



Office of the Inspector of the
Independent Commission Against Corruption

6 June 2018

Our ref: C32 2016 - 18/04

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

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

Dear Mr President & Madam Speaker

In accordance with sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the *ICAC Act*"), I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament a *Report concerning a complaint by Mr Murray Kear about the conduct of the Independent Commission Against Corruption in Operation Dewar (Special Report 18/04)*.

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

Yours sincerely,

Bruce R McClintock
Inspector, Independent Commission against Corruption.

1. I am pleased to provide pursuant to sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") a report determining a complaint made against the Independent Commission against Corruption ("ICAC" or "the Commission") by Mr Murray Kear, former Commissioner of the New South Wales State Emergency Service ("the SES"), concerning the conduct of Operation Dewar and his subsequent prosecution for an offence under s20 of the *Public Interest Disclosures Act 1994*.

Executive Summary

2. In its Operation Dewar report, the Commission made two findings that Mr Kear had engaged in corrupt conduct¹:

2.1 Commissioner Kear's conduct in deliberately failing to properly investigate allegations against [Deputy Commissioner A]² in relation to the entry into the Karoshi and Performance Drivers contracts, the use of SES funds to purchase roof racks and electric brakes, the obtaining of an SES-paid vehicle for Mr Schafer and the potential falsification of diary entries in relation to Mr [REDACTED] because of his friendship with [Deputy Commissioner A] is corrupt conduct.

This is because his conduct is conduct that adversely affected his honest or impartial exercise of his official functions within the meaning of s 8(1)(a) of the ICAC Act. His conduct could also constitute or involve the partial exercise of his official functions and therefore come within s 8(1)(b) of the ICAC Act. His conduct could also constitute or involve a breach of public trust and therefore come within s 8(1)(c) of the ICAC Act (Dewar Report, page 19).

2.2 The Commission is satisfied that Commissioner Kear engaged in corrupt conduct by dismissing [Deputy Commissioner B] from her employment with the SES substantially in reprisal for her making allegations about the conduct of his friend, [Deputy Commissioner A]. These included the allegations concerning the circumstances in which the SES had entered into contracts with Karoshi and Performance Drivers, [Deputy Commissioner A's] misuse of SES funds to purchase roof racks and electric brakes for his car, the alleged misuse by [Deputy Commissioner A] of his SES credit card, and the alleged fabrication of diary notes.

¹ *Investigation into the Conduct of the Commissioner of the NSW State Emergency Services May 2014 ("the Dewar Report")*

² Following a request by one, I have decided to refer to each of the Deputy Commissioners by pseudonyms.

This is because his conduct is conduct that adversely affected his honest or impartial exercise of his official functions within the meaning of s 8(1)(a) of the ICAC Act. His conduct could also constitute or involve the partial exercise of his official functions and therefore come within s 8(1)(b) of the ICAC Act. His conduct could also constitute or involve a breach of public trust and therefore come within s 8(1)(c) of the ICAC Act (Dewar Report page 24).

3. The Dewar Report also contained a recommendation pursuant to section 74A(2) of the ICAC Act in the following terms:

3.1 [T]he Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Commissioner Kear for an offence under s 20 of the Public Interest Disclosures Act 1994 of taking detrimental action in reprisal for a person making a public interest disclosure.

4. The *Public Interest Disclosures Act 1994* ("PID Act") mandates the obtaining of such advice. See section 20(6)(a), PID Act.
5. On 10 September 2014, the ICAC provided a brief of evidence to the DPP and on 3 February 2015, the DPP advised that there was sufficient evidence to prosecute Mr Kear for a summary offence under section 20 of the PID Act.
6. The ICAC initiated such a prosecution which was heard in the Local Court in October 2015 and February 2016. On March 2016 Magistrate Grogin found Mr Kear not guilty of the offence, and on 25 May 2016 awarded him costs under section 213 of the *Criminal Procedure Act 1986*.
7. Mr Kear initiated his complaint on 1 June 2016. I attach a letter of that date from Mr Kear's solicitor, one from my Office dated 14 July 2017 and the solicitor's reply dated 6 October 2017. For present purposes it is sufficient to say that Mr Kear complains that the ICAC did not disclose or lead as evidence in its public inquiry in Operation Dewar material in its possession which was exculpatory of Mr Kear. He further complains that because of the failure to consider that exculpatory material the two findings of corrupt conduct (see [2] above) were wrongly made. He also complains that the ICAC failed to provide the same exculpatory material to the DPP and asserts the prosecution should not have been commenced.
8. In my opinion, Mr Kear has failed to establish that these matters amount to "abuse of power, impropriety and other forms of misconduct" or to "maladministration" as those terms are used in section 57B of the ICAC Act being the only matters that I am empowered to determine in response to a complaint. Accordingly, I have decided that this complaint should be dismissed (I will refer to those statutory concepts compendiously as 'misconduct or maladministration').
9. This report sets out my reasons for that decision.

Background

10. In May 2013, Mr Kear was Commissioner of the SES. There were two Deputy Commissioners, Deputy Commissioner B, Deputy Commissioner Corporate Services and Deputy Commissioner A, Deputy Commissioner Operations. On 14 May 2013, Mr Kear summarily terminated Deputy Commissioner B's contract of employment. On the following day, Deputy Commissioner B reported her dismissal to the ICAC, stating that she had informed Mr Kear of allegations that Deputy Commissioner A may have engaged in corrupt conduct. Deputy Commissioner B asserted that Kear and Deputy Commissioner A were friends and that she suspected that Kear had failed to investigate her allegations because of that friendship.
11. I will not set out in detail the allegations about Deputy Commissioner A, which Deputy Commissioner B had reported to Mr Kear. They are set out in chapter 2 of the Operation Dewar Report (pp11-19) which is available online. See www.icac.nsw.gov.au/docman/investigations/reports/4378-investigation-into-the-conduct-of-the-commissioner-of-the-nsw-state-emergency-service-operation-dewar/file
12. In summary, Deputy Commissioner B raised the following matters concerning Deputy Commissioner A with Mr Kear:

12.1 An allegation that Deputy Commissioner A had negotiated two contracts with external consultants which did not comply with the relevant New South Wales government guidelines. This was not a mere matter of form-if true, the amounts payable under the contracts exceeded the amounts at which competitive tenders had to be called under the government guidelines. Such tenders had not been called. In addition, the contracts had termination clauses requiring longer periods of notice than those permitted under the guidelines. The allegation was further that Deputy Commissioner A had allowed at least one of the counterparties to prepare the contract. The potential for misapplication of public moneys is obvious if the allegation were true;

12.2 An allegation that had Deputy Commissioner A charged to his SES corporate credit card amounts for purchases of items for his personal use. As the Commission said, if true, it was blatant wrongdoing on the part of a senior employee. While the two items of which Deputy Commissioner B first became aware involved relatively small amounts, a subsequent audit concluded that there were 154 claims made by Deputy Commissioner A which required further investigation, potentially exceeding \$11,000;

12.3 An allegation that Deputy Commissioner A had approved overtime in the amount of \$60,000 for an employee under his supervision. The employee in question was found to have engaged in workplace misconduct and Deputy Commissioner A accepted he had failed to appropriately manage that

employee;

12.4 An allegation that Deputy Commissioner A arranged for another employee not to have to pay for the private use of his corporate motor vehicle. Deputy Commissioner A, in fact, arranged for the private use to be covered by NRMA sponsorship monies;

12.5 An allegation that Deputy Commissioner A had falsified a series of diary notes to cover up his failure to supervise the employee whose excessive overtime he had authorised referred to above.

13. Mr Kear's response to each of these allegations was either to dismiss them or sweep them under the carpet. For example, he authorised waiver of the debt owed to the SES by the employee referred to above in respect of the private use of his vehicle. As to Deputy Commissioner A's misuse of his credit card, Kear seems to have accepted in relation to the initial two items Deputy Commissioner A's explanation that he had made a "mistake" and would repay the monies. One has to say that, as the Commission thought, this explanation strains credulity.
14. Obviously, these matters involved a real possibility that a senior SES employee had engaged in a wide spectrum of serious misconduct. It is not relevant to my determination of Mr Kear's complaint whether or not Deputy Commissioner A had actually engaged in that misconduct and I make no finding that he did. The true question for me is whether Deputy Commissioner B was entitled to have a reasonable concern that Deputy Commissioner A had engaged in the misconduct she raised. Clearly, she did and, as the Commission found, she had reasonable grounds for raising her concerns in relation to Deputy Commissioner A's conduct with Kear. Equally clearly, and again as the Commission found, those disclosures were protected disclosures within the meaning of the PID Act.

ICAC Investigation and Report

15. The Commission determined to investigate the following matters:

Whether Commissioner Kear took detrimental action against [Deputy Commissioner B], including dismissing her from the position of [Deputy Commissioner], in reprisal for her allegations that [Deputy Commissioner A] had engaged in corrupt conduct;

Whether Commissioner Kear improperly showed favour to [Deputy Commissioner A] by failing to appropriately investigate allegations made [Deputy Commissioner B] that [Deputy Commissioner A] had engaged in corrupt conduct;

Whether in relation to allegations 1 and 2, Commissioner Kear made false statements to, or attempted to, mislead an officer or officers of the Commission in the exercise of their functions under the Independent Commission Against Corruption Act 1988 (“the ICAC Act”);

Whether Commissioner Kear failed to recognise, disclose and manage a conflict of interest arising out of his friendship with [Deputy Commissioner A] in connection with the hiring, managing, performance management and investigation of [Deputy Commissioner A] and in connection with the dismissal of [Deputy Commissioner B].

16. The Commission indicates in its report that it:

16.1 obtained documents from various sources by issuing 21 notices under s 22 of the ICAC Act requiring production of documents;

16.2 interviewed and/or took statements from a number of persons;

16.3 lawfully executed a search of SES premises and obtained various documents relevant to the investigation;

16.4 conducted eight compulsory examinations (Operation Dewar Report, page 8), including examinations of Kear, [Deputy Commissioner B] and [Deputy Commissioner A].

17. The Commission also conducted a public inquiry commencing on 3 December 2013 at which the then Commissioner, the Hon David Ipp AO QC presided.

18. At that inquiry the following evidence was elicited from Mr Kear (for convenience, I have taken the passages in question from pp22-23 of the Dewar Report):

[Counsel Assisting]: It’s the case isn’t it that in the course of her tenure what [Deputy Commissioner B] had done was raise reports to firstly you, correct?

[Commissioner Kear]: ---Yes.

ICAC?

---Yes.

And refer matters to the IAB for the investigation of [Deputy Commissioner A]?

---Yes.

That’s right isn’t it?

---Yes, and the Minister’s office and the Ministry.

She had questioned his competence, that’s right isn’t it?

---Yes.

She had raised what you understand to be Public Interest Disclosures in relation to a number of these issues where she sought thorough investigation?

---I didn't know if they were Public Information [sic] Disclosures, she wrote me memos and she made some complaints about the contracts.

She wrote memos in which she suggested you take the matter further and conduct proper investigations pursuant to the relevant acts didn't she?

---Yeah, she recommended I take a disciplinary investigation into those issues.

She raised these issues into a man you regard as your mate, correct?

---She raised them in regards to [Deputy Commissioner A] who I perceive as a mate, yes.

You regard as your mate, you don't perceive him as anything, he's your mate isn't he? ---Oh, he is, sorry, yes.

And she raised questions in relation to your competence?

---I don't know if she ever raised queries about my competence, certainly that I couldn't make decisions if that's what you're alluding to.

She made adverse comments about you in public didn't she?

---Yes.

And you sacked her in reprisal for doing those things and by that I mean reporting [Deputy Commissioner A], questioning you and criticising both [Deputy Commissioner A] and you?

---They weren't the only reasons, no.

[ICAC Commissioner]: *Did you ever warn [Deputy Commissioner B] that lest she changed in specific respects she was in jeopardy of losing her job?*

[Commissioner Kear]: ---I informed both the Deputy Commissioners that they were both in risk of losing their jobs.

Yes but do you mind answering my question?

---I thought I did, Commissioner.

I asked you whether you had ever informed [Deputy Commissioner B] that for specific reasons she was in jeopardy of losing her job?

---Well they, those times when I spoke about the possibility of either Deputy Commissioner losing their job I was quite specific about the need to develop high performing teams - - -

Are you saying that, in these arenas as you term them you warned [Deputy Commissioner B] that she was in jeopardy of losing her job?

---I stated on a number of occasion[s], Commissioner, that either one or both of them could lose their job and when there was only two in the meeting - - -

How long before you actually fired [Deputy Commissioner B] did you first say this to her?

---Um, it would have been many months.

Well, I note that this was never put to [Deputy Commissioner B]?

---Sorry, can you say that again?

It was never put to [Deputy Commissioner B] that you had warned her that unless she changed her behaviour she would lose her job?

---That's what I'm saying, Commissioner, that I did say to [Deputy Commissioner B] and [Deputy Commissioner A] that there was a chance that either one of them or both of them could lose their job.

You said this to both of them several months before?

---Yes (my emphasis).

19. After setting this evidence out, the Commission made a series of factual findings concerning Mr Kear and his conduct in the Dewar Report, as follows:

Commissioner Kear admitted that he terminated [Deputy Commissioner B's] employment at least partly in reprisal for the matters put to him in that question. Elsewhere in his evidence, Commissioner Kear told the Commission that he dismissed [Deputy Commissioner B] for the following reasons, namely, that she:

- lacked leadership skills in creating a high-performing team*
- was a divisive member of the senior executive group*
- was unable to resolve her conflict with [Deputy Commissioner A]*
- openly criticised him and other SES officers*
- on occasions, provided him with inadequate advice.*

The Commission does not accept that the reasons enumerated by Commissioner Kear were a factor in his decision to dismiss [Deputy Commissioner B] for the following reasons.

Commissioner Kear told the Commission that he spoke openly to [Deputy Commissioner A] and [Deputy Commissioner B] about their poor performance and told both of them they were at risk of losing their jobs. But the evidence of Commissioner Kear never went as far as to suggest that he told [Deputy Commissioner B] she was at risk of termination for the reasons he advanced in his evidence at the public inquiry. . . .

At no stage did Commissioner Kear warn [Deputy Commissioner B] that she was in jeopardy of losing her job for specific reasons, including lack of leadership, inadequate advice or for openly criticising him and other members of his executive team. Counsel for Commissioner Kear never suggested to [Deputy Commissioner B] that she was so warned. In answer to a question put to her by senior Counsel Assisting, [Deputy Commissioner B] said that at no stage did Commissioner Kear say to her that, if she failed to change her behaviour, she would be dismissed. The Commission accepts this evidence. Commissioner Kear never placed [Deputy Commissioner B] on any performance review or commenced any other form of disciplinary process based on his purported concerns about her conduct, about which he gave evidence at the public inquiry. When he dismissed [Deputy Commissioner B], Commissioner Kear provided no explanation to her as to why he had lost confidence in her.

Commissioner Kear was well-versed in the disciplinary process leading up to the termination of an employee as evidenced by his suspension, investigation and dismissal of [the employee involved in the overtime issue]. That Commissioner Kear failed to notify [Deputy Commissioner B] of his purported concerns about her conduct, or utilise appropriate procedures to discipline her, casts considerable doubt on whether these purported concerns were the actual reasons for dismissing her.

Counsel for Commissioner Kear submitted that Commissioner Kear explained the basis of his decision to dismiss [Deputy Commissioner B] in the course of making statements to various persons prior to and after [Deputy Commissioner B's] dismissal. These statements were to the effect that the relationship between [Deputy Commissioner A] and [Deputy Commissioner B] was "toxic" and incapable of resolution by reason of the fact that [Deputy Commissioner B] was unable to deal with Commissioner Kear's decisions with regard to the allegations of misconduct she had made against [Deputy Commissioner A]. It was suggested by Commissioner Kear that [Deputy Commissioner B's] resentment about his decisions concerning these matters manifested itself in her public criticisms of him, [Deputy Commissioner A] and other SES officers. Counsel for Commissioner Kear submitted that [Deputy Commissioner B] was dismissed for these reasons and not as a reprisal for making allegations that [Deputy Commissioner A] had engaged in misconduct.

The Commission does not accept this submission. At the Port Macquarie meeting in April 2013, Commissioner Kear publicly stated that he was considering the dismissal of [Deputy Commissioner B] or [Deputy Commissioner A] or both as a way of resolving the conflict of personality and "values disconnect" that had affected their relationship. But references by Commissioner Kear to his deputies experiencing relationship problems were misleading.

The truth of the matter is that [Deputy Commissioner B] had exposed issues about Deputy Commissioner A's integrity and competence that required investigation. In the Commission's view, Commissioner Kear disingenuously framed the issue as a personality conflict and "values disconnect". He did so as a means of diverting attention from the allegations of misconduct raised by [Deputy Commissioner B] about [Deputy Commissioner A] and from [Deputy Commissioner B's] concern that his response to the allegations was inadequate. This was a further example of Commissioner Kear's general attempt to exculpate his friend, [Deputy Commissioner A], from allegations of misconduct.

