit would also have to go into the area of social education: has the climate changed?

Mr ROBERTSON: Yes.

Mr GAUDRY: And you are moving into some very very subjective analyses?

Mr ROBERTSON: Yes, but at least you are exposing it. As you know, I am a critic of the institution and the legislation, but I am a strong believer in exposing to public light many of the matters that the ICAC has investigated. I have given you two instances; I will give you a third. The controversial North Coast inquiry, whatever criticism is made of specific matters that occurred in the process and specific ways in which the report

was framed, nonetheless disclosed a network of people in the North Coast development industry who were influencing or were putting themselves into a position to influence local government decision-making functions in a way which was not available to other people. Using the word corruption in its broadest sense, I think that sort of corruption of the decision-making process was important to expose. So too was it important for the ICAC to find what politicians frankly have always known, that is, that the electoral funding laws are a farce and that it was possible to make very substantial donations to political parties as administrative donations which would not be disclosed, even though they offset the costs of the party and enabled it to spend more money on election expenses. I note, Mr Chairman, that the Parliament has done nothing about that, despite there having been a report by a parliamentary committee. The report by the parliamentary committee seemed to beg the question that the ICAC commissioner, Mr Roden, raised in his report, and I think there could be legitimate public criticism of the Parliament and perhaps the major parties for the way they are approaching that issue.

CHAIRMAN: But that was the province of another parliamentary committee, not this Committee.

Mr ROBERTSON: Can I also say, Mr Hatton has asked me questions about the cost of inquiries. I have appeared in one ICAC inquiry, the Walsh Bay inquiry, and no greater waste of public moneys have I yet experienced. You may recall the Walsh Bay inquiry—

CHAIRMAN: Perhaps before you go on, I do not know if you have read a report that this Committee did in relation to witnesses where Mr Helsham actually came along and said: I got it wrong; I performed as an old judge. Had I had my time again I would have taken an active part as the presiding officer and I would have had three stages. The first stage, investigation, I would not become involved in, then an assessment, and only gone to a public hearing once the issues had been clearly defined.

Mr ROBERTSON: If it had been necessary at all.

CHAIRMAN: Yes, if it had been necessary at all.

Mr ROBERTSON: And I would say that had he done that, it would not have been necessary to go to a public hearing, except perhaps a statement by the commissioner that the whole problem in Walsh Bay arose because the head of a government department had lied to a senior public servant about Mr Murray, and that Mr Murray was unjustly accused of improper conduct and that a number of unfortunate events flowed from that, as a result of the lie told by the department head. That could have been sorted out probably in a couple of weeks of private inquiry. This is one of my problems with the legislation that, although it does not compel a public inquiry, unless you are going to report to Parliament, there is an inference that in those important matters or controversial matters there will be a public hearing. Of course, if a public hearing becomes an investigation itself, you will find what criminal investigators will tell you they find in many investigations, that is, they only find the truth at the end of the inquiry and between the commencement and the finding of the truth there is an awful lot of irrelevant material, scuttlebutt, unfortunate assertions, false statements, and wounding and hurtful matters occur.

Mr GAUDRY: These are the very things that you are saying that in the educative role, social engineering role, that often it is that salacious material that is damaging to reputation and not able to be cross-examined or rebutted?

Mr ROBERTSON: Yes. Well, in Walsh Bay I saw two dedicated public servants crucified—crucified—because they blew the whistle on what they thought was a corrupt act. I saw two dedicated public servants, both of whom I think have now had their careers ended because of this, in the witness box day after day after day under intensive and often aggressive examination—I am not criticising the lawyers for doing that; they were doing their jobs for their clients—for going to the Leader of the Opposition and reporting something they believed to be the truth.

Mr HATTON: But does that not happen in courts every day of the week?

Mr ROBERTSON: In a court situation, Mr Hatton, the cross-examination is controlled strictly by relevance to the material being elicited, by the ethics of the lawyer seeking to elicit the material—and there are ethical constraints on what you can put to witnesses—and by the good sense of the judge. In this case—and you can go to the transcript of Walsh Bay and check this—the whistleblower, a woman in a senior position in the MSB, concerned about the largest public tender ever let in New South Wales going awry as a result of alleged corrupt conduct by a Minister, and making that allegation to the Leader of the Opposition, being cross-examined—and I think she must have been brought back at least twice, and she was cross-examined for four or five days I think over all by a battery of lawyers, by five, six, seven different lawyers.

Mr HATTON: I should make it clear that I am not here to contest the accuracy or inaccuracy of what you are saying. I am saying that despite all the constraints that you talk about in courts people's reputations are destroyed in cross-examination—sometimes needlessly—and there are "innocent victims" of the court system. You are submitting that the ICAC is far worse than the court system because those constraints are not there; but is that a case in practice?

Mr ROBERTSON: You have given me an example where someone is destroyed in the process of reaching a decision, but in the ICAC it is a double-barrelled exercise because not only can someone be destroyed or subject to enormous emotional trauma in the course of giving evidence, but the evidence that person can be asked to give is not constrained in the way it would be in a court.

Mr HATTON: It happened to me in a coronial inquiry in Winchester and it happened to Eddie Azzopardi in a coronial inquiry over a fire. He was subsequently proved to be telling the truth. In his case, he broke down in the witness box. At a third coronial inquiry he was proven to be telling the truth. It happens in courts.

Mr ROBERTSON: The double-barrel aspect of the ICAC is not just the

relevance of questions that can be put to a witness, the questions which can be put to a witness are irrelevant to the ICAC inquiry—questions generally tend not to be objectionable in the ICAC process because cross-examinations can be quite roving. The ICAC reports—at the moment it is compelled to—about those people. In the court system the trauma is there one day and gone the next and, unless the person is a party to the proceedings, it is most unusual to find that the judgment at the end of the day condemns that person.

Mr HATTON: Let me expose the weakness in your argument. At least in the ICAC reports—we have found that this has not happened in some instances and we have stressed this as a point of civil liberty—if a person is put through the wringer in an ICAC inquiry the commissioner should go to some trouble in a report to Parliament to clear that person if he feels that that person deserves to be cleared. There are no such constraints on a judge because that person happens to be a victim on the way through to the conclusion which is that a person is successfully or unsuccessfully prosecuted by the court.

Mr ROBERTSON: I do not want to defend all of my colleagues, but the cases in which I have appeared where it has been necessary to attack a witness and the court has found—I am thinking of one in particular—that the attack was unjustifiable, I have never known an instance where the court has not said so in the strongest possible terms. In fact, the case I am thinking of was a minor driving matter that I did for a client on the South Coast years ago. On my client's instructions, I was asked to attack a particular witness—I was told that she was lying—and I did so. At the end of the case the magistrate said that the attack was completely unjustified and he considered that the witness's evidence was truthful and accurate. That is every lawyer's experience who has a trial practice—that courts go out of their way to remedy those sorts of instances. There is no obligation on them to do so—perhaps there ought to be. Perhaps what you are driving at is that one of the remedies Parliament should make in civil and criminal litigation is to require courts, where these problems have arisen, to make positive statements to

clear the air which has been muddied—but the air has been muddied, as it often is in ICAC inquiries, not necessarily by previous conduct but by the allegations which are raised during the course of the inquiry. When I talk about the ICAC having a crime creation function, where often the only crimes prosecuted as a result of an ICAC inquiry are crimes which are committed in the course of the inquiry; often the only allegations made against particular individuals, who are then cleared as it were by the ICAC, are allegations which are created or made in the course of the ICAC inquiry.

I know one of the justifications for the ICAC is the clearing of the air function. You will remember over many years during, say, the Wran Government's tenure of office every so often allegations would be raised against senior public servants or Ministers, no doubt for political purposes—but that is par for the course in New South Wales. Often there might have been something to justify the allegation. The Government was always perennially troubled by how to resolve it: do you hold an inquiry? The first step is for the Minister to call for the papers and then the Minister has an internal inquiry—and that never satisfies the critics; then there is an "independent inquiry", perhaps by a retired judge or someone who may have no powers—and there is criticism because the inquiry is powerless; and then you go to the special commissioner of inquiry type of legislation or a royal commission in order to settle the concerns. It is very difficult in the context of political attack on the Government, using corruption as a linchpin, to deal with those circumstances. The attack on the Government arises for one of two reasons: either there is serious corruption and there is substance to the allegations or there is a lack of confidence in the ordinary institutions of public life to deal with those allegations. I come back to my original comments about the regret I feel that we have had to go to this expedient because of loss of confidence in the police force which ought to be the organisation with the task of undertaking this sort of inquiry.

Mr HATTON: That must go hand in hand with the enormous loss of confidence that there is in the court system—I do not know whether it comes

through to you as a practising barrister, but it certainly comes through to me as a member of Parliament. There are two points I wish to make and you may wish to respond. I have been in this place for 19 years. At one stage I was almost breaking down in tears because I had so many people coming to me—I had brown paper envelopes 12 deep around my little office—because they were running into serious corruption problems and did not have anywhere to go. That heap of brown paper envelopes has dried up since the ICAC has been an institution. At last we have somewhere where these people can go. That is my practical experience. Why did they not have somewhere to go before? As you have said, the police system and the political structures let them down and the court system is failing to deal with the problem of institutionalised corruption. I do not know whether it is a process problem or what it is but it is certainly there. We have established, for a modest cost, the ICAC. Indemnity, even on your own admission, is a weapon which unfortunately has to be used if you are going to get a secret commission and that type of corruption. There is a role for the ICAC. If that role is not to make findings against individuals because you do not want to create another appealable structure then it has a role in finding facts. Is that where we are up to in terms of your evidence before the Committee?

Mr ROBERTSON: Except when you speak of indemnity you are thinking, I believe, of the indemnities of the small cog to catch the larger wheel, whereas when I speak of indemnity I speak of the statutory indemnity conferred by section 37 or 38 of the Independent Commission Against Corruption Act upon all persons who give evidence in the commission. That is not an indemnity which the investigator, the ICAC, decides to confer; it is an indemnity automatically conferred by statute, provided the claim is made by the witness at the time the evidence is given. That is the distinction—and I think it is a critical distinction because you cannot have an ICAC public hearing that is effective without there being the prospect that if the admission of criminality is made or discovered in the course of the hearing it will not be prosecuted. The Parliament in May 1988—whether it thought

consciously about it or not—thought, "We will throw away the prospect of actually prosecuting people because there is a greater good in undertaking the morality play of the public hearing and the social engineering functions of the ICAC". If that was a conscious thought pattern of Parliament, perhaps it was justified at the time having regard to the graphic illustration you have given of people who had nowhere to go because there was a loss of confidence in our institutions. In my role as a practising conservative this morning, I want to make the point that institutional reform is as much a protection of rights and liberties, including the right to be free of corrupt conduct, as it is to erect additional institutions to deal with it.

Mr HATTON: Has the legal profession dealt with its failure and its lack of accountability? Has the court system dealt with its lack of accountability? Does the ICAC a role in that?

Mr ROBERTSON: I think the legal profession certainly has not dealt well with accountability issues over the years. Legal professional privilege lies at the heart of the accountability of the legal profession. The short answer is no.

Ms BURNSWOODS: I think my questions have probably become a comment because Mr Hatton has raised much of what I was going to ask. I suppose my concern, particularly earlier, Mr Robertson, was when you were focusing more on the civil liberties aspect and talking about the ICAC's origins and a loss of confidence in the police. It seems to me that you were very much underplaying the long term loss of confidence in the courts, the legal system and Parliament—in so far as passing the right sort of legislation is concerned. I still think that by focusing so much on the commission—you used phrases such as "morality play", "social engineering" and so on —we are running a risk of not applying the same sorts of terminology to those institutions. It seems to me that every day the courts are acting their morality plays and engaging in social engineering.

. The ICAC has community support because of the role of the courts in dealing with white collar crime. It seems to me that the police, the courts

and the whole legal system have been historically efficient at picking up relatively minor blue collar crime but the whole system has been remarkably inefficient at picking up and punishing white collar crime. That, in itself, tells us a lot about the values of our community and to me is very much a morality play that is being played out year after year.

Mr ROBERTSON: Could I just comment on that?

Ms BURNSWOODS: And in that context, just to finish, it seems to me that while the ICAC has its faults—and that is one of the things that this review is about—we seem to keep not asking the questions about the legal profession or the courts or the kind of legislation we have got, but are focusing in on this newest body. I would like to see the same kind of thoughtful process of analysis go on to some of those areas where you operate, for instance.

Mr ROBERTSON: I would probably be the first to support that, but I think you are acting under a misapprehension of the role of the courts. The courts deal with what is served up to them. Our system is not inquisitorial. Our courts are investigative.

Ms BURNSWOODS: But that lets the courts off very lightly.

Mr ROBERTSON: Well, I am not sure that it does. I mean, a court cannot investigate corruption.

Ms BURNSWOODS: Sentencing, for instance?

Mr ROBERTSON: In what respect?

Ms BURNSWOODS: Relative likeness and heaviness of sentence at judges' discretion.

Mr ROBERTSON: Sentencing is very much constrained now by legislation introduced by Mr Yabsley which had the effect of doubling sentences.

Ms BURNSWOODS: I do not want to get into 10 minute discussions about every little bit.

Mr ROBERTSON: You raised this question and I think you are wrong. I mean, yesterday a person with a reputation as very fair and, indeed, a

sentencer with a light touch, Judge Madgwick, sentenced Peter Walker effectively to two years' imprisonment for a series of crimes where there were significant mitigating circumstances and this is a person who had been through the system for about five years now, I think it has taken.

Ms BURNSWOODS: And you regard that as a heavy sentence?

Mr ROBERTSON: In the circumstances as someone of prior good character, for the first offence.

Ms BURNSWOODS: But you see, prior good character is, in fact, part of the whole set of things.

Mr ROBERTSON: Have you ever spent any time in prison?

Ms BURNSWOODS: No, I have not.

Mr ROBERTSON: Do you know what it is like these days?

Ms BURNSWOODS: No.

Mr ROBERTSON: Well, I would not say that two years in a New South Wales gaol is a light sentence.

Ms BURNSWOODS: But I am concerned that people of prior good character almost always fit into a series of definitions in terms of their class background, their education, their income and so on which applies to a group that does not go to prison and a very different set applies to those who do go to prison?

Mr ROBERTSON: It did not apply to Alan Bond.

Ms BURNSWOODS: He did not spend very long there, did he?

Mr ROBERTSON: That is because he was acquitted on appeal.

Ms BURNSWOODS: But anyway all of this is obviously irrelevant.

Mr ROBERTSON: But it is not. You have put a proposition to me based on a series of assumptions that I think are wrong.

Ms BURNSWOODS: I was going to say that it is all irrelevant because, as you pointed out, I think, to Mr Hatton, the ICAC deals with public officials—

Mr ROBERTSON: Quite

Ms BURNSWOODS: And you have raised those instances of people—

Mr ROBERTSON: That has got to be something—

Ms BURNSWOODS: —so in that sense it is irrelevant?

Mr ROBERTSON: Yes. I mean there has to be perhaps something that is reviewed in the future, whether the ICAC should be restricted to public corruption, official corruption instead of also examining corruption in commercial dealings.

Mr ZAMMIT: I refer you to your "The Romans Were Right" speech, page seven, subsection 33, in which you say:

> I drafted the amendments to the Bill which were moved by the ALP and the Independent MP, Dr Peter Macdonald, and had several discussions with Dr Metherell concerning his "wilderness" amendment and other matters. The ICAC comprehensively misunderstood the dealings between Metherell and others, the genesis of the legislation, and the nature of the amendments themselves.

Could you elaborate as to the nature and the particulars as to how, in your opinion, ICAC comprehensively "misunderstood" the dealings?

Mr ROBERTSON: I have some difficulty answering that question, not because I do not have an answer to it but I was briefed to appear for Mr Carr to seek leave for him to appear in the Metherell inquiry in the ICAC, so you must understand there is a professional relationship there, but it also coincidentally happened that I had a personal knowledge or understanding of what went on, as it were, behind the scenes in that traumatic time which Mr Hatton would have cause to recall. Can I just say, because I think it might be going a bit off the beam of the inquiry, that in the course of that exercise there was a manipulator and a number of people who were manipulated. Now, I do not think that came through very clearly in the ICAC inquiry and I do not think the ICAC even bothered to interview the persons who had had discussions with Dr Metherell and other players and I know that they were given a list of such persons and I know that a number of people on that list were not even interviewed by the ICAC, which I found quite extraordinary.

Mr ZAMMIT: Given by whom?

