Office of the Inspector of the
Independent Commission Against Corruption

Report concerning a Complaint by Mr John McGuigan, Mr Richard Poole, Cascade Coal Pty Limited, Mount Penny Coal Pty Limited and Glendon Brook Coal Pty Ltd about the conduct of the Independent Commission Against Corruption in Operation Jasper

(Special Report 18/05)

Office of the Inspector of the
Independent Commission Against Corruption

21 June 2018

Our ref: C26 2015 – 18/05

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 John McGuigan, Mr Richard Poole, Cascade Coal Pty Limited, Mount Penny Coal Pty Limited and Glendon Brook Coal Pty Limited about the conduct of the Independent Commission Against Corruption in Operation Jasper*.

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

Yours sincerely,

B. R. McClintock

Bruce R McClintock SC
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") and former ICAC Commissioner the Hon. David Ipp AO QC by Mr John McGuigan, Richard Poole, Cascade Coal Pty Limited, Mount Penny Coal Pty Limited and Glendon Brook Coal Pty Limited (collectively, "the Complainants")[1] concerning two aspects of the Commission's conduct of Operation Jasper. That complaint is stated in a letter dated 30 October 2017 from Tress Cox lawyers, the Complainants' then solicitors, the attachments thereto and in earlier correspondence with my Office.

Executive Summary

2. In its July 2013 Report on Operation Jasper[2], the ICAC found that Mr McGuigan engaged in corrupt conduct in the following three respects:

   a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

   b) telling Mr Levi that he (Mr McGuigan) would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement, and

   c) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

   with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.[3]

3. It also found that Mr Poole had engaged in corrupt conduct in the following respects:

   a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

   b) telling the IBC that he (Mr Poole) was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him

   b) arranging for the Obeids to be extracted from the Mount Penny joint venture through

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[1] I have also received another complaint from Mr Poole as set out in letters dated 23 February and 30 September 2015 from solicitors also acting for him, Messrs Horton Rhodes. That complaint raises different issues from those raised by the Complainants here and I will deal with it separately and at a later date.

[2] Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others, July 2013 p 152 ("Operation Jasper Report").

[3] "IBC" is a reference to the Independent Board Committee of White Energy Company Limited which was in negotiations to purchase the shares in Cascade Coal Pty Limited. The IBC was formed because of perceived conflicts on the part, *inter alia,* of Mr McGuigan to assess the purchase. Mr Cubbin was Chairman of the IBC. Mr Levi was divisional director of corporate finance at an investment advisory firm involved in the transaction which was controlled by Mr Poole who was also, like Mr McGuigan, an investor in Cascade.

arrangements involving Coal & Minerals Group and Southeast Investments

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

4. The Supreme Court ([2014] NSWSC 1018) and then the Court of Appeal ([2016] NSWCA 143) declined to interfere with those findings. The High Court refused an application for special leave to appeal.

5. The Complainants initiated their complaint in April 2015. I attach a letter dated 30 October 2017 (including schedules) from their solicitors which summarises the complaint. It will be necessary to set out the precise terms of some parts below. For present purposes, it is sufficient to say they complain about two aspects of Operation Jasper. The first concerns what they assert to be inappropriate interactions between the Commission and the Executive Government of New South Wales and the second what they assert to be a denial of procedural fairness during the conduct of the Operation Jasper enquiry.

6. In my opinion, these matters do not amount to "abuse of power, impropriety and other forms of misconduct" nor to "maladministration" as those terms are used in section 57B of the ICAC Act. Accordingly, I have decided that this complaint should be dismissed.

7. This Report sets out my reasons for that decision.

Background-ICAC Operation Jasper

8. Operation Jasper concerned, principally, the circumstances surrounding a decision made in 2008 by Mr Ian Macdonald, then Minister for Mineral Resources, to grant a coal exploration licence in the Bylong Valley, and whether that decision was influenced by his parliamentary colleague, Mr Edward Obeid, who was a member of the Legislative Council and a former Minister in the Carr Government, or by members of the Obeid family. The licence in question was known as the Mount Penny Tenement.

9. As part of its investigation, the ICAC conducted a public enquiry over 45 days between 12 November 2012 and 20 May 2013. The first Operation Jasper Report titled *Investigation into the Conduct of Ian Macdonald, Edward Obeid senior, Moses Obeid and Others* was, as stated above, published in July 2013.

10. The facts found by the ICAC in the Jasper Report are both lengthy and complex and many do not concern Mr McGuigan, Mr Poole or the corporate Complainants. What follows is a summary of the background to assist in understanding the relevant finding against Mr McGuigan and Mr Poole.

11. The Commission found that Mr Macdonald, as Minister for Mineral Resources, had directed that a mining tenement known as Mount Penny be created to benefit the Obeids, and not for any legitimate public purpose. The Obeids sought to submit an expression of interest over Mount Penny and Glendon Brook tenements as part of a joint venture with Monaro Mining

NL and their company Voope Pty Limited. Monaro made bids for exploration licences for each of the Mount Penny and Glendon Brook tenements and subsequently sold to Voope all the shares in the subsidiary which had been intended to apply for the exploration licences. Before the expression of interest process was completed, Mr Macdonald reopened it as a favour to Travers Duncan, a wealthy investor. That permitted Cascade Coal, in which Mr Duncan had an interest, to lodge a bid for Mount Penny and Glendon Brook. The other investors in Cascade Coal included Messrs McGuigan, Poole and Atkinson. The Obeids reached an agreement with Cascade Coal to enter into a joint venture, using an Obeid controlled entity, Buffalo Resources Pty Limited. Those negotiating on behalf of Cascade Coal, including Messrs McGuigan, Poole and Atkinson knew that the Obeids were the party with whom they were entering into a joint venture. One aspect of the joint venture involved Buffalo Resources arranging the withdrawal of the Monaro Mining bids with respect to the Mount Penny and Glendon Brook tenements. That withdrawal resulted in Cascade Coal's bid being successful.

12. The specific findings made by the ICAC concerning Mr McGuigan and Mr Poole are set out in the following section of this Report.

13. In its December 2013 Report *Operations Jasper and Acacia-Addressing Outstanding Questions,* the ICAC, amongst other things, recommended that the New South Wales Government consider enacting legislation to expunge the authorities for the Mount Penny and Glendon Brook tenements. The ICAC notes at page 20 of that Report that any expungement could be accompanied by a power to compensate any innocent person affected by it.

14. Subsequently, Parliament enacted legislation that had the effect of expunging the authorities for the Mount Penny and Glendon Brook tenements without compensation. See *Mining Amendment (ICAC Operation Jasper and Acacia) Act 2014 No 1.*

Background—ICAC Findings involving Mr McGuigan and Mr Poole

15. In the first Jasper Report, the ICAC included the following findings concerning Mr McGuigan:

The Commission is satisfied that John McGuigan knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which John McGuigan was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

b) telling Mr Levi that he (John McGuigan) would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement

c) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement, and that John McGuigan thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

John McGuigan's conduct as set out in a) to c) above, in each case with the intention of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve company violations and therefore comes within s 8(2)(s) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found in relation to the deliberate failure to disclose information to the IBC and relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement in the Mount Penny tenement were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that John McGuigan committed criminal offences under s 184(1) of the Corporations Act 2001. This is because, as a director of White Energy, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of that company or for a proper purpose by withholding information about the Obeid family involvement so that the value of his holding in Cascade would not be adversely affected.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that John McGuigan committed a criminal offence of obtain a financial advantage by deception contrary to s 192E(1)(b) of the Crimes Act 1900. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

(The Commission then set out its findings against Mr McGuigan in the terms set out in [2] above).

16. In the first Jasper Report, the ICAC included the following findings concerning Mr Poole:

The Commission is satisfied that Mr Poole knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which Mr Poole was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

b) telling the IBC that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him

c) arranging for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement and that Mr Poole thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Poole's conduct as set out in a) to c) above with the intention in each case of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8(2) of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve fraud and therefore comes within s 8(2)(e) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a)of the ICAC Act that if the facts it has found, in relation to the deliberate failure to disclose information to the IBC and telling the IBC that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him, were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Poole committed criminal offences

under s 192E(1)(b) of the Crimes Act 1900. The advantage, in each case, was to prevent the loss in the value of his holding in Cascade should the sale to White Energy not proceed or if the NSW Government found out about the Obeid involvement and took steps to cancel the exploration licence or announced that it would not grant a mining lease.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to Mr Poole arranging for the Obeids to be extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Poole committed a criminal offence of obtain a financial advantage by deception contrary to s 192E(1)(b)of the Crimes Act 1900. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement. (The Commission then set out its findings against Mr Poole in the terms set out in [3] above).

The Complaint

17. In their solicitors' letter dated 30 October 2017, the Complainants raise, as I have indicated above, two general matters which they assert amount to abuse of power, impropriety, misconduct or maladministration within the meaning of section 57B(1)(b) and (c) of the ICAC Act:

    a) inappropriate interaction between the ICAC Commissioner and the New South Wales Government;

    b) denial of procedural fairness.

18. I will summarise the complaint. In August and September 2012, the then Minister for Planning received legal advice that he could not lawfully suspend or terminate the assessment of the exploration licences considered in Operation Jasper and could not suspend or terminate the Cascade Coal projects. In January 2013 then Premier Barry O'Farrell "interacted with Commissioner Ipp welcoming recommendations concerning exploration licences and leases and amendments to the *Mining Act*".

19. Further, the Complainants assert that Commissioner Ipp, while knowing of contrary legal advice, obtained further advice in February 2015 to support his recommendation that the exploration licence in question be cancelled. The Complainants assert that the ICAC never suggested to them that those licences might the subject of a recommendation for cancellation and that the Commission's mandate is to conduct an enquiry and report to the Presiding Officers of each House of Parliament pursuant to section 74 of the ICAC Act and that the ICAC should not "report" to the government as occurred in this case.

20. The proposition appears to be that it was improper for the Commissioner to allow the ICAC to be used by the Government to justify legislative intervention designed to bypass existing

statutory procedures to determine the grant of exploration licence and mining leases.

21. During the enquiry, so the Complainants assert, there were dealings between Commissioner Ipp and Premier O'Farrell and other Government officials concerning the possible suspension or termination of the Mount Penny mining tenement and cancellation of the Exploration Licence 7406. The interference by the Commission in the Executive Government gives rise, it is suggested, "to the inference that the inquiry was not free and independent from politics such that there can be no questions as to its efficacy or probity."

22. As to the complaint that the ICAC failed to give procedural fairness, the principal assertion appears to be that the Commission did not provide proper particulars under section 31(6) of the ICAC Act to witnesses and made adverse findings against them despite that failure. Section 31(6) provides:

A person required to attend a public inquiry is entitled to be informed of the general scope and purpose of the public inquiry and the nature of the allegation or complaint being investigated before or at the time the person is required to appear at the inquiry.

23. Further, the Complainants rely upon the following matters in support of this aspect of the complaint:

a) the Commission failed to investigate exculpatory evidence and to disclose such exculpatory evidence to the witnesses before it;
b) it failed to permit cross examination of witnesses as to their credit;
c) it refused to allow cross examination on critical issues; and
d) it used the public enquiry to destroy reputations of persons appearing before it.

The Commission's Response

24. I invited the Commission to respond to the complaint. It did so by letter dated 12 December 2017 which is also attached to this Report.

25. In relation to the allegation that the interactions with Executive Government amount to maladministration, the Commission points out that on 30 January 2013 the then New South Wales Premier the Hon Barry O'Farrell MP wrote to the Commission asking, inter alia, whether the Government should take any action with respect to licences or leases under the *Mining Act* relevant to the Operation Jasper investigation and, if so, what action.

26. Following this, on 1 May 2013 the Commission invited Counsel Assisting and all interested parties to provide written submissions to the Commission on whether, if it found any corrupt conduct occurred in connection with the Mount Penny, Yarrawa and Glendon Brook tenements, what recommendations might be made by it regarding the following:

a) whether the Government should do nothing about the existing Mount Penny tenement (and the other two tenements) and let matters take their course in accordance with the

existing statutory regime;

b) whether the State should rely on the existing statutory regime and any other rights available to it at law to terminate the Mount Penny tenement (and the other two tenements) and any other existing mining title or development application ancillary to any of those tenements, which had been brought into existence in consequence of the grant of any of those tenements;

c) whether the State should enact legislation entitling the Minister to terminate any exploration licence and any other existing mining title or development application ancillary to such licences or which had had been brought into existence as a result of the grant of such a licence, on public interest criteria

d) whether the State should enact legislation providing that the public interest criteria referred to in (c) above should include an opinion by the Minister that corruption or fraud or knowledge that the Minister who had granted the title in question had breached his duties.