The statements of Commissioner Kear, relied upon by his counsel to explain his reason for dismissing [Deputy Commissioner B], should be seen in the same light. They simply served as a pretext for taking that action and a convenient means of deflecting attention from the serious allegations of misconduct she had made against [Deputy Commissioner A].

The Commission is satisfied that Commissioner Kear dismissed [Deputy Commissioner B] on 14 May 2013 because of the allegations of misconduct she had made against [Deputy Commissioner A]. In coming to that conclusion, the Commission has had regard to the fact that [Deputy Commissioner B] was performing satisfactory work at the time of her dismissal – a matter acknowledged by Commissioner Kear – and the pattern of partial treatment of [Deputy Commissioner B] by Commissioner Kear leading up to her dismissal.[Dewar Report pp 23-24]

20. In respect of this aspect of the matter, that is, the dismissal of Deputy Commissioner B, the ICAC made the finding of corrupt conduct which I have set out in [2.2] above. It had earlier made the finding set out in [2.1] above.
21. The criminal offence required by section 9(1)(a) of the ICAC Act was constituted, in the Commission's view, a breach of section 20 (1) of the PID Act. This was the provision under which Mr Kear was ultimately charged.

Mr Kear's Complaint—Summary

22. Mr Kear's complaint raises a number of issues about the Commission's conduct of Operation Dewar, its findings and about the subsequent prosecution of Mr Kear for breach of section 20(1) of the PID Act which he asserts amount to misconduct and maladministration. They are set out in his solicitor's letter dated 6 October 2017. I summarise them, as follows:

22.1. Conduct of the investigation

22.1.1. That the Commission either failed to interview relevant witnesses (including, in particular, Rear Admiral Clarke (Ret)) who could have given evidence which would have exculpated Mr Kear.

22.1.2. That the Commission failed to call as witnesses at the public inquiry in Operation Dewar, people it had interviewed who could have given similar exculpatory evidence.

22.1.3. That it erred in making the findings of corrupt conduct which I have set out in [2] above. As I understand it, Mr Kear does not complain about the first such finding, or if he does, he does so but faintly. His main focus of his complaint is on the second finding.

22.2 **Conduct of the Prosecution**

22.2.1 That the ICAC failed to provide all relevant material to the Director of Public Prosecutions (“the DPP”) when the Office of the DPP was considering whether or not to authorise the prosecution of Mr Kear.

22.2.2 Thus the ICAC misconducted the prosecution by failing to make relevant disclosures,

23. This complaint, it seems to me, resolves itself into the following questions:

23.1. Were the findings of corrupt conduct properly made (applying the criteria binding me under the ICAC Act set out below) on the evidence before the Commission?

23.2. Was the evidence which was set out in the interviews which the ICAC had conducted (or could have conducted) “exculpatory” of Mr Kear?

23.3. Should that material have been disclosed to Mr Kear’s representative either during the Operation Dewar investigation or during the prosecution?

23.4. Was the Commission’s decision to prosecute Mr Kear justified?

23.5. What place do the judgements of Magistrate Grogin dismissing the prosecution and awarding costs against the ICAC have in considering whether that body engaged in abuse of power or maladministration?

23.6. Was there any impropriety in the ICAC’s decision to send a letter to the editor of the Temora Independent?

The Inspector’s Powers: The Legal Framework

24. Section 57B(1) of the ICAC Act specifies my functions in the following terms;

(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and

(b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and

(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and

(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

(4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:

(a) contrary to law, or

(b) unreasonable, unjust, oppressive or improperly discriminatory, or

(c) based wholly or partly on improper motives.

25. The parts emphasised are the parts relevant to determining this complaint. It will be seen that the word “maladministration” is defined by both the words in parentheses after the reference to the concept in section 57B(1)(c) and by the definition set out in section 57B(4). I note that for conduct to amount to maladministration it must be action or inaction of a **serious nature** and satisfy the requirements set out in sub-section 57B(4).
26. The concepts of “abuse of power, impropriety and other forms of misconduct” are not defined in the ICAC Act, no doubt because Parliament believed that their meaning is obvious and uncontroversial. That seems to me to be the case.
27. I should also point out that the ICAC Act gives the Inspector only one way of dealing with a complaint, that is, by making a report or recommendation. While not explicit in section 57B(1)(b) & (c) obviously such reports must be made to Parliament. Perhaps, recommendations might be made to the ICAC itself as well as to Parliament, but it seems clear that reports can only be made to Parliament and, specifically, to the Presiding Officers. The power is also affected by section 57B(5):

(5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:

(a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and

(b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

But Parliament has **not** granted the Inspector any power to engage in a merits review of Commission decisions, still less to operate as some form of appellate tribunal making determinations about whether the decisions of the ICAC or findings of corrupt conduct are right or wrong unless they are affected by misconduct or maladministration.

28. In dealing with this complaint (like others I have dealt with) I will keep in mind the functions Parliament has given the Inspector and the limitations on those functions which it has enacted.

29. As stated, I have no power to consider, in isolation, whether a finding of corrupt conduct was correctly made. Bearing in mind the criteria I must apply, the furthest I can go is to consider whether its findings were open to the Commission on the evidence before it, not whether those findings were right or wrong. Consequently, I will focus solely on the question whether the criteria expressed in section 57B(1)(b) & (c) have been satisfied. In doing so I will bear in mind that those criteria require expressly in the case “maladministration” and implicitly in the case of the section 57B(1)(b) concepts, a serious degree of wrongfulness. I say implicitly in the case of s57B(1)(b) because by their very nature, abuse of power, impropriety and misconduct involve a serious degree of wrongfulness on the part of the Commission or the relevant Officer of the Commission not constituted, for example, by rudeness to a witness by a Commissioner no matter how regrettable that may be.
30. In my view, underlying Mr Kear’s complaint about, and subsequent media criticism of, the Commission’s corruption finding against him is a misunderstanding of the respective roles of the ICAC and the courts. This point is explained in further detail below.

Consideration

The Commission’s findings of Corrupt Conduct

31. As stated, Mr Kear challenges the two findings of corrupt conduct set out in [2] above. As to the first, the failure to properly investigate the allegations against Deputy Commissioner A his complaint dated 1 June 2016 says this:

With respect to the ICAC concerns that I improperly showed favour to [Deputy Commissioner A] by failing to properly investigate [Deputy Commissioner B’s] allegations it is important to note, that the ICAC referred this component to the NSW Public Service Commissioner.

My investigation of the allegations, including reporting to the ICAC, the Ministers Office as well as utilising the services of the NSW Internal Audit Bureau. All of these investigations revealed no corrupt conduct by [Deputy Commissioner B]. Even ICAC’s Internal Review Committee examined one of those allegations and did not proceed.

Due to [Deputy Commissioner B’s] mistakes, I had placed him on a Performance Improvement Plan which I personally monitored.

The NSW Public Service Commissioner had a number of entities also investigate these matters; namely Ms Lynette Briggs (former ACT Public Service Commissioner and Price Waterhouse Coopers). The outcome of this finding were the same as my findings, in that [Deputy Commissioner A] had not engaged in corruption, although he had breached some of the NSW Govt Guidelines.

As a result of no corruption findings against [Deputy Commissioner A], the NSW Govt returned him to his substantive position of Deputy Commissioner of the NSW SES.

32. With respect to Mr Kear, this submission misses the point of the finding of corrupt conduct which was that he had failed to investigate Deputy Commissioner B's allegation because of his friendship with Deputy Commissioner A, not whether her allegations were objectively correct. On the evidence, it was properly open to the ICAC to make this finding against Mr Kear. Indeed, the evidence made such a finding inevitable. No misconduct or maladministration on the part of the ICAC is established. This aspect of Mr Kear's complaint is rejected.
33. While it is literally correct to say, as Mr Kear does, that the PSC investigation in question did not find any corrupt conduct on the part of Deputy Commissioner A, it did find that Deputy Commissioner A engaged in "misconduct" and "maladministration" in respect of a matter which was at the heart of Deputy Commissioner B's complaints about Mr Kear's failure to respond to her allegations concerning Deputy Commissioner A's conduct. This is in fact the conduct referred to in [12.1] above. This finding goes well beyond breach of "some of the NSW Govt Guidelines".
34. As to Mr Kear's complaint concerning the second finding of corrupt conduct, [2.2] above, while the position is more complex, the result is no less clear. That finding was clearly open on the evidence before the Commission which suffices to establish there was no misconduct or maladministration. There was evidence before the Commission that permitted it to find that Mr Kear had engaged in corrupt conduct by dismissing Deputy Commissioner B substantially in reprisal for her raising allegations about the conduct of Deputy Commissioner A.
35. The item is the evidence set out in [18] above and accepted by the Commission as stated in [19] above. Clearly, the Commission was entitled to treat, as it is did, Mr Kear's evidence as an admission made under oath that he had sacked Deputy Commissioner B in reprisal for reporting Deputy Commissioner A. Mr Kear complains that his evidence should not be misconstrued as an admission that he had sacked Deputy Commissioner B *substantially* in reprisal.

So far as the transcript is concerned Mr Kear accepts its accuracy. There is clearly an omitted qualification which is implicit in the response by Mr Kear. Given the gravity of the Commission's ultimate findings it was absolutely incumbent on the Commission and those appearing including Counsel Assisting to examine this response. This was not appropriately done until the criminal prosecution was undertaken and completed.

The use of the word "reprisal" may well be inappropriate because it inferentially raised the concept of retribution when Mr Kear's actions amounted to a response in all the circumstances to the Deputy Commissioner B issues. In this regard even allowing for the conclusion of at least partially in reprisal for

the failure to delve into Mr Kear's response was fatal to his prospects of a fair outcome.

I disagree – the evidence in question could plainly have that meaning. Moreover, even without that admission, the circumstantial case against Deputy Commissioner A as to his motivation in sacking Deputy Commissioner B was compelling. It included his failure to act appropriately on Deputy Commissioner B's allegation and his friendship with Deputy Commissioner A. In this connection I note he signed off at least one email to Deputy Commissioner A "*Your Boss and Mate*".

36. Mr Kear attacks the finding on several further bases. The first is the suggestion that it is vitiated by his subsequent acquittal. I disagree. The admission made by Kear as to his motivation in sacking Deputy Commissioner B was not admissible in the subsequent proceedings against him because of section 37(3) of the ICAC Act. Consequently, his acquittal on the charges under section 20 (1) of the PID Act provides no basis for concluding that ICAC was wrong in finding Mr Kear engaged in corrupt conduct by sacking Deputy Commissioner B substantially in reprisal of her protected disclosure.
37. In this connection, it is worth stating that it is inevitable, because of the different evidentiary regimes that bind them that there will be different results arising out the same circumstances in controversies before the ICAC and before the courts. That difference does not establish that one of those bodies is right and that the other wrong in making a particular finding or decision to convict or acquit. This was the subject of consideration in the 2015 ICAC review³, as follows;

12.2.6 The ICAC's position is set out in its submission to the Panel:

The Commission's position is that it is not appropriate to regard the rate of criminal prosecutions and convictions arising from Commission investigations as a measure of the Commission's performance.

It has been previously suggested by some commentators that the rate of criminal convictions following Commission investigations should be the measure against which the Commission's success should be assessed and, consequently, that the Commission should focus its efforts towards achieving criminal convictions.

This argument appears to be based on the erroneous belief that corrupt conduct is commensurate with criminal conduct and that a finding of corrupt conduct without a commensurate conviction for a criminal offence lacks legitimacy or meaning.

Advocating the use of prosecutions and conviction rates to measure the effectiveness of the Commission demonstrates a failure to understand the role of the Commission. In

³ The Hon. Murray Gleeson & Bruce McClintock SC *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report*

this respect, it is relevant to have regard to the principal objects of the ICAC Act, which are set out in s 2A as being:

(a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:

(i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and

(ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and

(b) to confer on the Commission special powers to inquire into allegations of corruption.

The gathering of admissible evidence for the prosecution of criminal offences is, rightly, a secondary function of the Commission. The Commission's primary function is to investigate and expose corrupt conduct. While ample evidence, including evidence by way of admissions, may be obtained to make factual and corrupt conduct findings, there are many factors that affect whether or not the Commission is able to obtain sufficient evidence in admissible form to warrant prosecution.

The Commission has extensive powers to investigate and expose corrupt conduct. The use of these powers, however, does not necessarily result in evidence that is admissible in a criminal prosecution. For example, the Commission has power to summons a witness to give evidence or produce a document in a compulsory examination or public inquiry. Such a witness is required to answer relevant questions and produce relevant documents even if the answer or document may incriminate the witness. If the witness objects, the effect of the objection is that the answer or document is not admissible in evidence against the person in any subsequent criminal prosecution (except for a prosecution for an offence under the ICAC Act). Other witnesses may give evidence about a person but not agree to provide a statement in admissible form for the purpose of a criminal prosecution of that person.

There are many cases where admissions made by witnesses provide the basis for a finding of corrupt conduct. As the admissions are made under objection, they are not available to be used for the purpose of a prosecution.

The Commission's investigative processes are not necessarily concerned with the admissibility of evidence in judicial proceedings (deliberately so). It is imperative to the work of the Commission that lines of enquiry are pursued regardless of their potential to result in a successful prosecution. A change of emphasis, which required the Commission to focus on prosecutions by assessing the potential admissibility of evidence, might well influence a decision to follow a particular line of enquiry in circumstances where the resources of the Commission have to be allocated in

accordance with its principal functions. Such a constraint could compromise the capacity of the Commission to fully expose corruption.

The Commission considers that its investigations, and findings of corrupt conduct, are an important deterrent in themselves to corrupt conduct. In addition, the identification of system weaknesses resulting in the making and implementation of corruption prevention recommendations designed to prevent corrupt conduct can have a more lasting and effective impact on reducing corrupt conduct than criminal prosecutions, which necessarily focus on past rather than prospective conduct.

12.2.7 There is force in this submission. Parliament has granted the ICAC wide coercive powers so as to enable it to carry out its functions. A consequence of the grant of such coercive powers is that longstanding and valued rights which most people think are fundamental to our society and to the operation of our criminal justice system, such as the privilege against self-incrimination, are, to some extent, abrogated. But few would think it right that admissions obtained by the use of such coercive powers should be admissible in criminal proceedings. This Panel itself does not.

12.2.8 Thus, section 37(2) of the Act abrogates the privilege against self-incrimination in respect of answers to questions and the production of documents at compulsory examinations and public inquiries. Section 37(3) prohibits the use of such answers and documents in any civil, criminal or disciplinary proceedings (subject to a limited exception).

12.2.9 In addition, the ICAC is not bound by the rules of evidence – see section 17(1) which provides: “The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate”. Obviously, criminal trial courts are bound by the rules of evidence.

12.2.10 The result of the matters mentioned in paragraphs 12.2.8 and 12.2.9 above is that the ICAC may well be making its findings, including those of corrupt conduct under section 13 of the Act, on material different from that which will be available to a criminal court subsequently determining the guilt or innocence of the person in question. It is obvious that the results must, in some circumstances, be different and that there will be fewer findings of guilt than there will be of corrupt conduct.

12.2.11 The discrepancy between convictions and findings of corrupt conduct, in fact, provides an eloquent demonstration of the fundamental distinction between an ICAC investigation and its function and the criminal justice system and its purpose and that of the criminal trial. The observations in paragraph 2.8.8 also are of relevance to this point.

12.2.12 The Panel does not recommend any legislative change in relation to this matter.

38. The second basis for suggesting that the relevant finding of corrupt conduct should not have been made is the asserted failure of the Commission to lead “exculpatory” evidence. I disagree. First, the issue in question involved Mr Kear’s state of mind, that is, whether he sacked Deputy Commissioner B substantially in reprisal for her disclosures concerning Deputy Commissioner A. In view of his admission as to his motives, the “exculpatory” evidence which was from others involved in the matter as to Mr Kear’s motives, seems largely beside the point. To be blunt, if he agreed that he had sacked her in reprisal, what did it matter that other people said that he had not? He was the only person in a position to know.
39. There is a further answer to his submission. It is that when properly understood the material in question was not “exculpatory”. When the material in question is considered, it seems to me to have the opposite effect, that is, it provides compelling evidence that Mr Kear sacked Deputy Commissioner B in reprisal for her disclosures. I say this with great respect to those who think otherwise, including the learned Magistrate who heard and dismissed the criminal charges. I regret to say that his Honour seems to have misunderstood the effect of the evidence in question. This I consider in detail in the following section of this report.
40. In so far as the complaint asserts that there was misconduct or maladministration on the part of the ICAC in making the second finding of corrupt conduct, I reject it.

Was the evidence in question exculpatory?