Mr ROBERTSON: Various persons with an interest in the subject-matter of the proceedings. I thought the way it dealt with the timber industry bill proceedings was superficial, basically, but the end result of such investigation may have been the same, I do not know. I do not think anyone really knows, but I was just concerned at the way that was dealt with. I thought it a pity, speaking personally, that there was not an adversary down in the arena in the Metherell matter because some of these things could have been crystallised better. Anyway, I think Mr Greiner has been unfairly treated in a way, but that is just a personal view. My personal view is that he did a great wrong and it was politically correct for him to suffer the consequences that occurred because I have considered it was hypocritical, after having come to office on the basis of merit appointments in the public service, and then to have reversed that.

Mr ZAMMIT: That is not relevant to my question.

Mr ROBERTSON: I know that, I am sorry, but I just wanted to make it clear that I thought there was a lack of perspective shown by the ICAC in its report on the Metherell matter and in that context Mr Greiner was unfairly dealt with, perhaps.

Mr GAUDRY: Just on balance, would you support the continuation of the public hearing function of ICAC?

Mr ROBERTSON: Well, I think the public hearing functions has performed in some of its inquiries very well. I have to say that the confidential information inquiry, for example, it has performed well. I think if the ICAC is to remain and is to be effective, it has to have a public hearing function, but I would say that if you restrict it to findings of fact, then what you should also look at is imposing a legal duty on the commissioner conducting the inquiry to do what the assistant commissioner in the Walsh Bay inquiry decided later he should have done, and that is do it in stages; do the investigation, then do the analysis and then work out, after taking statements privately from all the various players in the scene, whether it is worth going into a public hearing.

I think if you impose a legal duty rather than leaving it to the discretion of individual commissioners, you will get much more consistency in the practice of the commission because whatever faith and confidence we might have in the commissioner and certainly the assistant commissioners, there will always be people appointed who will be duds. That is inevitable, with courts, politics or whatever you are always going to get a dud, you are going to get someone who will not perform up to expectation and who will not do it the right way, and I think experience now teaches us that we should have a couple of gates to get through before we go into the public hearing function.

Mr HATTON: To assist the Committee, could you draft some suggestions in that regard?

Mr ROBERTSON: Oh yes. The other thing is that the public hearing process is much more expensive than the other parts of the inquiry, so there is a cost element also there.

CHAIRMAN: What sort of time frame would you like in relation to drafting those?

Mr ROBERTSON: I would have to say that I am fully committed until 19th February, so the week after the 19th is the first time I will be available really to do anything.

Mr GAUDRY: That would obviously remove some of the unfortunate situations that have occurred in terms of reputation of innocent witnesses being damaged but it would increase the likelihood of show trial, would it not?

Mr ROBERTSON: I think there is a very strong element of show trial in the exercise at the moment. Certainly there is a likelihood—there is certainly a possibility of that occurring. I have also to recognise the fact that under cross-examination in a public arena people are put under pressure and pressure can often produce results for the investigation. That will not always happen but it has happened. I think North Coast inquiry is a good example where under pressure certain people gave away more than they wanted to and enabled the assistant commissioner to draw conclusions about the motives for making certain payments, but then again there was a politician in the North

Coast inquiry who gave evidence on three or four occasions and I think the evidence on each occasion was inconsistent with the previous evidence but my assessment—and I have read the transcript of the North Coast inquiry—was that this politician was telling the truth throughout, even though on each occasion the politician appeared he got deeper into it.

This is one of the problems of the inherent uncertainty and the difficulty of making judgments about human motives and behaviour and why we should proceed cautiously before we erect new institutions to make those judgments. I will name the politician because what I am saying is not adverse to him, I think, was Mr Page who gave evidence on three or four occasions and recollected things on later occasions he had not remembered on previous occasions. Anyway, it ended up being a mess, but I got the overwhelming impression from reading the transcript that this man was doing his best to tell the truth but was placed in a situation where he did not perform well under that sort of pressure. I felt that was really unfortunate. I must say my assessment of this man on subsequent inquiries seemed to be shared by many people in his electorate who knew him. So, that is one of the unfortunate things about the process. Errors can creep in, people can make erroneous judgments and the effect of those judgments can be quite severe.

(The witness withdrew)

PIERRE MARK LE GRAND, Director of Official Misconduct Division of the Criminal Justice Commission of Queensland, [redacted], on former oath:

CHAIRMAN: Could you outline to the Committee your background?

Mr LE GRAND: I was admitted as a barrister and solicitor of the Supreme Court of Victoria in 1970. I have been in continual practice as a barrister and solicitor in various jurisdictions since that time. Initially I started off in private practice. I then spent a period in the prosecution section of the Commonwealth Crown. I then spent some time with the Australian Legal Aid Office and its precursor organisation. I have, since the mid to late 1970s been on a series of specialist inquiries and prosecution organisations, starting with a task force in 1976 that looked at a corrupt chief narcotics agent; 1979, the Williams royal commission; 1979-80 a joint New South Wales Commonwealth task force looking at organised crime; in 1981-82 the Mr Asia royal commission; 1982-83 special prosecutor dealing with matters arising from both the Mr Asia royal commission and the Costigan royal commission; then a period as deputy director of the Director of Public Prosecutions with the Commonwealth, in setting up that organisation and later running the Victorian office of that organisation; then a period as general counsel to the National Crime Authority for a period of two years in Melbourne; then a further period with the Director of Public Prosecutions in charge of the criminal assets branch; then a period as the South Australian member of the National Crime Authority; and most recently, for the last three years one month, as director of the Official Misconduct Division of the investigative arm of the Criminal Justice Commission.

CHAIRMAN: Is there any opening statement you would like to make to the Committee concerning the issues under consideration?

Mr LE GRAND: Yes, if I may. I noticed in a recent draft report of the Committee on its visit to, inter alia, the Criminal Justice Commission in Brisbane, the Committee generously observes:

> The Committee has enjoyed a very co-operative relationship with the CJC and the CJC has showed a readiness to assist the Committee with its inquiries wherever possible.

The CJC is prepared to assist the Committee to the best of its collective ability and hopefully my presence here today is further evidence of this. This Committee in general, and you as Chairman in particular, have gone out of its way to ensure that our appearances, that is members of the CJC, before it have been pleasant experiences, and today is no exception. You have been kind enough to indicate in advance the areas of interest to the Committee in its current inquiry. Before my appearance I had discussions with the chairman and other senior staff of the CJC and the CJC is happy to assist the Committee with whatever evidence it requires of the CJC's procedures, practices, policies and experience.

However, to the extent to which the Committee desires to seek the CJC's view of the appropriateness or otherwise of ICAC practices, procedures and policies, the CJC feels that it should not be required to do so for essentially three reasons. One, that such matters are the prerogative of this Committee, the ICAC and the New South Wales Parliament and not the CJC, and in the CJC's view it would be presumptuous for it to suggest what the ICAC should or should not do. Two, the CJC has a close and harmonious working relationship with the ICAC. Indeed, it owes much to the ICAC for advice and assistance regularly given during the establishment of the CJC, and this is continuing. Three, the CJC's procedures and practices have been in a constant state of metamorphosis since its establishment. Whilst in many ways we are still in our infancy, there is no reason to suggest that this will change. It is not appropriate for the CJC, in my view, to recommend what it considers appropriate for the ICAC when its own procedures are still undergoing regular modification. Perhaps I could add a fourth matter. That is, that our lack of a practical day-to-day working knowledge of the function of the ICAC and its legislation I think really disentitles us from any real standing when it comes to telling the ICAC what it should or should not do. It

may be useful for this Committee to be informed that the CJC has considerable respect for the reports of the ICAC which it views as being of high quality and considerable substance.

The ICAC and the CJC are superficially very similar bodies. However, there are profound differences in philosophy and practice which make comparisons difficult and possibly misleading. If I might explain what I mean. The ICAC was established, structured, and staffed and commenced functioning in a considered and deliberate way. The CJC, on the other hand, was launched as a going concern, taking over from the Fitzgerald commission of inquiry in the middle of an election campaign with its governing legislation substantially drafted over a weekend. Its initial establishment consisted of a change of name plate and thereafter the modifications to the staffing and structure of the commission of inquiry to create the CJC were attended to in the running over the ensuing months and years while, pursuing scores of investigations commenced by the commission of inquiry. Quite apart from the legislative differences, the work the CJC inherited has had a profound effect on the philosophy and shape of the CJC. In speaking about the CJC, I am more specifically speaking about the area of the CJC most obviously paralleling the work of the ICAC, namely the Official Misconduct Division, the investigative arm of the CJC, which constitutes approximately 60 per cent of the whole in terms of staffing and resources. As the Committee members are aware, the CJC is also composed of other divisions, such as the research and intelligence divisions.

Another difference stems from the fact that early in the life of the CJC it had transferred to it the complaints function in respect of the Police Service which also was undertaken as a going concern, with the resources of the disbanded Police Complaints Tribunal and the internal investigations branch of the Police Service being transferred to the Official Misconduct Division. This meant that thereafter the CJC was required to pursue literally hundreds of simultaneous investigations into complaints of misconduct or official misconduct against police officers and other employees of units of

public administration.

Finally, the Criminal Justice Act does not have the direct equivalent of sections 8 and 9 of the ICAC Act requiring the CJC to make administrative findings of corrupt conduct. The conduct of these influences, in my view, has preserved the CJC from some of the difficulties faced by the ICAC, although the CJC is certainly no stranger to controversy. The CJC in its early years has little option but to attend to its very large and burgeoning investigative workload. It did not pursue the philosophy of the ICAC of functioning as a royal commission looking at the substantial issues per se to anything like the same extent as the ICAC, although I, for one, would like to have had the flexibility to do so, at least to a greater extent than we have been able to do. But rather, it pursued individual cases with a view to investigating and, if appropriate, reporting on those investigations to the courts, to Parliament, to the misconduct tribunals or to the various disciplinary tribunals of relevant units of public administration.

I should say this for the record and for complete accuracy: A perusal of the Criminal Justice Act will lead you to section 2.31 which constitutes the misconduct tribunals as part of the Official Misconduct Division. Virtually from the coming into force of this provision on 22nd April, 1990, the CJC has sought administratively to divorce from the Official Misconduct Division those tribunals and to have them operating as independent tribunals. The CJC considered that the constitution of such tribunals within the investigative arm of the CJC was contrary to long accepted principle, namely that the investigator should not have any influence over the ultimate arbiter of the investigation. Those tribunals are separately housed, separately staffed, separately resourced. Thus, in theory it could be said that through the misconduct tribunals the CJC is required to label the conduct of persons investigated by the CJC as official misconduct or otherwise, whereas in practice these tribunals have acted independently of the CJC since their inception. The CJC has sought an amendment to the legislation from its earliest days to formalise this arrangement, and the CJC's views in this

regard have been strongly supported by its Parliamentary committee.

Thus, the CJC, at least as far as the Official Misconduct Division is concerned, has largely been able to avoid the debate about labelling, which has bedevilled the ICAC in recent times. The end product of its consideration of matters has been whether there is sufficient evidence to enliven the jurisdiction of the courts, the misconduct tribunals or the disciplinary processes of the public sector. It should be noted that Mr Fitzgerald himself avoided labelling those who appeared before him, thereby minimising any distraction to the implementation of his recommendations. Thus, it can be seen that the CJC, in other than its research capacity, has not made ultimate findings adverse to the interests of concerned persons. Its ultimate findings, where they have been made, have been findings that a complaint has not been substantiated, or occasionally positive findings that alleged misconduct did not occur where this is available on the state of the evidence.

Where adverse findings are made, they are simply an interim conclusion that in the judgment of the CJC there is sufficient evidence for the matter to go forward, one, to the director of prosecutions for his consideration as to the laying of criminal charges; two, to a misconduct tribunal for its determination as to whether a person has been guilty of a disciplinary charge of official misconduct; or, three, to a unit of public administration for its consideration of the imposition of a disciplinary sanction. In that sense the CJC has not been called upon to make ultimate adverse findings, although from time to time it has undertaken larger inquiries which have been reported upon by way of report to the Parliament, and in those reports there has been from time to time observations adverse to the interests of persons concerned in the investigation of a collateral nature, namely as to their credit as witnesses. I am talking about observations adverse to persons identified in those reports.

Mr Chairman, if I could make this further comment in relation to your role in reviewing the ICAC Act, I am sure it comes as no revelation to you if I observe that you have a difficult task. You must balance two sometimes competing interests, that is, on the one hand, the protection of the rights of

individuals, and on the other hand, the right of the citizen to live in a society free from crime and corruption. Where the scales should balance is not always easy to determine. As well as worthy citizens seeking to protect the rights and liberties of their fellow citizens, I am sure you are aware that there are others whose motives are not so pure. Those are my opening remarks.

CHAIRMAN: Do you believe the Fitzgerald inquiry was in any way made less effective by withholding adverse findings from its report and rather passing those findings on to a special prosecutor?

Mr LE GRAND: The Fitzgerald inquiry stands out as one of the most effective inquiries in modern Australian history. One of the reasons, in my submission, that it was so successful was that it was not distracted from its main task, that is reform, by labelling individuals and opening itself up to protracted litigation. Clearly the CJC is an example of the Fitzgerald model where we are fortunate in that we do not have to label as the ICAC is required to do.

CHAIRMAN: Could you please outline the appeal mechanisms which operate in respect to the CJC and the misconduct tribunals?

Mr LE GRAND: There are various, both incorporated within the Act and outside the Act.

CHAIRMAN: Perhaps it may be possible simply to table that material for this purpose unless you want to draw attention to—

Mr LE GRAND: I have made some informal amendments to it but if that does not create a problem I am happy to do that.

CHAIRMAN: It may be a couple of days before the transcript becomes available, but if you are happy, that material you were reading from could be photocopied and distributed to the Committee, including your opening remarks. We can arrange that at the end of your evidence.

Mr LE GRAND: Certainly. I have chopped and changed my opening remarks a little and my writing is appalling as anyone will attest. Perhaps if I can just briefly indicate there are the mechanisms under the Act, a general

mechanism under section 2.25 and it relates to the investigations undertaken by the commission, appeal processes that specifically relate to the findings of the misconduct tribunals, and now the CJC is subject to the provisions of the Judicial Review Act 1991 that embodies or codifies the procedures available at common law by way of prerogative writ.

CHAIRMAN: The findings of the misconduct tribunals, are they of fact and law?

Mr LE GRAND: Yes, and the appeal now lies both in respect of fact and law.

CHAIRMAN: Issue No. 8 in the Committee's discussion paper of September 1992 deals with false complaints and public statements by complainants. Could you outline any steps the CJC has taken to deal with this problem?

Mr LE GRAND: Certainly. The commission recognised that the investigation of a complaint against a police officer can be a traumatic experience for that officer or indeed any public official, especially where the complaint against him or her is unfounded. It is extremely difficult to defend oneself against a completely unfounded allegation. Unfortunately the provisions of the Criminal Justice Act, as they currently stand, are totally inadequate in our view in relation to this issue. The commission has the power to charge a person with supplying false information but only where the commission has previously served a notice on that person to furnish a statement or information. Most information coming in to the commission and certainly most complaints made by the public are not by way of notice to furnish a statement of information, but rather by way of letter or interview. Although the commission has power to charge a person on the basis that the complaint is frivolous or vexatious, the section does not relate to false complaints as such but rather complainants who persistently make this same or similar complaints, having been informed in writing that the complaint is considered to be frivolous or vexatious. It has been found that many persons who persist with complaints of this sort are considered to be of unsound mind

or at least eccentric and therefore there is little public benefit in prosecuting such persons.

There are also provisions under the Vagrancy Gaming and Other Offences Act 1971 and the Police Service Administration Act 1990. Both Acts require corroboration of the police officer against whom the complaint is made before prosecution action can be taken against the complainant. Furthermore, both require an investigation to be caused. These two limiting factors have resulted in the commission recommending few prosecutions under these provisions. Since the inception of the complaints section, two persons have been successfully prosecuted in the magistrate's court and fined $400 and $250 respectively. There are three other matters pending. One other matter involves a person facing three counts of perjury and one count of attempting to pervert the course of justice under the Queensland criminal code. The commission recognises the inadequacies of the current provisions involving false complaint and the demotivating effect that it has on police officers when complainants who make false complaints cannot be brought to account for their acts. Furthermore, it is considered essential that the commission's resources, which are strained by the volume of complaints and information made to it in good faith, are not further stretched by being utilised for the investigation of false complaints. The commission has recommended, through its parliamentary committee, the following amendment: that a person who falsely and with knowledge of a falsity gives or causes to be given information or makes or causes to be made a complaint to the commission commits an offence against this Act. The provision does not have a requirement for corroboration and further, it does not require the information to have been acted upon to cause an investigation. If enacted this provision would go a long way to assist the commission to adequately deal with false complaints, in our submission.