27. In response to the request, Counsel's advice of 10 December 2013 was published as appendix 1 to the December 2013 Report. In that Report, the Commission recommended that the New South Wales Government consider enacting legislation to expunge the authorities for the Mount Penny and Glendon Brook tenements. The reasons for the Commission making the recommendation are set out in that Report.

28. The Commission points out that it was a matter for the Government whether it accepted the Commission's recommendations and that the December Report addressed the Commission's jurisdiction to provide advice and make recommendations to the Government. Specifically, chapter 3 of that Report sets out the Commission's jurisdiction to provide advice and make recommendations. No party questioned the jurisdiction of the Commission to do so. The question of whether any impropriety was involved in the interactions between the Commission and the Government was considered and rejected in *Duncan v Ipp* [2013] NSWSC 314 (Hoeben CJ at CL) and *Duncan v Ipp* [2013] NSWCA 189.

29. The granting of the Mount Penny tenement was, as the Commission found in Operation Jasper, tainted by corruption. The specific findings were that Mr Macdonald engaged in corrupt conduct by entering into an agreement with Edward Obeid Snr and Moses Obeid whereby he acted contrary to his public duty as a Minister of the Crown by arranging for the creation of the Mount Penny tenement for the purposes of benefiting Edward Obeid senior, Moses Obeid and other members of the Obeid family.

30. In the December Report the Commission accepted the submission of Counsel Assisting that Cascade Coal had acquired the Glendon Brook tenement because of the agreement to acquire the Mount Penny tenement and that it would be inappropriate to permit Cascade Coal to retain the benefits of the Glendon Brook tenements.

31. The Commission points out that in *Duncan v ICAC* [2014] NSWSC 1018, McDougall J, in considering the corporate plaintiffs' claims to declaratory relief in relation to the

recommendations in the December 2013 Report found at [237]) that "to the extent that the factual findings in the [Jasper Report] stand, the factual basis for the Commission's recommendations was available". The Court of Appeal also considered the issue in *Duncan v ICAC* [2016] NSWCA 143. There Basten JA found [at 733] that "it cannot be said that there was any want of statutory power for the Commission to make a recommendation in relation to the Mount Penny tenement" that (at [737]) the recommendation with respect to Glendon Brook was "based squarely" on the results of the investigation and "there is no want of statutory power for the recommendation in relation to the Glendon Brook tenement".

Consideration of the complaint

32. 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.

33. 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 word 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).

34. 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 there meaning is obvious and uncontroversial. That seems to me to be the case.

35. I should also point out that the 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 of each House. This power is further affected by section 57B(5)and section 77A which are in the following terms:

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.*

77A ***Special reports***

The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:
a) *any matters affecting the Commission, including, for example, its operational effectiveness or needs, and*
b) *any administrative or general policy matter relating to the functions of the Inspector, and*
c) *any other matter relating to the exercise of a function to audit, deal with or assess any matter under section 57B that the Inspector considers warrants the making, in the public interest, of a special report.*

36. 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.

37. 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.

38. As stated, I have no power to consider whether a finding of corrupt conduct was correctly made and will not do so. Rather, 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 of "maladministration" and implicitly in the case of the concepts stated in section 57(1)(b), a serious degree of wrongfulness. I say implicitly in the case of section 57B(1)(b) because by their very nature, abuse of power, impropriety and misconduct involve a degree of wrongfulness not constituted, for example, by rudeness to a witness by a Commissioner no matter how regrettable such rudeness might be.

39. Having set out these general considerations, I will first deal with the aspect of the complaint that asserts there were inappropriate interactions between the ICAC Commissioner and the

Executive Government.

40. Putting aside for the moment legal decisions concerning this question, I do not consider that such an interaction, of itself, could amount to abuse of power, impropriety, misconduct or maladministration. The reason is that the ICAC is itself part of the Executive Government of New South Wales. It is a specialist investigative agency of the Executive. There can be nothing, of itself, wrong in one part of the Executive communicating with another. For example, would anyone think that there is something wrong with the Commissioner of Police communicating with the Premier on a matter relevant to his duties? The ICAC is in no different position.

41. In fact, Parliament has given the ICAC specific power to communicate to appropriate authorities the results of its investigations (ICAC Act s13(1)(c)). Significantly, that provision contains no suggestion that the Commissioner must wait until it has formulated a report before making such a communication. The provision contemplates such communications even if investigations are not completed because an investigation may achieve "results" at any time after its commencement.

42. This is a matter which was referred to in the 2015 Report *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report* [Gleeson & McClintock] in the following terms:

> *3.3.7 What is often called the inquisitorial nature of the process at a public inquiry is a potential source of misunderstanding in at least three ways:*
>
> *a) A distinctive feature of the adversarial process in the administration of justice is a climactic civil or criminal trial, conducted as a contest between opposing parties and presided over by a neutral judge (or judge and jury), who makes a decision affecting rights and obligations. A public inquiry held by the ICAC, on the other hand, is a further development of an investigative process that has already begun, and the outcome is a report by the investigator, not a judicial decision. The absence of features that are customary in the trial process does not, on that account alone, make it inappropriate or unfair. It is a different process.*
>
> *b) There are, however, some superficial similarities between a public inquiry and court process that may lead people to misunderstand its outcome as a judgment; especially where there is an exercise of a power, not only to make findings of fact, but also to characterise conduct as corrupt.*
>
> *c) The term inquisitorial can be misleading. It is often used to describe a judicial process in civil law jurisdictions. What occurs at a public inquiry is in no respect a judicial process, either adversarial or inquisitorial.*
>
> *3.3.8 In a submission made to the Panel, the Rule of Law Institute of Australia referred to the fact that a public inquiry is, more often than not, presided over by a former judge in court-¬like surroundings. This is a significant point and is relevant to 3.3.7(b). The Institute proposed that public inquiries should no longer be part of the function of the ICAC.*

3.3.9 The Panel does not intend to recommend that the legislation should now be altered in this far-¬reaching manner.

9.5.2 A consequence of constituting a body like the ICAC, that is, a standing royal commission, empowered to conduct public hearings and to make findings that corrupt conduct has occurred, is the danger that such proceedings will be misunderstood and misrepresented as if they were in the nature of judicial proceedings.

9.5.3 In truth, they are not. The ICAC is an arm of the Executive created to investigate certain kinds of conduct. Its findings, although capable of doing enormous harm, have no effect on the legal rights and liberties of any person. One submission received by the Panel was that the "normal" rules of evidence should apply to ICAC hearings and that questioning should not be conducted or limited in a manner different from a normal court. Investigation proceedings before the ICAC, both in private and in public, are not court proceedings of any kind and it is fundamentally wrong to think of them as some kind of abnormal judicial process.

9.5.4 This was a concern at the time of the 2005 Review and led to the recommendations which were adopted by Parliament to amend sections 30 and 31 to make as clear as possible that both "compulsory examinations" and "public inquiries" were an aspect of an investigation not a hearing at the culmination of a judicial process.

9.5.5 It is regrettable that this misperception and misunderstanding still appears widespread. That said, the Panel does not believe it is amenable to further legislative change.

It is true that if a Judge while hearing a case involving the New South Wales Government or having reserved his or her decision were to engage in communication with a Minister considering the subject matter of the case, it would correctly be seen as involving grave impropriety on the part of the Judge.

43. The Commission is not a court, as I have said, but an agency of the Executive constituted as such by the legislation. Thus, unlike a court in the circumstances outlined in the preceding paragraph, no impropriety is involved, of itself, in contact between the Commission and the Government of the day.

44. On this aspect of the complaint the Complainants make the following argument:

3. ICAC's interaction with the Executive Government during the course of the public hearing.

3.1 ICAC's mandate is to conduct an inquiry, prepare a Report(s) and then submit the Report to both Houses of Parliament . . . .ICAC should not report to the Government of the day as occurred in this case.

3.2 It was improper for the Commissioner to allow ICAC to be used by the Government to justify legislative intervention designed to bypass established statutory procedures to determine the grant of exploration licences and mining leases.

3.3 During the Inquiry there was interaction between Commissioner Ipp and the Premier Barry O'Farrell and other government officials concerning the possible suspension or termination of exploration of the Mt Penny mining tenement or cancellation of its exploration licence . . . . The interference by ICAC in the Executive Government gives rise to the inference that the inquiry was not free and independent from politics such that there can be no question as to its efficacy or probity. . . .

These propositions are expanded in paragraphs 1-8 of Schedule 1 to the Complainants' solicitors' letter dated 30 October 2017 referred to above.

45. As I have stated above, the Court of Appeal considered the dealings between the Commission and the Government in *Duncan v Ipp* [2013] NSWCA 189. The issue there was whether the various interactions between the Commission and the Government gave rise to a reasonable apprehension of bias on the part of the Commission so as to require orders restraining Commissioner Ipp from continuing with the Operation Jasper inquiry. Thus the matters dealt with by the Court of Appeal differ from those I must consider. Nevertheless, the observations of the members of the Court, particularly those of the Chief Justice, are relevant.

46. These propositions stated in paragraph 44 seem to me to be sufficiently answered by the following passages in judgements of Bathurst CJ and Barrett JA in the decision referred to:

158 It is important to bear in mind the context in which the matters complained of occurred. The Planning Minister had announced that he had received advice, first, that the manner in which an applicant for development approval came to be the proponent was not necessarily a relevant consideration in determining whether the application should be granted and, second, that a decision to terminate or defer assessment of the application would provide potential grounds for appeal to the Land and Environment Court.

159 It follows in my opinion, that if the Commissioner took the view that the exploration licence might have been obtained as a result of corrupt conduct and that it was in the public interest that that be taken into account in assessing the development application, it would be appropriate to advise the Planning Minister or the Executive of that fact and suggest deferral of any decision pending receipt of the report. Such conduct in my view, would not give rise to a possibility in the mind of a fair-minded observer that the Commissioner might have had a closed mind on whether such conduct had occurred. It would be seen simply as advice not to make a decision until all relevant facts were found.

160 *Further, it would be known to the fair-minded observer that it was a matter for the Planning Minister, acting in accordance with his or her statutory obligations, to determine at what point in time a decision to grant or refuse the development application should be made. The fair-minded observer would also be aware that the Commissioner himself would be aware of that fact.*

161 *In these circumstances it seems to me that if the Commissioner formed the view that there was a possibility that the Minister might make a decision before delivery of his report and that in those circumstances the evidence which had been led before the Commission was a matter the Planning Minister should take into account in reaching his decision, notification of that view to the Planning Minister would not lead to a reasonable possibility that a fair-minded observer with knowledge of the Commissioner's functions, to which I have referred, would conclude that the Commissioner might have a closed mind on the question of whether the corrupt conduct existed. Whilst the relevant test sets a low threshold, it does not seem to me that a fair-minded observer might reasonably conclude that the provision of such advice might indicate a closed mind on the issue. A fair-minded observer would appreciate, in my opinion, that it was a matter for the Planning Minister as to the manner in which the evidence should be taken into account and what if any conclusion should be drawn from it. It does not seem to me that notifying the Executive that the evidence before the Commission could or should be taken into account, without any expression of opinion as to what conclusion should be drawn from it, could indicate the possibility of a closed mind to a fair-minded observer.*

213 *The nub of the applicant's case on this issue is that a fair-minded observer might form the view that the Commissioner, having determined it was appropriate that the Planning Minister take either his findings or the evidence before the Commission into account in deciding on the fate of the development application, sought the Premier's letter as political cover and having received the letter made it public and called for submissions without disclosing that in fact he had sought the letter and already given such advice. It was said that a fair-minded observer might consider in those circumstances that what was done was to create an impression of fairness which would be contradicted if communications which had taken place prior to his announcement of the receipt of the Premier's letter had been disclosed. Finally it was submitted that in addition, the letter to the Premier might be construed by a fair-minded observer as encouraging the Planning Minister to reject the development application. From these matters in combination it was submitted that a fair-minded observer might have considered that the Commissioner might have had a closed mind on the issue of corrupt conduct.*

214 *I have dealt with all these matters individually and found that none of them might demonstrate the possibility of a closed mind to a fair-minded observer. In my opinion, taken in totality they also could not reasonably give rise to the possibility of a fair-minded observer considering that the Commissioner might have had a closed mind. At most in my opinion, they would demonstrate to a fair-minded observer that in January*

2013 the Commissioner formed a view as to what should be taken into account in dealing with the development application, communicated that view but decided to withhold it until he received political cover. In this context a fair-minded observer might at most consider that the Commissioner had formed a view on what the Planning Minister should take into account in considering the development application. However, for the reasons I have given it does not follow that a fair-minded observer could reasonably conclude that the Commissioner had or might have had a closed mind on whether corrupt conduct existed. (Bathurst CJ)

217 [Barrett JA] I agree. The inquiry upon which the Commission is engaged is not some form of legal proceeding in which the State and elements of the executive are pitted against persons summoned for examination or the interests that those persons represent. The process is quite different. In the course of an inquiry, hypotheses are formed and subjected to continuous assessment. As evidence accumulates, suspicions and inferences are tested and refined. Some are confirmed, others are not. Hypotheses are likewise re-evaluated and re-shaped as the process continues. A series of possibilities may be considered and discarded during the course of a particular inquiry.

