APPENDIX ONE

Opinion of Mr Brian Sully QC

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

11 February 1992

Mr M J Kerr MP
Chairman
Committee on the ICAC
Parliament House
SYDNEY NSW 2000

Dear Mr Kerr

At the Committee's hearing last Friday, 7 February 1992, to take evidence about and from the Operations Review Committee ("ORC"), the issue was raised whether the Commission is required by the terms of s59 (1)(a) of the ICAC Act to consult the ORC before it commences an investigation of a complaint.

In March 1989 the Commission sought advice from Brian Sully QC (now his Honour Mr Justice Sully of the Supreme Court) about precisely that matter. Mr Sully's advice was that a combined reading of s10, 20 (4) and 59 (1)(a) led to the conclusion that the Commission can commence an investigation without first consulting the ORC. A copy of that advice has been provided informally to the Committee's Project Officer. I understand the Committee wishes to table the opinion at its hearing today. I express no objection to that course and a copy of the opinion is hereby provided.

The Commission's procedure in relation to the ORC and the commencement of investigations is that the ORC is informed of newly commenced investigations very soon after they are commenced, generally at the next meeting, and thereafter kept informed of progress on a three monthly basis. The ORC has the power to recommend discontinuance of investigations. I think therefore that there is sufficient accountability. My present feeling is that procedural change is not required, but I will be consulting members of the Operations Review Committee, providing them with copies of Mr Sully's opinion and discussing the matter with them at the next opportunity.

Yours faithfully

Ian Temby QC
COMMISSIONER

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RE: THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988 (NSW)

OPINION

The Independent Commission Against Corruption, ["the Commission"], seeks advice concerning certain aspects of the operation of the Independent Commission Against Corruption Act, 1988 As Amended (NSW), ["the Act"].

My instructions propound two particular questions for advice. I shall set out hereunder each such question together with my answer.

Whether, pursuant to the Independent Commission Against Corruption Act, 1988, an investigation of a complaint can be conducted without prior reference to the Operations Review Committee?

My instructions, read as a whole, suggest that the word "conducted" in the question is to be read as "commenced". I will deal with the question upon that basis.

The correct answer to that question is, in my opinion: Yes.

I reason to that conclusion as follows:

1. The question raises for consideration the provisions of sections 10, 20 (4) and 59 (1) (a) of the Act, and the inter-relationship of those sections.

In considering the terms and the inter-relationship of those three sections, there are certain well-established principles which need to be kept in mind. They can be best summarised, relevantly for present purposes, by three short citations of authority, as follows:

1.1. "It is, ..., a sound rule of statutory construction that a meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided. Unless the statutory language is intractable, an intention to produce by its legislation an unjust or capricious result should not be attributed to the legislature." **Tickle Industries Pty Limited v. Hann & Anor [1973-74] 130 CLR 321; per Barwick CJ at 331.**

1.2 "In construing an instrument where its words are susceptible of two meanings, it is always legitimate to take into account reasonableness, justice and consistency on

the one hand, and unreasonableness, injustice and absurdity on the other." Metropolitan Coal Company of Sydney Limited and Ors v. Australian Coal and Shale Employees' Federation [1917] 24 CLR 85; per Isaacs and Rich JJ at 99.

1.3 "Where in a statute words are used capable of more than one construction the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail." Brunton & Ors v. The Acting Commissioner of Stamp Duties for NSW [1913] AC 747 per the Privy Council at 759.

In addition, it is appropriate to bear in mind the requirement of section 33 of the Interpretation Act 1987 (NSW), which provides as follows:

"In the interpretation of a provision of an Act ....., a construction that would promote the purpose or object underlying the Act ..... (whether or not that purpose or object is expressly stated in the Act .....) shall be preferred to a construction that would not promote that purpose or object."

2. Sections 10, 20 (4) and 59 (1) (a), when looked at as a whole and in the context of the entire Act of which they form a part, and in the context of the statements of principle to which I have referred in paragraph 1 above, form, in my opinion, a clear and coherent legislative pattern as follows:

2.1 Section 10 confers upon the Commission three discrete powers of decision, namely:

2.1.1 The power to decide to investigate a particular complaint;

2.1.2 The power to decide not to investigate a particular complaint;

2.1.3 The power to decide that an investigation already current should be discontinued.

2.2 Section 20 (4) does not cut down the power of ultimate decision of the Commission in respect of any of those three classes of decision. That power of ultimate decision rests, always, with the Commission.

What section 20 (4) does establish, is a statutory screening process of any proposed decision of the Commission falling within either of the categories 2.1.2 or 2.1.3

above. That process is one of consultation only; and, once the prescribed consultation has occurred, the Commission is then empowered and bound to proceed to the making according to law of a final decision in the particular case.

2.3 It is to be observed that section 20 (4) does not purport to apply to the making by the Commission of any decision falling within the category 2.1.1 above.

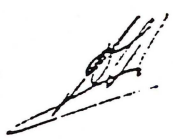
Had the legislature intended that the statutory requirement of prior consultation for which section 20 (4) provides should apply to the making by the Commission of a decision to commence an investigation, then "nothing .....(would have been) ..... easier than to say so in plain words". **Province of Bombay v. Municipal Corporation of the City of Bombay & Anor [1947] AC 58 per the Privy Council at 63.**

The mere inclusion of the words "or to commence" before the words "not to commence" would have sufficed. That the legislature did not employ this or some equivalent form

of words is, in my opinion, powerful warrant for the view that section 20 (4) was not intended to catch a decision to commence a particular investigation.

2.4 When section 20 (4) is thus analysed, then section 59 (1) (a) forms, in my opinion, a logical and consistent complementary provision. The Commission has a duty of prior consultation with the Operations Review Committee before it takes a final decision not to investigate a particular matter or to discontinue a current investigation. The Operations Review Committee, when thus consulted, has a corresponding function and power to tender advice to the Commission as the circumstances of the particular case appear to the Committee to require.

(Advise) as to questions which (Counsel) thinks significant and are linked to the primary question, particularly if any of the views contained in the attachment are considered incorect.



The attachment to which reference is made is a memorandum which is headed "Complaints, Investigations and the ICAC Act". The document is dated 25 January 1989 and is over the hand of the Commissioner.

The memorandum deals in part with the question, upon which I have previously expressed my own opinion, concerning the inter-relationship of sections 10, 20 (4) and 59 (1) (a) of the Act. I need say no more on that score.

Otherwise, the memorandum deals in substance with what I would understand to be a number of matters of practical administrative policy, principle and practice which the Commissioner thinks to be appropriate for adoption by the Commission once it commences formally its statutory duties.

I cannot usefully say more than that, having read the attachment, there is nothing in it which strikes me as being obviously incorrect.

I have spoken this morning to Mr. Bromwich about this particular aspect of my present instructions; and I have indicated to him that, if there is any particular question of law, additional to that which concerns the inter-relationship of sections 10, 20 (4) and 59 (1) (a) of the Act, upon which he would wish me to express an opinion, I shall be glad to do

so upon receipt of instructions as to the precise nature of the question(s) upon which such further advice might be desired.

CHAMBERS

13 March 1989

BRIAN SULLY [Q.C.]