Furthermore, I noticed from the material you sent me, Mr Chairman, that the commission has had the same unfortunate experience in recent times that the ICAC has experienced, of having persons running the local authority

elections making complaints about their opponents to the commission prior to the election and then publicly disclosing the nature and subject of those complaints with a view to damaging the prospects of their competitors in being elected. A clear inference has been that the complaints have been made for this personal benefit. The commission has at all times seriously maintained its independence and deprecated this perversion of its function. The commission objects to being used as a political tool. Often complaints of this nature are complex and cannot be summarily dismissed. Therefore a timely response cannot be made to the complainant and the person subject of the allegations. Of course, in many cases, even if the complaint is genuinely based, it can be detrimental to the prospects of a successful investigation. Our parliamentary committee has expressed similar concerns. The commission considers that the only way to ensure that persons who complain or furnish information to the commission maintain strict confidentiality of that fact and the details thereof, is to make it an offence against the Act. The commission has recommended accordingly and this has found favour with our parliamentary committee, although not with certain media outlets in Queensland.

Mr GAUDRY: From what you are saying you have a pro-active mechanism coming from the CJC through your committee in terms of recommendations and changes to the Act, is that the case, or just some isolated instances?

Mr LE GRAND: Certainly we have served on our committee a very substantial schedule of the amendments that we see as desirable for the effective and efficient working of the criminal justice commission, and, indeed, we believe it is a very poorly drafted piece of legislation, but given the time frame and the circumstances of its drafting, that is hardly surprising. I think we have recommended something in the order of 100 amendments to the Act covering all sorts of areas.

Mr GAUDRY: Has the Government been quick to take those up and enact them or is it a fairly slow process?

Mr LE GRAND: We believe there are some vital matters that still cry for amendment, but some amendments that have needed to be made have been made. I think the Government's philosophy, and I understand the rationale for it, is that rather than doing it piecemeal it should be done in a consolidated way and it is a bit hard to argue with that, but it is frustrating to continue to operate under defective legislation.

Mr HATTON: I would like to take up a question that particularly interests me. We have the potential here for problems with State and Federal employees, because if someone would like to make a challenge, then even though the behaviour of a Federal employee may impinge upon an inquiry and be a vital part of that inquiry, for example if someone were involved in the Federal department of railways in a corrupt way with a State department of railway official then you could get some legal challenge in terms of what rights the ICAC has to bring the Federal person before the ICAC and in some ways challenge the administrative as well as the legal power of the ICAC, if you were going to address some aspects of the Federal administration as opposed to the law. From that point of view and from the point of view that because of what happened in Queensland the CJC was formed, because of what happened in New South Wales the ICAC was formed, and Western Australia because of Western Australia Inc. is now looking at what has happened and what should happen and to address the question of corruption prevention and tackling the question of corruption and no doubt other States will do the same. It will not be too long before we will be looking at this question of should there be a comparable structure to a CJC or ICAC type structure at the Federal level. I frankly do not know to what extent the mechanisms at the Federal level handle corruption, but if we get on the one hand challenges to the State powers, even though there may be enmeshment of Commonwealth and State employees, and on the other hand no comparable organisation federally to handle corruption prevention and so on, then we are obviously going to run into a national problem here. Have you some thoughts on that?

Mr LE GRAND: Sure, but I should indicate they are my thoughts and not those of my commission. I think people forget that one of the two pillars upon which the National Crime Authority was founded, was not only organised crime but corruption, and the report of the Senate select committee into constitutional and legal affairs that I think inquired for a year as to whether the National Crime Authority should be established in its report to the Federal Parliament gives those functions as the primary functions of the National Crime Authority, organised crime and corruption. Now I, as a former officer of the organisation, am very gladdened to see the new chairman, Mr Tom Sherman, making great efforts to return that authority to the fight against organised crime, but it remains available as a body to tackle corruption. In my view it should also undertake that task.

Mr HATTON: As you probably know, I have been interested in this field for some time, yet the National Crime Authority has not been prominent in my mind in terms of its fight against corruption and it did not occur to me—even though I recognise that that was supposed to be one of its functions—that in fact it was operating in the same sorts of ways as ICAC and CJC. Have I a misapprehension in that regard?

Mr LE GRAND: I have voiced criticisms of the direction taken in the past by the National Crime Authority because I had deeply felt views that as the national equivalent, if you like, of the CJC and the ICAC it had a responsibility in these areas. As I have indicated, I am very heartened to see the directions taken recently under the chairmanship of Mr Tom Sherman. I am very hopeful that as those new directions take hold and as the initiatives that he set in place bear fruit—and they are bearing fruit, because we have been acting recently conjointly with the National Crime Authority to substantial effect in certain areas—I would hope that that body will realise more closely your expectations of it. That is a very fond wish of mine.

Mr GAUDRY: You are saying that the mechanism is there?

Mr LE GRAND: It is there. The legislation is there. The structure is there. The resources are there and, I think, now the will is there. But it will

be a long process. I think a lot of ground has been lost in the interim.

Mr HATTON: Much of the discussion with Mr Robertson, the witness on whose testimony you were sitting in, focused on the loss of confidence in the court system and in the police force—police forces, perhaps, might be more accurate. Do you think there will now be a real potential for an attack on corruption within police forces at the Commonwealth and State level with the new will that will, hopefully, be evident in the National Crime Authority working in conjunction with CJC and ICAC; and, how can we, as a committee, progress that? I should help you by saying that one of the things that we discussed prior to calling witnesses today was this very question, how can we get this thing going? How can we, as parliamentarians in New South Wales, get this sense of the need for national action and State co-operation going in corruption prevention? And I am putting a particular focus on it in the terms of police; we did not do this as a committee. It has been a great concern of mine for some time.

Mr LE GRAND: I think I noted with interest the remarks of Mr Robertson and, in particular, his thesis that the creation of the ICAC stemmed from a lack of confidence in the Police Service and that at least implicitly, if not directly, there would not be a need for the ICAC, at least in certain areas, to undertake the task it is undertaking if the Police Service were more effective. Frankly, I do not agree with that. I think that there is a permanent need for bodies such as the CJC, the ICAC and the National Crime Authority regardless of effectiveness of the Police Service because, I think, in the fight against sophisticated crime you need an armoury of weapons that is not available to the Police Service in terms of access to, for instance, the compulsory powers and I cannot see any government in this country, in the foreseeable future—I may well be wrong, but I have been in this area for a long time—providing the Police Service with the types of powers that are available to the CJC, the ICAC and the National Crime Authority. I think this grand jury, if you like, type powers will always remain removed from the Police Service. You will need to cross a threshold before

you can justify their use and they will need to be kept under strict control. As such, the embodiment of such powers in such organisations as the ICAC, CJC and the National Crime Authority, I think in my own view, is a necessary response to the increasing sophisticated challenge of crime.

Mr HATTON: Would you agree that when we use the term organised crime, we tend to look at a them and us situation when in fact organised crime is us. In other words, organised crime is able to flourish because of the failures in the system's lack of mechanisms of accountability and so on which enables it. Therefore it is of the system rather than opposed to the system. It grows out of the failings of the system. Is there some truth in that, in your view?

Mr LE GRAND: I think there is some truth in that. I think organised crime finds it difficult to flourish without associated corruption, but I believe there would be organised crime even if there were a perfect system of government and a perfect system of public administration. But to the extent to which organised crime is substantially assisted by corruption within the public sector, I would agree with that observation.

Mr HATTON: In your experience with all these various royal commissions—and there has been a considerable number of them and a number have addressed the question of Mafia involvement in Australia—do you have a real concern, and is that concern increasing, as to whether the Mafia is able to flourish despite those royal commissions and, in fact, its influence may even be growing or at least has not been kerbed to any significant extent?

Mr LE GRAND: Those royal commissions have given us a window into organised crime and Italian organised crime is just one aspect of organised crime.

Mr HATTON: Yes, I accept that.

Mr LE GRAND: The mere fact that we have caught a glimpse of the subterranean system that is organised crime does not in any way provide any check or control of it. It requires a dedicated, sophisticated, continuing

endeavour and indeed our response to organised crime, I think, has ben fairly pathetic to this time. We have tended to concentrate upon that spectrum of organised crime that has broken the surface. Like the proverbial iceberg, seven-eighths of it lies undiscovered, in my view, and indeed we, as a commission, have set about trying to discover—at least within our jurisdiction of organised criminal activities, at least in certain specific areas and to the extent to which our resources allow us, and that requires not looking simply at criminal indices; seeing people of Italian birth or extraction who may have been convicted of serious offences, labelling them as Italian organised criminals and looking at their current activities and trying to place them before the courts, but unfortunately to a substantial degree that has been our response to date—and perhaps that is an appropriate starting point, what is the structure of the organisation? With whom are they associated? Where are they geographically located? In what activities are they involved? What are their financial resources? What are the links to other jurisdictions, both here and overseas? Then, having got some appreciation of the whole iceberg, target the principles. But at the moment we tend to target simply those who come to notice who, as you would expect in most cases, are not the principals. People who are likely to run up against law enforcement are the soldiers. The principals are comfortably hidden, taking the benefits of the work of those in the field, and are substantially anonymous, in my view.

CHAIRMAN: We are getting a bit off the track in terms of this inquiry.

Ms BURNSWOODS: I think my question can be answered briefly; I admit it is on that track. When you referred to an iceberg, in talking about the possible tip compared to the rest, are you talking about kinds of crime, that some are visible and some are not; or are you talking about the soldiers, as you call them, being visible but not the people who control them?

Mr LE GRAND: I think both, but the people who have come to police notice, I think, do not represent the organisation.

Mr GAUDRY: In that whole draft of changes you propose, through the

Parliament, to your Act have you moved in any direction towards the public hearing mechanism as a general way of operating or do you prefer to continue the CJC in the role that it has at the moment, where they are mainly investigatory approaches to specific areas?

Mr LE GRAND: The point I tried to make in opening was that in some ways our endeavours have been conditioned by the exigencies of our birth and the fact is that we have been swimming towards the surface since 22nd April, 1990. That has been good and it has been bad. It has been good in the sense that I think it has kept it out of some of the debate that you are now facing with the ICAC, because we have been very much an investigative agency—placing people before the courts or the disciplinary tribunals. We have not been in competition. We have not, if you like, usurped, at least in part, the function of the courts which, I think, has caused some people concern and anxiety. We investigate, we place material before the courts, the courts then adjudicate upon it or the misconduct tribunals or the disciplinary process and we have had little luxury to go out and look at things globally.

We have done that in a few instances and submitted reports, but basically the pressures of business have not been such to allow us to do that on a larger basis and I would like to do that because it is fine to undertake investigations; it is fine to put people before the courts and to have the courts process them; convict or acquit and, if acquit, to impose an appropriate sentence and, in many ways, nothing dries up a rort quicker than the clanging of the cell door. But in doing it that way it also has disadvantages. You tend to look at the conduct through a keyhole—a particular person doing a particular act—but how representative is it of a wider malaise and, I think, the value of some of the ICAC inquiries are trying to lay bare just what the total problem is. For instance, the abuse of official information et cetera. I think there is a nice balance. I think there is a nice balance. I think it is nice to show you, the Parliament, what the problem is. It is also nice to take out some key players, place them before the courts and have them condone punishment and thereby have the very substantial deterrent effect in respect

of their conduct.

Mr GAUDRY: So you yearn for some of the social engineering aspects?

Mr LE GRAND: Yes.

Mr GAUDRY: But possibly without the negative side?

Mr LE GRAND: I do. I think you have seen our procedural fairness guidelines. We are very conscious of the difficulties there are in conducting those sort of hearings and, indeed, let us not be shy about this, we have run up against our own problems in that regard. Perhaps the main case is the Ainsworth case that went to the High Court. We are looking very much into Mr Justice Cole's recent decision and other decisions to see to what extent we need to modify our procedures, so our procedures are subject to modification on a continuing basis.

Mr GAUDRY: Just on that, is that a publicly perceived view of the CJC, that they are willing and looking to change and growth, rather than a body that is independent and, therefore, not so much set in concrete but with a determined set of procedures and they will not change?

Mr LE GRAND: I think so. Well, certainly, if we have not created that impression, it is a failure on our part to bring that philosophy at attention. In our annual report we are talking about our hearing powers. We refer to our royal commission type function as well as investigative function. Perhaps if I can refer you to page 14 of our most recent annual report in which we discuss our hearing program, the fact that of our 54 hearings last financial year only four were in public and the others were in private, and the reasons that we held them in private.

Mr GAUDRY: There is no clamour from the public to have all this held in public, there is no such feeling?

Mr LE GRAND: I do not believe so. There is a clamour by some media outlets from time to time but generally, no. I think in fact to the contrary, that there is a general appreciation of our attempts to try and strike the right balance.

CHAIRMAN: The code of procedural fairness, was the Bar Association and the Council for Civil Liberties involved in the formulation of that document?

Mr LE GRAND: The Council for Civil Liberties certainly was and we have sought input from the community generally, interested groups and the community generally.

CHAIRMAN: Are there any groups you can think of that did not respond to that invitation?

Mr LE GRAND: Beyond the Council for Civil Liberties, basically, no. Speaking as one of the profession, it was a bit disappointing.

CHAIRMAN: Do CJC reports go beyond the primary facts?

Mr LE GRAND: Yes, they do, to the extent to which it is necessary to reach conclusions, to comment upon conclusions and to make recommendations. We have been increasingly careful about the naming of persons in an adverse way.

CHAIRMAN: I think the Committee would probably like the material you are reading from in relation to vexatious complaints. Would it be possible to provide that?

Mr LE GRAND: Certainly. I should indicate that these notes are simply prepared for my evidence here today. There are not great works of literature, I can assure you. There are also a few interlineations.

(The witness withdrew)

ANDREW ARNOLD TINK, Member of the New South Wales Legislative Assembly, of [redacted], sworn and examined:

CHAIRMAN: Did you have some material you wished to place before the Committee?

Mr TINK: Yes. I have prepared a written statement. I also have a video which I would like to make part of the submission but also to hold on to in order to make a small presentation in a moment.

CHAIRMAN: Did you wish to read your written statement?

Mr TINK: Yes, I might proceed to do that and show the video during the course of that. Perhaps I can begin by reading the statement. As you know, until recently I was a member of the parliamentary ICAC Committee. You are therefore aware that I have always been and remain a strong supporter of the Independent Commission Against Corruption. Whilst many people make these claims, I believe that in my case it can be demonstrated by my strong support for a number of commission initiatives, amongst them initiatives relating to internal audit and data protection. Whilst it is true in the latter case that I do not agree with every recommendation that Mr Roden made, I do feel that I have indicated by strong support on the record as a private member of Parliament over the last couple of years on that particular issue and others. It is equally true that I have not been shy to criticise the commission as a member of the Committee and otherwise where I believe it has been in error. In particular, I made public criticisms of the findings of Mr Temby in the Greiner-Metherell matter which were similar to criticisms later made by the Court of Appeal.

It is with this background that I come before you today to raise an issue which I believe broadly relates to whether or not ICAC staffing should be made subject to the Public Sector Management Act of 1988. The particular issue that I wish to raise concerns the appointment of Mr Paul White as Media and Public Affairs Manager of the ICAC. This appointment came to my attention on or about 27th January this year at the time of the

release of the ICAC report on prison informers. In considering the video that I am about to show you I think it is important to bear in mind the following comments made by Mr Temby in his report on the investigation into the Metherell resignation and appointment at page 51, as follows:

> It is not a criminal offence to lie, and as I was reminded so often during the course of the hearing, the ICAC is not a "court of morals". However some plain facts can be stated. One is that whenever politicians are speaking to journalists, on the record, they are also speaking through them, actually or potentially, to the public generally. That is the public they are sworn to serve. I do not think it is an old-fashioned irrelevancy to say that politicians ought to ensure that what they say to the public, the people, to whom they must give an account of themselves, is never misleading. They are most important role models.

Pausing there, it can be seen that Mr Temby places a very high onus upon politicians to never be misleading with the media, which I assume by implication he would extend to the media itself. Indeed, this is implicit from the commissioner's comments at page 166 of his annual report to 30th June, 1990, as follows:

> The Commission recognises the important role the media plays in disseminating information and comment regarding the operation of the Commission. The Commission will use its best endeavours to enable the media to achieve a high standard of reporting in relation to the Commission.