218 Given that context, the Commissioner's action in communicating as he did with the Minister for Planning was not such as to engender in the mind of a reasonable fair-minded observer an apprehension of predisposition towards any particular outcome of the Commission's inquiry. It was (and would have been seen to be) a step taken legitimately in the public interest to acquaint the Minister with the fact that future findings on matters under consideration by the Commission might be relevant to the exercise of the Minister's statutory functions. The Commissioner flagged no more than a possibility indicated by the then state of the inquiry's evolution.

219 Likewise, a reasonable fair-minded observer would not have inferred any such predisposition from the Commissioner's solicitation from the Premier of a request to extend the scope of the inquiry in a way that the Commissioner could himself have achieved in any event. The extension was no doubt made so that developing possibilities might be brought within the terms of reference. Whatever may have been the motivation for seeking the request, the desire of the Commissioner to have in advance some measure of government support or political cover for a course that he proposed taking did not imply anything but an open and inquiring mind in relation to the expanded subject matter of the investigation. (Barrett JA)

47. For these reasons I consider the Complainants have failed to establish any of the matters stated in Section 57B (1) (b) &(c).

48. I turn then to the second basis of the complaint, that is, the alleged denial of procedural fairness, or as the complaint puts it, a failure to adhere to the principles governing inquiries. There are several aspects to this complaint which I will summarise as follows:

a) An assertion that witnesses against whom adverse findings were ultimately made were not provided with proper particulars of the allegations against them;
b) Assertions to the following effect;
i. That the commission failed to investigate and disclose exculpatory evidence;
ii. That the Commission failed to permit cross examination of witnesses as to their credit;
iii. That the Commission refused to allow cross examination on critical issues;
iv. The Commission used the public inquiry to destroy reputations.

I will consider each of these matters in turn.

49. In relation to (a) the Commission put the following to me :

The scope of the Commission's investigation were set out in the summonses served on witnesses. An amended scope was published on the Commissions restricted website on 8 November 2012. A further amended scope was announced by the Commissioner on the first day of the Operation Jasper public inquiry and published on the Commission's public website. Counsel assisting delivered a detailed opening address on the first day of the public inquiry that identified the issues under investigation. At the conclusion of evidence in the public inquiry, counsel assisting prepared detailed written submissions that were provided to all relevant parties. Those submissions canvassed potential findings available to the Commission, submissions in response were received. The latter included submissions on behalf of Mr McGuigan, Mr Poole and Cascade Coal. In addition, counsel assisting and persons adversely mentioned in the submissions in response were given the opportunity to reply. It is noted in the Jasper report, that in preparing the report, the Commission considered each of the submissions it received.

50. Mr McGuigan and Mr Poole, along with other persons subject of adverse findings in Operation Jasper, challenged the Commission's decision in the Supreme Court and in the Court of Appeal on what appear to me to be substantially the same grounds as they now raise with me. The Court of Appeal determined the matter in *Duncan & others v Independent Commission against Corruption* [2016] NSWCA 143. There, the allegation made by the Complainants along with other appellants was that they were not afforded procedural fairness in circumstances in which the offences and the particular elements relied upon by the Commission were not averted to until closing submissions by Counsel Assisting which consequently denied the Complainants the opportunity to be questioned or to give evidence as to the elements of those offences.

51. This argument was dealt with by Basten JA (with whom Bathurst CJ and Beazley P agreed) in the following terms:

688 In considering the scope of the undoubted obligation of the Commission to afford procedural fairness to persons who may be adversely affected by its findings, it is necessary to bear in the mind the separate fact finding and characterisation functions of the Commission. It is also necessary to have regard to the statutory powers of the Commission including, where exercised, the powers with respect to the conduct of a public inquiry.

689 The Commission may permit a person who is interested in the subject-matter of the public inquiry to "appear at the public inquiry", and may authorise such a person, and a person giving evidence, to be represented by a legal practitioner.. That person may, with leave of the Commission, examine or cross-examine any witness. Each of the appellants was legally represented at the public inquiry conducted by the Commission.

690 The relevant principal function of the Commission engaged in the present case was the investigation of allegations or complaints, or circumstances which in the Commission's opinion implied that there had been corrupt conduct. The Commission is empowered to hold a public inquiry, if satisfied that it is in the public interest to do so, "[f]or the purposes of an investigation". Accordingly, the statutory function being exercised by the Commission in the course of the public inquiry was, in a fundamental sense investigative. It bore no relation to a civil or criminal trial before a court with jurisdiction to resolve factual and legal issues in a dispute between contending parties. Using the term "adversarial" in the limited sense of such a judicial proceeding, an inquiry conducted by the Commission is not adversarial.

692 At the heart of the appellants' complaints of procedural unfairness were two propositions: the first was that it was not until final submissions by counsel assisting the Commission that the attention of the affected parties was directed to any particular offences which might have been committed by the conduct revealed in the evidence. Secondly, and no doubt by way of an inevitable consequence of the first complaint, the appellants were not questioned, nor able to give evidence, as to the elements of the offences.

696 The written submissions of McGuigan and Poole were terse: they were not relevantly expanded upon in oral argument. They did not suggest that any relevant complaint was made before the Commission, but rather submitted that it was a matter for counsel assisting to identify the particular elements of each relevant offence and the evidence which might support them. That submission appeared to be a complaint as to the content of counsel's submissions, but this Court was not taken to either the written or oral submissions in order to demonstrate that the primary judge had misunderstood the submissions to him or had misconceived the submissions made to the Commission. The proposition that they could have applied to reopen the hearing was met with the submission that "[t]he reality was that by reason of the directions made on 15 October 2012 that was not an option." However, the document referred to was merely a statement provided by the Commission as to the scope of the proposed public inquiry. Its relevance to the likely response of the Commission to an application to reopen was obscure.

697 The submissions contained no express complaint that an opportunity to provide adequate answers by way of written submissions was denied; nor did the submissions before this Court, any more than those before the primary judge, identify any evidence which might have been available and which was not presented to the Commission. In short, the appellants did not condescend to address the detail of their complaints, so as to demonstrate that there was an element of practical unfairness.

698 In circumstances where a procedural complaint is raised for the first time on judicial review, the Court is placed in a difficult position. It will have no assistance from the primary tribunal as to how it would have dealt with an argument which was never presented to it. Given the broad discretionary powers of the Commission, an applicant for judicial review faces a heavy burden of persuading a court of error in these circumstances. That burden was not met in the present case. The grounds relating to procedural unfairness in each appeal must be rejected.

52. For these same reasons, I consider that the complaint concerning procedural unfairness has not been made out and therefore the allegation that the Commission engaged in the matters referred to section 57B (1) (b) &(c) are also not made out.

53. As to the assertion that ICAC failed to investigate exculpatory evidence and failed to disclose exculpatory evidence, I make the following findings. First, I note that as the Commission points out the Complainants do not specify in the complaint the exculpatory evidence which the Commission failed to investigate. The only failure to disclose exculpatory evidence mentioned in the complaint is that Gardner Brook and the directors of Monaro Mining knew that he did not have $25 million to pay as an additional financial contribution to the Government and therefore its bid was non-compliant. I do not agree that this evidence was exculpatory and I am unable to see how it was relevant to the findings of corrupt conduct made against Mr McGuigan and Mr Poole in the Jasper Report. Further, as the Commission points out, Monaro's ability to pay was considered in the *Jasper Report* at page 96 and had been raised in the submissions on behalf of Cascade Coal and Mr McGuigan to the Commission.

54. As to the failure to permit cross examination of witnesses as to their credit, this was a matter within the Commissioner's discretion as to how the public inquiry should be conducted and, in my view, does not constitute abuse of power, impropriety, misconduct or maladministration. In this respect, it appears to me that the Commissioner was within his rights to reject the cross examination set out in paragraph 34.1 of page 27 of schedule 2 of the complaint.

55. The Complainants raise an issue concerning the credibility of a witness, Gardner Brook and whether Commissioner Ipp should have accepted his evidence - see [4.2] of the 30 October 2017 letter referred to above. I am presently considering whether or not to commence an investigation of my own initiative under section 57B(2) of the ICAC Act into a related matter concerning Mr Brook and the Commission. The issue raised by the present Complainants concerning Mr Brook is better dealt with in the wider inquiry I am presently contemplating, and I will defer resolution of this aspect of the complaint pending a decision as to whether or not I undertake such an inquiry and its conclusion if I do undertake it.

56. Finally, the assertion is made, as set out in paragraph 29-30 of schedule 2 to the complaint, that Commissioner Ipp saw the role of ICAC as being to destroy reputations where he determined that the person with the reputation in question had engaged in corrupt conduct. This claim is based upon quotations from Commissioner Ipp as reported by a journalist

Michaela Whitbourn in the Sydney Morning Herald of 2 August 2014. The Complainants ask me to infer from these quotations that Mr Ipp regarded the "trashing" of individual reputations as one of his roles. I do not believe that this is a fair reading of those quotations and this argument is rejected.

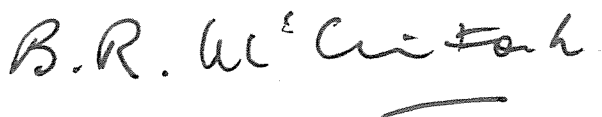
57. I should add two things. The first is that, obviously, a finding of corrupt conduct will have an impact on the reputation of the person against whom such a finding is made. That may suggest caution in making such a finding but, once the ICAC is satisfied to the requisite standard that there has been such conduct, it must make the finding regardless of reputational damage. Secondly, I would accept that if a Commissioner were to make a finding of corrupt conduct not believing it had occurred but to damage a person's reputation, it could amount to "abuse of power" within the meaning of section 57B(1)(b) of the Act. As stated, that did not occur in this case.

Conclusion

58. For these reasons, and subject to the qualification set out in [55] above, I have decided that the complaint should be dismissed.

59. I provided a draft copy of this Report to the Complainants (through their legal representatives) to give them an opportunity to make any comments before its submission to Parliament. None of the Complainants provided any comments on the draft Report.

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



Bruce R McClintock SC
Inspector, Independent Commission Against Corruption
21 June 2018

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Dear Sir

Further Submissions to the ICAC Inspector

We refer to your letter dated 29 August 2017. The conduct of ICAC by acts or omissions by its Commissioner, David Ipp, have far reaching consequences (as occurred in the Operation Jasper Inquiry (*Inquiry*)) including destruction of assets and reputations. This further submission is made on the instructions of John McGuigan, Richard Poole, Cascade Coal Pty Limited, Mount Penny Coal Pty Limited and Glendon Brook Coal Pty Limited.

1. Maladministration

The conduct and actions of Commissioner Ipp amounting to maladministration were:

1.1. ICAC's interaction with executive government during the course of the public hearing:

(a) in August and September 2012 the Planning Minister obtained legal advice that he could not suspend or terminate the assessment of the Exploration Licences nor could he suspend or terminate the Cascade Coal projects;

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(b) in January 2013 Premier O'Farrell, on advice, interacted with Commissioner Ipp welcoming recommendations concerning the exploration licences and leases and amendments to the Mining Act;

(c) to overcome the obstacle of contrary legal advice, in February 2015 Commissioner Ipp obtained further legal advice which suited his needs to support his recommendation that the Exploration Licences be cancelled. In effect he went opinion shopping, refusing to accept previous legal opinions; and

(d) at no stage prior to February 2013, after our clients had given evidence, was it suggested that the Exploration Licences might be the subject of a recommendation for cancellation.