41. In response to my question in the 14 July 2017 email to Mr Kear when I raised the conduct of the investigation (including the failure to investigate or call at the public inquiry relevant witnesses including Rear Admiral Clarke and former Commissioner Greg Mullins), Mr Kear’s solicitor responded:

The ability of staff members of ICAC to act individually or in concert to affect the evidence/ information placed before the inquiry provides the basis for both “an action” in respect of witnesses available. In so far as statements that had been taken and; failure to act in respect of no statement being taken from Rear Admiral Clarke (ret), in circumstances where he contacted the Commission on at least two (2) occasions and offered highly probative information. The execution of his contract with the SES under the then Commission Mr Kear was foundational to the issues the subject of the inquiry and were known to the staff of the ICAC as a result of information provided by numerous sources including those actually called to give evidence.

For the same reason former Commissioner Greg Mullins’ evidence being taken in camera precluded an examination by those who appeared for Mr Kear, from examining in detail the matter which gave rise to Mr Kear’s approach to Mr Mullins.

42. Mr Kear's position, both before the Commission during the public inquiry (a position vitiated by the admission I have dealt with above) and before the Local Court during the criminal proceedings, was that he had dismissed Deputy Commissioner B because of the breakdown in relationship between her and Deputy Commissioner A and because her attitude towards the decisions Mr Kear made in response to her allegations of misconduct on the part of Deputy Commissioner A. There was no doubt that the relationship between Deputy Commissioner B and Deputy Commissioner A was "toxic" to use a description applied in the Local Court proceedings. Equally it is obvious that such a situation could not be allowed to continue in an organisation like the SES, but, as it will appear below, it seems to me a false dichotomy to say, as Mr Kear does, that it was a choice between a determination that he had dismissed Deputy Commissioner B in reprisal for her disclosures concerning Deputy Commissioner A on the one hand and that he had dismissed her because of the "toxic" relationship between the two on the other. When the facts of the matter are understood it becomes clear that the two are related and the existence of a "toxic" relationship confirms Mr Kear's motive to be the prohibited one.
43. The Commission's response to this aspect of Mr Kear's complaint is to assert that the material in question was not exculpatory and therefore no misconduct or maladministration was involved in failing to call or disclose the evidence in question. I point out the following passages of the Commission's response⁴:
25. *The Commission's response to Mr Kear's complaints may be summarised as follows:*
- (i) *The evidence before the Commission in the public inquiry strongly supported both sets of findings made against Mr Kear of corrupt conduct.*
 - (ii) *In relation to the records of interview, which were obtained by the ICAC but not utilised in the Commission's public inquiry, the following are noted:*
 - (a) *No requirement arose in the course of the public inquiry necessitating the use of the records of interview. A reading of them indicates that they confirmed what was otherwise well-established in the evidence adduced i.e. that there had been a relationship breakdown between [Deputy Commissioner B] and [Deputy Commissioner A] (a "toxic culture").*
 - (b) *The Records of interview did not contain or constitute "exculpatory" material.*
 - (iii) *The finding by the Commission that Mr Kear deliberately failed to properly investigate reasonably based allegations that [Deputy Commissioner B] made against [Deputy Commissioner A], was a key*

⁴ I sought the ICAC's response to Mr Kear's complaint and it responded by letter received by my Office on 6 March 2018. It is attached to this report.

finding. It was one made in relation to what was a central issue in the public inquiry and it was also one based upon cogent evidence.

- (iv) *The Commission's finding to the effect that Mr Kear improperly showed favour to [Deputy Commissioner A] by failing to investigate allegations raised by [Deputy Commissioner B] was in particular, a finding that was well based upon cogent evidence.*
- (v) *On the evidence, the relationship issues between [Deputy Commissioner A] and [Deputy Commissioner B] stemmed from the complaints made by her against [Deputy Commissioner A] and Mr Kear's refusal to investigate them.*

The Commission's fact-finding in this respect, taken in conjunction with the evidence in the public inquiry, provided a sound basis for the finding of corrupt conduct by Mr Kear in dismissing [Deputy Commissioner B] from her employment with SES as '... substantially in reprisal for her making allegations about the conduct of his friend, [Deputy Commissioner A]' (ICAC Investigation Report page 24).

27. *[Deputy Commissioner B] was employed by the SES from 3 September 2012. Between that date and 14 May 2013 the relationship between [Deputy Commissioner B] and Mr Kear deteriorated following upon her report to Mr Kear of allegations that [Deputy Commissioner A] had engaged in misconduct in relation to a series of separate matters.*

As stated above it is understood that Mr Kear's complaint with respect to the conduct of the Commission's investigation relates to:

- (a) *The failure by the Commission to produce the abovementioned records of interview and failure to call Mr Mullins to give evidence at the public inquiry; and*
- (b) *The failure by the Commission to interview, obtain a statement from or call evidence at the public inquiry from Peter Clarke.*

28. *Although not specifically stated in the material provided to you by Mr Kear, I also understand that his complaint may extend to the failure by the Commission to call evidence at the public inquiry from Mr Connellan, Mr Farmer, Mr Hankel and Mr Murphy.*

29. *Mr Kear contends that their evidence was relevant because it supported his claim to the Commission that he dismissed [Deputy Commissioner B] for reasons other than her making a protected disclosure. He claims the Commission failed to provide evidence at the public inquiry from those named in the preceding*

paragraph because it did not support the case that [Deputy Commissioner B] was dismissed in reprisal for making a public interest disclosure.

30. *All of this material was available to Mr Kear at the public inquiry.*
32. *It is important to understand that the relevance of potential evidence from Messrs Mullins, Clarke, Connellan, Farmer, Hanckel or Murphy was at all relevant times known by Mr Kear. This is because their (potential) evidence concerned what Mr Kear had himself told them about [Deputy Commissioner B] or what they had told him about [Deputy Commissioner B]. He did not need the Commission to provide him with records of interview in order to discover any relevance their evidence might have to his evidence regarding his reason for dismissing [Deputy Commissioner B].*
33. *The records of interviews of Messrs Mullins, Connellan, Farmer, Hanckel and Murphy and the evidence given in the Local Court by Mr Mullins and Mr Clarke are discussed below. The nature of the material in each of the records of interview has been summarised below. The Commission's submission is that the material given in the interviews was confirmatory of evidence otherwise given as to the relationship issues that had arisen between [Deputy Commissioner B] and Mr Kear and between [Deputy Commissioner B] and [Deputy Commissioner A]. Importantly, the records of interview, when examined, do not contain exculpatory matter that could explain or justify Mr Kear's deliberate failure to investigate the allegations or the complaints made against his friend, [Deputy Commissioner A], or that he terminated [Deputy Commissioner B] for conduct unrelated to her allegations against [Deputy Commissioner A].*
34. *Similarly, the evidence of Mr Mullins and Mr Clarke, which amongst other things, dealt with the question of the attempts to manage the relationship between [Deputy Commissioner B] and [Deputy Commissioner A], it is submitted did not provide exculpatory evidence that would have assisted Mr Kear in respect of his continued and deliberate failure to perform his duty to investigate and the relevance of that to the termination of employment issue. The evidence given by Mr Mullins and Mr Clarke did not establish that the issues between [Deputy Commissioner B] and [Deputy Commissioner A] arose wholly or mainly from some extraneous or independent problem unconnected with the complaints by [Deputy Commissioner B] against [Deputy Commissioner A]. The material confirmed other evidence as to the existence of a dysfunctional relationship between [Deputy Commissioner B] and [Deputy Commissioner A] and the fallout from the same.*
35. *During the course of the investigation, Commission officers interviewed Messrs Mullins, Connellan, Farmer, Hanckel and Murphy. Transcripts of their interviews were not tendered at the public inquiry and they were not called to give evidence. Mr Clarke had been engaged by Mr Kear to help manage the conflict between*

[Deputy Commissioner B] and [Deputy Commissioner A]. Although approached to be interviewed, no interview was ultimately conducted with Mr Clarke. He was not called to give evidence.

44. In my view, the Commission is correct in its analysis. This is best demonstrated by taking the evidence of Rear Admiral Clarke as representative of the persons Mr Kear asserts could have given exculpatory evidence⁵. Certainly, he is the person upon whom Mr Kear places the most reliance in this respect.
45. Mr Clarke, after his retirement from the Navy, had provided leadership advice and training to the SES, including the Commissioner and his direct reports, so as to facilitate leadership development and strategic planning, a role he had occupied since 2008. In 2012 Mr Kear phoned Mr Clarke and told him he was having trouble with the two Deputies who were not getting on, there being a lot of conflict.⁶ As result Mr Clarke was given a brief to work with Deputy Commissioner B and Deputy Commissioner A to understand the cause of the conflict and then resolve the difficulty (LCTR 525.10 -14). Mr Clarke gave evidence as follows concerning his instructions from Mr Kear:

“So his instructions to me were understand what is going on, work with them, get them working together so they can discuss their problems in a safe environment with me facilitating and then let me know what you think the chances are of working this out, in terms of their differences. It was a different sort of engagement from the standard leadership training I had done.” (LCTR 525. 38-44).

46. The following evidence from Mr Clarke is significant - it concerned the meeting arranged by Mr Clarke to resolve the issues: : LCTR 527.15- 529.9

A. We - I took them through a process where I made my observations based on the interviews and then I invited them to comment on that. It emerged that [Deputy Commissioner B] had difficulty with working with [Deputy Commissioner A] because she considered him to be flaky - I think she used the term “show pony”. Later on in the day she said he was dishonest and couldn’t be trusted. [Deputy Commissioner A] of [Deputy Commissioner B] said that he was trying to do his best to get on with her but he found her very difficult to deal with, very abrupt and abrasive. [Deputy Commissioner A] is the sort of bloke who gets on with everyone and expects everyone to like him. I think he found it very difficult to come against a peer who clearly didn’t like him, so he had difficulty coping with that as well.

⁵A threshold issue is the content of the concept “exculpatory evidence”. I accept the definition by ICAC in its recently published *Public Inquiry Procedural Guidelines* as follows:

“ ‘exculpatory evidence’ means credible, relevant and significant evidence that tends to establish that a person has not engaged in the corrupt conduct that is the subject of the Commission’s investigation”. See

<https://www.icac.nsw.gov.au/docman/investigations/5047-section-31b-guidelines-february-2018-final/file>

⁶*Local Court Transcript 7216 P125 (LCTR)*

Q. Where did you take the parties or say to the parties in relation to a resolution of the difficulties you saw or were expressed to you?

A. There were some issues around what had generated the conflict in the first place. I didn't want to discuss those with them. So this was accusations of improper use of – I think something about contracts or something. I didn't want to get into that. That was not my job. I said there will often be things like that that emerge amongst senior teams and you have to work through them. You simply have to be able to resolve the issues, investigate them or do whatever you need to do, but still maintain a good working relationship. The organisation will not operate if the top team are fighting with each other.

Q. In relation to that aspect where you say the organisation will operate..

A Yes.

Q. There was – perhaps if you go on?

A. I said that I was willing to do more work with them both to take them through this. I said in my view and I told them the messages I would take back to the Commissioner was that this conflict was more of an issue that I thought would be and if they couldn't sort it out my advice to Mr Kear would be that one or both of them would have to go.

Q. In relation to the organisation, how did you see that the issue between two deputy commissioners was affecting the organisation, in terms of what you were told and what you observed in the meeting?

A The senior executive group had become a group where they operated very much like a team. Mr Kear's leadership style was a very inclusive one. He tended to involve them all in decisions. He insisted they all discuss the respective problems with others and it generated a really high performing team that was very effective. When this conflict emerged all of that stopped. The team members were very reluctant to put their views forward; they were certainly very reluctant to share with others any misgivings they had or any mistakes they thought were going to be made. It really shut down the communications at the SEG level.

Q. You said that you indicated to the parties that you would take the message back or report back to Mr Kear. What did you then report back to Mr Kear?

A. Well I did exactly that. I said that it was a much harder day that I expected it to be. The conflict seem to be pretty deep rooted. I said that [Deputy Commissioner A] had a lot of work to do to – to improve the relationship and

to give [Deputy Commissioner B] – she had a job to do, trying to sort out governance and inevitably that would bring her into conflict with people and he understands that and not to take it personally.

Q. What view did you take as to his response?

A. He was very positive

Q [Deputy Commissioner A]?

A. [Deputy Commissioner A]. And I explained it to them, the two of them together. So I said to Mr Kear afterwards that [Deputy Commissioner A] had been responsive to this, attentive and he committed to working to improve the relationship. And my sense was that he was committed to improve their relationship. I also reported back to Mr Kear that I didn't get the same confidence from [Deputy Commissioner B] and indeed she had said she didn't think she would ever be able to trust [Deputy Commissioner A].

Q In the context—

A. I was going to say one more bit to that and I then said to Mr Kear that I had told them both if they couldn't sort this out, one of them would have to go. That was my recommendation to him that he might have to terminate one or both of them.

Q. In the context of your observation and subsequent report to Kear, and I am paraphrasing, that [Deputy Commissioner B] was unwilling to change is that a fair assessment?

GRAY: I object. It is a leading and it's not the evidence

HIS HONOUR: The evidence was she said she didn't think she could ever trust [Deputy Commissioner A].

GOOLD

Q. That was her complaint in the first place was it not? And she wasn't prepared to change?

A. My judgement was at that stage, and I think the think that concerned me the most, was that she seemed unwilling or capable of accepting why change was necessary. She didn't seem to me to understand the role of a senior executive in terms of strategic leadership and the need for her and her colleague, the other deputy, to be seen as a strong team. She just didn't get it. So that was the thing that concerned me the most and that is what I reported back to Mr Kear.

47. In fairness to Mr Clarke his brief was not to deal with the issues which had caused [Deputy Commissioner B] to report [Deputy Commissioner A's] misconduct to Mr Kear. Nevertheless, they came up during the course of Mr Clarke's interviews with [Deputy Commissioner B] and [Deputy Commissioner A]:

Q. In terms of your role, you've given evidence that you weren't concerned about the basis of the conflict, is that right?

A. Well, I wasn't concerned about accusations of improper use of contractors or whatever that was not for me to get involve in.

Q Do you understand though that [Deputy Commissioner B] might have a sense of grievance if she had the perception that those issues weren't being dealt with?

A Were that the case, yes.

Q. Did she ever express to you any views about the relationship between [Deputy Commissioner A] and Mr Kear?

A. Yes

Q What did she say about that?

A. She said she thought, they were mates and Mr Kear was looking after [Deputy Commissioner A]. (LCTr 534.43 -535.9)

Q. Certainly you would agree, wouldn't you, that Mr Kear maintained that position until you spoke with him in late April?

A. No I think – well, I can't say how his mind might have shifted, but my advice to him after my work with them, after the day with them, was that [Deputy Commissioner A] was listening and in my view willing to try hard to build the relationship, [Deputy Commissioner B] wasn't.

Q In terms of conversations that you had with Mr Kear was it the case that in the conversation you had with him in late April he indicated that it was [Deputy Commissioner B] who had to go?

A I don't think that was discussed explicitly, I reiterate my advice; one or both.

Q I'm asking what Mr Kear was saying to you, rather than what your advice was to him.

A. Right. I recall him saying that, [Deputy Commissioner B] had not changed her ways, had not made any improvement in her approach to the Senior Executive Team and that was it, really. (LCTr 535.23- 535.40).

Q Did Mr Kear ever talk to you about the allegations that [Deputy Commissioner B] was making about [Deputy Commissioner A]?

A. Yes.

Q. When did he do that?

A. I think - I can't be certain about this, but I think it was mentioned in the first telephone call we had and again during the brief before I started the specific piece of work.

Q. What did he say?

A. I recall him saying that an allegation had been made, there was a reference to ICAC. He said that he had investigated the issue and that he had found there was - I think he had taken advice, he told me he had taken advice from - I can't remember who - but there was no need to proceed, there was nothing illegal, that [Deputy Commissioner A] had made a stupid mistake and that he was going to put him on a performance management regime as a result.

Q. Did he say anything about [Deputy Commissioner B] in relation to the making of that allegation?

A. Not that I recall, no, I don't think so, I mean he said that, she had made it.

Q Although you had given evidence that the foundation for the conflict between [Deputy Commissioner B] and [Deputy Commissioner A] wasn't part of your remit you would agree, wouldn't you, that if [Deputy Commissioner B] had a sense of grievance in relation to the original issue that would have an impact on her ability to overcome the trust issues she had with [Deputy Commissioner A]?

A. I would, but in that position it has to be done.

Q. But there are different ways of it being done?

A. Yes.

Q. And one of the ways that it could be done is for the other person to be appropriately dealt with by the leader of the organisation?

A. Well, yes.

Q. Because if somebody had a perception that they had made an allegation about someone and that allegation wasn't properly investigated that would have an impact on their ability to resolve the conflict issue with the other person?