Moreover, the Australian Journalists' Association code of ethics as set out in its annual report of 30th June, 1991, states amongst other things the following in relation to its members:

> They shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis.

It is with these comments in mind that I now ask you to view an excerpt of a video of Stuart Littlemore's "Media Watch" program screened on the Australian Broadcasting Corporation on 18th May, 1992, which relates to some

of the coverage by Mr White as a "7.30 Report" journalist of the Greiner-Metherell inquiry. Just pausing there, this video which I will table contains an edited version of "Media Watch" The beginning is cut out of it and a slight segment in the middle, but at the end of the tape—I am not proposing to show it today—on this same tape there is a full video of the whole of that "Media Watch" program, or at least as much of it as I could find. In the transcript itself the relevant extracts are set out of the edited version with Littlemore's commentary in light type and the "7.30 Report" excerpts to which it refers in dark type. I will show the excerpt from the video and I set out a transcript of the edited version of the video, as follows:

LITTLEMORE: . . . And therewith a serious journalistic problem. Dempster, according to the diary, was close to Metherell through the resignation crisis. His name and his words are studded through its pages. That emerged on Tuesday (12 May 1992) during the hearing, which adjourned at four. Dempster and the 7.30 Reporter Paul White were there. They returned from ICAC to the ABC where it was decided to deal with the Dempster mentions in a "two-way", that's a link-up between the compere and White in which the day's evidence was discussed.

DEMPSTER: Paul White has been at the ICAC Inquiry all day and he joins me now. Paul, what have we got here, confidential conversations, personal observations, what?

WHITE: Well Quentin, what we've got is attention solely focused on these diaries.

LITTLEMORE: Well, so far so good, except, why did White go back from the ABC to the empty ICAC hearing room to do his end of it? A facile and very expensive bit of set dressing. Or was he in fact only pretending to be at ICAC? Still, to more important matters. Here's how they did it.

WHITE: They've lived with the cynicism and hypocrisy of their own posturing.

DEMPSTER: They've got the journalists figured out. Thanks Paul.

WHITE: Quentin, there's one other thing, Quentin, I should report in the

interest of balance if we have time. It appears that you get a detailed mention several times in the doctor's diaries.

DEMPSTER: In what context?

LITTLEMORE: And that's where it all went horribly wrong. Amateur actors, passing off their exchange as if it were the first Dempster had heard of heard of his embroilment in the matter, and as if his answers were spontaneous.

WHITE: Apparently it says "Quentin rang today to see where we stood and fill us in on the situation in Sydney", so you're obviously a good source of information.

DEMPSTER: I was trying to induce him to record a television interview.

LITTLEMORE: And the same disingenuous deception was worked on Wednesday night (13 May 1992) too.

DEMPSTER: Paul, I understand I got another mention today.

WHITE: Yes, you got another mention, in fact Dr. Metherell said that again under cross examination that he had given you these controversial diaries and that he had asked you to look after them and that he trusted you implicitly. What in fact happened?

DEMPSTER: Well, he did give them to me on 24th April on the day that the ICAC Inquiry was announced. He gave them to me in his office at Parliament House, asked me to keep them but not to use them.

LITTLEMORE: On Thursday night (14 May 1992) Dempster, though a key player, was out of the action and on the bench.

DEMPSTER: Now, ICAC, and I'm leaving the reporting of the proceedings to Paul White—this is in light of the mentions I have been getting and the possible perception of conflict of interest— Paul.

LITTLEMORE: Of which the Herald:

FEMALE VOICE: Understood that Peter Manning, Controller of News and Current Affairs at ABC TV sent Mr. Dempster a memo yesterday instructing him not to do any more "two ways" with Paul White.

LITTLEMORE: Firmly slamming the stable dor as the horse disappeared over the horizon. There was no conflict of interest at all, and properly handled

> there would have been no perception of one either. Dempster's involvement was that of a resourceful and diligent journalist. But he was let down by those who thought the "two way", and worse still, the deceptive and dishonest way it was conceived, was the appropriate vehicle for dealing with his role. . . . It's silly, it's indefensible, and it's unacceptable. They make an oxymoron of journalistic integrity . . .

Thus Littlemore says that there are two issues arising from the video: first, the relatively minor matter involving the pretence that White was reporting from the ICAC building; and, second, the serious matter involving White and Dempster passing off their exchanges as if they were the first Dempster had heard of his embroilment in the matter, and as if his answers were spontaneous. The next part of the video is a short clip from the Channel Two news of 29 January 1993 showing Paul White acting as the ICAC spokesman in connection with Justice Cole's decision on open ICAC hearings. It was only in late January 1993 that I became aware that Mr White was working at the ICAC. What concerns me is that Mr White, who as a journalist reporting crucial ICAC hearings, was involved in conduct described by a fellow journalist as "deceptive, dishonest, indefensible and unacceptable, making an oxymoron of journalistic integrity", has now been appointed ICAC's media spokesman.

At the time that the "Media Watch" program came out, I was concerned by it and contemplated whether or not I should take any action. On reflection, however, I thought that at the end of the day, ABC management at least had handled the issue appropriately by allowing Stuart Littlemore to broadcast his "Media Watch" program. Accordingly, I decided to let the matter rest there. However, upon learning that Mr White is now employed by the ICAC itself I felt that I should raise the issue with the Committee, given the nature of the criticisms made by Mr Littlemore. In that regard, Mr Littlemore is a journalist of long standing and a senior media lawyer in New South Wales. It seems to me that given Mr Littlemore's very serious criticisms of Mr White's handling of the programs, given the importance to

the ICAC of the issues raised in the programs, and the position now held by Mr White at the ICAC, the matter should be referred to you for your consideration, especially in the context of whether or not the Public Sector Management Act 1988, and in particular Section 26, should apply to the ICAC. Section 26(1) is in the following terms:

> 26.(1) A department Head shall, for the purpose of determining the merit of the persons eligible for appointment to a vacant position under this Section have regard to:
>
> (a) the nature of the duties of the position; and
>
> (b) the abilities, qualifications, experience, standard of work performance and personal qualities of those persons that are relevant to the performance of those duties.

The importance of this issue from the ICAC's perspective is surely demonstrated by the following quotes from a speech by Mr Temby to the St James Ethics Centre on 7th April, 1992, entitled "To Tell a Lie":

> " . . . the truth is an absolute, and we must never forget it. Either a particular event occurred, or it did not. Similarly with statements. Similarly with the very fact of existence . . ."
>
> " . . . the onus of persuasion must rest upon those who seek to justify known departures from the truth. I take that to be the definition of a lie . . . "
>
> " . . . those who tell lies, even if driven to some form of acknowledgment, wish to avoid use of the word."

I therefore leave the matter with you to deal with as you think fit. In doing so, I end where I began, by saying that I have been and remain a strong supporter of the ICAC. However, this should not prohibit me from criticising the ICAC where I believe I have an obligation to do so. Mr Chairman, I think you know that I have spent a few days giving this matter the most careful thought. I have not come here lightly and in some ways it is a bit difficult for me to do so. I do not bear any personal grudge or animosity towards anybody concerned, I do not even want to particularly say anything about where the matter should go from here. I think it is entirely a matter for the

Committee. It may well be that the matter should not go any further. I raise those issues for you to look at. I considered whether it was an appropriate matter to raise in the Parliament or in some other way and, on reflection, I thought the most appropriate place to raise it was here in this forum.

Mr TURNER: Mr Tink, in viewing the exchange that occurred which gave rise to the report, was your impression that it was a very convenient vehicle for Mr Dempster for put on the public record his position?

Mr TINK: Mr Turner, if I can avoid it, I do not want to go into my personal views of the video. I guess if I did not have a strong view on the program I would not be sitting here. What is of concern to me is Mr Littlemore's comments. As a member of Parliament, perhaps I have certain views on the media at times which are not those of the general public, perhaps not even which are reasonable. What is of concern to me is Mr Littlemore's comments. I think it is also significant, even though it was only mentioned in passing, that plainly something happened at the ABC with the involvement of Peter Manning, if the *Sydney Morning Herald* article, which is referred to in that video, is in fact correct. As I say, when the matter first ran I was concerned about it. The ABC management, in a media sense, handled the matter appropriately by allowing Stewart Littlemore to have his say. That was one way of dealing with it. I therefore let it go. What has motivated me to come here now is the knowledge that Mr White is now working for the ICAC. I think that raises an issue which you need to look at.

(The witness withdrew)

GREGORY EUGENE SMITH, General Counsel Assisting the Independent Commission Against Corruption, o[redacted] examined:

CHAIRMAN: Mr Smith, would you like to respond to Mr Tink's statement?

Mr SMITH: I came down with Mr White at late notice because we received notice that there was going to be some evidence given which might be critical of Mr White. The matter is obviously one which Mr White and the commission need to look at. We have not had any previous notice of it so we would like some time—it is obviously something we have to look at. You have looked at a video; it is unusual and we would like more time. I would also like to say that so far as the commission is concerned the selection processes used were in accordance with the highest of standards and I was a member of the selection committee.

CHAIRMAN: I think you understand the difficulty the Committee was placed in and we have had to improvise to ensure fairness.

Mr SMITH: We appreciate the courtesy you have shown us.

(The witness withdrew)

(The Committee adjourned at 1.12 p.m.)

CORRECTED

MINUTES OF EVIDENCE

TAKEN BEFORE

THE PARLIAMENTARY COMMITTEE ON

THE ICAC

At Sydney on Monday, 19 April, 1993

The Committee met at 3.00 p.m.

PRESENT

Mr M. J. KERR (Chairman)

The Hon J C BURNSWOODS MLC
Mr B J GAUDRY MP
The Hon D J GAY MLC
Mr J E HATTON MP
The Hon S B MUTCH MLC
Mr P R NAGLE MP
Mr J H TURNER
Mr P J ZAMMIT MP

CHAIRMAN: At the outset I think it would be helpful for me to say a few words about the purpose of today's hearing.

In September last year the Committee released a discussion paper on the review of the ICAC Act. The Committee received a large number of submissions and conducted public hearings through October, November and December last year. In December the Committee issued a press release which identified areas in which the Committee had come to preliminary conclusions.

A further hearing was held in February and since then the Committee has spent some time deliberating further on the review. The Committee has yet to resolve one issue. That is the issue of the findings about individuals which the ICAC should be able to include in its investigative reports.

I have recently received a late submission from the Hon. Athol Moffitt QC, CMG which I feel raises an important matter related to this issue. That is the special place of Parliamentary references to the ICAC and the need for the Parliament to be able to determine exactly what sort of findings it requires from the ICAC on a Parliamentary reference.

It was because this issue had not been raised before and because of its significance that I arranged today's public hearing. This will enable Committee members to question Mr Moffitt about his proposal and ensure that this important proposal receives a public airing.

I have also invited Mr Tim Robertson to attend this afternoon's hearing. That is for two reasons. Firstly, Mr Moffitt's proposal seems to have been motivated in part by a reading of a report of a Commission of Inquiry that Mr Robertson drew to the Committee' attention in his submission to this inquiry, and I would like to question him further about that report. Secondly, when Mr Robertson appeared before the Committee in February he raised a number of issues about the functions of the ICAC which may be able to be addressed in part by Mr Moffitt's proposal.

(Response to a submission by Clarke J. from the ICAC tabled)

(See annexure)

(Further submission by the Hon. A Moffitt QC CMG tabled)

(See annexure)

ATHOL MOFFITT, of [redacted], on former oath:

CHAIRMAN: You were formerly President of the Court of Appeal, Supreme Court of New South Wales?

Mr MOFFITT: That's correct, a few years ago now.

CHAIRMAN: Is there an opening statement you would like to make?

Mr MOFFITT: Yes, there is, and I rather anticipated it and if its all right I think that I should go back to the premise on which this submission is made, and perhaps for the record on this occasion, if its acceptable, make a statement at some length which would summarise what I think this question is all about.

When I was asked to attend this hearing it was rather foreshadowed that I might be asked to go back and summarise what had gone before it, because what I put now is rather premised on the basis of eventual acceptance of something in the order of what I had originally submitted to this Committee. I suppose this further question of Parliamentary references really only arises, if there is some acceptance of that earlier submission.

This makes it important that I put this earlier matter with some care and put it on the record. I do this for two additional reasons. The first is that my proposals, that is the original ones, their consequences and the supporting arguments have been spread over a number of written and oral submissions and need to be drawn together in order to be fully understood.

The second is that since those proposals were put in various forms and developed from time to time, the ICAC, through Mr Temby, has made various criticisms which, at this final session so far as I am concerned, needs to be dealt with, if that's permissible. I think its necessary, as an introduction, to the very question I have raised in this last submission.

I do that particularly because I would be wishing to put forward the submission that some of the ICAC's submissions directed to this issue are based on some misstatements or lack of appreciation of the contents of the proposals and what they involved, so that, basic to my response to those criticisms, it is necessary again to detail those proposals because it seems that the ICAC, in meeting them, hasn't really faced up to what they are, and I think they need to be summarised, if that's in order.

CHAIRMAN: Yes.

Mr MOFFITT: To justify that approach perhaps I should make some reference at the outset to that second matter, namely the basis of the ICAC's criticisms.

Most of Mr Temby's comments on the issue do not advert to the narrow area in which proposed restrictions to finding of primary facts would apply, and to a reader appear to treat the entirety of the reports to be restricted to primary facts. Then, in fact, as Mr Temby has directly said, will mean being restricted to just stating the raw evidence, without reporting the ICAC judgment of which of conflicting versions was correct or reporting which were the true facts, or as he put it at one stage, it would be just like setting out the transcript of evidence.

On premises such as these, it is said the reports and inquiries would be inconclusive and that the ICAC would not have the ability to remedy, for the future, systems. This might well be so, if the premises were correct but, with respect, as will appear in my summary, they are quite wrong.

By way of further criticism, it is said that the ICAC would not be able to report an exculpatory finding, where a public allegation against a named person had been found by an ICAC inquiry to be wrong. This assertion of the ICAC is quite wrong. My proposal would not prevent it and one of my submissions expressly says so. This is one of the reasons that it is necessary, I think, to go back and summarise what the proposals really are, before we move on to the exception covered by my last submission.

It should also be said that the primary facts issue raises a fundamental civil rights issue, which has been at the forefront of the submissions made by myself and other persons. This issue and the Salmon report type of question concerns the acceptability under our democratic concept of justice of an inquisitorial body, armed with exceptional powers, using them to pronounce adverse public judgments concerning named persons, at times in substitution for trial and judgment under the court system.

In the criticisms of the proposal the ICAC has virtually made no mention of this question and, in my submission, has made no attempt to come to grips with it. That is a point of which I should remind this Committee in this final stage.

I say these things with respect, but the issue faced by this Committee, and in the end, by Parliament is of such public importance that I believe that these things should be said quite frankly. What I have said, I believe will be borne out by my summary.

I don't know whether I am out of order in using this occasion to summarise these matters which will take me some little time - it might take me 15 minutes?

CHAIRMAN: No, I think that will be useful.

Mr MOFFITT: I don't know whether the rest of the Committee find that acceptable. I don't want to press it if its not convenient.

Mr GAY: I do. It is a question that I asked Mr Roden on the rule of law.

CHAIRMAN: There is no objection to that course of action.

Mr MOFFITT: As always, I think this Committee will understand, I like to speak with precision and I am, therefore, to some extent speaking fairly closely to prepared material.

The very limited scope of my proposals concerning finding of primary facts need to be understood. That proposal is directed solely to preventing adverse judgmental findings against named persons being publicly pronounced. Their precise terms ensure that that is <u>all</u> that is prevented. The primary functions of the ICAC will be untouched.

The proposal to prevent such public ICAC judgments against named persons, tried, using procedures and material not in accordance with the democratic safeguards of our system, is based on the view that the primary function and purpose of the ICAC is by exposure, mostly in open sittings, by finding and then pronouncing what are the true facts and by recommendations, to create a climate for change and to change <u>for the future</u> the long standing corrupt culture and corrupt practise of this State. The secondary function is to reveal <u>the past</u> conduct of identifiable persons in aid of external authorities, including courts, dealing with such past conduct.

My proposal concerning the contents of public reports is based on the view it should not be the function of an inquisitorial body, exercising extreme powers,

not hedged in by democratic safeguards, to operate as a kind of trial system in parallel and inevitably, at times, in conflict with the court system, so that the ICAC pronounces judgments which, as the Chief Justice and others have said, may cause devastating damage. I add, the damage may be greater in some cases than a criminal conviction. Further, in the use of such a judgmental power, some errors in its use and some public perceptions of unfairness puts, and has already put, the public image of, and support for, the ICAC in some jeopardy.