1.2. ICAC's total failure to adhere to basic principles governing the conduct of independent inquiries. Commissioner Ipp:

(a) in breach of s.31(6) of the Independent Commission Against Corruption Act 1988 (NSW) ('*Act*') did not outline the nature of the allegations or complaints in respect of our clients as affected persons. The scope and purpose document lacked specificity of the case to be met and there was a lack of procedural fairness in failing to refer to either potential breaches of section 192E of the *Crimes Act* or section 184 of the *Corporations Act 2001*;

(b) failed to investigate evidence that might exculpate our clients, as affected persons, particularly in connection with the way in which commercial due diligence processes are conducted[1];

(c) failed to disclose exculpatory evidence namely that Gardner Brook and the directors of Monaro Mining NL well knew that it never had $25 million to pay as an additional financial contribution to the Government and therefore its bid was non-compliant[2];

(d) did not permit proper cross-examination of witnesses as to their credibility or otherwise[3]

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[1] s31B(2)(a) of the ICAC Act
[2] s31B(2)(b) of the ICAC Act
[3] s31B(2)(c) of the ICAC Act

(e) abused his power by, in concert with Counsel Assisting, using the public inquiry as a forum for destroying reputations[4];

(f) did not permit counsel for affected persons to cross-examine witnesses until they stated their positive case, in circumstances where the allegations or complaint being investigated had not been stated to affected persons;

(g) permitted Gardner Brook to give damning evidence where his credibility as a witness was, to the knowledge of the Commissioner, very questionable given that by his own admission during the private hearing, Mr Brook was a fraudster and a liar.

2. Adherence to the rule of law during the course of the public hearing

2.1. The powers and functions of ICAC are subject to the rule of law. The content of the rule of law applicable to ICAC determines the minimum capacity for judicial review of its administrative action.

2.2. For good order an administrative tribunal must adhere to the basic principles applicable to an inquiry.

2.3. Procedural fairness is a cornerstone of every inquiry.

2.4. In 2001 the Coalition Government set up the Royal Commission into the Building and Construction Industry for substantially political reasons. In that case the appointee, the Hon. TRH Cole QC, while asserting his independence frequently, implicitly acknowledged upfront in his report that political considerations played a part in the establishment of that Commission.

Commissioner Cole explained his approach to the requirements of procedural fairness in relation to adverse findings in chapter 5 of his final report. He identified the right to make submissions as the key right conferred by the rules of procedural fairness in circumstances where there was a risk that adverse findings might be made. Commissioner Cole described the procedure he designed to comply with such principles:

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[4] Destroying reputations creates a risk of serious unfairness (see Independent Panel Report dated 30 July 2015 at [9.4.17] – [9.4.19]

> *'... Counsel Assisting were on every occasion directed to set out, in submissions made available to any person who might be adversely affected, the findings of fact which Counsel Assisting contended I should make,* ***to provide references to the evidence that supported those findings of fact, to provide references to the contrary evidence, and to set out the conclusions which Counsel Assisting contended should be drawn from the findings of fact sought*** *...'* (p.55) (Emphasis added)

This was an essential step that Commissioner Cole considered was necessary in order to give persons who might be adversely affected by his findings the opportunity to make submissions in response to advocated findings before any such findings were made. This process is in stark contrast to that adopted by Commissioner Ipp in the Jasper Inquiry

2.5. Following publication, on 30 July 2015, of the Report of the Independent Panel titled 'Review of the Jurisdiction of the Independent Commission Against Corruption' the guiding principles to govern ICAC public inquiries have been set out in statutory form in section 31B which was inserted into the Act pursuant to the Independent Commission Against Corruption Act 2016 No. 65 (NSW). Section 31B(2) provides:

'(2) *The guidelines are to provide guidance on the following aspects of the conduct of public inquiries:*
- (a) *the investigation of evidence that might exculpate affected persons,*
- (b) *the disclosure of exculpatory and other relevant evidence to affected persons,*
- (c) *the opportunity to cross-examine witnesses as to their credibility,*
- (d) *providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,*
- (e) *any other matter the Commission considers necessary to ensure procedural fairness.'*

2.6. At the time of the public inquiry in Operation Jasper section 31(6) provided:

'A person required to attend a public inquiry is entitled to be informed of the general scope and purpose of the public inquiry and the nature of the allegation or complaint being investigated before or at the time the person is required to appear at the inquiry.'

2.7. Neither section 31B(2) nor section 31(6) create new standards of procedural fairness. On the contrary these are the standards that Commissioner Ipp should have adhered to in the conduct of the public inquiry in Operation Jasper.

2.8. This submission summarises Commissioner Ipp's abuses of power, impropriety and other forms of misconduct amounting to maladministration.

3. ICAC's interaction with executive government during the course of the public hearing

3.1. ICAC's mandate is to conduct an inquiry, prepare a Report(s) and then submit the Report to both Houses of Parliament (section 74 *Independent Commission Against Corruption Act 1988* (NSW)). ICAC should not report to the government of the day, as occurred in this case.

3.2. It was improper for the Commissioner to allow ICAC to be used by the government to justify legislative intervention designed to bypass established statutory procedures to determine the grant of exploration licences and mining leases.

3.3. During the Inquiry there was interaction between Commissioner Ipp and Premier Barry O'Farrell and other government officials concerning the possible suspension or termination of exploration of the Mt Penny mining tenement or cancellation of its exploration licence (EL7406). By referring to "evidence" before ICAC he led Premier O'Farrell to believe that the Inquiry was 'some kind of abnormal judicial process'[5]. The interference by ICAC in the executive government gives rise to the inference that the inquiry was not free and independent from politics such that there can be no questions as to its efficacy or probity (refer to Schedule 1 paragraphs [1]-[8] below).

3.4. In his third Report published December 2013 titled 'Operations Jasper and Acacia – Addressing Outstanding Questions', Commissioner Ipp changed the findings made in his first Report and recommended expropriation of assets based on findings that were never made. There were no proven facts from which an Inference could be drawn that grant of the Mt Penny mining tenement was tainted by corruption. There was no finding in the First Report, being the

[5] Report of the Independent Panel dated 30 July 2015 at [9.5.3] to [9.5.5]

report that supposedly contained the findings, that the grant of the mining tenement was tainted by corruption.

3.5. The particulars to support this Submission are contained in Schedule 1. These particulars substantially repeat particulars from our clients submission dated 4 June 2015 to which they adhere. These particulars are repeated for convenience.

4. Total failure to adhere to basic principles of inquiries

4.1. ICAC, as an administrative body, by the acts and omissions of Commissioner Ipp, failed to follow procedural fairness criteria in the conduct of the Inquiry. In particular:

(a) where the private hearings determined the basic facts which give rise to a prima facie finding of corrupt conduct, the public hearings should (but did not in this Inquiry) be conducted by precisely stating, to an affected person, as required by s.31(6) of the Act, the allegations of corrupt conduct, including the acts and omissions, and the criminal offence(s) in respect of which a jury properly instructed may make a finding of guilt. In this Inquiry:

(i) no allegations were made prior to the commencement of the public hearings;

(ii) the allegations made at the commencement of the public hearings were vague and did not identify the criminal offences (s.192E *Crimes Act* and s.184 *Corporations Act 2001* (Cth) (refer to Schedule 2 paragraphs [5]—[28] below);

(b) Commissioner Ipp believed that during the conduct of the public hearings it was fair to trash reputations. Further, he was prepared to create new standards of conduct during commercial dealings between private companies and public companies having failed to investigate evidence that was likely to exculpate our clients. (refer Schedule 2 paragraphs [29]-[30] below);

(c) at no stage prior to February 2013, after our clients had given evidence at the public hearing, was it suggested that the exploration licences held by Cascade Coal through its subsidiaries might be the subject of a

recommendation for cancellation (refer to Schedule 2 paragraphs [31]-[33] below);

(d) failing to adhere to the audi alteram partem rule by not allowing cross-examination, on critical issues (refer to Schedule 2 paragraphs [34]-[34.1] and 37] below);

4.2. Further examples of maladministration include:

(a) accepting the evidence of Gardner Brook as a credible witness, who by his own admission was a fraudster and a liar. His evidence should have been rejected by Commissioner Ipp where it conflicted with the evidence of other witnesses (refer to Schedule 2 paragraphs [38]-[43] below); and

4.3. not providing exculpatory evidence adduced during the private hearings which should have been made available during the public hearings (refer to Schedule 2 paragraphs [44]-[46] below).In summary our clients were denied procedural fairness in circumstances where:

(a) at no time during their evidence was it put to any of them that they had committed, or may have committed, an offence under s 192E of the Crimes Act;

(b) at no time during their evidence were the elements of the offence of dishonesty, or the facts necessary to establish the elements of the offence, under s 192E of the Crimes Act put to them;

(c) at no time during his evidence was it put to John McGuigan that he had committed, or may have committed, an offence under s 184 of the Corporations Act; and

(d) at no time during Mr McGuigan's evidence, were the elements of the offence, or the facts necessary to establish the elements of the offence, of an intentionally dishonest or reckless breach of s 184 of the Corporations Act put to him.

4.4. It is not for the witness against whom a finding is to be made that his or her conduct could or may involve a criminal offence to prove his or her innocence. The obligation is upon the tribunal to accord procedural fairness and not upon the witness to take steps to cure deficiencies or irregularities in the process

that was followed. This proposition was stated by the Privy Council in *Mahon v Air New Zealand* [1984] AC 808 at p821:

> *'The second rule [of natural justice] requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.'*

4.5. Regard to the principles of procedural fairness is important in circumstances where, as Basten JA said in *Cunneen v ICAC* [2014] NSWCA 421 at [95], '*the potential damage to reputation (and intrusions on personal privacy) result not from the considered assessment and reporting of an investigation but from public examination, often involving questions put in colourful terms and denials which are disregarded*'.

4.6. The particulars to support this Submission are contained in Schedule 2. These particulars substantially repeat particulars from our clients submission dated 4 June 2015 to which they adhere. These particulars are repeated for convenience. However, additional particulars are set out in Schedule 2 at paragraph [38] and following.

5. Conclusion

5.1. It is important that no future ICAC inquiries be conducted in the same way as Operation Jasper was conducted by Commissioner Ipp to minimise the possibility that innocent people have their reputations, careers, and lives damaged. The damage to our clients has been significant and unnecessary. The word of Gardner Brook, an admitted fraudster and liar, was preferred over that of Mr McGuigan, who is the former Global Chairman of Baker & McKenzie and a man of unblemished career and corporate record.

5.2. Further, confiscation of assets by government without due process is contrary to the rule of law. The legislative cancellation of exploration licences of our clients was a direct result of the maladministration of the Inquiry by Commissioner Ipp and his interaction with the government of the day prior to submitting his report to both Houses of Parliament and subsequently basing his recommendations on findings that were never made in the First Report.

Yours faithfully
TressCox

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SCHEDULE 1

Particulars of ICAC's interaction with executive government during the course of the public hearing

1. Extraordinarily during the public inquiry and prior to the close of evidence the Government and Commissioner Ipp corresponded with each other about the recommendation which the Government wanted, namely a recommendation to cancel exploration licences including the Mt Penny exploration licence (EL7406) and the Glendon Brook exploration licence (EL7405). It is apparent that the Commissioner had already formed a view that the exploration licences should be cancelled and had communicated that view to the Government. This view was based on the Commissioner's belief that the **creation (not the grant)** of the Mt Penny mining tenement was tainted by the corruption of Minister Ian Macdonald and Edward Obeid Snr. It is notable that the view was formed prior to the public examinations of either Mr Macdonald and Mr Obeid. The opinion must have been based upon the results of the private hearings and therefore should have been the subject of proper notice to Cascade Coal and its subsidiaries, at the commencement of the public hearing (pursuant to s.31(6) of the Act), that that recommendation would be made. The history of these communications is summarised below:

   (a) in August and September 2012 the Department of Planning & Infrastructure (DPI) sought and obtained legal advice on whether the Planning Minister could suspend or terminate the assessment of the Exploration Licence, could suspend or terminate the project or, alternatively, whether the Exploration Licence would be invalidated if ICAC made a finding of corrupt conduct in connection with the grant of EL7406. The advice given was that the Planning Minister could not suspend or terminate the assessment of the Exploration Licence, nor could he suspend or terminate the project **(Tab 1)**;

   (b) on 15 January 2013 the Department of Premier & Cabinet prepared a briefing note for the Premier containing a recommendation that the Premier write to ICAC indicating that the Government would welcome, in due course, recommendations from ICAC as to what action the NSW Government should appropriately take with respect to any licences or leases the subject of ICAC's investigations **(Tab 2)**;

   (c) on 30 January 2013 Premier O'Farrell wrote to Commissioner Ipp indicating that the NSW Government would welcome any findings and

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recommendations the Commission may think fit to make including recommendations under the *Mining Act*, recommendations with respect to amendment of the *Mining Act* and recommendations concerning legal proceedings against any individual or company surrounding the allocation of the exploration licences, the subject of the ICAC investigation (**Tab 3**);

(d) on 30 January 2013 Mr McGuigan was in the second day of his examination at the public hearing. Commissioner Ipp was in deep communication with Premier O'Farrell and either had received or knew that he would receive the letter dated 30 January 2013 from Premier O'Farrell referred to in the preceding paragraph. Late in the morning of 30 January 2013 the Commissioner knew that Cascade Coal and its subsidiaries had not been forewarned that the Commission might make a recommendation to cancel their exploration licences. This lack of procedural fairness was apparently realised by Commissioner Ipp during the examination of Mr McGuigan by Mr James QC. Just after noon on 30 January 2013, prior to the luncheon adjournment which was taken at 12:28pm, prompted by a question by Mr James and Mr McGuigan's answer, the Commissioner interjected. With the benefit of hindsight we now know the relevance of the following exchange which occurred at T3377.48 – T3380.8:

Commissioner: *'Well, let me put to you a scenario, Mr McGuigan. Perhaps this might also relate to what Mr Hale said to you. Should the Inquiry establish that the Exploration Licence was granted in circumstances which involved an abuse of powers by the Minister are you suggesting that that wouldn't affect the validity of the Exploration Licence or the Mining Lease?'*

....