A. Yes (LCTr 536.13 – 537 .2)

48. When one considers this evidence from an independent outsider, albeit one with a long association with Mr Kear, it is obvious that the relationship between Deputy Commissioner B and Deputy Commissioner A had broken down and that this could not be allowed to continue in an organisation like the SES. But this issue, which is the one Mr Clarke raised misses the point which is why the relationship broke down. The reason that relationship breakdown could be stated as follows:

48.1 Deputy Commissioner B had discovered evidence which suggested alleged serious wrong doing on the part of Deputy Commissioner A, including misapplication of public monies - on this point I have difficulty seeing how there could be a satisfactory explanation for spending public monies on surf board racks and electric brakes for his trailer. Deputy Commissioner B was entitled to conclude that it was not a “mistake” but dishonest.⁷

48.2 Deputy Commissioner B had reported her findings to Mr Kear who she was entitled to think, had done nothing to investigate them.

48.3 Deputy Commissioner A was a close friend of Mr Kear.

48.4 Deputy Commissioner B could conclude:

- I. Deputy Commissioner A had behaved in a dishonest manner
- II. Kear had failed to investigate Deputy Commissioner B's allegations of dishonesty because of the friendship between the two men⁸.

49. In these circumstances, it is hardly surprising that Deputy Commissioner B had difficulties with the environment in which she was working and was not seen as a “team player”. The team on which she was being asked to play was one where the captain was prepared to cover up serious wrongdoing on the part of her co-captain because of the friendship between them, so Deputy Commissioner B was entitled to conclude.

50. The “toxic” relationship between Deputy Commissioner B and Deputy Commissioner A was a result of Deputy Commissioner A's alleged dishonesty as perceived by Deputy Commissioner B, and the Mr Kear's unwillingness to take appropriate steps in relation to that probable dishonesty. Thus, when Kear sacked Deputy Commissioner B because

⁷ The fact that subsequent public service investigations determined that no action should be taken against Deputy Commissioner A is beside the point on the reason stated in [14] above.

⁸ I emphasise that I am not expressing any view about whether or not [Deputy Commissioner A] had engaged in any form of dishonesty or misconduct.

of, as he said, that “toxic” relationship, that relationship was brought about as a direct result of her protected disclosures, and therefore sacking her for involvement in that toxic relationship was sacking her in reprisal for making the disclosure.

51. I regret to say that the learned Magistrate does not seem to have understood this relatively obvious point. If he had, I doubt whether he would have acquitted Kear⁹.
52. The evidence in question was not exculpatory of Kear but the contrary. There was no misconduct or maladministration on the part of the ICAC in failing to disclose it or to call witnesses such as Clarke at the public inquiry.

Should the Material in Question have been disclosed?

52. The materials considered (other than that from Mr Clarke, had not been interviewed nor provided a statement to the ICAC during Operation Dewar) in the preceding section were ultimately obtained by Mr Kear’s representatives as a result of a subpoena served in the course of the Local Court Proceedings.
53. The question is whether they should have been disclosed to his representatives during the course of the Commission’s investigation or inquiry or to the DPP or at an earlier point in the prosecution than the time when they were obtained on subpoena, and whether that failure constitutes misconduct or maladministration.
54. Before turning to answer that question, I should point out that the Commission recently adopted a set of guidelines for public inquiries – “Public Inquiry Procedural Guidelines”. These guidelines were tabled in both Houses of Parliament on 13 February 2018 and are available online:
<https://www.icac.nsw.gov.au/docman/investigations/5047-section-31b-guidelines-february-2018-final/file>¹⁰
55. Those guidelines make provision for disclosure of exculpatory evidence. I note, in addition to the definition “exculpatory evidence” which I have set out in the preceding section, the following:

The disclosure of exculpatory and other relevant evidence to affected persons

4.1 The Commission’s duty to afford procedural fairness to an affected person requires it to provide the affected person with material that is adverse to that person and upon which the Commission may rely. The affected person should be given a reasonable opportunity to consider and respond to that material. Where the Commission’s investigation includes a public inquiry, it will make available to an affected person exculpatory evidence in its possession. The timing of the disclosure of any such evidence, and the form in which disclosure will be made, are matters for the presiding Commissioner.

⁹ The learned Magistrate’s decision went off on a pure question of fact so there was no basis for any review thereafter.

¹⁰ The Commission sought my comments on the guidelines before tabling them. They seem to me to be both considered and appropriate and I was happy to endorse them.

4.2 Where Counsel Assisting is aware of evidence, which is adverse to the interests of an affected person and Counsel Assisting intends to rely upon such evidence to contend that an adverse finding, or findings, against that person should be made, Counsel Assisting will ensure that the substance of that evidence is disclosed to the affected person.

4.3 Where Counsel Assisting intends to contend that the evidence of a witness should be preferred over that of an affected person for the purpose of the Commission making a finding about the affected person and Counsel Assisting is aware that:

(a) the witness has made an inconsistent statement or previously given inconsistent evidence,

(b) the witness has been subject to an adverse finding as to credibility,

(c) the witness suffers, or has suffered, from any physical or mental condition that may affect the reliability of the person's evidence,

(d) a concession or benefit has been offered or provided to the witness to secure that person's evidence, or

(e) the witness has been convicted of any criminal offence or is, or has been, the subject of disciplinary proceedings relevant to the conduct of the investigation, Counsel Assisting will disclose that information to the affected person at an appropriate time.

These guidelines address any issues which previously arose in relation to such disclosures.

56. For the reasons given in the preceding section, I do not consider that there was any misconduct or maladministration in not disclosing the material in question to Mr Kear or his representatives. I should add that Mr Kear was at all times aware of the persons in question and what they would say, regardless of disclosure of their interviews. As to disclosure to the DPP, that body's guidelines at the time precluded submission to it of material which was not in admissible form. The material in question was not in such form and its submission would have breached the DPP's guidelines. There was no misconduct or maladministration in this.
57. Equally there was no misconduct or maladministration in failing to disclose the material during the prosecution.

Was the Commission's decision to prosecute justified: The validity of Magistrate Grogin's Criticisms?

58. These two issues are conveniently considered together.
59. Magistrate Grogin found in his judgement dealing with Mr Kear's application for costs that the proceedings were initiated without reasonable cause, that the failure to disclose the interview to Mr Kear was improper as was the failure to investigate Mr Clarke's

evidence. The findings in question are set out at [14], [18-19], [28] and [31] of his Honour's judgement on the costs issue.

60. I disagree with his Honour's findings and consider that there was a reasonable basis for the prosecution whose initiation, in any event, was the responsibility of the DPP.
61. As stated above, on 3 February 2015, the DPP notified the Commission that there was sufficient evidence to prosecute Mr Kear under section 20 of PID Act. In accordance with the usual practice, an ICAC officer prepared a court attendance notice and arranged for its service on Mr Kear for the offence in question. That notice named a Commission officer as "prosecutor" but, again in accordance with the usual procedure, the DPP took over the prosecution under 9 of *Director of Public Prosecutions Act 1986*. Thus the DPP, not the ICAC, was responsible for the conduct of the prosecution and anything that occurred during it.
62. I agree with these aspects of the submission made to me by the Commission:

The finding of the Local Court that there was a failure by the prosecutor to disclose the records of interview with the abovementioned persons, it is submitted with respect, was misconceived and erroneous. As stated above, the interviews did not advance Mr Kear's position in relation to any of the fundamental matters upon which findings of corrupt conduct were made by Commissioner Ipp (including in particular the finding in respect of Mr Kear's decision to terminate [Deputy Commissioner B's] employment).

This was not in any event a case of the prosecution withholding potentially exculpatory evidence the existence of which the defendant was unaware. Importantly and for the reasons given above, Mr Kear was aware of Messrs Mullins, Connellan, Farmer, Hanckel, Murphy and Clarke and the substance of the evidence they could give in any prosecution proceedings. Despite this knowledge, he did not request the DPP to call any of those witnesses or make any submission to the DPP that the proceedings be discontinued on the basis of their evidence.

The further statement made by the Local Court Magistrate '...the prosecutor failed to provide important records of interview of major witnesses to the Crown and these, I find, suggested that the applicant might not be guilty' was also, for reasons set out above, with respect, wholly misconceived. Simply put, the records of interview did not in fact support the proposition that they "suggested" the accused might not be guilty. The records of interview (summarised above) are, as I have indicated, available for inspection if required.

Finally the Magistrate's finding that it would appear that Mr Clarke's role in the resolution process was "disregarded" by the investigators is incorrect. As earlier noted, the Commission investigators did not interview Mr Clarke. For reasons stated above, whilst ever the complaints made by [Deputy Commissioner B] remained uninvestigated, the friction and the tension between [Deputy Commissioner B] and [Deputy Commissioner A] would continue despite any efforts by Mr Clarke. Mr Kear, in breach of his duty as Commissioner, in refusing to investigate the complaints was

himself at the very epicentre of the toxic culture referred to in the evidence. Mr Clarke, of course, was not involved in any attempt to confront or deal with Mr Kear's deliberate failure to investigate the complaints made against [Deputy Commissioner A] or the effect that such failure had upon the situation he was asked to resolve.

At [28] the Local Court found that the proceedings were instituted without reasonable cause and that the failure of the prosecutor to disclose the interviews to Mr Kear was improper. Although the "prosecutor" was the DPP, I assume the Court was referring to the Commission, when it wrongly referred to the DPP with respect to the failure to disclose. As the DPP did not have the relevant records of interview (other than that of Mr Murphy), the DPP was not in a position to disclose them to Mr Kear.

In determining whether there was a sufficient basis to institute proceedings it is, of course, necessary to consider the material that was available to the DPP's office. There had been very strong and serious adverse findings made by Commissioner Ipp against Mr Kear based on cogent evidence. There has been no suggestion that the evidence called and adduced before the Commission in the public inquiry was inadequate or in any way deficient. No criticism was or could be made in relation to the Commissioner's fact-finding or conclusions. In addition, an assessment of the evidence had been undertaken by the ODPP. The advice of the ODPP was that there was sufficient evidence to prosecute Mr Kear. Finally, there was considerable evidence that established Mr Kear's conduct in protecting [Deputy Commissioner A] by his deliberate failure to have the complaints investigated. These factors were not considered by the Local court.

63. I do not consider there has been any misconduct or maladministration either in the initiation of the prosecution or its conduct in so far as the Commission is responsible for either.

Was there any misconduct or maladministration in the Commission's Decision to write to the Editor of the Temora Independent?

64. Mr Kear complains about a letter to the Editor from a Commission officer published in the Temora Independent in response to an article in that newspaper on 7 October 2016, which contained the following paragraph:

"Mr Kear was recently embroiled in a controversial Independent Commission Against Corruption (ICAC) case but was found innocent of all corruption charges and was awarded costs in a judgement that reflected poorly on the Corruption Watchdog"

65. The letter to the Editor was over the signature of a Commission officer and was in the following terms:

"I refer to the story "High Flyers on Board – Leadership changes for Temora Aviation Museum", (Temora Independent, 7 October 2016).

The statement in the story that Mr Murray Kear was found "innocent" of all corruption charges is misleading. Mr Kear was acquitted of a charge of taking detrimental action in reprisal for a person making a public interest disclosure.

The corruption findings against Mr Kear for deliberately failing to properly investigate allegations against [Deputy Commissioner A] and for dismissing [Deputy Commissioner B] from her employment with SES substantially in reprisal allegation about the conduct of [Deputy Commissioner A], still stand"

66. Whilst I suppose that some people might see ICAC's decision to write such a letter as vindictive, it cannot be characterised as misconduct or maladministration. The Commissioner's letter is strictly accurate. Both of the findings that Mr Kear had engaged in corrupt conduct stand, and for the reasons explained above, his acquittal on the criminal charge does not affect those findings of corrupt conduct. For that reason, it was inaccurate for the newspaper to say that Mr Kear had been found "innocent" of all corruption charges. But, in any event, it is difficult to criticise the Commission for exercising a right available to any citizen, that is, to write a letter to the Editor provided it was accurate. I consider the letter to state accurately the status of the Commission's findings of corrupt conduct and the effect of the acquittal of Kear.

Conclusion

67. I provided Mr Kear and the former Deputy Commissioners with a draft copy of this report to provide them with an opportunity to make any comments. I received a response from both former Deputy Commissioners and have adopted some of their comments or suggestions. However, ultimately their comments did not persuade me to change the substance of my report.
68. Mr Kear did not provide any comments on the draft report.
69. Mr Kear has failed to establish any misconduct or maladministration on the part of the Commission and accordingly I have decided that his complaint should be dismissed.
70. Pursuant to section 78(1)(a) of the ICAC Act, I recommend that this report be made public forthwith.

B. R. McClintock

Bruce R McClintock SC

Inspector

Independent Commission Against Corruption

6 June 2018

From: Murray Kear <murray.kear@gmail.com>
Sent: Wednesday, 1 June 2016 11:38 AM
To: OIICAC_Executive
Cc: Greg Goold
Subject: Formal Complaint - ICAC Investigation (Operation Dewar)
Attachments: 20151012.pdf; 20151013.pdf; 20151014.pdf; 20151015.pdf; 20151016.pdf; 20160208.pdf; 20160209.pdf; 20160210.pdf; 20160211.pdf; 20160212.pdf; 20160215.pdf; 20160216.pdf; 20160217.pdf; 20160218.pdf

To: Hon. David Levine AO RFD QC
Inspector ICAC

Sir,

Following my recent emails, please accept this email as my formal complaint into the investigation by Officers of the ICAC during Operation Dewar and the subsequent Hearings.

I have been briefed by my lawyer Mr Greg Goold, and he agrees for me to proceed and take this action.

Should you need to contact him direct his contact details are:

Gregory J Goold
Suite 101, Level 1
281 Elizabeth Street
Sydney NSW 2000
Ph: (02) 9264 6611
Fax: (02) 9264 5922
Mobile: 0411 566 677
Email: gooldlaw@bigpond.com

As a result of the investigation by the ICAC into myself, ICAC referred their investigation to the DPP where I was charged with one count of taking detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure pursuant to s.20(1) of the Public Interest Disclosure Act 1994.

ICAC investigated, including:

- * raiding the offices of the NSW SES in Wollongong on 6 September 2013.
- * having me attend a private hearing - 23 October 2013
- * I attended the public hearing from 26 - 29 November 2013
- * On 28 May 2014 the ICAC released a report which found me corrupt for failing to properly investigate allegations against Deputy Commissioner [REDACTED] and by dismissing Deputy Commissioner [REDACTED] from her employment with the SES substantially in reprisal for her making allegations against [REDACTED]
- * As I indicated above the ICAC also examined allegations that I improperly showed favour to [REDACTED] by failing to appropriately investigate allegations by [REDACTED] that [REDACTED] had engaged in corruption.

* ICAC also alleged that I made false statements or attempted to mislead an Officer of ICAC. (this allegation was dropped by ICAC in their report).

* The report also included the act of referring the matter to the DPP.

* On 24 February 2014 ICAC investigator Darren Curd rang me and advised me that the DPP would proceed with the above charge.

* The case DPP v Murray Kear was held on the following dates - 12-16 October 2015; 8-12 February 2016; 15-19 February 2016; 22 February 2016.

*The Cost Application Hearing was held on 25 May 2016.

I believe it is evident from the findings of Magistrate Greg Grogan, especially in his judgement following the Cost Application that ICAC Officers have acted improperly and without reason.

Some major anomalies were identified by Magistrate Grogan, but not limited to;

* Redacted parts of a statement by Mr Mark Morrow. The original statement was 88 pages and only approx 22 pages were submitted by ICAC to the DPP. In the first hearing, this fact was identified by Mr Morrow and Magistrate Grogan ordered that ICAC immediately furnish the original Statement.

* Redacted parts of a statement by Ms Helen Colby.

* Failed to call Mr Greg Mullins to give evidence at the ICAC Public Hearing which would have demonstrated that there were other obvious reasons why I dismissed [REDACTED].

* Failed to interview, produce a statement or call as witness in ICAC Public Hearing and in the Hearing in the Local Court, Mr Peter Clarke, Retired Rear Admiral, Australian Navy - whose evidence was paramount in the final judgement by magistrate Grogan.

* In relation to Mr Mullins and Mr Clarke, ICAC Officers were aware of their role and potential evidence when they seized documents in the raid on the 6 September.

During the Charge Hearing it was noteworthy to me that the evidence given by all but one witness, [REDACTED] supported our defence case.

With respect to the ICAC concerns that I improperly showed favour to [REDACTED] by failing to properly investigate [REDACTED] allegations, it is important to note, that the ICAC referred this component to the NSW Public Service Commissioner.

My investigation of the allegations, included reporting to the ICAC, the Ministers Office as well a utilising the services of the NSW Internal Audit Bureau. All of these investigations revealed no corrupt conduct by [REDACTED] Even ICAC's Internal Review Committee examined one of the allegations and did not proceed.

Due to [REDACTED] mistakes, I had him placed on a Performance Improvement Plan which I personally monitored.

The NSW Public Service Commissioner had a number of entities also investigate these matters; namely Ms Lynelle Briggs (former ACT Public Service Commissioner and Price Waterhouse Coopers). The outcome of this finding were the same as my findings, in that [REDACTED] had not engaged in corruption, although he had breached some of the NSW Govt guidelines.