The proposal concerning primary facts is no more than a convenient way of preventing public pronouncement of adverse judgments against named persons. I think it could have been done in other ways.

The precise terms of the proposal should be stated and understood. It is no more than that reports to Parliament, and hence those necessarily made public, shall not include any finding adverse to a named person or identifiable person, other than a finding of primary facts. This, as intended, excludes adverse judgmental findings concerning the quality of the conduct of named persons, and I emphasise, does no more.

Let me enumerate what it does not include or prevent:

(1) It does not prevent including in a report to Parliament any finding or opinion without limitation, such as to the nature and quality of practises, revealed by the inquiry, in particular areas of the public service and what needs to be done by way of remedy.

(2) It does not prevent the publication of an exculpatory or neutral statement concerning a named person. This is important because if a specific public allegation has been made under privilege against a named person, and the ICAC has investigated the allegation and found it to be not sustained, there is no effective way open for the person to be cleared and justice done to him except by an exculpatory report by ICAC. I emphasise, contrary to what has, on one occasion, been put by the ICAC itself, that that is not prevented by the proposal.

(3) It places no restriction on the ICAC adjudicating on disputed facts and pronouncing the true facts found, even when adverse to a named person. So there is no limitation on what it can find so far as facts are concerned.

(4) It places no restriction at all on the advices or opinions, written or oral, open to be given to prosecution authorities, such as the DPP.

An important consequence of the proposal should be noted. If the reform is not made and the ICAC continues to have power to pronounce judgmental findings against named persons, capable of causing great damage and open to possible error, there is a very strong case in justice to allow a full appeal. Necessary as this will be, in my view it would create intolerable difficulties, added expense, delay and confusion, particularly when it comes to operate in parallel with court proceedings. Elimination of judgmental findings and adopting the reform proposed would relieve the system of these problems which, I submit, is very important.

What are primary facts needs to be understood because there has apparently been some confusion about it, particularly on the part of the ICAC. I have dealt with this in one of my later written submissions. It is a term well understood by lawyers, although Mr Temby, with respect, has clouded the matter by wrongly stating that it would almost be the equivalent of setting out the transcript of evidence.

Primary facts are what a person does, including what he says and what he thinks or intends. A finding of primary facts involves the most important part of

the judgment in any inquiry by the ICAC or in a court case. Where there are two conflicting versions, it involves a judgment of what is true and this may depend on inferences from other evidence and other facts. Almost the entire province of the jury is to find what are the primary facts. Then relying on the judge's direction as to the elements of criminal conduct, they make a secondary finding or value judgment of the conduct of the person charged relying on their finding of primary facts.

In an ICAC inquiry, finding the primary facts will involve a considerable amount of judgment to say which of the accounts about events and conversations are correct. In order to make such judgments direct evidence, inferences from other facts and decisions concerning the credibility of witnesses will be brought to account. The intention or knowledge of a person is a matter of fact, a thing well known to all lawyers, and a determination of that fact would depend on what the person asserts about his intention and the inferences to be drawn from other facts. In short, finding the primary facts is judging all of what happened but excluding judgmental opinions about the quality of the conduct of persons.

In one of my submissions, I remind, that I gave this illustration of findings of primary facts: A met B at X RSL club on 1 January 1992; the version of the conversation at the RSL club given by B is correct but that of A is false; C paid $100 in cash to D; at the time both C and D intended that D should pay the $100 to X. You will see that its important to understand that and that it is quite wrong to say it is just a matter of setting out the transcript of evidence. It permits the whole of the judgmental finding of facts by the ICAC which is really central to most of the inquiry.

In one of my written submissions I gave a precise definition of primary facts and suggested that an option open would be to include such a definition in any amendment to the Act. If I might go back and quote it so this can be put together when it is transcribed.

> "Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person."

In view of the misconceptions to which I have referred, originating from the ICAC, I now believe, and now submit, that in the interests of clarity and certainty, a definition on these lines should be included in any amendment of the Act. Of course, it would need to be much polished by a Parliamentary draftsman. Mine is merely to indicate the way.

Basic to Mr Temby's claim that, if limited to finding primary facts, the ICAC's function would be unworkable and prevent matters being finalised, is his claim that the reports would not be able to say what happened and, in effect, be limited to

just stating the raw evidence and that on what I have just referred, is not correct.

With the proposed change most of the former reports, in my submission, would be little different in substance to what they were. The substance of them, as in the past, would be to report the true facts found; what evidence was accepted and what was rejected; what inference of facts were made; and what were the intentions of persons. They would still exculpate persons from public allegations not sustained. They would still make general value judgments concerning past practises and make recommendation for reform of systems and make general value judgments about what has happened in the past without identifying persons.

The ICAC asserts that the proposal would affect its ability to reform systems. I would submit that the ability to include an adverse judgmental finding against a person named in the public report would not affect such an ability to make recommendations for reform.

If the change were made, for example, it would have made little difference to the substance of the Local Government report, directed to reforms in relation to conflicts of interest. The only change in respect of reports would be to exclude from reports adverse judgmental findings against named persons which, in fact, appear in only some of the reports. In the past such findings, in some cases, far from producing finality, produced the very opposite. Findings of corrupt conduct have led to almost automatic dismissals which have been reversed by courts in some cases on their own view of the facts.

If the narrow limits of the proposals earlier stated are understood, and its also understood that the ICAC can fully find and report the true facts, it is quite wrong to just assert baldly that the change is unworkable, a not unusual attitude to any change. On the best review I can make, and after some further thought about it, the only possible difficulty I can see is quite minor and avoidable. It could arise if the ICAC elects to enlarge without restrictions on its reasons for its findings of fact, this is by categorising in a critical way the conduct and evidence of a person as a witness or complainant.

Although I do not think it is really necessary, because I think it is avoidable, an option open, which indeed I had set out in one of my earlier submissions, is to qualify the terms of the amendment which restricts adverse judgmental opinions concerning the conduct of named persons by adding words such as "other than concerning the conduct of named persons in their capacity as witnesses before or complaints to the ICAC." In other words, the ICAC could criticise, in a value judgment kind of way, what it finds about the quality of evidence of a particular witness or the quality of a complaint made or of the complainant.

If the restriction on reports advocated had been in force at the time, in my submission, the substance of the Metherill report would have been little different, except in one important respect. Central to the inquiry was finding and reporting the true facts which had been either in dispute or were unknown and also to investigate an allegation of bribery against Mr Greiner which could lead, in some circumstances, to a statement being made under s.74A in relation to a criminal trial.

Under the reform, the ICAC could have reported its findings as to what were the true facts, in substantially the same way it did. It could have exonerated Mr Greiner of the bribery allegation, in much the same way as it did. The only substantial difference is it could not have made and reported the corruption finding concerning Mr Greiner and Mr Moore.

However, Parliament did not need these findings to discharge its own function, on its own responsibility and decision - that's concerning no confidence motions. All it needed to know from an independent inquiry was what were the facts? That is, what were the primary facts? The addition of the judgmental findings were unnecessary and, indeed, I think it can be said, confused the issue as some, including Mr Hatton, claimed. That addition usurped the function of Parliament in that it prejudged and, therefore, prejudiced the independent exercise by Parliament of what was its sole responsibility. Far from finality, the judgmental finding, the error involved and the court proceedings which followed confused and compounded the issue for Parliament and, in some quarters, seriously damaged the public image and support for the ICAC.

With hindsight it would have been better if only primary facts had been found and reported and the limited exoneration pronounced concerning the allegation of bribery and the judgment left to Parliament. Should not that hindsight provide foresight for the future?

Mr Temby's submission would leave it open for the ICAC in future to pronounce judgmental findings of corruption as ordinarily understood or in any other adverse terms considered appropriate, even when criminal proceedings are in possible contemplation.

A further question arises because Mr Temby has submitted that the limitation to primary facts would lead to more litigation. This is quite wrong and, in fact, I suggest the reverse is the case. If the amendment is not made, there will have to be, as earlier stated, a right of appeal provided against erroneous adverse judgmental pronouncements which will greatly increase court challenges of a most difficult kind.

If the primary facts proposal is adopted and with it the statutory definition of primary facts, the only room for a court challenge would be if the ICAC, in direct conflict with the definition, included an adverse judgmental finding about the quality of conduct of a named person. There would be no difficulty in avoiding that, so that any basis for challenge would be the fault of the ICAC. Any other challenge would be after the report was issued, would not interfere with the ICAC function, and would fail with costs against the challenger. Thus, the proposal so defined would really leave no room for delaying litigation and little room for vexatious litigation.

I should not leave this summary of my proposal concerning primary facts, without reminding you and putting on the record an important, but separate, qualification which I have added to my package. I believe it is critical to the civil rights issue, which I believe our Parliament in this democracy will be concerned about.

In some cases reporting publicly findings of primary facts adverse to a person which would be permitted by my proposal, will prejudice the fair trial of the person concerning the same event. My package, therefore, needs a safeguard. It is that if criminal proceedings are reasonably in contemplation, the report should not include findings of primary fact which may be in issue at the trial, so as to prejudice its fairness.

Let me take an example. A central issue of fact in an inquiry may be whether a well known senior police officer received cash in a brown paper bag, denied by the officer. The ICAC report finds as a fact that the officer received the money in the brown paper bag, highlighted on T.V. radio and the press. These publications, under Parliamentary privilege and free from the contempt laws, would make a fair trial of

the officer for bribery most difficult and could, for this reason, deter the DPP from laying a charge. Perhaps that is acceptable - I would submit not.

All this could be worse if the ICAC finding were based on or were influenced or the ICAC just had before it material which would not be admissible in court proceedings. It may be said that without any such statutory requirement, such as I have suggested, the ICAC in such cases would refrain from including such findings in its public reports. However, in some reports it has failed to do so. Then one assistant commissioner, in oral evidence before this Inquiry, expressed the view that the intended function of the ICAC was to pronounce its own findings without being concerned with the prospects of later criminal proceedings so that DPPs and the courts should be left to make their own decisions in the light of what the ICAC had pronounced.

In my respectful submission Parliament which has conferred the power should make express statutory provision on the lines indicated to ensure that the power so conferred is not so exercised as to prejudice the fair trials which are in reasonable contemplation.

I am conscious what I have said in this final session may seem to mean that I have been somewhat a devil's advocate in dealing with the ICAC's submissions, which oppose almost any change to its near absolute and unreviewable power. I make no apology for my trenchant but respectful comments. The ICAC and its defence of its powers is properly under public and Parliamentary scrutiny. The present issue being important to our democratic processes, nothing less than trenchant comment will suffice.

I might add that in all I have said before this Committee, and most members of this Committee will know, I am a strong supporter of the concept of the ICAC and the need for it as a permanent institution if we are to uncover corrupt practises and reform systems, practises and attitudes. For years, I have contended, not enough is being done in Australia to expose and counter organised crime and corruption and immediately on retirement wrote in 1985 a book of warning, *A Quarter to Midnight*. In the public conference held in the Australian Senate chamber just before the National Crimes Authority was set up I was one of a number, but against great opposition, who advocated the introduction of the compulsive powers.

I still believe these strong, inquisitorial powers can and should be used, mostly in public, to expose organised crime and corruption and their methods of operation and to change systems in order to counter and prevent them, and also to aid a change of public opinion which is so important in these matters.

However, I believe equally that these objectives can and should be achieved using these powers in ways which do not trample on those individual rights which are basic to our democratic ideals. The present structure of the ICAC leaves the ICAC able to trample on those rights, and it has done so, in my respectful submission, in the past on a significant number of occasions, some, of course, directly caused by the statutory requirement itself.

Mr HATTON: I would welcome your assistance in that I understand that Parliamentary counsel would need to do a great deal of research to define in legislation what a primary fact is. I was very interested to hear what you were saying about what primary facts are. Although I am not open to tell you who I have spoken to because it was only a private conversation, but there is some confusion in the minds of some lawyers that I have spoken to in terms of what primary facts are, and

we would need to ask the Parliamentary counsel to undertake some research so that it could be defined in legislation. That is really my major concern.

Mr MOFFITT: The definition I gave is what my belief it is from both experience. Also in one of my submissions I rather enlarged on it a bit more than I have now, and referred to what you mean by primary and secondary things and so forth. It seemed to me whatever doubts tere may be that a definition would resolve it. Whether everybody accepted the definition, you would make it a statutory definition, much on the line I have put.

Mr HATTON: I understand it is not referred to in *Cross on Evidence* and, therefore, as far as I know as a laymen, there is not a definition in existence, so it is bound to cause some contention if we define it legislatively.

Mr MOFFITT: I had thought about that, Mr Hatton - it is a very good question, if I might say. I thought the lawyers might clearly know but its emerging a bit that there is some confusion about it. The thing I put as an option I have now come to the view it is not an option, it is something that should be done. I would not be concerned about what Cross said about it because, in the ordinary course of events, there is no occasion in the law to say what a primary fact is or is not. All you would need to say here is that the ICAC can find the "ordinary facts". I don't care whether you call them "primary facts" or what they are called. You can call them the "relevant" facts. You can use any word you like and then define it. You can drop the "primary" if you like and call them "relevant" facts and then define it in the way I have. In other words, any fact which can be an event or conversation which has occurred, like "I have done it" or any state of mind is a statement of fact. Every lawyer will accept that a state of mind is a question of fact. It doesn't matter what the views are you could create the definition of the purpose of this Act.

Mr HATTON: There is one other matter that excited my interest which gets to the core of it. In the example of whether you find that a policeman had accepted a bribe, wouldn't it be so that Mr Temby could not really make a statement about that if there were litigation pending? Secondly, if however, he made a statement as to what he believed are the primary facts that that, in any case, in the way it is reported by the press would prejudice the trial, therefore, would emasculate his power in regard to dealing with that matter in any event?

Mr MOFFITT: That's two concepts: one is the press would report it, it wouldn't be possible to have a fair trial. So the question is, first of all, should Mr Temby do it? If he did it you couldn't have a fair trial. If its satisfactory to say so, then the next question is that he does it in substitution for a trial. You now come to the situation, are you going to have the ICAC which isn't bound by the rules of evidence coming to that determination? What happens if its based on hearsay? What happens if its wrong?

Mr HATTON: No, that was not the point of my question. I understand the point you are making about the ICAC behaving as if it were a court. The point of my question is that Mr Temby should not, in your reasoning, find against the officer if there is going to be a court hearing later on?

Mr MOFFITT: Yes.

Mr HATTON: Is it your submission that he can, in fact, find primary facts or relevant facts? If he does, I submit, wouldn't that also prejudice a later trial and, therefore, if we follow your line of reasoning, Mr Temby in investigating that

police officer, is neutered because he can not report?

Mr MOFFITT: He is only muted in respect to a matter where a criminal trial is reasonably in contemplation. If a criminal trial is reasonably in contemplation and he makes, particularly against a person who is well known the jury will certainly know all about it, if he then makes that finding, he is muted because otherwise you can't have a fair trial. Or, unless you are quite happy to let Mr Temby say it and not have a trial.

Mr HATTON: If, in fact, his recommendation is that the matter be referred to the Director of Public Prosecutions then he should not make a public report which comes to any conclusion or exposes primary facts as regards that officer?

Mr MOFFITT: Anything which is likely to be relevant. It would depend on what the fact is. A fact certainly such as that one or any other fact which is reasonably likely to be in issue at that trial. It would be very much an issue whether the policeman received the brown paper bag, of course, and therefore, if there is going to be a criminal trial he shouldn't do it. Because the position is if he hadn't said that under privilege and a newspaper had reported it and a pending trial, they would be up for contempt of court.

Mr HATTON: I understand the logic of it. I am just trying to get to where your logic goes in terms of what he should or should not do if there is an impending court trial because he has recommended to the DPP -

Mr MOFFITT: In any case where it is in reasonable contemplation, yes. Certainly where he has recommended or he has made a statement saying it should be considered, that he should not in those cases. The ICAC, unfortunately, has not observed that rule in some cases in the past.

Mr GAY: Would that mean that the probability would be that the DPP should review all draft reports before they are finally published?

Mr MOFFITT: No. I think the ICAC has to act within whatever the statute says and on its responsibility. I am very much against other people intruding into the function. I think the ICAC has to have the responsibility.

Mr GAY: You would be relying on the commissioner concerned to make a judgment on whether there is a valid case for the DPP rather than the DPP making the decision?

Mr MOFFITT: Yes. There are some provisions similar to this in the NCA Act right from the beginning, you know, about making statements which would prejudice a fair trial and there is nothing unusual about that if this was introduced here.