Commissioner: *'And if the investigation discovered, notionally I'm talking about, that the Exploration Licence was granted say in consequence of a misuse of powers by the Minister or a conspiracy involving others, wouldn't that be a real question raised as to the validity of the grant of the Exploration Licence itself?'*

John McGuigan: *'It's a complex question ... I viewed then and I view now that, Cascade in its dealings that it, in, responding to the Expression of Interest and its communications, was acting essentially as*

a bona fide purchase for value and if there was something going on behind the scenes that we were not aware of and I find it difficult to believe that that activity which we manifestly are not part of should adversely impact our title.'

Commissioner: *'Well, I'm not going to debate that with you, Mr McGuigan, but that is – I'm simply asking you whether that's not an issue which was pretty obvious once you learned that there was the potential for an investigation of the circumstances under which the Exploration Licence was granted?'*

John McGuigan: *'Commissioner, I'm ... sorry to take issue but as I understood and do understand that that Inquiry was not directed to the matters that you've just referred to, it was directed to compliance by companies with the conditions of their Exploration Licences.'*

Once the chronology of the events which were unfolding is considered, this was an extraordinary exchange to occur between the Commissioner and Mr McGuigan and although the possibility of issues arising as to the *'validity of the grant of the Exploration Licence'* were raised, it cannot possibly be said the procedural fairness obligations were satisfied. It appears that the Commissioner may have manipulated the evidence to suit his case theory.

(e) on 31 January 2013 the Director-General of the Department of Premier & Cabinet had a telephone conversation with Commissioner Ipp which was followed up by a letter by Commissioner Ipp to the Department of Premier & Cabinet dated 31 January 2013 in which the Commissioner explored the different approaches which the Director-General and the Minister might take to have regard to public interest issues concerning exploration licences and the grant of mining leases. The letter concluded by indicating that the evidence given by witnesses at the public inquiry is available before the Commission publishes its report to be taken into account by the Minister on the public interest question (**Tab 4**). The reference by Commissioner Ipp to "evidence" was misleading and deceptive and improper. It was calculated to lead Premier O'Farrell to believe that the Inquiry was "some kind of judicial process" which clearly it was not;

(f) on 5 and 7 February 2013 ICAC, in an attempt to obtain an advice which suited his needs (contrary to the legal advices given to the government

referred to in paragraph 1(a) above, sought advice from Mr Bret Walker, SC on 2 questions, namely:

(i) whether, in order to attract the public interest criteria under Section 79C of the *EPA Act*, the Minister for Planning & Infrastructure could declare the Mt Penny tenement a development of State significance;

(ii) whether, in considering the public interest under Section 79C of the *EPA Act*, the Minister is entitled to take into account the circumstances in which the tenement was created and the exploration licence was granted;

(Tab 5)

(g) on 6 February 2013 Commissioner Ipp made a statement during the public inquiry in Operation Jasper advising that he had received the Premier's letter which was marked Exhibit J122 and indicating that the Commission was considering responding to that letter and providing advice within 10 days. Submissions were invited concerning the matter;

(h) On 15 February 2013 Minister Hartcher was interviewed by Quentin Dempster and in that interview he stated: ... *'I can assure your listeners and you who've taken enormous amount of interest in this matter and any recommendation by the Commissioner will first of all be taken with the utmost seriousness and secondly acted upon with the utmost expedition.'*

(i) on 20 February 2013 Commissioner Ipp wrote to Premier O'Farrell, attaching an Opinion from Bret Walker, SC dated 19 February 2013 (**Tab 6**), and expressing the following opinions:

(i) irrespective of any factual findings of the Commission, it is now open to the NSW Government to consider public interest criteria to be applied to any decision affecting the Mt Penny exploration licence and any grant or refusal of any development application or application for a mining lease, having regard to the '*substantial media publicity*' and the '*general notoriety of the issues which are the subject to evidence before the inquiry*'; and

(ii) In his letter to the Premier dated 20 February 2013 Commissioner Ipp stated:

> *'The Commission is aware that the Department of Planning and Infrastructure has received legal advice which casts doubt on whether evidence relating to the circumstances in which an exploration licence was granted could be taken into account in assessing a development application because of a lack of legal interdependence between the granting of an exploration licence and the approval of the development application.* ***The Commission disagrees with that advice.'*** *(emphasis added)*

(iii) *'in considering the public interest, the Commission considered it would be open to the Minister for Planning & Infrastructure to take into account matters such as "irregularities of a sinister kind" referred to in Mr Walker's advice and any "nefarious" connection between Minister McDonald and a proponent or a person standing behind a proponent with an interest in the Mt Penny mining tenement'.* This is a direct reference to the Minister having regard to the Obeid family interests in the Mt Penny mining tenement through Cascade Coal.;

(j) on 21 February 2013 Premier O'Farrell responded to a question in the Legislative Assembly by informing Parliament that the NSW Cabinet had met after receipt of Commissioner Ipp's letter and agreed:

(i) *'first, that for the purpose of the Mt Penny major project application, public interest will be interpreted as including but not being limited to consideration of matters raised in evidence before ICAC, and those matters included allegations of corrupt conduct associated with the grant of the exploration licence;*

(ii) *secondly, Cabinet agreed that it would consider the most suitable immediate administrative or legislative mechanism to achieve that outcome; and*

(iii) *thirdly, Cabinet agreed to consider whether legislative change was required to protect the public interest in ensuring probity and propriety in future grants of mining and exploration and project application approvals'.*

The Premiers statement to Parliament was the clearest indication that ICAC was being used as a parallel system of justice (albeit where the

rules of evidence and other protections existing in judicial proceedings did not apply).

(k) The media reports on Premier O'Farrell's statement to Parliament included:

(i) The Australian article dated 22 February 2013 by Andrew Clennell and Vanda Carson – *'The move looks set to end the hopes of Cascade Coal to build the mine...The government would legislate if it had to and consider whether new laws were also needed to protect the public interest in the future granting of mine licences.'*

(ii) ABC News article dated 22 February 2013 at 7:14am – *'The move effectively gives the Government an avenue to kill off the mine, without having to cancel the licence.'*

(iii) SMH article dated 22 February 2013 by Sean Nicholls and Kate McClymont – *'A proposed open cut coal mine central to the state's largest ever corruption inquiry is set to be blocked by the NSW government after the Premier Barry O'Farrell announced that evidence heard during the public hearings would be considered in deciding whether it should go ahead.'*

2. As noted above, on 31 January 2013 Commissioner Ipp wrote to the Director-General of the Department of Premier and Cabinet and in his letter he stated *'The evidence given by witnesses at the public inquiry is available before the Commission publishes its report. Such evidence can be taken into account in considering the public interest question.'* As we now know, prior to the luncheon adjournment of the public inquiry on 30 January 2013, Commissioner Ipp added to the "evidence" by asking questions of Mr McGuigan (see paragraph 1(d) above).

3. Presumably, the Commissioner was not referring in his 31 January 2013 letter to the evidence given by Mr Macdonald who denied any impropriety or the evidence given by Mr Eddie Obeid Snr to the same effect. It is troubling that an investigatory body such as ICAC, given the unusual nature of its processes, can make findings which affect significantly valuable proprietary rights. It is even more disturbing that a Minister himself is told that he can ignore the legal advice previously given to him and that he can make findings of fact based upon "*evidence*" of this nature (where the rules of evidence did not in fact apply) and

in circumstances where he has not himself seen or heard it being given, and in all probability, has not even read it. It is not clear upon what basis the Minister or his delegate would make an assessment of the competing *'evidence'* given during the ICAC proceedings for the purposes of making his own findings for the purposes of consideration of the *'public interest'* criteria under the EPA Act.

4. For the reasons given above in relation to the construction of the words *'public interest'* in the EPA Act and the obvious difficulties associated with acting on *'evidence'* it is was unlikely that the approval would be refused as a result of changes to the legislation which did no more than take *'evidence'* into account. Such an approach would have invited a challenge to the decision on administrative law grounds.

5. In December 2013 the Commission published its Third Report titled *'Operations Jasper and Acacia – addressing outstanding questions'*. In that report it made a finding, unsubstantiated by the evidence and inconsistent with the findings in the First Report, when it stated:

> *'The Commission is of the view that the* ***granting*** *of the authorities for Doyles Creek, Mt Penny and Glendon Brook was so tainted by corruption that those authorities should be expunged or cancelled and any pending applications regarding them should be refused'.*

6. Whilst there was evidence for the Commission to make findings concerning corrupt conduct in the **creation** of the Mt Penny tenement (and which did not involve our clients), there was no evidence of corrupt conduct concerning the grant of the exploration licences. Notwithstanding, the Commission recommended that the NSW Government consider enacting legislation to expunge the authority and stated (at page 20 of the Third Report):

> *'Counsel Advising have considered the constitutionality of such legislation and are not of the view that the State would be prohibited from so legislating. Such legislation would, of course, need to be carefully drafted to avoid successful constitutional challenge'.*

7. That legislation, being the *Mining Amendment (Operations Jasper and Acacia) Amendment Act 2013* (NSW) was enacted on 31 January 2013. The constitutional challenge to its validity by our clients was unsuccessful (Cascade & Ors v State of NSW [2015] HCA 13).

8. In respect of the findings in the First and Third Reports, the following further matters should be noted:

   (a) neither Cascade Coal nor its wholly owned subsidiaries, MPC and GBC were investigated by ICAC and there were no findings against those companies. At all times, Cascade Coal, MPC, and GBC complied with all relevant disclosure obligations and conditions of the Exploration Licences.

   (b) the First Report contains no evidence or findings that either Cascade, MPC, GBC or the respective directors had knowledge of corrupt conduct involved in the creation of the Mt Penny tenement.

   (c) the creation and grant of the exploration licence (EL7406) over the Mt Penny tenement to MPC and the exploration licence (EL7405) over the Glendon Brook tenement to GBC were not tainted by any adverse findings of corruption against Cascade Coal, MPC, GBC or their directors, **as acknowledged by the Commission**.

   (d) the First Report contains findings that the Mt Penny Exploration Licence was granted by the Department in accordance with procedures and processes laid down by the Government. The First Report expressly states that no findings reflect adversely on the integrity of any of the members of the EOI Evaluation Committee or the Probity Auditor and states that each of those persons did their task honestly and to the best of their ability.

Aftermath: Legislative retribution

9. It should be noted that the NSW Parliament has now enacted 3 pieces of legislation, arising out of the findings in Operation Jasper, directed specifically at our clients. All of this has been prompted by the Commission - a body supposedly unable to make findings of criminality or to impose penalties. Those pieces of legislation are:

   (a) the *Mining Amendment (Operations Jasper and Acacia) Amendment Act 2013* (NSW), which cancelled the Mt Penny and Glendon Brook exploration licences;

   (b) section 380A of the Mining Act which was inserted by the *Mining and Petroleum Legislation Amendment Act 2014* (NSW), which effectively

brands our clients as being not fit and proper persons to be engaged in mining in this State because they were directors of companies which had their exploration licences cancelled; and

(c) the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) which was enacted by parliament 2 days prior to our clients obtaining 'consent' declarations from the NSW Court of Appeal on 8 May 2015, declaring that ICAC had acted beyond jurisdiction and contrary to section 8(2) of the ICAC Act. The result was that the Court of Appeal was not able to make that previously agreed declaration. That Act purports to retrospectively validate the findings of the Commission in Operation Jasper so as to defeat our clients claim that the Commission had no jurisdiction to make the findings.