As a result of no corruption findings against [REDACTED] the NSW Govt returned him to his substantive position of Deputy Commissioner of the NSW SES.

In relation to the finding that I treated [REDACTED] with favour, ICAC presented no evidence to the DPP in this regard.

As a result of the ICAC preliminary investigations, evidence obtained during the raid, evidence obtained in private and public hearings, and evidence obtained prior to the referral to the DPP; it is evident that they chose not to take a reasonable approach to this investigation, and in Magistrate Grogan's words - their actions were improper.

This unreasonable approach focuses on the withholding of evidence and choosing not to include and investigate witnesses that would not have supported their case.

I am at a loss to understand their motives in deliberately mismanaging this case, which has resulted in my forced resignation, having to forgo many years of income, access my superannuation scheme at a premature age, on top of 3 years of unnecessary stress and depression for my family and myself.

I was forced to stand down as Commissioner of the NSW while an investigation was conducted. These improper and unreasonable actions of Officers of the ICAC now need to be examined. They still hold public office and I consider they could be guilty of misconduct or even perverting the course of justice.

I therefore ask that you consider investigating the actions of ICAC in these investigations and hearings.

I have attached further documents (transcripts of hearing) in addition to those that I have previously forwarded.

I note that you have also requested any communication between myself and ICAC. I will now locate these; many are embedded within the ICAC's non-indexed brief of evidence that I have electronically, are on the ICAC website and I have also some in hard copy. I will gather these documents and forward them to you asap.

I thank you for the opportunity to make this complaint.

Regards

Murray Kear AFSM
Ph; 0447 143628

FILE COPY



Office of the Inspector
of the Independent Commission Against Corruption



New South Wales Government

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

14 July 2017

Our ref: C32 2016 02

Mr M Kear

Via Email: murray.kear@gmail.com

Dear Mr Kear,

Re: ICAC Investigation (Operation DEWAR)

The Governor has appointed me Inspector of the Independent Commission Against Corruption effective 1 July 2017. As such, it is my function to deal with the complaint you made on 1 June 2016.

My functions are limited by the Independent Commission Against Corruption Act 1988 ("ICAC Act") in dealing with complaints of abuse of power, impropriety and other forms of misconduct and maladministration by the ICAC or its officers under s.57B of the ICAC Act.

To assist me in dealing with your complaint, would you please provide the following:

1. Please confirm that you wish me to proceed to investigate and determine your complaint.
2. Your complaint seems to involve the following disputed areas of conduct by the ICAC:
 - (a) The ICAC Investigation, including failure to interview or call at the ICAC public inquiry witnesses whom you consider to be relevant (e.g. Rear Admiral Clark (Ret), Mr Mullins);
 - (b) Dealings between the ICAC and the DPP and failure by the ICAC to supply all relevant material to the DPP;
 - (c) Conduct of prosecution and apparent failure to make relevant disclosures.

Please:

- (a) Confirm that I have stated accurately the areas of your complaint;
- (b) Please state with as much precision as you can, each item of conduct (whether it is an action or a failure to act), that you allege amounts to:
 - (i) Abuse of power
 - (ii) Impropriety
 - (iii) Other misconduct

(iv) maladministration

(c) Please state, in respect of each item of conduct mentioned in answer to the preceding paragraph, the basis for the allegation. In other words, state why you say each action or failure to act was an abuse of power, impropriety etc.

3. The ICAC's Report with this matter quotes a lengthy extract from your evidence at the Public Inquiry (on p.22 thereof). One quoted question and answer was in the following terms:

Q. "And you sacked her [redacted] as reprisal for doing those things and by that I mean reporting [redacted] questioning you and criticising both [redacted] and you?"

A. "They weren't the only reasons, no."

4. On the basis of that answer the ICAC concluded that you had terminated [redacted] employment at least partly in reprisal etc. (pp 22-23).

- (a) Is your evidence accurately set out? Is any qualification omitted?
- (b) I would be interested to know whether your counsel made submissions about that aspect of your evidence and if so, what were they? Can you supply me with a copy? If there is an order by the ICAC restricting publication of submissions, please let me know and I will take steps to obtain the relevant materials from the ICAC itself.

I look forward to hearing from you no later than Friday 4 August 2017.

To assist you I enclose a copy of s.57B of the ICAC Act.

I will copy this letter to your solicitor who you indicted was acting for you last year, Mr Goold.

Yours sincerely,



Mr Bruce McClintock, SC
Inspector: ICAC

Cc: Gregory J Goold
gooldlaw@bigpond.com



New South Wales Consolidated Acts

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INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988 - SECT 57B

Principal functions of Inspector

57B Principal functions of Inspector

(1) The principal functions of the Inspector are:

(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and

(b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and

(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and

(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

(2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.

(3) The Inspector is not subject to the Commission in any respect.

(4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:

(a) contrary to law, or

(b) unreasonable, unjust, oppressive or improperly discriminatory, or

(c) based wholly or partly on improper motives.

(5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:

(a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector

considers may effectively be dealt with by recommendation or report under this section, and

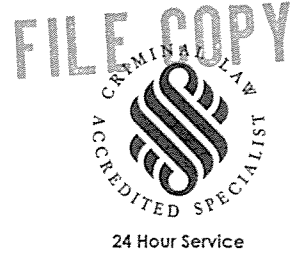
(b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

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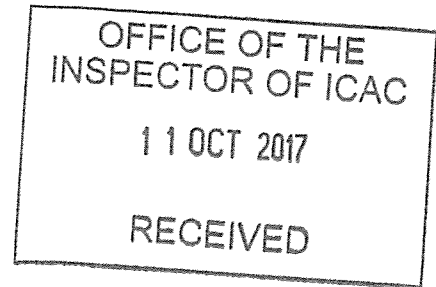
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Mobile: 0411 566 677
Email: gooldlaw@bigpond.com

Gregory J Goold
Criminal Law Specialist
Solicitors & Barristers



6 October 2017



Office of the Inspector of ICAC

GPO Box 5341

SYDNEY NSW 2001

Dear Inspector,

RE: ICAC INVESTIGATION (OPERATION DWAR)

I refer to your letter of 14 July 2017 and subsequent correspondence regarding Mr Kear's response. On behalf of my client Murray Kear I respond to your numbered paragraphs in sequitur: -

1. Yes, I wish you to proceed with your investigation.
2. I confirm the following areas of concern.
 - a. Yes.

- b. Yes – all the defence witnesses called in the criminal proceedings, save and except Rear Admiral Peter Clarke (ret) who did not provide material to that inquiry notwithstanding attempts by him to do so, had provided statements to the ICAC which were favourable to Mr Kear and may have materially borne upon the inquiry and the eventual findings of corrupt conduct and the integrity of the complaint which initiated the inquiry.
- c. Yes, but not in respect of the DPP prosecutor Ms Fiona Grey; rather the ICAC informants and legal advisers who briefed the DPP to conduct the prosecution.

In addition, Mr Kear requests that you investigate the ability of the ICAC informants and legal advisers to act on their own volition seemingly with their own agendas in respect of the non-disclosure vital evidence.

In relation to the confirmation you seek we note further in numbered paragraph 2

- a) The conduct in (a) above amounts to: -
- i. Abuse of power.
 - ii. Impropriety.
 - iv. Maladministration as defined in S11 (2) of the Protected Disclosure Act (1994).

The ability of staff members of ICAC to act individually or in concert to affect the evidence / information placed before the inquiry provides the basis for both "an action" in respect of witnesses available. In so far as statements that had been taken and; failure to act in respect of no statement being taken from Rear Admiral Peter Clark (ret), in circumstances where he contacted the Commission on at least two (2) occasions and offered highly probative information. The execution of his contract with the SES under the then Commissioner Mr Kear was foundational to the issues the subject of the inquiry and were known to the staff of ICAC as a result of information provided by numerous sources including those actually called to give evidence.

For the same reason former Commissioner Greg Mullins' evidence being taken in camera precluded an examination by those who appeared for Mr Kear, from examining in detail the matters which gave rise to Mr Kear's approach to Mr Mullins.

In respect of (b) above the conduct again amounts to items (i); (ii) and (iv). Such conduct was a continuation of what had occurred in the investigation of the complaint against Mr Kear as set out in response to (a) above.

In responding to (c) above consideration should also be given to paragraphs 3 and 4 of your correspondence in regard to the

proposition "that you terminated [REDACTED] employment at least partly in reprisal".

The operative words must be "at least partly". The criminal prosecution requires the establishment to the requisite standard of an action "substantially in reprisal for".

This raises the spectre of conduct that produced the prosecution that was ill-informed and if pursuant to s.11(2)(c) of the Public Interest Disclosure Act based wholly or partially on improper motives and may have amounted to a malicious prosecution.

In respect of paragraph (C) the basis for the allegation with respect, would appear obvious. Colloquially the persons responsible for the manner in which both the inquiry and prosecutions were conducted, clearly and unequivocally buried evidence based wholly or partially on improper motives or because such evidence was contrary to their agenda.

This conduct was exacerbated by the failure of the Commission in the inquiry to seek to examine properly the issues clearly raised by the response identified in paragraph 3.

The decision of the magistrate, now Acting District Court Judge Grogin in respect to both the criminal proceedings and the subsequent costs application identifies this conduct.

3. We rely on matters above in response to this paragraph.
4. (a) So far as the transcript is concerned Mr Kear accepts its accuracy. There is clearly an omitted qualification which is implicit in the response by Mr Kear. Given the gravity of the Commission's ultimate findings it was absolutely incumbent on the Commission and those appearing including Counsel assisting to examine this response. This was not appropriately done until the criminal prosecution was undertaken and completed.

The use of the word "reprisal" may well be inappropriate because it inferentially raised the concept of retribution when [REDACTED] actions amounted to a response in all the circumstances to the [REDACTED] issues. In this regard even allowing for the conclusion of at least partially in reprisal for the failure to delve into Mr Kear's response was fatal to his prospects of a fair outcome.

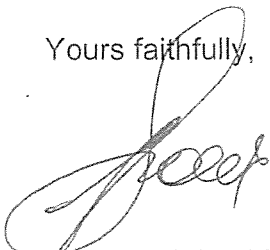
(b) we no longer have Counsel's submissions to hand. However given the absence of material which was available but "buried" reliance on such submissions would or may divert this investigation from the real issues. Any failure by Mr Kear's Counsel to submit in respect of this issue would be affected by a lack of exposure to the material which was readily available to

ICAC but was neither disclosed or relied upon in Mr Kear's prosecutions. Rather it fell to his defence team at what might be called "the eleventh hour" to unearth the material which may well have influenced the inquiry and its ultimate finding in respect of Mr Kear's conduct.

We would invite you to examine the transcripts of both the inquiry and the criminal proceedings including the relevant remarks given in relation to the finding of both forums.

Please do not hesitate to contact Mr Kear or myself for any further information.

Yours faithfully,



Gregory J Goold

Mr Bruce McClintock SC
Inspector
Office of the Inspector of the ICAC
Culwulla Chambers
Level 7, 67 Castlereagh Street
Sydney
NSW 2000

OFFICE OF THE
INSPECTOR OF ICAC
06 MAR 2018
RECEIVED

DELIVERED BY HAND

Your Ref: C32 2016 04
Our Ref: Z18/0067/D10472619

Dear Inspector,

Operation Dewar – Mr Murray Kear

1. I am writing in response to your letters of 13 September 2017 and 10 October 2017.
2. I understand Mr Kear's complaints are that the Commission acted improperly by failing to interview or call at the Operation Dewar public inquiry certain witnesses whose evidence Mr Kear considered was relevant and that, during the subsequent criminal proceedings for an offence under s 20(1) of the *Public Interest Disclosures Act 1994* (the PID Act), the Commission improperly failed to disclose certain material to the Director of Public Prosecutions (DPP) or him.
3. For the reasons given below, I do not consider that Mr Kear was prejudiced by any failure on the part of the Commission to interview or call particular witnesses at the public inquiry or to disclose material to the DPP. I do not consider that any Commission officer acted in bad faith or with improper motive or that, as claimed by Mr Goold, it was left to Mr Kear's defence team at "*the eleventh hour*" to "*unearth*" the material the subject of his complaint to you.
4. As the complaints are based upon significant misconceptions it is necessary that this response identifies the reasons as to why that is so. Before addressing these matters, it may be helpful to set out some background information concerning the Commission's investigation and the subsequent prosecution.

PART A
Background information

5. The Commission's investigation commenced following a complaint on 5 May 2013 from Ms [REDACTED] that Mr Kear, the then Commissioner of the NSW State Emergency Service (SES), had dismissed her from her position as an SES deputy commissioner in reprisal for her making allegations of misconduct against [REDACTED], another SES deputy commissioner and that Mr Kear had failed to properly investigate or deal with her allegations against [REDACTED]
6. The Commission commenced a preliminary investigation on 31 May 2013. This was escalated to full investigation status on 17 July 2013.
7. A public inquiry was conducted in December 2013. Commissioner the Hon David Ipp AO QC presided. Michael Fordham QC and Callan O'Neill acted as counsel assisting.
8. The Commission's report on the investigation was made public in May 2014.
9. In the report, the Commission made two separate sets of findings that Mr Kear had engaged in corrupt conduct, as follows:
 - (i) One was that Mr Kear had engaged in corrupt conduct by deliberately failing to properly investigate a number of allegations against [REDACTED] in relation to certain matters specified in the report.
 - (ii) The other was that Mr Kear had engaged in corrupt conduct by dismissing Ms [REDACTED] substantially in reprisal for her making allegations about the conduct of his friend, [REDACTED]
10. The bases for these findings are set out in the Commission's report. I note that, as indicated in the report, the Commission did consider Mr Kear's evidence and his subsequent submission to the Commission that he had dismissed [REDACTED] for reasons other than her making a protected disclosure. In essence, his position was that [REDACTED] had been dismissed because of the breakdown in the relationship between [REDACTED] and [REDACTED] and her resentment about Mr Kear's decisions concerning her allegations of misconduct on the part of [REDACTED]. For the reasons set out in the report (page 24) those reasons were rejected by the Commission.
11. The report also contained a statement under s 74A(2) of the ICAC Act that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Kear for an offence under s 20 of the PID Act of taking detrimental action against a person who had made a public interest disclosure.
12. I also note that, under s 20(6)(a) of the PID Act, the Commission is required to refer a matter to the DPP by way of providing a brief of evidence if it forms the opinion that an offence has been committed under the PID Act.

13. On 10 September 2014, the Commission provided a brief of evidence seeking the advice of the DPP as to whether there was sufficient evidence to warrant the commencement of a prosecution of Mr Kear for an offence under s 20 of the PID Act.
14. On 3 February 2015, the DPP wrote to the Commission advising there was sufficient evidence to prosecute Mr Kear for a summary offence under s 20 of the PID Act.
15. Following receipt of the DPP advice, a court attendance notice was prepared by a Commission officer and served on Mr Kear for the offence recommended by the DPP. The court attendance notice named a Commission officer as "Prosecutor". In accordance with usual procedure, the DPP took over the prosecution under s 9 of the *Director of Public Prosecutions Act 1986*.
16. The proceedings were heard over three weeks, initially between 12 and 16 October 2015 and then from 8 to 19 February 2016.
17. In the period between the October and February hearing dates, the defence caused a subpoena to produce documents to be issued to the Commission. In response, the Commission produced two volumes of material including 29 records of interview and other material. The material produced included records of interview with Malcolm Connellan, Scott Hanckel, Greg Mullins and Greg Murphy and the audio tape of the interview of Mr Farmer.
18. At the close of the prosecution case, a submission was made on behalf of Mr Kear that there was no case to answer. In a written decision dated 14 February 2016, Magistrate Grogin found that a prima facie case had been established.
19. Subsequently, a number of witnesses were called to give evidence at the trial on behalf of Mr Kear. These included Craig Farmer, Peter Clarke and Mr Mullins. Their evidence went to other reasons why Mr Kear dismissed [REDACTED].
20. On 16 March 2016, Magistrate Grogin found that Mr Kear was not guilty of the offence and dismissed the charge. It appears from his judgment that his Honour found that it was [REDACTED] inability to assimilate into the SES senior executive team that was the primary reason for her dismissal. As discussed below, the Magistrate omitted to refer to or analyse the evidence concerning his friendship with [REDACTED] and his decision not to properly investigate the allegations made.
21. On 25 May 2016, Magistrate Grogin awarded costs to Mr Kear under s 213 of the *Criminal Procedure Act 1986*.

There is, of course, a clear difference between a Commission investigation and a criminal prosecution arising from that investigation. Evidence before a court in criminal proceedings will, as in this case, be different from the evidence before the Commission. The Commission makes its factual findings on the balance of probabilities in accordance with the 'Briginshaw test' while a court determines whether the prosecution has proven its case beyond reasonable doubt. These differences, of course, need to be borne in mind when considering Mr Kear's complaint and Magistrate Grogin's decisions.