Mr GAUDRY: One of the problems though in the direction you are going in, surely, you are going to have to look at the whole function and format of the ICAC which is to look at corruption or whatever we like to call it, systemic change and the impact of reports in relation to that. Really what we are leading towards is the ICAC becoming a compiler of evidence which may be used by the DPP. This would take it right away from that more broad function that it has at the moment which flows from the more comprehensive reports and the fact that the commissioner does make statements as to the general nature of conduct?

Mr MOFFITT: There is nothing to prevent the Commission in a general way to say all that happened in a particular industry, like what was done in the Local Government report. I haven't got exact detail in front of me but basically

what was done there was dealing with the conflict of interest situation. It wasn't concerned with dealing with prosecuting people. It made no recommendation but it could make without much difficulty, general statements, and saying there is something that has got to be done. It set out all the facts which had happened in different councils. On that basis it said that systems, laws and rules have to be changed about conflicts of interests. I don't see any difficulty there.

It is only in respect of the past where you have something that is revealed which ought to be dealt with by the courts. Then in those cases you have got to make up your mind, is the court going to deal with it or are you going to have an inquisitorial body making the judgment? My contention is you can't have both. The situation is that, in our democracy, it has to be the courts. For that purpose when you get to that point, the ICAC, it can deal with all the other things, but so far as findings of fact affecting that particular person, all it does is to say "I don't propose to deal with the facts dealing with that person because, in my opinion, it has to be dealt with by the courts."

Mr GAUDRY: Doesn't that automatically provide in the context in which the ICAC has developed a situation where the public will automatically convict that person without the corroboration of a comment by the commissioner? So that "not dealing with a person", infers that its going forward for contemplation by the DPP?

Mr MOFFITT: I think that is a thing you have got to accept. That happens every day when you see a picture on T.V., with a man with a coat covering his head and then you hear his name that he has been arrested after the murder of a little boy and the police have charged him, he must be guilty. That's something which happens in every system. It certainly couldn't really be anything like that, merely because the ICAC has said that consideration should be given to criminal proceedings. You have just got to accept that. As soon as the DPP charges a person people are going to say "Oh well, the ICAC has inquired and the DPP has charged the fellow he must be guilty".

Mr GAUDRY: If they don't do it, if there isn't a charge by the DPP?

Mr MOFFITT: If there is not a charge by the DPP, you must assume that reasonable people - and we are trying to deal with reasonable people - will say "When it was investigated the DPP has found there wasn't a case to charge." That's happening all the time. You have somebody committed for trial by the Magistrate and the DPP then decides there is not a case to be tried or for some reason doesn't launch a prosecution. That goes right through the system.

Mr GAY: You said that the various commissioners would make the decision on whether it should go to the DPP - the DPP wouldn't make that decision. Do you envisage that in that instance the whole report is withheld or is it just the situation where you would withhold the part pertaining to charges against a particular person? If there isn't a charge after you hold it back would you imagine the Commission would then publish the report?

Mr MOFFITT: I would think that the Commission would publish its report. The Act itself contemplates in s.74A(2)(a) - off the top of my head - that, in issuing its report, it will make a statement whether or not criminal proceedings should be continued. That has always been in the Act. Therefore, there is nothing wrong that that is contemplated and the issued report would state that. The only addition I am

making is that, while it can state all the facts, where its going to identify a person, it shouldn't state the facts which are going to prejudice the trial. It seems to me the law is pretty clear that you should do that if you are going to give people fair trials.

Mr GAY: You say the report is published and in the case of B there would be a short statement saying that we are have recommended to the DPP that charges be laid?

Mr MOFFITT: That he "give consideration" to that. Its that softer statement.

Mr GAY: In the event that the DPP decides not to go ahead with charges against B, would you then publish those primary facts?

Mr MOFFITT: I would think normally speaking the ICAC would wish at the start to complete its report, throw it open to court, then if the court doesn't take any action about it, because it wasn't sufficiently serious or the evidence wasn't there, there wouldn't be a great deal of point in going back to it. In so far as it was an example of what the ICAC was trying to do, it could have, in its report referred to the general position without referring to the particular facts of the particular case, and so deal with the proposition generally about the reform of law. I wouldn't think it would go back again. If it did go back again it might, in fact, create an injustice, if the DPP says that the man shouldn't be charged with bribery and then the later report of the ICAC found facts that the brown paper bag had been handed over and it came from inadmissible evidence, I think it would only lead to a mischievous situation and complications that wouldn't serve any purpose.

Mr GAY: What about a situation where you refer the facts on B to the DPP for possible charges because the Commissioner felt there was a lot more involved than say, person C, person C gets a mention in the report and person B gets no mention, yet the Commissioner felt that he was worse than person C, then the DPP doesn't go ahead and person C gets worse than person B?

Mr MOFFITT: The other person referred is mentioned but all that's done are the statement of facts and by definition the statement of the facts were such that they didn't warrant any consideration of any proceedings. It is true to a degree what you say but when you have a look at it, its going to be more of an innocuous situation. Its only the person who might be the bad guy who is left out.

Mr GAUDRY: What about those instances where the person may be subject to departmental or administrative sanction but not the DPP, would the Commissioner then publish more than just facts?

Mr MOFFITT: I would think, so far as they were concerned, you may have a question there as to whether you should prejudice a departmental trial. I would think a lot of those matters would have to be dealt with by private communication and say "these are the facts and these are the findings of facts". I would think there ought to be a lot of cooperation between the DPP and the ICAC. That happens very closely in respect of the National Crimes Authority. I don't see any reason why the same rules shouldn't apply in respect of departmental offences but that's a bit more of a different area. I think the same thing applies, they shouldn't prejudice fairly dealing with departmental offences.

The question of dismissal is a very difficult question. What do you do if you find, and I don't know whether I will give you the complete solution to this, that the person has done something which seems to warrant consideration for dismissal?

Under my submission you shouldn't make any judgmental findings because the moment you say "I find the person is corrupt" the departmental head has not really much practical option than to dismiss the person. Then the person has got an appeal to the Public Service Board or GREAT and they then look at the facts. The departmental head hadn't looked at the facts because the statement of the ICAC was sufficient. As has already happened they look at the facts and say "Oh no" and they set aside the dismissal. So you get to this confused situation.

That problem really doesn't arise, once you prevent the judgmental statements being made if merely the facts are stated. Then the departmental head states "these are the facts found, we will have a look at it. We want to have a look at what the evidence is". They may or may not but just say "on these facts we think we should dismiss the fellow" or "we will give him a caution" as they case may be. I don't see much problem in the dismissal question if you state the facts.

There is a problem the moment you start making findings of statutory corruption or corruption according to ordinary meaning or some other finding which is derogatory of the person. It doesn't carry any weight once you get to the appeal, GREAT or whatever the case may be. They have got to get back to the facts and in my view it only adds to confusion as it has already done. We have had quite a few such cases and the kickback is people say "Oh well, the ICAC is not very good they have got it wrong." The ICAC comes back and says "Oh no, we didn't get it wrong, its just for some other reason" but that's not how the public sees it.

Mr GAUDRY: In the Moffitt view you have the finding of the facts, and then perhaps some statement about systemic implications of those and recommendations which might look at change in departmental processes or whatever?

Mr MOFFITT: Yes, and if you have a look at some of the reports and I go back to some of the particular ones, what you are looking at is defined over a whole lot of different members of the public service - it is a practise that's there. The crunch thing is that people have got the thrust of what is happening. That's the critical thing. You don't necessarily have to have every detail, executing every person involved, in order to point out what's wrong with the system. You have to give a lot of the facts to back it up, but you don't need to give judgmental findings. That's my point.

Mr ZAMMIT: Mr Moffitt, I think your words were that the "ICAC has yet to come to grips with it" and you were referring to the protection of the civil rights of the individuals. Specifically what safeguards or protective measures would you like to see put in place to allow the ICAC to function without the damaging consequences to the civil rights of the individuals who are being investigated?

Mr MOFFITT: Basically I think two things: one is to prevent judgmental findings. Whether you do it by saying confining to primary facts or whatever, you straight out prohibit it, whatever you do, but first of all you say you are not a court, you can't pass judgmental findings adverse to people - that's number one. The other one I have said is that where you have a trial reasonably in contemplation you shall not publish the facts which are likely to be in dispute and critical and therefore prejudice the fair trial of that person. Those are two democratic principles. One is, leave judgments and trials of people to the courts and to the ordinary processes and so forth. The other one is, if you find something wrong, don't prejudice the trial. Those are the two things when it all boils down, of course.

Mr TURNER: It would on the scenario you have put through that there

may still be the implication that a person has got a stigma about them. I think that is one of the criticisms of how the ICAC presently operates, that often people are left with a stigma. Your proposal is that there would be no finding of primary facts and then mention of the person is under investigating by the DPP. On the old adage that justice delayed is justice denied it doesn't really fix the problem because the stigma is there. Have you contemplated something along the lines of a seconded DPP official working parallel or in tandem with the ICAC?

Mr MOFFITT: I hadn't thought that but I think there is some merit in that. I would need to think about that. You may confuse functions if you did that, is a possibility. Certainly there should be a great deal of oral communication and there should be, I would think, within the ICAC something set up that people can get the material, organise it and sift it. The NCA has got that direct responsibility to prepare material etc. etc. for the courts.

Mr TURNER: There would be the possibility - and I haven't developed this in my own mind - of running the DPP in tandem and parallel that you could bring your report down and details of any charges flowing from that report almost simultaneously?

Mr MOFFITT: Well you could.

Mr TURNER: Which would mean the stigma may not be hanging over a person who is otherwise later found by the DPP to have no case to answer?

Mr MOFFITT: Yes, I think that's a very good point. In other words, consideration should be given and you could, in fact, as it were telescope those two things what you are putting. Instead of saying "consideration should be given" and you don't hear for six months what the DPP is doing about it. In the meantime the fellow has got the thing hanging over his head, that's what you are saying?

Mr TURNER: Yes.

Mr MOFFITT: I think it would be very ideal if you could telescope them. There may be a time factor. The DPP on some occasions may have to go out and collect other evidence. The ICAC has got evidence which really isn't going to be admissible and he may have to go to the Attorney General if he has some witness who has compulsorily given evidence and he might need to get some undertaking from the Attorney General. A whole lot of things could happen, but to some degree it might be possible.

CHAIRMAN: You wanted to continue?

Mr MOFFITT: No, I don't want to say anything further about that. If you are coming now to this Parliamentary reference, did you want to go to that?

CHAIRMAN: Yes.

Mr MOFFITT: If I have got the message across concerning the earlier part of what I raised that you have got in some way to have a limitation to finding of primary facts or excluding judgmental findings adverse to a person, assuming I have had whatever I have said understood in respect of that and I hope I have clarified it and livened up the debate a bit and acted a bit as the devil's advocate and I apologise for doing that but I thought it was necessary then what I have said in respect to reference to Parliament is almost self evident on its reading. I don't know if the members of the Committee have had an opportunity of reading this prior to today or not?

CHAIRMAN: I might give them an opportunity now. I have prepared

some questions which I think you have covered probably most of them but I might use them actually as a check list. Your new submission is predicated on the assumption that in inquiries other than Parliamentary references the ICAC would be limited to findings of primary fact or a finding would be adverse to an individual?

Mr MOFFITT: Where the findings otherwise would be adverse, yes.

CHAIRMAN: Could you briefly restate why you believe findings should be so limited? I think you have covered that in your submission.

Mr MOFFITT: More than covered it.

CHAIRMAN: What is your definition of primary fact, which I think you have covered both in the submission and in answer to Mr Hatton?

Mr MOFFITT: I did that because they really arose out of what the ICAC has been saying itself.

CHAIRMAN: What is your response to the ICAC's position that such a limitation would be unworkable, would prevent the ICAC from finalising matters that lead to litigation - you have covered that too?

Mr MOFFITT: I have.

CHAIRMAN: Could you take the Committee through your new submission and give some background as to how you came to develop the proposal contained in the submissions?

Mr MOFFITT: Yes. I am going to assume the Committee will go away and read this fairly shortly, so, to some degree, I won't go through the detail. With regard to how this question arose I, as you know, from the beginning made these submissions about restrictions so far as judgmental findings are concerned. I was dealing with the ordinary run of the mill case that the ICAC has dealt with to date.

There has only been one Parliamentary reference and that was in respect of the Metherill matter and that, as you will recall, has earlier been a matter of public debate and allegation. The ICAC itself then raised the question with the Leader of the Government and the Leader of the Opposition as to whether he should inquire into it and then Parliament made the reference. It came about in that way. It wasn't entirely an inquiry which originated from Parliament.

When the ICAC came to deal with it, it dealt with it in accordance with the statute. There were no substantially different directions. Therefore, when the Court of Appeal in respect of the prohibition proceedings, declaratory proceedings, entered the fray and dealt with it, it dealt with the case generally of an ordinary ICAC inquiry.

My later submission arose quite recently and the reason it arose was this. It arose out of some matters which have been raised by Mr Tim Robertson. This led me to reread the Salmon report which I knew well before. As you may remember, in respect of my submissions about public hearings and suppression orders, I dealt extensively with the Salmon report so it is a report of which I was well aware. It led me to reread the Salmon report but then for the first time the Antigua report which, of course, is the most classic illustration of a case of the type referred to in the Salmon report.

It then occurred to me that there could be an exceptional case upon a Parliamentary reference under the Act where it might be inappropriate to apply the general statutory requirements. That is whether my proposal is operating or whether

the Act is it is at present or under some other proposal. It seems to me that something different might properly be required in respect of a great and particular public scandal such as that, the subject of the Antigua inquiry and I will tell you about what that was if you want, but I won't if its not relevant.

CHAIRMAN: I think it might be helpful just in terms of background.

Mr MOFFITT: I will come back to that in the moment. The Antigua report could, in short, be quite different to what Parliament may require say, in respect of the Greiner type inquiry. I have quoted in this document two significant passages from the Salmon report. One is p 3, par 28 and the other is p 4, part of par 64.

There is a class of case, as Salmon puts, where the particular matter investigated is so grave and of such great public importance that allegations or rumours have been floating around which, almost touch the democratic process itself. On those occasions it is such an important matter to the community that there is some justification for putting aside for the moment the ordinary processes of law, and to use the compulsive powers such as under the Act of Parliament that Salmon dealt with, which are very similar to the ICAC, for the purpose of compelling answers, receiving any material and getting to the bottom and publishing to the world what the truth is, passing judgmental opinions about people or exculpate them, so that whatever has happened is resolved. It is accepted then by Salmon, as he puts it in the second paragraph quoted that the inquiry has, in effect, to be a complete substitute for criminal proceedings. In effect, you forget about criminal proceedings and to a degree you forget about what you do in a normal case.

In Antigua, if I could just very shortly say what it is about, arms were bought from Israel which was manufacturing small arms including a type of machine gun that you could put under your coat. Israel would only export it to select countries and countries which themselves would officially ask for it. There was a plot of a wicked nature involving many people whereby under colour of it being brought in by the government, a large consignment of arms was imported and then on the wharf trans-shipped with some kind of assistance from customs officer to another ship. Then it was taken at sea and transferred in some way and reached, as it always has been intended to reach, the private army of the drug barons of Colombia.

You can imagine that was a scandal of great proportions. As it happened, in the end, involved were the son of the Prime Minister, the head of the defence force, some customs person and some people in Israel and elsewhere.

That scandal was such that it was decided to hold a Parliamentary inquiry in which there was no holds barred. People could be compelled to answer questions, hearsay, the lot, and an eminent person was given the responsibility to say "Well, what was the truth of what happened?" It meant that it was on radio every day, it was on T.V. and it was in the newspapers. The judgments were finally pronounced, headlighted all around the place and a number of people had judgemental findings against them, including the head of the defence force. But it was said, adopting the Salmon principle, that this was a case where that was justified, it was only justified because of its gravity. It was then said because of that, although these people, if there hadn't been an inquiry, could have been fairly tried, it would be impossible to try them and, therefore, it recommended there be no criminal trial. That's the kind of case that Salmon refers to.

It seemed to me that, without necessarily adopting the Salmon test of seriousness, there is a case with some test of seriousness, such as Salmon laid down, the example in Antigua, where it would not be appropriate if Parliament makes a reference to confine it by the statute to the ICAC not being able to make judgmental findings. Therefore, it should be within the province of Parliament itself to decide that when it came to adopt the established ICAC set up, and that would be the ideal to use, that it should be able to say that whatever the statute provides, this is the nature of the report we require. We want a full report, to the hell with criminal proceedings, we have got to know what happened to clear the air one way or the other. In that case they would say, if you are limited to primary facts, forget it, we want to know the lot.