SCHEDULE 2

Particulars of ICAC's total failure to adhere to basic principles governing conduct of inquiries

1. The way in which the Commission conducts its investigation is to first require production of documents and then to conduct the compulsory private hearings. Through this process it develops its case theory.

'Evidence, leading questions and case theory'

2. During the examination of Brad William Mullard, a senior officer in the DPI, he was asked leading questions by Counsel Assisting, Mr Chen, about discussions between the Department and Monaro Mining about when it would be required to pay its additional financial contribution. The Commissioner interrupted the examination and made the following statement at T1281.15:

   THE COMMISSIONER: *Mr Barry, I think I should just say this, the last bit of evidence is relevant to a potential corrupt conduct finding and the evidence has been led with leading questions largely that it is necessary to remember that this is not a trial and the rules of evidence do not apply and therefore objections simply to leading evidence rather than answering open ended questions will seldom be withheld* [sic *'upheld'*] *although as I mentioned to Mr Hale submissions can easily be made as to the reliability of the material but* ***in many instances the Commission has already conducted investigations on the issue and has determined more or less what the facts are*** *and needs to get confirmation from some witnesses, that is the purpose of the question. But I didn't, did not want you to be misled in any way because we have now passed the point of actual procedure and are going on to other aspects that is why I thought it necessary to make this explanatory statement.*

   MR BARRY: *Thank you, Commissioner, will I have the opportunity to be able to cross-examine in relation to that material?*

   THE COMMISSIONER: *I think so but can we wait for that?*

3. The statement by the Commissioner referred to in the preceding paragraph that the Commission had *'determined more or less what the facts are'*, suggests that the Commission proceeded with a pre-determined case theory as did the statement by Commission Ipp to Mr Barry:

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'We know what happened.'

4. Having developed its case theory the purpose of the public inquiry should be to further investigate the matter by collecting the evidence. However, what is inappropriate is that the Commission failed to provide proper particulars to those witnesses against whom it made adverse findings of corrupt conduct. Rather it provided copious amounts of generalised statements leaving it to the witnesses to determine whether they were targets and if so what the basis of an allegation of corrupt conduct might be and what the elements of any linked criminal offences were.

Scope and purpose document – lack of specificity of case to be met

5. The scope and purpose of the public Inquiry is contained in a document first published on 1 November 2012 and amended on 12 November 2012, a copy of which is behind **Tab 7**.

6. The allegations against our clients and others are contained in a document titled 'Operation Jasper' with paragraphs numbered 1 to 267 dated 12 November 2012, a copy of which is behind **Tab 8** (***Allegations Document***). These written allegations were the subject of the opening by Counsel Assisting, Mr Geoffrey Watson, SC.

7. It was the duty of Commissioner Ipp to ensure that a fair hearing was conducted. He breached that duty. In order for our clients to determine the allegations made against them, they were required to consider the terms of the scope and purpose document, the Allegations Document, the opening by Counsel Assisting, and, thereafter, snippets of allegations made randomly during the course of the public hearing. His conduct was well below the standard required by s.31(6) of the Act.

8. Behind **Tab 9** are extracts of the random way in which allegations were made against our clients. At the time it was difficult to discern what was being alleged. The allegations were deficient and irregular. Our clients did not have the benefit of hindsight.

9. An example of the frustration experienced by Mr Barry QC appearing for Mr McGuigan is the exchange at T943.9 - 25 concerning alleged confidential information about the expression of interest process. Mr Barry's retort:

MR BARRY: *Commissioner, may I ask when there is a reference to expression of interest process we don't have any particulars of what, what precisely that is supposed to involve and the only way I can find out is to ask questions as to whether or not that includes our knowledge of what coal resources were ... '*

...

THE COMMISSIONER: *Why do you persist in raising this?*

MR BARRY: *I only raise it, Commissioner, so that I could be clear in my own mind about what it is that is being alleged against us.'*

10. Having regard to the ultimate findings of corrupt conduct, and the recommendation that the Mt Penny and Glendon Brook exploration licences be cancelled:

    (a) Our clients were not informed, prior to receipt of the submissions by Counsel Assisting at the conclusion of the inquiry, that the possible criminal conduct triggering section 9(1) of the ICAC Act was pursuant to section 184 of the *Corporations Act 2001 (Cth)* and section 192E of the *Crimes Act (NSW)*; and

    (b) It was not until after Messrs. McGuigan and Poole, and other relevant witnesses, had been examined that the Commission revealed its behind the scenes dealings with the Government concerning the Commission's determination to cancel the exploration licences. They were not revealed until the legal proceedings initiated by Travers Duncan alleging apprehended bias against the Commissioner.

Procedural fairness – McGuigan and Poole

11. At no time prior to the commencement of the public hearing or during their evidence was it put to either John McGuigan or Richard Poole that they had committed or may have committed an offence under section 192E of the *Crimes Act*. Nor was it put to John McGuigan that his conduct was intentionally dishonest or reckless in breach of section 184 of the *Corporations Act 2001* (Cth).

12. The first notice that our clients received that their conduct *'could constitute or involve'* the offences under s.192E of the *Crimes Act* or under s.184 of the

Corporations Act was at the end of the evidence when the written submissions from Counsel Assisting were received[6].

13. On 20 November 2012, complaint was made about the lack of specificity of the conduct alleged against our clients[7] to which the Commissioner responded: *'Yes, Mr Barry. I will think about your concerns and I will say something about them tomorrow morning... '*.[8]

14. On 21 November 2012 the Commissioner stated: 'The second matter concerns the statement I made yesterday that I would say something about Mr Barry's complaints this morning. I've decided that it would be preferable for those remarks to be made by Counsel Assisting.'[9]

15. Counsel Assisting then simply repeated the substance of what had been said in the opening statement[10].

16. There was no mention of the possibility, and no reason for our clients to believe, from the statement of scope or purpose, the original opening address of Counsel Assisting or the revised opening address that any adverse findings were going to be made against any of them arising out of the CMG/SIG transaction or that their conduct would be alleged to involve criminal fraud or that the proposed Cascade Coal/White Energy transaction would be alleged to involve reckless or dishonest criminal conduct.

17. Following a general complaint that what had been opened was not proven and that *'affected persons'* were not being accorded procedural fairness, the Commissioner made a further statement:[11]:

> *'When the evidence is concluded, Counsel Assisting will provide the Commission and all affected persons with their written submissions. Those submissions will indicate to affected persons the final allegations made and the basis for them. The affected persons will be given the opportunity of replying in full to them. If any affected person contends that he or she has been taken by surprise the Commission will consider those submissions and take whatever action it deems fit.'*

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[6] ICAC is required to observe the rules of natural justice – *ICAC v Chaffey (1993)* 30 NSW LR 21 at 27

[7] T1090.18. [CB:V:4 T:182 P:1184].

[8] T1090.18. [CB:V:4 T:182 P:1184].

[9] T1116.10. [CB:V:4 T:183 P:1189].

[10] T1116-1118. [CB:V:4 T:183 P:1189]

[11] T1766.1. [CB:V:4 T:185 P:1219]

18. The written submissions dated 22 March 2013 of Counsel Assisting simply contained bald assertions of criminal fraud and criminal misconduct as directors without reference to any evidence.

19. Further, the procedure of only permitting submissions in response is inconsistent with the principles of procedural fairness. An affected person should not be obliged to guess what might ultimately be put by way of written submissions nor is it any answer to a complaint of want of procedural fairness that a party may be given the opportunity to make submissions.

20. Submissions can only be based upon evidence. If during the course of the evidence affected persons such as our clients are not put on notice by the statement of scope or purpose, or opening statements by Counsel or other statements by the Commissioner, of what ultimately may be found against them and the relevant factual basis is not put in cross-examination, this constitutes a denial of procedural fairness.

21. At no stage was it put to any of our clients that the conduct in which they had been engaged could constitute or involve the criminal offence of fraud yet this was the very matter found against each of them. Criminal fraud is a very serious allegation to make against any person. Such allegations should be supported in the same way as they are in criminal proceedings where a brief is delivered to the lawyers for the accused and particulars of the overt acts are provided.

22. Nor, at any stage was it put to any of our clients that they had committed criminal offences under s.184(1) of the *Corporations Act 2001*. The highest the allegation against any of them went was that they had been in breach of fiduciary duty to the 'shareholders'.[12]

23. Nor was there any identification of the relevant financial advantage that our clients were supposed to have been receiving from the transaction with White Energy.

24. There was also a further breach of procedural fairness.

25. In the passage quoted in paragraph 17 above the Commissioner led the parties to believe that procedural fairness would be accorded to them by the opportunity to make submissions.

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[12] T3345.35 (John McGuigan) [CB:V:6 T:209 P:2329], T3350.44-48 (John McGuigan) [CB:V:6 T:209 P:2334], T2593.14-38 (John Atkinson). [CB:V:5 T:203 P:1839],.

26. There is no point in according parties an opportunity to make written submissions unless the relevant decision-maker engages with those written submissions and gives reasons for rejecting them.

27. Whilst ICAC is an administrative body and (unlike judges[13]) is not required to engage fully with evidence and explain why it accepts some matters and not others, when the only opportunity for affected persons to deal with proposed adverse findings is in submissions, it has an obligation to engage with and deal with those submissions.

28. This is particularly so when the allegations involve criminality.

Conduct of Commissioner David Ipp – role of ICAC in destroying reputations

29. Newspaper articles attribute statements to Commissioner Ipp to the effect that he saw the role of ICAC to destroy reputations where he had determined there was corrupt conduct even though, in all likelihood, the Director of Public Prosecutions would not proceed with criminal charges. The article in the Sydney Morning Herald by Michaela Whitbourn published on 2 August 2014, a copy of which is behind **Tab 10** attributes the following statements to Mr Ipp:

- He said that one of ICAC's '*most important weapons*' is the use of public exposure.

- '*The whole raison d'etre of ICAC is the exposure of corruption,*' he says. '*The idea of exposing corruption behind closed doors is oxymoronic.*'

- '*But if you think about past inquiries* ,' he adds, stressing that he is not commenting on current investigations, '*I think my response is: just name one person whose reputation has been **unfairly** trashed.*' (emphasis added)

The clear inference to be drawn is that Mr Ipp regarded one of his roles as trashing the reputations of individuals whom he believed deserved it. He steadfastly refuses to acknowledge the criticisms levelled at ICAC by the

[13] *Mifsud v. Campbell* (1990) 21 NSWLR 725, *Jones v. Bradley* [2003] NSWCA 81, *Waterways Authority v. Fitzgibbon* (2005) 79 ALJR 1816 at [129]-[130], *Pollard v. RRR Corporation Pty Ltd* [2009] NSWCA 110, *Mitchell v. Cullingral Pty Ltd* [2012] NSWCA 389, *MM Constructions (Australia) Pty Ltd v. Port Stephens Council* [2012] NSWCA 417.

judiciary, by Chief Justice Gleeson in the *Greiner* case and more recently by Justice Basten in the *Cunneen* case, concerning reputational damage.

In response to Mr Ipp's invitation we name John McGuigan and Richard Poole as persons whose reputations have been unfairly trashed. The reputational damage is ongoing. We can provide examples if required.

30. The Commission is not empowered with the function of creating new standards of conduct for public officials and individuals and then making adverse findings in relation to those new standards. On the evidence adduced at Operation Jasper, it was not open to the Commissioner to make findings in connection with the commercial dealings between our clients and White Energy that our clients acted contrary to known and recognised standards of honesty and integrity. There was no evidence before the Commission of the way in which commercial due diligence is conducted. Accordingly, it was inappropriate for the Commissioner to create his own standards for those commercial dealings and then find our clients in breach of those standards.

Procedural Fairness - Cascade and Subsidiaries

31. At no stage prior to February 2013, after our clients had given evidence, was it suggested that the Cascade exploration licences might be the subject of a recommendation for cancellation. See Schedule 1 paragraph [8] above.

32. The Mt Penny exploration licence (EL7406) which was held by Mt Penny Coal Pty Limited, being its major asset, was confiscated from it by legislative fiat even though no finding of corrupt conduct was made against it.[14] Moreover, the confiscation was supposedly based upon a finding that the grant of the authorities for Mt Penny and Glendon Brook were tainted by corruption.