PART B
Factual matters

22. The following matters are identified as key issues arising out of the investigation, including the public hearing, and subsequent proceedings before the Local Court in respect of “reprisal” action pursuant to the PID Act:
- (i) *Mr Kear’s conduct.* The Commission’s finding was that Mr Kear deliberately failed to properly investigate reasonably based allegations and complaints lodged by ██████████ concerning the conduct of ██████████ (ICAC Report page 19).
 - (ii) The Commission, following a public inquiry, concluded that it was satisfied that Mr Kear failed to discharge his duties as Commissioner of the SES to properly investigate the allegations/complaints and that this failure arose because he was unduly influenced by his friendship with ██████████ (ICAC Report page 19).
 - (iii) Although Mr Kear, by reason of his friendship with ██████████, was in a position of conflict of interest, the Commission’s finding was that he failed to identify, acknowledge or appropriately manage ‘...the clear conflict of interests that arose out of his relationship with ██████████’ (ICAC Report page 19).
 - (iv) At the centre of the relationship issues (described in the Magistrate’s Reasons for Decision as a “toxic culture”) was the continued existence, by reason of Mr Kear’s failure to investigate, unresolved complaints/allegations that had been brought by ██████████ (and ██████████, in the relevant period, both occupying the positions of Deputy Commissioners).
 - (v) ██████████, after having made the complaints, persisted with them until she was dismissed by Mr Kear. Mr Kear, up to the time of her dismissal maintained his position of “no independent investigation”.
 - (vi) Mr Kear’s continued refusal to investigate the complaints had two significant consequences:
 - (a) His deliberate refusal to act put him in continuing breach of his duty as Commissioner of the SES
 - (b) The fact of the complaints made by ██████████ and the fact as to Mr Kear’s refusal to investigate them together operated, in a causal sense, to what became an unworkable or “toxic relationship”.

The factual issue for the Local Court to determine was related to the real reason or reasons for Mr Kear’s decision to dismiss ██████████. The Local Court, however, entirely omitted from consideration as a relevant fact or matter Mr Kear’s conduct referred to in (vi) (b) in the development of the “toxic culture”. The unresolved tension between the two Deputy Commissioners ██████████ and ██████████ arising from the complaints made was a central factor.

23. The Commission's finding was that instead of acting impartially to resolve the issue/tension between them by appropriately investigating the complaints, Mr Kear favoured and protected [REDACTED]. Mr Kear said in the public inquiry that he was 'a close friend' of [REDACTED]. The finding was that Mr Kear deliberately did not investigate the complaints. Mr Kear's own personal conduct in this respect was directly relevant to the Local Court proceedings, in particular as to:
- (i) his reason or reasons for terminating [REDACTED]
 - (ii) his credibility, in particular, on the issues as to his motivation and/or his reasons for dismissing her.
24. For reasons not explained, the result was that the Local Court's focus was largely upon the evidence concerning the relationship between [REDACTED] and [REDACTED] and to [REDACTED]'s conduct, without a consideration of the relevance of Mr Kear's conduct in favouring his friend [REDACTED] in not having [REDACTED] complaint investigated and the effect that had upon the relationship between [REDACTED] and [REDACTED].
- (i) It is important to observe that in the Local Court proceedings the Crown made it clear that Mr Kear's own conduct, his failure to investigate the complaints, was very much an issue in the Local Court Proceedings on the issue of "reprisal" action. In the *Prosecution Closing Submissions* dated 16 February 2016, it was emphasised on behalf of the DPP that: *'Also of prominence is the accused's failure to have each of the subject matters of the allegations fully and independently investigated prior to the termination of [REDACTED]. This again leads to the inference that the accused was terminating her employment because she was making these allegations.'* extract (p 16)
 - (ii) *'It is conceded that there was conflict between [REDACTED] and [REDACTED]. What is in dispute is as to whether it was as a result of the failure of the accused to properly address the allegations themselves as being the basis of the termination of her employment.'* extract (p 20)

(T600) *'The conduct was not therefore such as to warrant termination, thereby leading to inference that the termination was as a result of the disclosures made by [REDACTED] and the accused's efforts to protect [REDACTED] because of their longstanding relationship.'* 92 extract (p 20)

The Commission's Response

25. The Commission's response to Mr Kear's complaints may be summarised as follows:
- (i) The evidence before the Commission in the public inquiry strongly supported both sets of findings made against Mr Kear of corrupt conduct.
 - (ii) In relation to the records of interview, which were obtained by the ICAC but not utilised in the Commission's public inquiry, the following are noted:

- (a) No requirement arose in the course of the public inquiry necessitating the use of the records of interview. A reading of them indicates that they confirmed what was otherwise well-established in the evidence adduced i.e. that there had been a relationship breakdown between ██████████ and ██████████ (a "toxic culture").
- (b) The Records of interview did not contain or constitute "exculpatory" material.
- (iii) The finding by the Commission that Mr Kear deliberately failed to properly investigate reasonably based allegations that ██████████ made against ██████████ ██████████, was a key finding. It was one made in relation to what was a central issue in the public inquiry and it was also one based upon cogent evidence.
- (iv) The Commission's finding to the effect that Mr Kear improperly showed favour to ██████████ by failing to investigate allegations raised by ██████████ was in particular, a finding that was well based upon cogent evidence.
- (v) On the evidence, the relationship issues between ██████████ and ██████████ stemmed from the complaints made by her against ██████████ and Mr Kear's refusal to investigate them.

The Commission's fact-finding in this respect, taken in conjunction with the evidence in the public inquiry, provided a sound basis for the finding of corrupt conduct by Mr Kear in dismissing ██████████ from her employment with SES as '... *substantially in reprisal for her making allegations about the conduct of his friend, ██████████* (ICAC Investigation Report page 24).

PART C

Conduct of the Commission's investigation

- 26. Prior to the Local Court proceedings there had, of course, been an extensive inquiry by the Commission into the conduct and events concerning ██████████ and Mr Kear. In making findings former Commissioner Ipp had a large body of cogent evidence in accordance with a considerable volume of which was admissible by the ordinary evidentially principles.
- 27. ██████████ was employed by the SES from 3 September 2012. Between that date and 14 May 2013 the relationship between ██████████ and Mr Kear deteriorated following upon her report to Mr Kear of allegations that ██████████ had engaged in misconduct in relation to a series of separate matters.

As stated above it is understood that Mr Kear's complaint with respect to the conduct of the Commission's investigation relates to:

- (a) The failure by the Commission to produce the abovementioned records of interview and failure to call Mr Mullins to give evidence at the public inquiry; and

- (b) The failure by the Commission to interview, obtain a statement from or call evidence at the public inquiry from Peter Clarke.
28. Although not specifically stated in the material provided to you by Mr Kear, I also understand that his complaint may extend to the failure by the Commission to call evidence at the public inquiry from Mr Connellan, Mr Farmer, Mr Hankel and Mr Murphy.
29. Mr Kear contends that their evidence was relevant because it supported his claim to the Commission that he dismissed ██████████ for reasons *other than* her making a protected disclosure. He claims the Commission failed to provide evidence at the public inquiry from those named in the preceding paragraph because it did not support the case that ██████████ was dismissed in reprisal for making a public interest disclosure.
30. During the course of the investigation, Commission officers interviewed Messrs Mullins, Connellan, Farmer, Hanckel and Murphy. Transcripts of their interviews were not tendered at the public inquiry and they were not called to give evidence. Mr Clarke had been engaged by Mr Kear to help manage the conflict between ██████████ and ██████████. Although approached to be interviewed, no interview was ultimately conducted with Mr Clarke. He was not called to give evidence.
31. However, during the public inquiry, a significant amount of documentary evidence was tendered by counsel assisting (Exhibits 1 and 2) which set out Mr Kear's defence to the allegations in terms identical to his defence at the trial. Much of this material was obtained during the execution of a search warrant on Mr Kear's office. The material included, but was not limited to, the following documents:
- (a) a file note recording that Mr Kear had spoken to Mr Mullins about Mr Mullins' concerns regarding ██████████'s performance;
 - (b) a note of a conversation Mr Kear had with Mr Connellan about some public criticism ██████████ had made of Mr Kear and ██████████;
 - (c) a document created by Mr Kear dated 24 May 2013 which included reference to the fact that he had engaged Mr Clarke and Mr Farmer to remedy the mistrust that had developed between ██████████ and ██████████;
 - (d) Mr Kear's typed notes of reports he had received from others including Mr Mullins about inappropriate comments made by ██████████ about ██████████ and other members of SES senior executive team;
 - (e) a document titled 'Reasons for Terminating ██████████' in which Mr Kear noted that a number of people had come forward to complain about ██████████ including Mr Hanckel; and
 - (f) a typed note of instructions to Mr Clarke.

32. All of this material was available to Mr Kear at the public inquiry.
33. It is important to understand that the relevance of potential evidence from Messrs Mullins, Clarke, Connellan, Farmer, Hanckel or Murphy was at all relevant times known by Mr Kear. This is because their (potential) evidence concerned *what Mr Kear had himself told them about* [REDACTED] *or what they had told him about* [REDACTED]. He did not need the Commission to provide him with records of interview in order to discover any relevance their evidence might have to his evidence regarding his reason for dismissing [REDACTED].
34. The records of interviews of Messrs Mullins, Connellan, Farmer, Hanckel and Murphy and the evidence given in the Local Court by Mr Mullins and Mr Clarke are discussed below. The nature of the material in each of the records of interview has been summarised below. The Commission's submission is that the material given in the interviews was confirmatory of evidence otherwise given as to the relationship issues that had arisen between [REDACTED] and Mr Kear and between [REDACTED] and [REDACTED]. Importantly, the records of interview, when examined, do not contain exculpatory matter that could explain or justify Mr Kear's deliberate failure to investigate the allegations or the complaints made against his friend, [REDACTED], or that he terminated [REDACTED] for conduct unrelated to her allegations against [REDACTED].
35. Similarly, the evidence of Mr Mullins and Mr Clarke, which amongst other things, dealt with the question of the attempts to manage the relationship between [REDACTED] and [REDACTED] it is submitted did not provide exculpatory evidence that would have assisted Mr Kear in respect of his continued and deliberate failure to perform his duty to investigate and the relevance of that to the termination of employment issue. The evidence given by Mr Mullins and Mr Clarke did not establish that the issues between [REDACTED] and [REDACTED] arose wholly or mainly from some extraneous or independent problem unconnected with the complaints by [REDACTED] against [REDACTED]. The material confirmed other evidence as to the existence of a dysfunctional relationship between [REDACTED] and [REDACTED] and the fallout from the same.

PART D

Findings of Corrupt conduct

36. The matters of central importance as established by the Commission are as follows:
- (i) The issues in the investigation.
 - (ii) The findings, in particular, the corrupt conduct findings, made by Commissioner Ipp.
 - (iii) The evidence before the Commission that supported the findings in the Commission's report.

- (iv) The statements and a record of interview held by the Commission, not tendered or used in evidence.
37. In the Summary of Investigation and Results (appearing at p 4 of the Commission's Report "Investigation into the Conduct of the Commissioner of the NSW State Emergency Service", May 2014), reference was made to the allegations which were examined by the Commission in the course of its investigations. Those allegations related to Mr Kear's conduct.
38. As to the *first set of corrupt conduct findings*, Commissioner Ipp made a central finding of fact, namely, that Mr Kear deliberately failed to appropriately investigate the four allegations or complaints made by ██████████. Based on the factual findings referred to in the Commission's report, the Commission determined that Mr Kear's conduct constituted corrupt conduct within ss 8 and 9 of the *ICAC Act*.
39. As to the *second corrupt conduct findings*, Commissioner Ipp found that Mr Kear engaged in corrupt conduct by dismissing ██████████ from her employment with the SES substantially in reprisal for her making allegations about the conduct of his friend, ██████████.
40. In relation to the reports made by ██████████ to Mr Kear, the paragraphs that follow summarise the subject matters of each of the complaints made by her.
- (i) The first report by ██████████ concerning ██████████: SES Contract**
41. On or about 10 October 2012 ██████████ reviewed a number of SES contracts. She formed the view that two existing consultancies under her portfolio failed to deliver what was required. She had examined what was referred to in evidence as the "Karoshi agreement" but found that it was not in fact in the NSW government format. She also found that the other contract was also non-compliant. The termination clauses in each disadvantaged the SES by locking it into extended notice periods. ██████████ was closely involved with the making of both contracts. It was also established that the two contracts each exceeded the amount for which the SES could contract without a competitive procurement process. ██████████ conceded the wording for the Karoshi contract originated from Karoshi's principal. He provided SES badging and logo so the documents would look like SES documents (Report pp 11-12).
42. ██████████ conceded the process that had been followed in relation to the two consultancy contracts was "inappropriate".
43. The report of the Commission recites the events that followed (see p 12). The matter was reported to the ICAC by ██████████. The Commission in its report on the investigation stated that she had reasonable grounds to suspect corruption may have been involved (Report p 12).
44. Mr Kear returned from leave on 29 October 2012. He told ██████████ that he was not going to take any action about the above complaint (Report p 12).

45. In the report, the Commission stated: *'There was never any suggestion by Commissioner Kear that he had conducted any formal investigation into the circumstances in which the contracts came into being and ██████████ involvement with those contracts. Nor did Commissioner Kear declare any conflict of interest due to his friendship with ██████████ that could hinder his ability to investigate the issue formally (a matter which is considered in further detail below...'* (Report p 12).
46. The Commission referred to Mr Kear's evidence that he had spoken to other employees, Les Tree and Brad Scutella, in relation to the contracts issue while he was on holiday (Report p 12).

The Commission stated: *'...both Mr Tree and Mr Scutella gave their evidence in a clear and cogent manner. Both testified that they had not formed any opinion in relation to ██████████ conduct such that they could provide any useful comment to Commissioner Kear...Commissioner Kear was in the same position as Mr Tree and Mr Scutella. He was not in possession of enough information to be able to form any reasonably reliable opinion in relation to corrupt conduct. He, nevertheless, formed the view that no corrupt conduct was involved. By his own admission, he did so based solely on his trust of ██████████*

47. Commissioner Kear's approach of placing trust in a person he described as a "mate" ██████████ without undertaking any objective inquiry, the Commission found was materially inconsistent with the notion of unbiased, objective decision-making. Entering into the contracts, it was observed, resulted in state funds being wasted. There was no independent assessment by or on behalf of Mr Kear as to any element of the alleged corruption, despite ██████████ having requested an investigation. Contrary to the submission made by counsel for Mr Kear, the Commission found that: *'this conduct on Mr Kear's part fell so far short of the standards required of him that it gives rise to a strong inference that it was conduct that involved the partial exercise of Commissioner Kear's official function...'* (Report p 14).
48. The Commission noted that ██████████ was subsequently placed on "a performance management plan" about which the Commission observed: *'...as is discussed more fully below, that performance management plan contains no real plan for performance reviews. In fact, ██████████ was later given a pay increase. These matters reinforce the inference that Commissioner Kear, being motivated by bias in favour of ██████████ wished to take steps to exculpate him'* (Report p 14).

(ii) ██████████ Report re: Corporate Credit Cards

49. From about 19 November 2012 ██████████ was provided with a reconciliation of SES spending. It indicated that ██████████ had purchased roof racks for his vehicle on 20 November 2010 to the value of \$286.
50. ██████████ admitted to the Commission that the roof racks were to carry his surfboard. The Commission observed that he did not require the surfboard for work purposes. ██████████ formal investigations, the Commission noted, revealed that on 13

September 2011, ██████████ had also invoiced the SES \$398 for the supply and installation of electric brakes for the towing of his camper trailer on his motor vehicle. This, it was noted, was clearly for personal use (Report p 14).

51. These matters were brought to Mr Kear's attention by ██████████ indicating that they needed to be properly investigated.
52. The Commission was satisfied that ██████████ disclosure constituted a protected interest disclosure.

The Commission noted that the allegations: *'were serious and required appropriate investigation by Commissioner Kear to determine whether ██████████ had deliberately and knowingly misused SES funds for his personal benefit.'* (Report p 14).

The Commission then noted: *'Instead of causing such an investigation to be undertaken, Commissioner Kear informed ██████████ that he intended to raise the matter directly with ██████████. Having done so, Commissioner Kear told ██████████ that ██████████ had explained his conduct on the basis that he had made a mistake and that he intended to repay the money...'*

53. The Commission stated that the explanation given was difficult to accept and that on its face it involved "a blatant wrongdoing" (Report p 14).
54. The report refers to Commissioner Kear's claimed justification as to a lack of investigation being the fact that the money spent by the SES on the installation was to be repaid by ██████████ and that he did so on 8 November 2012. It was noted that the repayments were made 2 years and 14 months after each purchase.
55. The Commission stated: *'In the circumstances, the failure to investigate the incurring of these expenses further was conduct upon the part of Commissioner Kear that was partial to ██████████'* (Report p 15).
56. The Commission then went on to refer to a number of credit card statements for ██████████ ██████████ that were drawn to ██████████'s attention on or about 25 March 2013. She considered that the expenses appeared to fall outside of relevant SES expenditure guidelines. Some details on expenses were discussed in the Commission's report at p 15.
57. Once ██████████ had undertaken a review of ██████████ expenses, she determined that she would engage the Independent Audit Bureau (IAB) to conduct a desktop audit of ██████████ credit card expenditure. The IAB finished the audit on 5 April 2013. It concluded that there were 154 claims by ██████████ that required further investigation, with the potential for irregularities to exceed \$11,000.
58. ██████████ provided details of the 154 claims to Mr Kear and recommended disciplinary action take place.