There would be another class of case that assuming that you had the Act as it is in which ICAC could make judgmental findings, that the Parliament say "We don't want judgmental findings. We only want to know what the facts were." I suggest, and from what I have said earlier, and this appears in my writing, that the Greiner type case would be such a case. There you have disputed facts, some facts unknown, Parliament has a function to perform a no confidence motion. There may be a different case. There may be a question of the Speaker or there may be a question of a Judge. Parliament has the power to remove a Judge on very strict constitutional grounds but it can't exercise that power unless it knows the facts. Therefore, it needs some independent body such as the ICAC to inquire and report what are the true facts? What are all the facts so we can exercise our power, either a no confidence motion, removal of a Speaker or removal of a Judge, as the case may be.

One thing we don't want is we don't want that body to tell us whether we should or should not dismiss the person. We don't want that body to pass some judgment. Its our judgment and we can't have either political interference or a matter being prejudged from outside. Whereas in the Antigua case you would need one thing, in the case of a Minister, a Premier, a Speaker, a Judge and in some other cases you say "No, we have got a function to perform. We only want the facts."

In effect, what I suggest is that Parliament in respect of references by it should have the power to give special directions as to what shall be or what may be included in a report to meet the particular case. Then before Parliament there can be debate in both Houses as to how serious is this to warrant forgetting the criminal law and being dealt with by the ICAC passing the judgment? Or is it a case which we only want to know the facts?

In my paper I have suggested that somebody might argue that Parliament would have that power anyhow but I haven't examined the question of Parliament's right to give directions in respect of a Parliamentary inquiry. I am assuming that Parliament would say "We want to use the ICAC" and the question raised by me, can the Houses of Parliament which acting together isn't legislating pass a resolution by the Assembly and the Council in identical terms which doesn't alter the law. I suggest in this that you would need, whatever power Parliament may have, the desirable thing is that it should have an express power when it makes a reference to ICAC to give, if it thinks fit, a special direction in respect of what may or what shall be included in a report. If it is not given that power I think considerable difficulty would arise as to whether the Houses of Parliament, without changing the law, could give the ICAC a direction which is contrary to what the legal requirements

are in an Act of Parliament.

Be that as it may I have suggested the power should be clearly dealt with. There are quite a lot of other matters dealt with in the submission and I think that sufficiently covers it.

Mr GAY: Surely that would be able to be accomplished by just changing the Act to say that by a joint sitting, or however, of both Houses of Parliament the variation on primary fact could be allowed?

Mr MOFFITT: I don't know about that because it raises the question, and I haven't examined that question, as to what is the effect of a resolution of both Houses? Its not an Act of Parliament. It doesn't change the law.

Mr GAY: No, but if you had it within the Act that the only way that primary fact may be varied is through a submission of both Houses of Parliament -

Mr MOFFITT: Yes, that's what I am suggesting. You will find already there is a provision in the Act giving the power for Parliament in its resolution to vary some matter, but it doesn't cover this matter.

CHAIRMAN: What happens if the ICAC were to approach Parliament and request a Parliamentary reference in relation to a particular matter and Parliament declines a request for a reference?

Mr MOFFITT: First of all I should say this - and I think it is very important - what comes through in this submission if you read Antigua and you read Salmon, that a case where you set aside the criminal law and you use the inquisitorial judgment is a rare case. Salmon puts it, its exceptional and he not only says its rare, but he says very, very rare, I think. That being so one might say "Well, the occasion would arise from the ICAC itself perhaps may never happen." I would think up to date there has been no case which answers the seriousness test of the Salmon report which the ICAC has dealt with.

I would be against having any provision in the Act to provide machinery where the ICAC could make a formal request, because that would suggest it might be a usual practise. If there is such a rare and exceptional case which does arise then the ICAC could do so informally in such other way it thinks fit. In the Metherill case the approach was to the Premier and the Leader of the Opposition. There was no former basis. It might be done in some different way in any other way he thought fit. Assuming he did you would have to understand what ICAC is really asking. There is nothing to prevent ICAC from making an inquiry on any subject it thinks fit provided its in the Act. The only reason it would want to approach Parliament is because itfelt that the reporting powers didn't suit that inquiry. The restriction is to primary facts under the Act and if the Commissioner says "I want to be able to report at large" there is no embarrassment for Parliament, I wouldn't think. Parliament would simply say "No, we think the ordinary processes of the law should operate." I don't think that would embarrass Parliament or anybody else.

There is one case where he might well ask for a variation and that's the case where if it ever came that up through the complaint channels, or the allegation channels, he came to deal with the question of the conduct, say, of a Judge or may be of a Minister. He would say "Look this is a serious matter. This is a matter in which Parliament may want to exercise power. This is a bit like the Greiner case." Now in that case it seems to me an embarrassment, and it was an embarrassment for Mr Temby, that he had to express any opinion concerning the dismissal question. As you

remember he mentioned that and I mention it here. If it came up that way and not on a Parliamentary reference, he might quite properly approach Parliament and say "Look, I would like this to be made a Parliamentary reference for the purpose of my being relieved of the obligations to make this statement about dismissal required by the Act." I see no difficulty in that, I don't know whether that answers your question?

CHAIRMAN: Yes, it does and I think it would probably answer the next one I was going to ask about an anticipated criticism of your proposal where a government controls both Houses of Parliament, whether it would give the government excessive control over an ICAC inquiry?

Mr MOFFITT: I have dealt with that in the middle of p 4. I have become very interested in this because as I say before, I greatly supported these powers in the ICAC and, with respect, I think we have gone a bit the wrong way and we need to step back a little. I have been interested to participate to that extent and I leave it to you people now.

(The witness withdrew)

TIMOTHY FRANK ROBERTSON, Barrister, [redacted], on former oath:

CHAIRMAN: Is there any opening statement you would like to make to the Committee? Perhaps you might like to comment on Mr Moffitt's recent submission and whether it addresses the concerns you have raised about the ICAC when you appeared before the Committee on 5 February?

Mr ROBERTSON: Yes. I undertook to obtain some information for the Committee on the last occasion. I did bring most of it with me. It might be useful. The comments I made concerning cost benefit analysis as one means, one technique of analysing the effectiveness of public policy were based on the research done by the Bureau of Industry Economics. I have Research Report 39 which was their evaluation of CSIRO research. You can't assess the value of scientific research in normal financial terms just as you can't assess the value or effectiveness of policing bodies in normal financial terms except perhaps in discreet areas like drug law enforcement. This provides an overview of the techniques adopted and the development of the approaches of the BIE. (Research report 39 by the Bureau in Industry Economics tabled)

(See annexure)

Perhaps it could be returned to me eventually.

The BIE found one of the most useful ways of assessing public action was using a technique called multi criteria analysis which was assigning monetary values - but money is used purely as a kind of a shadow for social value - to activities which didn't have a market value or a property value and to work out, based on the combination of those various values, whether it would be better to proceed with the activity or refrain from proceeding with it. This has been developed in Australia by the Resource Assessment Commission and they have published Research Paper No. 6 in March 1992 called *Multi Criteria Analysis, A Resource Assessment Tool.*

(Resource Assessment Commission, Research Paper No. 6 tabled)

(See annexure)

Although it was developed for the purposes of the resource inquiry into the forest and timber industry I think it is probably relevant to other public action where there are conflicts between rights and where there are disputant parties.

At a Federal level these tools are being used to a fairly sophisticated degree but it is still early days yet in their use of them. The cost benefit analysis has a lineage going back 150 years but the recent variants of cost benefit analysis are much more recent innovations. I am not sure if there was anything else that you wanted.

CHAIRMAN: We can check the record and if there is we will let you know.

Mr ROBERTSON: Yes, I am sure I can do it in writing.

The only general comment I wish to make is that the ICAC was something of an experiment and where an experiment has failed, or where it has not produced the results that have been expected, I think is a better way of putting it, then the scientist will always adjust the inputs to the experiment to see if it comes out the right way. I don't think Parliament should be afraid of making adjustments to the structure or mission of the ICAC if events have occurred which show that it's not performing as well as it might or as expected, or perhaps that Parliament didn't fully appreciate the nature of its powers or responsibilities when it first enacted the

legislation.

To a very large extent the proposal of Mr Moffitt for a fairly carefully constructed division between what is effectively an investigatory body, albeit one that enjoys the power to hold public hearings and compel testimony which is exceptional, and another body which has a power to make adverse findings, is one way of dealing with the perceived concerns, certainly the matters that I have raised in my first appearance before the Committee, and others have, of course, as well.

The suggestion that there should be a degree of Parliamentary control over the process is also useful. I tend to believe that the problem you raised, Mr Chairman, of there being political control over the ICAC to an unacceptable degree won't eventuate in reality because one can only imagine that the power to make adverse findings will be conferred on the ICAC in the most exceptional of circumstances presumably after public scandal and there would be a political imperative to ensure that the ICAC was relatively unfettered in its investigatory powers. But nothing in the proposal would restrict the ICAC from conducting an investigation in the normal course of events.

If I may make myself a little clearer, you have so far had an experiment from 1988 to date in one model. I don't see logically why there can't be an experiment in the next three or four years with a different model. Perhaps it would be a model which is drafted on the original one but one which makes changes leaving it open to Parliament through this Committee and its procedures to adjust it in accordance with social realities.

CHAIRMAN: When you appeared before the Committee on 5 February you said that the ICAC was required to perform two functions which were "essentially incompatible" - a social engineering function and a policing function. Do you believe that Mr Moffitt's proposal could assist in separating these two functions by distinguishing between Parliamentary references and matters investigated by the ICAC on its own initiative?

Mr ROBERTSON: I am not sure that it will do that. It addresses more the problem of unfairness in the ICAC having powers to denounce the morality of conduct. The problem with the policing function and the social engineering function is that the powers of exposure and, as I call them, shaming conferred upon the ICAC were very important in changing people's attitude towards corruption or, perhaps I think even more importantly, conduct which in previous years was not regarded as corrupt by many people. For example, assisting friends, giving friends a leg up, if you like, by using official powers in a partial way perhaps in breach of trust. There is a famous advising by the former Solicitor General, Mr G. Sullivan, QC, in reference to the allegation that a police commissioner had interfered in summary proceedings to assist a defendant with the assistance of the presiding magistrate in that case. It was said that this was done as a favour to the solicitor appearing for one of the parties. He said that this is an unfortunately tolerated form of wrong doing in our society. That was an observation that he made in 1980. It perhaps remains true to a much lesser extent today.

There has been a change in public morality which I have detected over the last ten or twelve years and the ICAC is part of the process of changing that view.

But that function is quite different to a policing function which is something that will have to occur in 100 years' or 1000 years' time because you will

never get public office holders who are impeccable. There will always be a certain level of criminal activity in all walks of life. Once the social engineering function is performed, and I think that's probably got a relatively limited life, you have to work out whether the way in which you structure the operations to satisfy that objective is also relevant to satisfy the other objective.

If you examine what the ICAC set out to do what you have are two inconsistent paths to fulfil those objectives. Sooner or later we will find that the courts say you can't make adverse public judgments about people for conduct which you later prosecute. The courts will say "Well, the prosecution is doomed to fail because you have prejudiced that person's right to a fair trial." Alternatively, the prosecution will never be launched because in order to obtain the evidence you have had to indemnify the malefactors and you have lost all that evidence for later use in legal proceedings.

The tension between these two objectives, policing and social engineering, is not going to be solved by adopting the distinction that Mr Moffitt has proposed. It may be lessened but that distinction is nonetheless important. It will change the nature of the ICAC. It won't lose all its important community benefit functions at all but what it will do is lead to a concentration less on the show pony type of activities and more on the policing and developing of its investigative abilities.

Ms BURNSWOODS: You are broadly in favour of limiting the ICAC to findings of primary fact, is that right?

Mr ROBERTSON: I think that the ICAC can better perform its functions purely as an investigative body, yes, that's right. Insofar as findings of primary fact are seen to be the outcome of an investigation and if the Parliament think that -

Ms BURNSWOODS: - I mean not only in relation to the Parliamentary issue but broadly?

Mr ROBERTSON: Well, can I answer the question this way? I don't see this as an objective. The objective is to investigate corruption. You can go about that objective by engaging in a police investigation which would usually never result in the publication of anything other than through the courts' system if a prosecution ensues. Or you can go about it in the way which Parliament has structured, and the ICAC tends to do for major matters and some minor matters, and that is hold a public hearing as an aid to the power of investigation. At the end of that hearing, if it holds a hearing, it is required by law to make a report and that report is required to be public and its protected from proceedings for defamation. The judgments tend to be final in that sense because they won't be agitated later in civil proceedings in defamation courts. I am not suggesting that would be a satisfactory way of challenging it but that's one way of doing it.

To say that I am broadly in favour of it is correct. I am broadly in favour of the ICAC exercising investigatory powers. I think that the public hearing function is vastly over played by the ICAC.

Ms BURNSWOODS: If I can interrupt, that's what I was getting at really. I wondered whether, assuming that you are broadly in favour of limiting the Commission to findings of primary fact, you thought there was a tension between that and the holding of open hearings?

Mr ROBERTSON: There is one way of answering it, is that it depends

how the hearings are conducted. If the hearings are conducted in such a way that people are able to ventilate opinions about conduct themselves, then to limit the ICAC to primary facts may be to eliminate the occasion for the rebuttal of the expression of outrageous allegations.

But then again most of the hearings concern, and allegations are made, of facts although opinions can be received because there is no hearsay rule restricting the receipt of opinions about conduct. One would hope that there would be some degree of restraint in receipt of evidence and that wild opinions would not be ventilated or that the ICAC would use its suppression powers to prevent their publication and in that way harm can be avoided. With some sensible adjustment you can overcome that possible prejudice to people who are subject to public hearings.

Ms BURNSWOODS: You wouldn't prefer to abandon public hearings?

Mr ROBERTSON: I have a real difficulty with this because I can see that there is an argument in favour of exposure. It is quite different to the argument concerning protection of persons from inquisitorial processes. The argument in favour of exposure is that where there is a serious allegation of wrong doing in public office which could have a significant effect on competence in government, or whatever, then people are entitled to know.

As a believer in freedom of information and free speech I think there is an entitlement on the part of the public to know how their money is being spent and hence there is a good argument in favour of a public approach to those sorts of investigations.

On the other hand as someone concerned to see that the results of those investigations can be used later on if they result in corruption, I would be concerned about the over use of the public hearing power because that will inevitably cramp the potential to take later criminal proceedings against the persons whose conduct or wrong doing has been exposed.

I am also concerned that the public hearing function can be used as a kind of a show trial and that allegations can be made, or so-called facts can be elicited in the course of those hearings which, after much investigation, perhaps months of investigation, are found to be completely wrong yet the sting will be there and there won't be an opportunity for the balm to be applied in any realistic way. People can become the subject of vile allegations and never have the opportunity for redress and I think it is a pity that Parliament should have developed a system such as this which carries with it that very real potential. It has happened already in some of the hearings and there have been examples given to the Committee of those events.

One possible way of overcoming the problem if you want to retain public hearings is to have put in the legislation a code of procedure. The ICAC comes along to this Committee's hearing every year and says "We are good boys and girls, we do things by the book and we give people an opportunity to comment on things before we make allegations publicly" and this, that and the other. They may or may not do that. I am not privy to all their inquiries and whether that's so and I know that there are some people who say that it is not. But if the ICAC generally does comply with those sorts of principles then there is no difficulty in writing into the legislation a requirement to do so. That's another way of overcoming some of the prejudice.

I think that's a proposal the Committee should examine if the public hearing function is to continue. I think that has been proposed by others who suggested that you should adopt the Salmon rules as a legislative code of procedure.

There are other more detailed codes developed in the United States for administrative procedures such as this that are equally applicable.

Mr GAUDRY: In such a code of procedures, Mr Robertson, where are the sticking points? Its the actual method of presentation of the evidence before the ICAC that you would be concerned about?

Mr ROBERTSON: I see the greatest difficulty with giving people notice of allegations as there is always an inevitable tension in a criminal investigation between the sensible course of telling people that an allegation has been made against them, and may be ventilated publicly at some appointed time, and not tipping a suspect off to the line of inquiry. This is a problem where you compel the ICAC to engage in these major exercises in public you are inevitably requiring them to be unfair to people.

Now if the investigation was in private then you could control the flow of information much better. There wouldn't be the fear of tipping people off necessarily by giving them notice in advance. There might not even be the need to give them notice in advance of an allegation because the allegation won't be made publicly and hence damage that person. It will be made in the course of either an informal investigation or one requiring formal hearings.