33. The Glendon Brook exploration licence (EL7405) held by Glendon Brook Coal Pty Limited, being its major asset, was confiscated by legislative fiat.[15] The cancellation of the Glendon Brook exploration licence was extraordinary. At no stage during the public inquiry was any evidence adduced concerning the creation of that mining tenement nor was there any evidence produced concerning the grant of that exploration licence. That is, it was not the subject of examination of any witness. The justification for the recommendation by the

[14] See the comment by the NSW Solicitor General, Mr Sexton SC contained in paragraph [36(e)] below.

[15] See the comment by the NSW Solicitor General, Mr Sexton SC contained in paragraph [36(e)] below.

Commission to Government to cancel the Glendon Brook exploration licence was based on a supplementary submission by counsel assisting referred to on page 17 of the Third Report which said:

> *'[For] the same considerations that would apply in respect of the Mt Penny tenement, it would be inappropriate to permit Cascade Coal to retain the benefits of the Glendon Brook tenement.'*

Absent any evidence which would impugn either the creation or the grant of the Glendon Brook exploration licence, this recommendation was totally illogical, not based upon any evidence before the Commission and an abuse of power. There was no jurisdictional basis for the recommendation.. Yet the Government acted on that recommendation.

Audi Alteram Partem Rule - Refusal to allow cross-examination on critical issues

34. There are numerous instances through the public inquiry where Counsel representing our client, and others, were not permitted to ask questions of their clients to enable them to clarify matters the subject of the investigation or to explain their own position.

34.1. On the issue of concealment of the prior Obeid involvement in the Mt Penny joint venture from the Independent Board Committee of White Energy the Commission had heard from and rejected the evidence of Richard Poole[16] and his employee, Anthony Levi[17]. On 30 January 2013 when John McGuigan was giving evidence there was an opportunity for his Counsel, Mr Barry QC, to explore this issue so that he could state his own position. During the following exchange between Mr Barry and the Commissioner, he was not permitted to do so. At T3402.30-43:

'MR BARRY: *I then want to take you to matters that you were asked some questions about at some length. Now, Mr Stitt didn't want to ask you but I do. In relation to the CMG transaction, what was the commercial purpose of that transaction?*

[16] Richard Poole's reasons for the structure of the commercial deal are at T2861.40 – 2970.

[17] Anthony Levi's reasons for the structure of the commercial deal are at T3254-3257

THE COMMISSIONER:	*No, he has given that evidence. He gave that answer to Mr Watson. That's repetitive. When Mr Stitt spoke to me I indicated that I understood his evidence to be along the same lines as the witness who I mentioned. I will not allow that question, it is repetitive.'*

Rules of evidence did not apply

35. The rules of evidence did not apply during the examination of witnesses at the public hearing. The Commissioner overruled a number of objections to questions on the basis that the rules of evidence did not apply[18]

36. The Commission published 2 reports which are referred to in this submission as the First Report and the Third Report. An inference can only be drawn from a provable fact[19]. In the absence of the rules of evidence, the so called 'facts' relied upon by the Commissioner were often not provable facts admissible in a court of law. The best example of this is the actual finding against Messrs McGuigan, Atkinson and Poole that they intended to conceal the prior Obeid involvement from public authorities or public officials. This was pure speculation and not an inference drawn from provable facts.

    (a) there were no facts identifying the public official or public authority;

    (b) there was no direct evidence with respect to the 'intention' to conceal from public officials or public authorities. On the contrary, the evidence under oath was that there was no such intention;

    (c) there was no evidence of what the official functions of these unidentified persons were. Rather, presumptions were made as to what those functions might be. Therefore there was no evidence of the procedural steps involved in the exercise of the official functions;

    (d) there was no evidence as to what was the fiduciary duty of the directors of White Energy to that company, yet the inference was drawn that those fiduciary duties had been breached and that assumption was put to the witnesses to deny;

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[18] Operation Jasper T416, T1281, T1735, and T4004

[19] *Dublin, Wicklow and Wexford Railway Co v Slattery (1878)* 3 App Cas 1155: and *Hocking v Bell (1945)* 71 CLR 430 at 443

(e) there was no evidence that the **grant** of the exploration licences to Cascade Coal were tainted with corruption. In fact, the evidence was to the contrary. The First Report contains findings that the Mt Penny exploration licence was granted by the NSW Government in accordance with procedures and processes laid down by the Government. It expressly states that no findings reflect adversely on the integrity of any of the members of the EOI Evaluation Committee or the Probity Auditor and states that each of those persons did their task honestly and to the best of their ability[20]. Therefore there was no provable fact from which the inference could be drawn that the grant of the exploration licences were tainted by corruption. During the High Court constitutional challenge (*Cascade Coal Pty Limited & Ors v the State of NSW* [2015] HCA 13) the Solicitor General for NSW, Mr Sexton SC, stated at T79.3508 – 3511:

> *'In fact, the ICAC did not make findings of corrupt conduct against any of the licence holders in these proceedings. There was a finding of corrupt conduct made against one of the plaintiffs – against Mr Duncan – but that did not relate to the grant of one of the licences.'*

Witnesses only able to put positive case?

37. Prior to Counsel being permitted to cross examine a witness, invariably the Commissioner would require that Counsel state his 'positive case'. This was plainly inappropriate. How can a witness, who doesn't know the particulars of the case made against him, state the positive case he is seeking to make? What, in effect, the Commissioner did was to reverse the onus during the investigation. Instead of the Commission stating its positive case in clear and unambiguous terms, the 'defendants' were presumed guilty and required to state why they were not guilty of what they perceived they may have done wrong. Furthermore, it was impossible to point to evidence supporting a positive case when specific allegations had not been made against them.

Was Gardner Brook a credible witness?

38. Gardner Brook was involved in every aspect of the matter from before the Department called for expressions of interest up to June 2009 when the

[20] First Report at p97. See also the statement by Commissioner Ipp at T1277.27 *'... it's not suggested that the evaluation board meeting and the approval by the board of the preferred candidates was corrupt ...'*

Evaluation Committee determined to grant exploration licences. His reliability as a witness was crucial to many of the factual findings. Commissioner Ipp accepted Gardner Brook as a credible and reliable witness. In the First Report in chapter 18 at page 82 he said:

> *'Broadly speaking, the Commission formed a favourable view of Mr Brook and his evidence; he gave his evidence in a slow and careful way, and in a manner that was designed to be generally honest and accurate. There were numerous instances where Mr Brook gave evidence that was against his own self-interest. Even so, there were times when Mr Brook was hesitant in telling the full story, possibly as a matter of self-preservation.*
>
> *One matter is clear – if there is a conflict between the evidence of Mr Brook and the evidence given by Moses Obeid, Paul Obeid or Gerard Obeid, the Commission generally prefers the evidence of Mr Brook.'*

39. During the private examination of Gardner Brook on 12 March 2012 he was examined on his credit. The following exchange commencing at 193PT .10 is illuminating where Counsel Assisting extracted from Mr Brook concessions that he held himself out as a lawyer and falsely pretended that he had degrees which he didn't have:

"MR WATSON: It would be false for you to hold yourself out as having a law degree?---Yes, it would be.

Have you ever held yourself out as holding a law degree?---Yes, I have.

It would be false to hold yourself out as having attended the Booth School of the University of Chicago?---It would be, yes.

Have you ever held yourself out as having qualified with an EMBA from 20 the Booth School of the University of Chicago?---Yes, I have.

Just to make it plain the Booth School of the University of Chicago is one of the top tier business courses in the world. Is that right?---Correct, yeah.

(Extract from Gardner Brook's private hearing pages 190 PT-194PT are behind **Tab 11.)**

40. During the public hearing Counsel Assisting did not attack the credit of Gardner Brook in any way shape or form. The conduct of Commissioner Ipp in not requiring Counsel Assisting to adduce evidence of credit in the public hearing

was improper. Gardner Brook was a key witness. Evidence going to his credit should have been adduced during the public hearing to give lawyers for affected persons a proper opportunity to cross examine him as to his credibility (s.31B(2(c) of the Act.

41. Notwithstanding his admission that he was a fraudster and a liar, the transcript of the compulsory examination of Mr Brook reveals that he may have been given special treatment:

(a) at PT211 the Commissioner stated to Mr Brook:

'Mr Brook I want to say something to you and I'd like you to think about it carefully and I am sure your legal representatives will also think about it carefully and there will come a time when you will be able to discuss with them what I'm going to say. It is a matter of public record that in the last number of – at least in the last number of inquiries that the Commission has undertaken that where witnesses who have been involved in corrupt conduct have told us the truth immediately, fully we have decided not to recommend any prosecution of them. That is not a promise. I'm simply saying something that is a matter of public record that this has been our practice in many instances. And you just simply have to examine the reports we have published where that has occurred. Now, I am not saying that you have involvement in corrupt conduct, but this is your chance if you have. Do you understand that?'

(b) at PT282:

'I can understand that you are concerned about your safety and what I can offer you is this, that should you return to give evidence, should that be necessary, you will be met by ICAC officers at the airport, you will be accompanied to an appropriate hotel, the whereabouts of which will be known to this Commission. You will be taken from the hotel to the hearing rooms. You will not be – you enter the hearing room privately, by that I mean that although if it is a public hearing, the public will be present. You will be brought in without passing through any member of the public.'

42. The knowledge which Mr Brook had prior to the call for expressions of interest and his involvement in the dealings with Monaro Mining NL were such that, but for the immunity afforded to him by the Commission a finding of corrupt conduct,

which was recommended by Counsel Assisting, would have been made against Mr Brook because of his involvement in and participation in matters involving Moses Obeid and Paul Obeid both of whom had corrupt conduct findings made against them.

43. The way in which the evidence of Mr Brook may have been influenced is illustrated by contrasting the evidence he gave at the public hearing in Operation Jasper with the evidence he gave in the ACCC proceedings before Justice Foster:

(a) in Operation Jasper the following evidence was given:

Mr Barry: *When you had that contact did you know that the Department of Primary Industries was going to require that Monaro Mining to be able to proceed with its bid would have to come up with the amount of money that it offered by way of financial contributions?*

Brook: *Yes*

Mr Barry: *And did you know that it was unable to do so?*

Brook: *I knew that Monaro wanted to withdraw so it's a moot point.*

Mr Barry: *Did you -- ? – I wasn't trying to raise money for Monaro anymore.*

Mr Barry: *My question is did you know that Monaro could not meet its commitments and therefore it had an expiration of interest which was invalid and ineffective?*

(b) In the ACCC proceedings, on 5 April 2016 at p164 during cross-examination by Mr Smith (representing John McGuigan) of Mr Brook the following exchange occurred:

Mr Smith: *And the position was the – as at 22 May, you met with the Monaro directors and they, in effect, said, "we are not proceeding with the bids because we've got concerns about our financial capacity and our financial exposure if we proceed without the cash", correct? --- that's right.*

They didn't have the cash? --- that's right.

Failure to provide exculpatory evidence

44. A lot of evidence and time in the public hearings was devoted to Monaro Mining's offer to pay an additional financial contribution of $25 million and to the issue of whether it had it. However, Gardner Brook had already given clear evidence during his compulsory hearing that Monaro Mining did not have the money. Why wasn't this evidence introduced to the public hearing? The evidence of Gardner Brook at the compulsory hearing at PT263-264 was:

Mr Watson: *Well, that's what I want to ask you, what was the deal?*

Brook: *Okay. The company called Loyal Coal did a deal with Monaro Mining to take over responsibility for the, the EL applications. I couldn't finance the – Monaro Mining had to put a deal to the DPI, their proposal was frankly not commercial, it was a ridiculous amount of money upfront, I think it was $20 or $25 million to that effect.*

...

Mr Watson: *Was it in respect of property which you sold? What was it?*

Mr Brook: *Okay. The bid that was with the DPI as I've mentioned was not commercial, it was too much money being offered upfront without establishing the resource. The DPI had told Monaro Mining of the other bidders in the, the process who, who else had bid for, for Mt Penny.*

45. During his opening Counsel Assisting misleading stated that the people of NSW were deprived of $25 million:

'When Monaro Mining withdrew and when Cascade Coal succeeded in the EOI process, the State received no additional financial contribution at all. That is the basis of my suggestion that the State and thus the people of NSW missed out on the $25 million.'