59. The Commission, in its report observed: *'Commissioner Kear did not undertake the disciplinary investigation recommended by ██████████. Counsel for Commissioner Kear pointed out that the IAB concluded that disciplinary action was not warranted against ██████████. Counsel submitted that in the circumstances Commissioner Kear could not be faulted in not taking any disciplinary action against ██████████ in regard to the 154 claims.'* (Report p 15).
60. The Commission said that whilst there was no finding of corrupt conduct in relation to the 154 claims: *'...nevertheless the Commission notes that the failure to take ██████████ ██████████ misuse of his credit card further is yet another decision on the part of Commissioner Kear that exculpated ██████████ and forms part of the general pattern of conduct on the part of Commissioner Kear that tended to overlook misconduct by ██████████'* (Report p 15).

(iii) Overtime and Motor Vehicle usage by Mr ██████████, Director of Finance, Fleet and Logistics

61. ██████████ brought to Mr Kear's attention what she thought were anomalies concerning Mr ██████████. Mr Kear suspended Mr ██████████ pending full investigation. Helen Colbey, an investigator from the IAB, was engaged by Commissioner Kear to undertake an investigation into Mr ██████████. ██████████ was appointed to manage the investigation.
62. ██████████ became concerned about a number of matters involving ██████████ supervision of Mr ██████████. These principally related to ██████████ approval of overtime on the part of Mr ██████████ in the amount of nearly \$60,000 and flexible working arrangements relating to him. (Report p 15).
63. The Commission found that ██████████ was correct to be concerned about the matter. The Commission noted that Mr ██████████ had been found to have engaged in workplace misconduct. In or about January 2013, Mr Kear terminated Mr ██████████ employment with the SES. He was later re-instated at a lower grade following unfair dismissal proceedings.
64. The Commission noted that the approach taken by Mr Kear towards Mr ██████████ was to be differentiated from the performance review process that had been put in place for ██████████. The vast difference between the measures applied, the Commission stated, demonstrated the partial treatment shown to ██████████ by Mr Kear (Report p 16).

(iv) Failure by Employee to pay for Private Use of his Corporate Motor Vehicle

65. The Commission noted that ██████████ had arranged with a Mr Shafer that he would give him private use of a motor vehicle in order to induce him to take the job as manager of marketing etc. In order to do so, ██████████ arranged for the SES to use NRMA sponsorship monies to cover the cost of the vehicle. ██████████ informed the Commissioner of these facts. ██████████ sought to explain what had happened with Mr Shafer as a "miscommunication" between Mr Shafer and himself. The Commission

observed: *'...the suggestion that there was a misunderstanding between Mr Shafer and [REDACTED] is difficult to understand. The fact is that Mr Shafer was given the private use of a motor vehicle and the SES bore the cost of that usage.'* (Report p 16).

66. A few days later, the Commission noted, Mr Kear informed [REDACTED] that there was nothing to be concerned about and that he would not be conducting an investigation. It was also noted that on 15 November 2012 Mr Kear waived the debt of Mr Shafer, owed to the SES, in relation to his car. As of the date of the waiver, Mr Kear had not ascertained the value of the waiver.
67. The Commission held Mr Kear's action *'...in allowing [REDACTED] to provide his own briefing note to justify a clear transgression was another instance of Commissioner Kear acting unusually to exculpate [REDACTED] from blame for what arguably was misconduct on his part. Commissioner Kear's actions in relation to [REDACTED] provision of a car to Mr Shafer demonstrate Commissioner Kear's partial treatment of [REDACTED]* (Report p 16).

(v) Diary Entries

68. The last matter involving [REDACTED] concerned a question as to whether or not, in the context of unfair dismissal proceedings brought by Mr [REDACTED] notes that had been prepared by [REDACTED] were authentic or not.
69. It is not necessary to here set out the full details concerning that aspect as discussed by the Commission in the report at pp 16-17.
70. On the question of favouritism being a conflict of interest, the Commission noted that in an email to Mr Kear, [REDACTED] described him as *'a very authentic mate and a good boss'* and notes that those factors were *'probably the major reasons I left the firm that I love.'* (Report p 17). Reference was also made to a statement made by Mr Kear that he did not have a long-standing friendship with [REDACTED]. In oral evidence, however, Mr Kear admitted that he and [REDACTED] had been friends and mates since 2008. (Report p 18).
71. The Commission made a number of observations in relation to Mr Kear's failure to disclose a conflict of interest involving [REDACTED] on a number of occasions. (Report p 18).
72. It also noted that in cross-examination Mr Kear could not articulate the concept of conflict of interest. He admitted that he did not see investigating his "mate" as a conflict of interest. (Report p 18).
73. The Commission also observed that Mr Kear should have disqualified himself from dealing with the allegations made against [REDACTED] and should have arranged for the allegations to be investigated impartially. (Report pp 18-19).

74. The Commission stated that Mr Kear '*... deliberately failed to properly investigate reasonably based allegations that [REDACTED] made against [REDACTED] ...*' (Report p 19).
75. The Commission found that Mr Kear '*...was unduly influenced by his friendship with [REDACTED] and sought to exculpate him from any allegation of his conduct*'. (Report p 19).
76. In Chapter 3: '*The termination of Deputy Commissioner [REDACTED] employment*', the Commission examined whether Mr Kear took detrimental action against [REDACTED] by dismissing her from the position of Deputy Commissioner of Corporate Services in reprisal for her making allegations that [REDACTED] had engaged in corrupt conduct (see in particular Report p 21).

PART E

Conclusion as to Corrupt Conduct findings on failure/ reprisal of Mr Kear to investigate the complaints against [REDACTED]

77. Commissioner Ipp stated that he was satisfied that Mr Kear engaged in corrupt conduct by dismissing [REDACTED] from her employment with the SES substantially in reprisal for her making allegations about the conduct of his friend, [REDACTED] (see report at page 24).
78. After referring to the relevant provisions of the PID Act, Commissioner Ipp stated that he was satisfied that, if the facts found were to be proved on admissible evidence to the criminal standard and accepted by an appropriate tribunal, there would be grounds on which that tribunal would find that (then) Commissioner Kear committed a criminal offence of taking detrimental action against [REDACTED] substantially, in reprisal for her making a Public Interest Disclosure, contrary to Section 20 of the PID Act (ICAC Report page 24). The Commission expressed the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Kear for an offence under Section 20 of that Act in taking detrimental action in reprisal for a person making a public interest disclosure. The Commission also stated that it was of the opinion that the Minister of Police and Emergency Services should give consideration to the taking of action against Mr Kear for the disciplinary offence of misconduct in relation to his termination of [REDACTED] employment with a view to his dismissal (ICAC Investigation Report page 24).
79. If Mr Kear believed any of the persons referred to in paragraph 35 could give relevant evidence and should be before the public inquiry then he could have availed himself of the procedure under paragraph 19 of the Commission's then Standard Directions for Public Inquiries (July 2013). The Directions provided that:

'Any person wishing to have evidence of a witness or witnesses placed before the public inquiry must notify the Commission of the name of the witness, and provide a signed statement containing their expected evidence. Commission

staff may interview the witness, and take further statements if necessary. Counsel assisting will decide whether or not to call the witness. An application may be made directly to the presiding Commissioner to call the witness only after the above procedure has been completed, and counsel assisting has refused to call the witness.'

80. This was not a case of a person appearing before the Commission unrepresented. Eric Oates appeared for Mr Kear at the public inquiry. He is an experienced legal practitioner who has appeared before the Commission on a number of occasions. He did not seek to have any further witnesses called on behalf of Mr Kear or tender any additional documentary material. This may well have been because the view was taken that the necessary material to support Mr Kear's version could be found in exhibit 1 and/or 2. Whatever the reason, there was no perceived or stated reason to have any of the above-mentioned persons called at the public inquiry.
81. No complaint was made in the course of the public inquiry that relevant witnesses had not been called.
82. At the conclusion of the public inquiry, written submissions were made on behalf of Mr Kear. The submissions dealt with Mr Kear's reasons for dismissing ██████████, they also identify Mr Kear's knowledge of the relevance of Messrs Clarke (paragraph 9), Murphy (paragraphs 11 and 16), Connellan (paragraph 15) and Mr Mullins (paragraph 15) to his version of events. A copy of the written submissions is enclosed.
83. No complaint was made in the written submissions that relevant witnesses were not called and no submission was made that any additional evidence, whether by way of further witnesses or otherwise, should be adduced before the Commission prepared its report.

Provision of material to the DPP

84. Commission officers preparing the brief of evidence for consideration by the DPP concentrated on the elements of the offence, namely that ██████████ was a public official, who had made public interest disclosures and that her employment was terminated by Mr Kear. Under the PID Act, if those elements are proven, the onus of proof would shift to Mr Kear to establish that, on the balance of probabilities, ██████████ termination was not substantially in reprisal for her public interest disclosures.
85. The brief of evidence served on the DPP by the Commission included a statement by Commission officer Darren Curd annexing all the documents tendered as Exhibits 1 and 2 in the public inquiry. The brief also included a statement by ██████████ that Mr Kear had engaged Mr Clarke to act as a conciliator between ██████████ and ██████████ and attached emails from Mr Kear to that effect. Taken together, this material identified any potential exculpatory evidence as well as possible witnesses who could provide that evidence.

86. Under the Memorandum of Understanding between the DPP and the Commission, the Commission is required to only provide the DPP with evidence in admissible form. Although statements obtained by the Commission were included in the brief, records of interview, which were not in admissible form, were not included. Thus, the interviews with Messrs Farmer, Mullins, Hanckel, Murphy and Connellan were not included in the brief.
87. The DPP did not raise any requisitions requesting the Commission obtain any further evidence relating to Mr Kear's reasons for dismissing [REDACTED]
88. At the relevant time, there was no requirement to complete a disclosure certificate for summary matters pursuant to s 15A of the *Director of Public Prosecutions Act 1987*. Accordingly, the DPP was not put on notice nor required to be put on notice of all the material held by the Commission. I note that after the decision in Kear, and prior to the recent legislative amendments requiring provision of a disclosure certificate in summary matters, the Commission agreed with the DPP to provide disclosure certificates in summary matters.
89. On 31 August 2015, prior to the Local Court hearing, Mr Curd emailed the DPP lawyer with carriage of the matter and advised her that he had been contacted by Mr Murphy, who wanted a copy of the transcript of his interview as he anticipated that he might be called by Mr Kear at the trial. Mr Curd attached a copy of Mr Murphy's transcript of interview in the email. Later that day he was sent an email by the DPP lawyer that she had not read the interview and was not sure whether she was permitted to do so. The Commission has no record of whether the DPP lawyer did read the interview.
90. A brief of evidence was served on Mr Kear's solicitor on 27 April 2015. It contained essentially the same documents as in the brief to the DPP. The brief included Mr Curd's statement annexing the material in Exhibits 1 and 2 and [REDACTED] statement.
91. Once again, Mr Kear would have been aware of the involvement of Messrs Farmer, Mullins, Hanckel, Murphy, Connellan and Clarke independent of the contents of any brief served on him. He was always in a position to call any of them as witnesses on his behalf and, in the cases of Mr Farmer, Mr Clarke and Mr Mullins, he did so.
92. It is also relevant to consider the provisions of the *Criminal Procedure Act 1986*. Chapter 4 of that Act deals with the procedure for the prosecution of summary offences. Section 183(2) provides:

'The brief of evidence is, unless the regulations otherwise provide, to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence and is to include:

- (a) written statements taken from the persons the prosecutor intends to call to give evidence in proceedings for the offence, and*
- (b) copies of any document or any other thing, identified in such a written statement as a proposed exhibit.'*

93. The brief of evidence served on Mr Kear complied with s 183(2) in that it consisted of the documents regarding the evidence that the DPP, as prosecutor, intended to adduce in order to prove the offence and comprised statements in admissible form.

PART F

The Magistrate's reasons

94. The Magistrate's analysis of the evidentiary material is principally to be found in paragraphs [86] – [111] of his decision. Under the sub-heading "*External Leadership Training*" (p 17) the evidence of Mr Farmer is dealt with at [86] – [92], the evidence of Mr Clarke at [93] – [101], the evidence of Mr Morrow at [102] – [103]. Issues as to the troubled relationship between [REDACTED] and criticisms of [REDACTED] her conduct and Mr Kear's conduct and involvement in such issues are all referred to in the evidence of those witnesses.
95. Under the sub-heading "*External Advice*" the evidence of Mr Greg Mullins is referred to with extracts from that evidence [104] – [110].
96. The evidence given by Mr Kear in the Local Court proceedings as to his reasons for terminating [REDACTED] employment, as reflected in the evidence referred to by the Magistrate, may be compared and contrasted with the reasons he gave to the Commission in the public inquiry. These may be ascertained from the material recorded in chapter 3 of the Commission's report, '*The termination of Deputy [REDACTED] employment*' (pages 21-24). Commissioner Ipp there set out the reasons advanced in the public inquiry by Mr Kear and the basis upon which the Commissioner rejected his account.

PART G

Magistrate Grogan's criticisms at [14], [18]-[19], [28] and [31] of the costs judgment

97. You have asked the Commission to address certain criticisms in Magistrate Grogan's judgment.
98. The comments at [14] and [18] to [19] of the "Costs Judgment" go to the question as to whether the investigation was conducted in an unreasonable or improper manner.

As a preliminary point, I note that the Court's criticism of the Commission's investigation was made in the context of an application that the DPP pay the defendant's costs. For the reasons set out below, issue is taken with the Magistrate's "comments". Those comments are with great respect, both incorrect and misconceived.

Records of Interview

99. The Commission conducted four interviews resulting in four records of interview, which were not served or otherwise utilised for the purposes of the Commission's investigation.

Should you wish to be supplied with any or all records of interview I, of course, will supply the same forthwith.

100. As earlier stated, it is submitted that the records of interview do not contain material that may be said to exculpate Mr Kear in relation to the issue of alleged reprisal action. They do confirm what was common ground – serious issues had been raised by [REDACTED] and from that time the relationship between [REDACTED] and I [REDACTED] remained dysfunctional and that they arose by reason of [REDACTED] having made the complaints against or involving [REDACTED]
101. I enclose copies of the records of interview:

Record of interview with Scott Hanckel: 27 September 2013

Scott Hanckel held the position of Assistant Director, Operations where he was primarily in charge of the Communications Centre of the SES. When asked as to his understanding of the reasons for the dismissal of [REDACTED], he said as to his knowledge: *'Pretty much limited to what Murray has told us directly which is that he lost confidence in her to support him, and he didn't go into the details around that in his interaction with us as Managers, but you know there is obviously discussion around and so my perception is that he felt that she was no longer able to support him in his command of service. The rest was pure gossip... (page 4) He said that he attended a conference in Port Macquarie on 7 May 2013.'*

He said *'...most people thought it was a turf war; that was the general consensus of the group. Murray corrected us on that, he said. . . I don't think this is about turf I think this is about ideology but these two are in conflict. And he said something which I found very dramatic at the time, he said, I'm doing things to help these people sort this out, and if they haven't sorted this out in a few months time then I may well need to have two new Deputy Commissioners'.* (page 6).

102. He said that on 17 May he arranged to speak with [REDACTED] and told her that he thought he should understand where she was coming from a bit better and what her strategies or priorities were. He said that he was disappointed with his meeting with her commencing with her explaining to him that she had not been able to think strategically because she had been too busy dealing with heritage issues. He added that he wanted to talk to her about strategy but she was not in that space. (page 7).
103. He said that he saw Mark (Morrow) before [REDACTED] dismissal. He asked him to send him a file note in reference to the fact that he had seen [REDACTED] recently. He sent him a file note setting out recollections "in general terms". (page 8).