That is the most important issue in a practical sense is giving notice to people. I can't see any reason why the ICAC can't be required to do that so that people are available at the instant the allegation is made to publicly to deal with that, if you are using the public hearing model.

Mr GAUDRY: But you do have the problem of some sort of collusive evidence, perhaps, and that's what they are probably trying to avoid in that process?

Mr ROBERTSON: Yes. We are not dealing with cops and robbers stuff here. You don't go into the public hearing format without a reference and you have got to announce the general nature and object of the hearing at each day's hearing. You are going to know about it, in fact, the whole world knows about it. That's one of the purposes of the exercise. It's not as if it's a super sensitive police inquiry into a bank robbery and you don't want to tip off a suspect to hide the booty. It's not that sort of a situation so I don't see that that's really a strong argument against requiring them to comply with the duties of fair procedure.

The ICAC may then decide that if they had this legislative requirement that it's better off than not having public hearings in some cases. If they have to comply with that requirement and it's going to cruel the pitch of the investigation, then it's open to them to decide to investigate it as if it was a police investigation or to use the private hearing powers.

If you look at what happened the other day when the Supreme Court ordered the ICAC to go into private hearing in this long running inquiry into police and criminals, once the court required the ICAC in a very general sense to abide by various natural justice restrictions, I think the ICAC made a policy decision that it should undertake all inquiries in private, at least until that was overturned by the Court of Appeal.

Mr GAUDRY: Interestingly in cross examining the Commissioner on that there was the great Queensland drought of information, according to the ICAC, following the movement from a public to a private hearing. There was much less flow of information and obviously that's one of the public hearing aims, is it not, to publicise these matters of corruption and in that way to prevent or educate?

CHAIRMAN: It is also suggested that people then come forward with information?

Mr GAUDRY: Yes.

Mr ROBERTSON: What I said on the last occasion was that this has always been said to be the justification for public hearings of this nature. Never have I seen a study which seeks to quantify that so-called effect. If it is an effect, and if the intelligence that the investigator receives as a result of public exposure has any use for the investigation, presumably that effect can be quantified. I would prefer to see a study done by a couple of criminologists before agreeing that public exposure of that kind leads to any useful information.

This was probably the case in the Street Royal Commission into the allegations against the former Premier that a lot of information is received where great publicity is given to those inquiries but I think the former Chief Justice made reference in his report to the fact that none of it was of any significance or didn't have any significance for his inquiry. In fact, most of it was positively misleading, including an allegation that Mr Farquahar had transferred huge sums of money to a South American bank account, an allegation which was chased up and found to be absolutely baseless.

To answer the question, you just don't know and I think it would be unwise to accept subjective opinions about this matter whether it's my opinion or the opinion of someone else without some analysis of the information.

Ms BURNSWOODS: It would be a good area of study for the first cost benefit analysis?

Mr ROBERTSON: It could be, but one of the ways in which you can avoid the problem is you can release a transcript of a private inquiry - and this is done quite frequently in these inquiries. It may not have the gripping effect of the blow by blow cross examination - most blow by blow cross examinations are boring, not gripping - but it certainly doesn't have that liveliness but it does serve the informational purpose if the media picks it up which it is likely to do. Again you avoid the problems of people being prejudiced without the right to answer at the time the publicity is given to the matter.

Ms BURNSWOODS: You mean releasing a transcript some considerable time after?

Mr ROBERTSON: Yes.

Ms BURNSWOODS: Or even only a week after or something?

Mr ROBERTSON: Yes, that's an option. There are ways you can do it. Its not a black and white area. I wouldn't like to say that the ICAC should never hold public hearings. Afterall it is an inquisitorial model and there will be occasions when it might wish to hold public hearings for non investigatory reasons.

(The witness withdrew)

(The Committee adjourned at 5.05 p.m.)

Parliamentary Committee on the ICAC

Reference by Parliament under s.13(1)(a) and s.73 Contents of Reports to Parliament

Comments of Athol Moffitt

At this late stage I raise the question whether some special consideration needs to be given to the judgemental finding issue where the inquiry is on a Parliamentary reference. It seems to me some important questions arise in respect of such references.

I will later propose a particular amendment to s.73 to meet special considerations which may arise in respect of reports following an inquiry upon the Parliamentary reference. In the last paragraph I will refer to a critically important general consequence of such an amendment.

So far as I am aware, submissions to the Committee to date have not raised these questions or considered the special position of Parliamentary references. A recent re-reading of the Salmon report turned my attention to these questions. Earlier, in my submissions to the Committee on the Discussion Paper dated August 1990, prepared by me, I referred extensively to that report. It is regarded, and rightly so, to be of impeccable authority and reasoning and deals with the special position of inquiries made by a tribunal with powers similar to those of the ICAC, upon a reference to it by Parliament.

On reflection, I believe that reports upon inquiries set up by Parliament should be in a separate category. The requirements may differ from inquiry to inquiry and cannot be properly met by a general statutory provision as to the contents of reports earlier debated before the Committee concerning inquiries initiated otherwise. In exceptional and rare occasions, later to be referred to, it may be necessary, and Parliament ought to be able to so direct, that full judgemental findings should be made, and reported. In other cases it will be appropriate, and Parliament may require, that a report be of findings of fact only. The latter is where Parliament needs to know the facts, (which may be in dispute), in order itself to exercise some power, but does not want its judgement prejudged or politically prejudged by some external judgement. This is because the matter is within Parliament's exclusive power and responsibility. Examples are votes of no confidence or the removal of a judge or a Parliamentary Officer.

A Parliamentary reference under s.73(1) takes the ICAC with its duties and powers as they are under the Act. A resolution of both Houses in identical terms has no legislative effect. A direction in such a resolution referring a matter to the ICAC, in the absence of an amendment to the Act, cannot, it seems, exempt the ICAC from the requirement of the Act. S.73(3) does give Parliament the power to give directions which the ICAC is bound to follow, but this is on a limited subject matter, which has no application to varying its reporting powers and duties under s.74A in its present or any amended form. It may be that Parliament has some inherent powers, which I have not examined, concerning the setting up of Parliamentary inquiries, but there may be some difficultly or uncertainty in attempting to do so in respect of a body such as the ICAC, governed by a statute, particularly if the direction were in conflict with the requirements of the Act. If Parliament, is to have the power by resolution of both Houses to vary the reporting provisions of the Act in a particular inquiry, obviously it would be best expressly to confer such a power by an amendment to s.73 in terms similar to s.73(3).

It follows that if, as has been proposed, the Act is amended to vary generally the reporting powers and/or duties of the ICAC, for example, to confine reports to findings, adverse to named persons, to findings of primary facts, then this would apply equally to reports upon a Parliamentary reference. This would be so, unless there is an amendment of s.73 on the lines suggested to empower contrary directions to be included in the reference. The same would apply if the Act remains as it is. Parliament could not give a valid direction contrary to the existing s.74A(1), confining reports to findings of primary facts. It could not direct the ICAC not to make any statement under s.74A(2)(c) on the matter of dismissal.

The only reference, so far, by Parliament to the ICAC was that which led to the Metherell inquiry. All the provisions of the Act were applied to that inquiry in the same way as if the inquiry had originated otherwise. Hence the present review, which to a degree arose out of that inquiry and the resultant Greiner case, has been directed to the Act generally.

I turn now to the Salmon report reasoning. This is particularly relevant to a Parliamentary reference to the ICAC, because the Salmon report dealt with the setting up by Parliament of inquiries before a tribunal of an inquisitorial nature established by an Act of Parliament and having compulsive powers somewhat similar to those of the ICAC. That Act did not confer on the tribunal the ancillary functions of the ICAC or that in aid of court proceedings. The report, as well as dealing with when Parliament is justified in setting up such an inquiry, also deals with the consequences of the reporting publicly of tribunal findings.

The report deals with the limited occasions for the proper use and justification for the use of these compulsive powers, not available in the ordinary and democratic court system. It deals with their use in public hearings ending, importantly, in judgemental findings publicly pronounced, adversely to named persons even where they involve or imply criminality.

It is a long report but two major conclusions, presently relevant, emerge.

The first is that while democratic principles require persons to be dealt with in accordance with the ordinary processes and safeguards of the law, there are rare cases where the interests of democracy require that the compulsive powers be used and judgements given and that all should be in the full glare of publicity. This is put in paragraph 28 as follows:

> "**28.** Normally persons can not be brought before a tribunal and questioned save in civil or criminal proceedings. Such proceedings are hedged around by long standing and effective safeguards to protect the individual. The inquisitorial procedure is alien to the concept of justice generally accepted in the United Kingdom. There are, however, exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed..."

It is clear from the last part of the quotation and the report otherwise the crises in public confidence being referred to are those which relate to particular events and that there is certainly no suggestion, in respect of some general class of worrying crime or conduct such as in the drug, organised crime or corruption fields, that inquisitorial judgements be substituted for court trials.

The second major conclusion which really is a corollary of the first, is set out in part of paragraph 64 as follows:

> "**64.** The publicity however which such hearings usually attract is so wide and overwhelming that it would be virtually impossible for any person against whom an adverse finding was (*publicly*) made to obtain a fair trial afterwards. So far no such person has ever been prosecuted. This again may be justified in the public interest because Parliament having decided to set up an inquiry under the Act had clearly considered whether or not civil or criminal

> proceedings would resolve the matter and has decided that they would not." (emphasis is mine)

A useful example of the application of these two Salmon principles is provided by the Parliamentary initiated Antigua inquiry into what was referred to as the arms scandal which classically fell within Salmon paragraph 28. It is relevant to refer to the application of paragraph 64.

Having pronounced publicly adverse findings concerning a number of named persons and having stated that if there had been no inquiry those persons could have been fairly tried in the courts, the report added

> "... the trouble is that the Commission of Inquiry (*including its judgements*) have been conducted in the full glare of publicity.... It is in my view generally speaking, wherever a public scandal demands an instrument of a Commission of Inquiry to elicit the truth for the benefit of the public welfare, there is implied in such an official action that the inquiry is to be a complete substitute for criminal proceedings against those implicated or concerned in the events under inquiry." (the addition in brackets is mine)

There followed a recommendation that there be no criminal prosecutions. It was pointed out that, in substitution for criminal punishment, the various public officials, in consequence of the revelations and findings had been dismissed or had had their reputations or careers ruined.

The reality, which the Salmon reasoning revealed and the Antigua Report illustrated, is that it is not practicable to have two systems each producing a public judgement against the same person on the same subject. They also acknowledge that there are particular and extreme cases, where an inquisitorial inquiry and judgement in public should be preferred in order to determine the truth, but that that judgement should almost invariably be in place of criminal proceedings. The same reasoning must lead to the conclusion that, except in the particular and "very rare" case which answers the extreme test, the ordinary processes of the law must be allowed to operate and inquisitorial powers should be exercised in aid of and so as not to prejudice the fair operation of those processes of the law. In particular, pronouncing inquisitorial condemnatory public judgements cannot stand alongside the functions of the courts to adjudicate and pass judgement on the same subject.

What has been proposed so far in submissions to the Committee are strongly supported by the Salmon reasoning, and are, one would expect, likely to lead to the ICAC being denied the power to make adverse judgemental findings against named persons.

If such a restriction is imposed on ICAC reports generally, then the question arises, not earlier adverted to, whether it should apply universally to all inquiries which have been the subject of a Parliamentary reference. On the Salmon reasoning, there will be particular exceptional but rare cases, such as Antigua, where the ICAC not only should hear the whole inquiry in public, using the compulsive powers, but in the end should make public judgemental findings, virtually in lieu of criminal proceedings. Should not your Committee consider whether there should be some mechanism to allow these exceptional but rare cases to be reported on differently?

For reasons earlier indicated there may be some cases, in which it is appropriate that the ICAC only find the facts, leaving Parliament unfettered to make its own determinations, which also may be virtually in lieu of criminal proceedings. It is arguable that the Metherell inquiry, involving the conduct of a Premier, may have fallen into this latter class. It seems, Mr Temby was embarrassed by the obligation to determine whether there was statutory corruption, when the question of a no confidence motion was the province alone of Parliament. He also found difficulty with the requirements of s.74A(2)(c) concerning dismissal. In "declining" to make a statement concerning dismissal, he considered that to do so would "not be a responsible exercise of the Commission's power" and that the supremacy of Parliament should be observed (report p 91). It will also be recalled there was much debate whether any question of the removal of the late Mr Justice Murphy should be preceded by a finding of the facts, or by a full judgemental inquiry or by a criminal trial.

The point is that the general provisions in the Act concerning the contents of reports, whether s.74A(1) and (2) remain as they are or are amended, may need to be open to variation in a few exceptional cases, where there is a Parliamentary reference. This could be achieved by an amendment of s.73 to authorise Parliament in its referral to vary the powers and duties concerning the contents of reports, provided by s.74A(1) and (2) as amended.

If the foregoing is acceptable, I suggest it is important that Parliament, on the facts of each case, be the body to take the responsibility to make a decision concerning any variation what may be the contents of the report. If inquisitorial judgements in lieu of court judgements are to be permitted important civil liberties will be effected. Further, Parliament is the one to judge whether it requires only the facts to be found. If this course is adopted, Parliament would decide in conjunction with a Parliamentary reference whether, in what would be an exceptional and rare case, that say a prohibition of reporting judgemental findings adverse to named persons can be set aside in the public interest.

This would mean that in the run of the mill ICAC inquiry based on complaints by any person or an official report or allegation, that the ICAC would be restricted in one of the ways submitted to the Committee eg. limitation to findings of primary fact, leaving courts to make appropriate decisions.

If it should happen that upon an inquiry by the ICAC not initiated by a Parliamentary reference it appears to the ICAC that it answers the Salmon test of seriousness or some equivalent test, then it would be open to the ICAC to seek through appropriate avenues, as it did in respect of the Metherell inquiry, to have the inquiry made the subject of a Parliamentary reference. Parliament would then decide whether it was appropriate to do so and also to vary the reporting powers.

In any of the special cases just adverted to there would be public Parliamentary debate. It would be open to Members of Parliament to debate the application of the Salmon principles, as applied to the particular subject matter of the inquiry.

It might be argued that if the present line up of political parties and Independents changes, so one party has an absolute majority, the amendment to s.73 proposed would mean that the party in Government could change the operation of an Act of Parliament. However, the variation in the reporting requirements would still require the reports to be to Parliament, both Houses would have to assent to the decision and the whole issue would have to be debated in both Houses, and hence open to political and media comment. It would still be a resolution of Parliament and not a Government decision behind closed doors. In any event, if a party in Government was able to have a resolution passed by both Houses, it would be able to pass an Act of Parliament setting out the terms of reference and any variation of the reporting provisions of the Act to be applied to that inquiry.

If as a result of an amendment to s.73 and a direction of Parliament there should result ICAC judgemental findings adverse to named individuals, the question earlier before this Committee of an appeal, indeed a full appeal, would be revived. The question, however, will be markedly different for a number of reasons. One is that the occasion for an inquiry would be rare, so that the disruption of ICAC functions will be a negligible factor. The second is that on the premises earlier stated, the matter would be of great public concern, the open hearings and open findings will have the full glare of publicity, and on the Salmon and Antigua reasoning, the finding would be virtually in substitution for proceedings in the courts. Therefore, the problems of two competing systems would be most unlikely to arise. The consequences to an individual, as in the Antigua case, could be as devastating as a criminal

conviction and is a strong case to afford such a person a full right of appeal (of fact and law).

I submit there would, for the same reason, be good ground to provide a full appeal where, upon a Parliamentary reference, the ICAC is limited to finding primary facts ie. where it is in aid of the exercise of some Parliamentary power such as a no confidence motion or the removal of a constitutional office holder such as a judge or a Parliamentary Officer. An adverse decision of Parliament most likely with grave consequences would depend on the finding of facts, perhaps open to challenge as wrong.

In either case it is likely that the office holder would be well-known publicly and an adverse finding would be so adverse in its consequences, that it would seem unjust not to accord him or her the same right as accorded to any person against whom an adverse court judgement has been given. The ICAC judgement on such an occasion will be by one person, who can be just as fallible as any judge.

Finally and importantly it should be stated that if the general rule is to be that the ICAC should be restricted, in some way, to finding primary facts but that Parliament has the province and responsibility to decide when it should be otherwise, this would meet the argument or concern that there are some cases where the ICAC should report all its conclusions upon its inquiry. There will be a means under the control of Parliament for this to be done in a particular case which it judges to be appropriate.