104. He said that she perceived ██████████ to be incompetent and that had created "the legacy issues" but he did not seek any details from her. (page 9).
105. He said that in conversation with her ██████████ referred to the directors as "*a bunch of gutless bastards*". (page 10).
106. He said that it was not obviously a good atmosphere going on between ██████████ and ██████████. He told Mr Kear that he had spoken to ██████████ and how the conversation had unfolded. Mr Kear said ██████████ had intimated to him that she was not happy with ██████████ in the sense that he thought he did, or had not done, something that should be the subject of the ICAC. His note to Mark Morrow was sent on 17 May 2013.
107. In the conversation with Mr Kear, Mr Hanckel said that Mr Kear said that if he could not '*... get these two guys working together he was going to look at options of sacking them*'. (page 16).
108. Mr Hanckel said "*that he felt surprised at the statement, that Mr Kear had come across as a very measured sort of individual, did not show emotion but on this occasion he was showing a new side – the Director's side of him*'." (page 16).
109. He said that having two Deputy Commissioners was causing conflict (page 17).
110. He said that Mr Kear said that he did not think it was "*a turf war*". He thought that it was a discussion around ethics. (page 17).
111. He said that after the Port Macquarie meeting he understood that there was conflict between ██████████ and ██████████ and it was an open secret '*that there was no ill will between them*'. (page 18).
112. He said that during the Port Macquarie conference that James M... said that he wanted to talk about "the turf war" between the two Commissioners. Mr Hanckel said that he then said he agreed and that there was clear conflict happening. (pages 23-24).
113. Mr Hanckel then said that there was discussion around the issue and that he had not seen the like of such discussion before. (page 24).

Record of interview with Mr Mullins: 23 September 2013

114. He joined the service on 31 March 1978 and was appointed Commissioner of NSW Fire Brigade on 4 July 2003.
115. Mr Kear and ██████████ in earlier periods directly reported to Mr Mullins. Mr Mullins said he considered them both friends and work colleagues.
116. ██████████ reported to him allegations that had been made by ██████████. He was then Acting Commissioner. He felt that there had been a breakdown in the relationship between them.

117. Mr Mullins said that he said to ██████████ *it'll need to be fully investigated and independently investigated and my understanding is that IAB Services conducted the investigation at some stage . . .*
118. Mr Kear was very concerned about the relationship and said to them that if they could not work it out their relationship then eventually both would have to go.
119. He heard that the reports/allegations had been made by ██████████ and his *' . . . understanding was that Murray had had that looked at by the Department of Finance and Services . . . and that IAB Services . . . it didn't constitute anything that he'd need to notify ICAC about or anyone else'*. (pages 2-3).
120. Mr Mullins said that he had said that ██████████ believed that he was not dealing with matters because of his friendship. That he was distressed about that and that he was concerned that ██████████ was quite confronted by the allegations – they were as a result of both of them not working at the relationship – the two direct reports were in quite a dysfunctional relationship at work. (page 4).
121. He said that there was an occasion earlier in 2013 in Canberra where Mr Kear was quite distressed and he mentioned, he thought IAB, was investigating “credit card fraud”. Then in May 2013, Mr Mullins was aware that ██████████ at the Australian Institute of Police Management had publicly stated that Mr Kear was incompetent and couldn't make decisions. He said that Mr Kear had heard that she had talked to staff saying that the Deputy Commissioner ██████████ as corrupt and was *'quite upset at how things were going'*, he didn't know quite how to deal with it and it might have to come to termination *'he said that he agreed with him'*.
122. He said that he had a couple of conversations with ██████████ – suggested that he swallow his pride and get over it and work with ██████████ – he ██████████ believed that he had been wrongly accused.
123. He said that the Chief Superintendent, Malcolm Connellan made a file note on 27 May 2013 concerning a meeting at which ██████████ had said things in relation to Mr Kear. He gave a note to Mr Mullins.
124. He was asked, whether based on his experience that if some officer had made a similar “complaint” how would he deal with it? He said that he would speak with the person face to face and give the person an opportunity to explain themselves and say *'what's this all about?'* and try to understand why they felt they had to speak out like that. (page 12). If necessary to counsel them about appropriateness of where they talk about certain things. He said that he was *'a bit shocked/surprised when Mr Kear told hold him that he had terminated ██████████ services'*. (page 13).

Record of interview with Greg Murphy: 27 September 2013

125. Greg Murphy was Regional Controller, SES, from October 2000. He was made permanent from November 2004. He said that he felt that there was a power struggle

between [REDACTED] and [REDACTED]. He said that [REDACTED] had said to him – people are encouraging me to go to the ICAC. Murray won't do anything about . . .

126. In addition to that, she said, *'I keep telling Murray if he is going to sack me, sack me, get it over and done with. . .'* That was said to be said in relation to *'concerns about*

127. He said that there was talk amongst staff in respect of the *"open warfare"* between [REDACTED] and [REDACTED] – *"a power struggle"*. (pages 11-12).

128. Reference was made to issues involving Mr [REDACTED] and [REDACTED] as his former supervisor *'was pretty well under attack for the clear breaches as described on multiple occasions by [REDACTED] of [REDACTED] breaches . . . [REDACTED] was on the back foot'* as a result.

129. [REDACTED] had mentioned to him about *'roof racks on his car, electric brakes – to tow his caravan'* (references are to [REDACTED]. He could not recall any other details. (page 17).

130. He said that he made notes in respect of the whole senior level of the organisation being at risk – *'we got [REDACTED] and [REDACTED] at each other . . . Murray's defending [REDACTED] refuses to do anything about it . . . so to me it was a realisation that we've got a Commissioner, two Deputy Commissioners who are actually embroiled in this that the whole top level of the organisation could be at risk. There's mention of ICAC in the car – there's mention of wrongdoing; there's a whole range of things. . .'* (pages 21-22).

He said that he later decided to speak to Mr Kear on the phone – he said that [REDACTED] had made a number of statements to him and that he considered the situation was of particular risk to the organisation and to him (Kear) . . . *'basically it was what we do we do now? . . . That's when he decided to speak to Kear which he did by phone – he listened. . . didn't say a lot back while I explained (to Kear) that . . . he said something along the lines of "I don't need to defend [REDACTED] against all these allegations but I can tell you that each of these things have been raised. They've been sent to IAB. IAB have identified issues and mistakes have been made, that they are not corrupt behaviours. There was no corrupt behaviour in these mistakes. There was no intent – there was no gain or something from that behaviour . . ."*' (page 24).

131. He thought that Mr Kear may have mentioned probably a dozen other people who have had the same conversation with [REDACTED] and that all of the allegations had gone to IAB and they have responded that there was no corrupt behaviour, even though mistakes may have been made. (pages 23-24).

Mr Murphy's account suggests that the above conversation took place on the Monday, the day before Mr Kear dismissed [REDACTED].

Failure to call witnesses

132. In relation to the alleged failure to interview or call at the public inquiry witnesses which Mr Kear considered persons who could give relevant evidence, the following matters are noted.
133. As stated above, the Commission did not conduct an interview with Mr Peter Clarke.
134. Although there was no record of interview undertaken with Mr Clarke, before the Local Court his evidence went to his attempts to assist to conciliate, to bring the relationship problems between ██████████ and ██████████ to an end. In the circumstances of Mr Kear's decision not to act on the complaints and have them independently investigated, it was unsurprising that Mr Clarke was unable to resolve or remove the problem that arose out of the complaints made by ██████████. Whilst ever Mr Kear maintained his refusal to have his friend investigated and whilst ever ██████████ persisted with her complaints the tension between her and ██████████ was not going to end.
135. As with the material contained in the four records of interview referred to above, Mr Clarke's evidence could not and did not provide any basis to justify or provide a reasonable ground for Mr Kear's own conduct in terminating ██████████ employment in circumstances of Mr Kear's failure to act (determined to have been 'corrupt conduct' within the meaning of the ICAC Act) and where his failure contributed to the dysfunctional relationship.
136. In fairness to Mr Clarke, it was not his role to examine the factual matters that were motivating Mr Kear nor to undertake a full investigation into the facts subjacent to the complaints that had been made against ██████████
137. As stated above, the reason for not providing the records of interview to the DPP was that they were not in admissible form. As required by the DPP, only material in admissible form was included in the briefs for the DPP and Mr Kear. The briefs did however include material identifying witnesses who could potentially provide any exculpatory evidence (that is presuming any such evidence existed).
138. The finding of the Local Court that there was a failure by the prosecutor to disclose the records of interview with the abovementioned persons, it is submitted with respect, was misconceived and erroneous. As stated above, the interviews did not advance Mr Kear's position in relation to any of the fundamental matters upon which findings of corrupt conduct were made by Commissioner Ipp (including in particular the finding in respect of Mr Kear's decision to terminate ██████████ employment).
139. This was not in any event a case of the prosecution withholding potentially exculpatory evidence the existence of which the defendant was unaware. Importantly and for the reasons given above, Mr Kear was aware of Messrs Mullins, Connellan, Farmer, Hanckel, Murphy and Clarke and the substance of the evidence they could give in any prosecution proceedings. Despite this knowledge, he did not request the DPP to call any of those witnesses or make any submission to the DPP that the proceedings be discontinued on the basis of their evidence.

140. The further statement made by the Local Court Magistrate '*...the prosecutor failed to provide important records of interview of major witnesses to the Crown and these, I find, suggested that the applicant might not be guilty*' was also, for reasons set out above, with respect, wholly misconceived. Simply put, the records of interview did not in fact support the proposition that they "suggested" the accused might not be guilty. The records of interview (summarised above) are, as I have indicated, available for inspection if required.
141. Finally the Magistrate's finding that it would appear that Mr Clarke's role in the resolution process was "disregarded" by the investigators is incorrect. As earlier noted, the Commission investigators did not interview Mr Clarke. For reasons stated above, whilst ever the complaints made by N [REDACTED] remained uninvestigated, the friction and the tension between [REDACTED] and [REDACTED] would continue despite any efforts by Mr Clarke. Mr Kear, in breach of his duty as Commissioner, in refusing to investigate the complaints was himself at the very epicentre of the toxic culture referred to in the evidence. Mr Clarke, of course, was not involved in any attempt to confront or deal with Mr Kear's deliberate failure to investigate the complaints made against [REDACTED] [REDACTED] or the effect that such failure had upon the situation he was asked to resolve.
142. At [28] the Local Court found that the proceedings were instituted without reasonable cause and that the failure of the prosecutor to disclose the interviews to Mr Kear was improper. Although the "prosecutor" was the DPP, I assume the Court was referring to the Commission, when it wrongly referred to the DPP with respect to the failure to disclose. As the DPP did not have the relevant records of interview (other than that of Mr Murphy), the DPP was not in a position to disclose them to Mr Kear.
143. In determining whether there was a sufficient basis to institute proceedings it is, of course, necessary to consider the material that was available to the DPP's office. There had been very strong and serious adverse findings made by Commissioner Ipp against Mr Kear based on cogent evidence. There has been no suggestion that the evidence called and adduced before the Commission in the public inquiry was inadequate or any deficient. No criticism was or could be made in relation to the Commissioner's fact-finding or conclusions. In addition, an assessment of the evidence had been undertaken by the ODPP. The advice of the ODPP was that there was sufficient evidence to prosecute Mr Kear. Finally, there was considerable evidence that established Mr Kear's conduct in protecting [REDACTED] by his deliberate failure to have the complaints investigated. These factors were not considered by the Local court.
144. The failure to disclose the records of interview to Mr Kear before the subpoena was issued has been addressed above.
145. In considering the Magistrate's comments at [28] of his Honour's "Cost Judgement" it is to be noted that the Magistrate found a prima facie case to answer this finding in itself indicates that the proceedings were not foredoomed to fail.

146. At [31] the Magistrate found that the “prosecutor” had unreasonably failed to investigate a relevant matter by failing to provide evidence from Mr Clarke or to provide records of interview to the DPP.

As discussed above, the evidence potentially available from Mr Clarke and the other witnesses referred to was within Mr Kear’s knowledge and did not in any event “exculpate” Mr Kear. As is clear from the Commission’s report that, the Commissioner had considered alternative reasons for ██████████’s dismissal and had, for the reasons set out in the report, dismissed those reasons.

PART H

Letter to the Temora Independent

147. On 7 October 2016, the Temora Independent published an article in which it reported that Mr Kear ‘...was recently found innocent of all corruption charges...’ That assertion was, at least potentially, misleading as it suggested that the corrupt conduct findings had been successfully challenged by Mr Kear. Although Mr Kear had been found not guilty of an offence under s 20 of the PID Act, he had not been “found innocent” of either of the two sets of corrupt conduct findings which stand.

I understand that, in those circumstances, Commissioner Latham decided it was appropriate to inform the editor of the paper that the corrupt conduct findings stood. To that end, an email was sent to the editor.

PART I

Summation

148. The Magistrate’s finding that the Commission’s investigation was conducted in an “unreasonable” or “improper” manner by reason of the failure to serve records of interview and a failure to interview Mr Clarke rested upon an assumption, not established, namely, that these two matters could or would have resulted in evidence becoming available that exculpated Mr Kear on the issue of reprisal action. Any such assumption was, for reasons discussed above, devoid of any evidentiary support. The Magistrate’s criticism, it is contended, with respect was, contrary to the evidence before the Commission and the Local Court.
149. The fact of a dysfunctional relationship or a “toxic culture” between ██████████ and ██████████ was not, in the Local Court proceedings, a matter of issue or in controversy as the Crown emphasised. The central issue for a determination concerned Mr Kear’s motivation and reason or reasons for terminating ██████████ employment.
150. It is submitted that there was no evidence that supported the proposition that ██████████ was dismissed for misconduct completely unrelated to the complaints made by her against ██████████. Mr Kear’s breach of duty in his capacity as Commissioner of the SES in his failure to investigate the complaints against ██████████ was ongoing throughout the unhappy episode up to the point when ██████████ employment was being terminated. His failure to take appropriate action, as Commissioner Ipp,

determined was for an unacceptable and improper reason, namely, the protection of [REDACTED]

151. Mr Kear's failure to act as he should have acted ensured that the relationship issue would not go away. The evidence well-supported the Commissioner's finding (at p 24) that Mr Kear's dismissal of [REDACTED] was an act of reprisal and that dismissal was chosen:

- As the way to rid him (Mr Kear) and the SES of the ongoing dysfunction;
- As diverting attention away from the allegations of misconduct raised by [REDACTED] about [REDACTED]

As protecting [REDACTED] (p 24).

The Commission in the latter respect observed:

... Commissioner Kear publicly stated that he was considering the dismissal of [REDACTED] or [REDACTED] or both as a way of resolving the conflict of personality and "values disconnect" that had affected their relationship. But references by Commissioner Kear to his deputies experiencing relationship problems were misleading. The truth of the matter is that [REDACTED] had exposed issues about [REDACTED] integrity and competence that required investigation. In the Commission's view, Commissioner Kear disingenuously framed the issue as a personality conflict and "values disconnect". He did so as a means of diverting attention from the allegation of misconduct raised by M [REDACTED] about [REDACTED] and from [REDACTED] concern that his response to the allegations was inadequate. This was a further example of Commissioner Kear's general attempt to exculpate his friend, [REDACTED] from allegations of "misconduct." ' (ICAC Report page 24).

152. It is submitted that it is clear on this basis that the termination of [REDACTED] employment produced a benefit to both [REDACTED] and to Mr Kear himself for the reasons identified by the Commissioner. Any explanation as to how the Local Court came to the opposite conclusion on the issue as to reprisal action to that of Commissioner Ipp may be wholly or partly explained by the learned Magistrate's failure to consider, refer to or have regard to a relevant consideration namely the issue in the case as identified in the prosecution submissions (see paragraph 25 above). That issue was at the very centre of the relationship breakdown between [REDACTED] and [REDACTED] being Mr Kear's ongoing and improper refusal to investigate and the consequential or "knock-on" effect that produced, vis-à-vis the [REDACTED] relationship. There is no explanation by the Magistrate as to why that issue was not addressed or considered by him either in his primary decision or in the "Costs Judgment".

Concluding remarks

I regret the length of this response but consider that it is essential that the matters arising in this case are dealt with in detail.

The Magistrate with respect made, in the course of a costs judgment a number of serious findings, which, with respect, were erroneous and misconceived. A critical failure in fact – finding by the Local Court lay in the failure to bring into consideration Mr Kear's conduct in not

investigating the complaints as he was obliged to do, his (improper) reason for not doing so and the effect that that had on the relationship between [REDACTED] and [REDACTED]

The corrupt conduct findings ultimately made by the Commission, as noted above, fell into two quite separate categories. The evidence before the Commission in relation to both categories, was cogent and compelling.

The Crown case in the proceedings for an offence under s 20(1) of the *PID Act* was a strong one.

The Magistrate's findings that the investigation was conducted in an unreasonable or improper manner were based on a claimed failure by the Crown to serve records of interview and conduct an interview with Mr Clarke. With respect, for the reasons discussed above, those findings were both wrong in fact and contrary to the evidence.

Enclosed are:

1. Copy of the *Commission's Report*, May [REDACTED]
2. Copy of the Magistrate's Primary Decision.
3. Copy of the Magistrate's Costs Decision.
4. Copy of written submissions on behalf of Mr Kear.
5. Copies of records of interview with Scott Hankel, Mr Mullins and Greg Murphy.
6. Copy of the Temora Independent article and the Commission's response.

Should you require any further information or documents I will ensure that such is provided to you forthwith.

Yours faithfully,



The Hon. Peter Hall QC
Chief Commissioner

6 March 2018