(T1117 lines 30 – 34)

46. Commissioner Ipp, fully aware of this exculpatory evidence referred to above allowed Mr Watson to make this and other references to the NSW Government being defrauded of $25 million and allowed him to put to witnesses including our clients that they were part of this conspiracy to defraud the NSW Government. Commissioner Ipp was allowing Counsel Assisting to be his instrument for the destruction of reputations.

Sensitive

I·C·A·C
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

Mr. Bruce McClintock SC
Inspector of the ICAC
OIICAC
Culwulla Chambers
Lv 7, 67 Castlereagh Street
SYDNEY NSW 2000

Your Ref: C26 2015

Dear Inspector,

Re: Operation Jasper – John McGuigan & others

I am writing in response to your letter of 3 November 2017 in which you sought the Commission's response to matters raised by Mr Ron Heinrich on behalf of John McGuigan, Richard Poole, Cascade Coal Pty Ltd, Mount Penny Coal Pty Ltd and Glendon Brook Coal Pty Ltd.

The matters raised by Mr Heinrich fall into two broad areas – the Commission's interaction with executive government during the course of Operation Jasper and what is described by Mr Heinrich as the failure to adhere to principles governing the conduct of inquiries.

For the reasons given below, none of the matters raised by Mr Heinrich constitute any abuse of power, impropriety, misconduct or maladministration on the part of Commissioner Ipp or the Commission.

Before responding to the matters of complaint, it is helpful to set out some background information.

Background information

The Commission's Operation Jasper investigation principally concerned the circumstances surrounding a decision made in 2008 by Ian Macdonald, the then Minister for Mineral Resources, to grant a coal exploration licence (the Mt Penny tenement) in the Bylong Valley, including whether that decision was influenced by Edward Obeid or members of his family.

As part of its investigation, the Commission conducted a public inquiry over 45 days between 12 November 2012 and 20 May 2013. The Commission's report: *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others* (the Jasper report), was published in July 2013.

The Commission found that Mr Macdonald directed that a Mt Penny tenement be created and did so to benefit the Obeids. The Obeids sought to submit an expression of interest over the Mt Penny and Glendon Brook tenements by way of a joint venture with Monaro Mining NL and their company, Voope Pty Ltd. Monaro made bids for exploration licences for each of the Mt Penny and Glendon Brook tenements. Monaro subsequently sold to Voope all the shares in the subsidiary which had been intended to apply for the exploration licences. Before the

expression of interest process was completed, Mr Macdonald reopened the process as a favour to Travers Duncan. That permitted Cascade Coal, in which Mr Duncan had an interest, to lodge a bid for Mt Penny and Glendon Brook. The other investors in Cascade Coal included Mr McGuigan and Mr Poole. The Obeids reached an agreement with Cascade Coal to enter into a joint venture, using an Obeid controlled entity called Buffalo Resources Pty Ltd. Those negotiating on behalf of Cascade Coal, including Mr McGuigan and Mr Poole, knew that the Obeids were the party with whom they were entering into a joint venture. An aspect of the joint venture involved Buffalo Resources arranging the withdrawal of the Monaro Mining bids with respect to the Mt Penny and Glendon Brook tenements. That withdrawal resulted in Cascade Coal's bids being successful.

Findings were made in the Jasper report that Mr McGuigan and Mr Poole engaged in corrupt conduct (see pages 150, 151 and 153 of the Jasper report). The findings of corrupt conduct were confirmed by the NSW Supreme Court in *Duncan & Ors v ICAC* [2014] NSWSC 1018 and by the NSW Court of Appeal in *Duncan & Ors v ICAC* [2016] NSWCA 143. The High Court refused applications by Mr McGuigan and Mr Poole for special leave to appeal. No corrupt conduct findings were made against Cascade Coal, Mount Penny Coal or Glendon Brook Coal.

The Jasper report contained statements, pursuant to s 74A(2) of the ICAC Act, that the Commission was of the opinion that consideration be given to obtaining the advice of the DPP with respect to the prosecution of Mr McGuigan and Mr Poole for offences under s 192E of the *Crimes Act 1900* and s 184(1) of the *Corporations Act 2001*. The Commission is waiting on advice as to whether any prosecution proceedings should be commenced against Mr McGuigan or Mr Poole.

In its December 2013 report: *Operations Jasper and Acacia – Addressing Outstanding Questions* (the December report) the Commission, among other things, recommended that the NSW Government consider enacting legislation to expunge the authorities for the Mt Penny and Glendon Brook tenements. A copy of the December report is enclosed for your information. The Commission noted (at p 20) that any expungement could be accompanied by a power to compensate any innocent person affected by the expunging.

The NSW Government subsequently enacted legislation expunging the authorities for the Mt Penny and Glendon Brook tenements.

Interaction with executive government

This complaint appears to be that Commissioner Ipp allowed the Commission to be used by the government to justify legislative intervention and that there were no facts from which an inference could be drawn that the granting of the Mt Penny and Glendon Brook tenements was tainted by corruption.

On 30 January 2013, the then NSW Premier, the Hon Barry O'Farrell MP, wrote to the Commission asking, inter alia, whether the NSW Government should take any action with respect to licences or leases under the Mining Act relevant to the Commission's Operation Jasper investigation and, if so, what action.

By direction made on 1 May 2013, the Commission invited counsel assisting and all interested parties to provide written submissions to the Commission on whether, in the event it found any corrupt conduct occurred in connection with the Mt Penny, Yarrawa and Glendon Brook tenements, recommendations might be made by it in regard to the following matters:

(a) whether the State Government should do nothing in regard to the existing Mt Penny tenement (and the other two tenements) and let matters take their course in accordance with the existing statutory regime;

(b) whether the State should rely on the existing statutory regime and any other rights available to it at law to terminate the Mt Penny tenement (and the other two tenements), and any other existing mining title or development application ancillary to any of those tenements or which has been brought into existence in consequence of the grant of any of those tenements;
(c) whether the State should enact legislation entitling the Minister to terminate any exploration licence, and any other existing mining title or development application ancillary to such licence, or which has been brought into existence in consequence of the grant of such a licence, on the grounds of public interest criteria;
(d) whether the State should enact legislation providing that public interest criteria of the kind referred to in sub-paragraph (c) above should include an opinion by the Minister that corruption or fraud or breach of ministerial duties known to the grantee affected the creation of the mining title in question; and
(e) whether the State should enact legislation entitling the Minister to impose a condition, when granting a mining lease or any other form of mining title or development application ancillary to such a title, requiring the grantee of such a title to pay a sum of money, to be determined by the Minister, to the State.

Submissions were received from counsel assisting and on behalf of a number of parties, including Cascade Coal and Mr Poole.

The Commission engaged Bret Walker SC and Perry Herzfeld to provide advice on the Premier's questions. Their advice of 10 December 2013 was published as Appendix 1 to the December report.

In the December report, the Commission recommended that the NSW Government consider enacting legislation to expunge the authorities for the Mt Penny and Glendon Brook tenements. The reasons for the Commission making the recommendation are fully set out in the December report. It was, of course, a matter for the NSW Government whether or not to accept any recommendation made by the Commission.

The December report addressed the Commission's jurisdiction to provide advice and make recommendations. I draw your attention to chapter 3 of the December report which sets out the Commission's jurisdiction to provide advice and make recommendations. It is noteworthy that, although the question of jurisdiction was raised with respect to those aspects of the Commission's jurisdiction in relation to Operation Acacia, no such questions were raised by any party at the time in relation to Operation Jasper.

The question of whether there was some impropriety involved in interactions between the Commission and the NSW Government with respect to this matter was considered and rejected by Hoeben CJ at CL in *Duncan v Ipp* [2013] NSWSC 314 and by the NSW Court of Appeal in *Duncan v Ipp* [2013] NSWCA 189. The High Court of Australia refused a special leave application in relation to those proceedings.

It is clear from the findings in the Jasper report that the granting of the Mt Penny tenement was tainted by corruption. The Commission found that Ian Macdonald engaged in corrupt conduct by entering into an agreement with Edward Obeid Snr and Moses Obeid whereby he acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mt Penny tenement for the purpose of benefitting Edward Obeid Sr, Moses Obeid and other members of the Obeid family. In the December report the Commission accepted the submission of counsel assisting that Cascade Coal had acquired the Glendon Brook tenement because of the agreement to acquire the Mt Penny tenement and that it would be inappropriate to permit Cascade Coal to retain the benefits of the Glendon Brook tenement.

I also note that in Duncan & Ors v ICAC [2014] NSWSC 1018, McDougall J, in considering the corporate plaintiffs' claims to declaratory relief in relation to the recommendations in the December 2013 report, found (at [237]) that "to the extent that the factual findings in the (Jasper report) stand, the factual basis for the Commission's recommendations was available".

The Court of Appeal also considered the issue in Duncan & Ors v ICAC [2016] NSWCA 143. Basten JA found (at [733]) that "...it cannot be said that there was any want of statutory power for the Commission to make the recommendation in relation to the Mt Penny tenement" that (at[737]) the recommendation with respect to Glendon Brook was "based squarely" on the results of the investigation and "...there was no want of statutory power for the recommendation in relation to the Glendon Brook tenement".

Failure to adhere to principles governing the conduct of inquiries

The principal basis of this complaint is that the Commission failed to provide proper particulars to those witnesses against whom it made adverse findings. The Commission rejects that claim.

The scope of the Commission's investigation were set out in the summonses served on witnesses. An amended scope was published on the Commission's restricted website on 8 November 2012. A further amended scope was announced by the Commissioner on the first day of the Operation Jasper public inquiry and published on the Commission's public website. Counsel assisting delivered a detailed opening address on the first day of the public inquiry that identified the issues under investigation. At the conclusion of evidence in the public inquiry, counsel assisting prepared detailed written submissions that were provided to all relevant parties. Those submissions canvassed the potential findings available to the Commission. Submissions in response were received. The latter included submissions on behalf of Mr McGuigan, Mr Poole and Cascade Coal. In addition, counsel assisting and persons adversely mentioned in the submissions in response were given the opportunity to reply. It is noted in the Jasper report that, in preparing the report, the Commission considered each of the submissions it received.

I note that in *Duncan & Ors v ICAC* [2014] NSWSC 1018, the individual plaintiffs, including Mr McGuigan and Mr Poole, submitted that they had been denied procedural fairness in that they had not been given notice, prior to receiving closing written submissions from counsel assisting, spelling out the way they were said to have acted corruptly or the nature of the alleged criminality and that they had not been cross-examined on the elements of the offences. McDougall J rejected those submissions and concluded there had been no denial of procedural fairness.

In *Duncan & Ors v ICAC* [2016] NSWCA 143, the Court of Appeal rejected the ground of appeal that McDougall J had erred in failing to conclude that the appellants had been denied procedural fairness.

Various other complaints are included under this general heading, including that the Commission:

- failed to investigate exculpatory evidence;
- failed to disclose exculpatory evidence;
- failed to permit cross-examination of witnesses as to their credit;
- refused to allow cross-examination on critical issues; and
- used the public inquiry to destroy reputations.

The complaint does not identify what exculpatory evidence the Commission failed to investigate.

The only incident cited of a failure to disclose exculpatory evidence is the compulsory examination evidence of Mr Brook concerning Monaro Mining's ability to pay $25m as a contribution should it succeed in being awarded the tenements. Monaro's ability to pay was considered in the Jasper report (at p 96) and had been raised in the submissions made on behalf of Cascade Coal and Mr McGuigan. In any event, Mr Brook's evidence on this matter was not exculpatory and was not relevant to the corrupt conduct findings made against Mr McGuigan or Mr Poole in the Jasper report.

The complaint does not identify in what instances the Commission failed to permit cross-examination of witnesses as to their credit or how, in the circumstances of the public inquiry, that constituted abuse of power, impropriety, misconduct or maladministration.

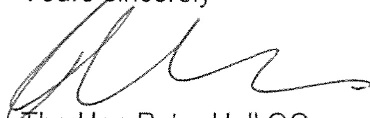
The only example provided in the complaint concerning a refusal to allow cross-examination on a critical issue is set out at pages 26-27 of Schedule 2 to the complaint. It is evident from the transcript excerpt set out on those pages that the reason cross-examination was not allowed on the relevant topic was because the evidence on that topic had already been given and the question was repetitive.

The public inquiry was not used to destroy reputations. The public inquiry was held for the purpose of the Commission's investigation. The purpose of the public inquiry was to enable the Commission to establish facts and to ascertain whether corrupt conduct had occurred.

Complaint is also made about the acceptance of Gardner Brook's evidence. It was a matter for the presiding Commissioner to assess the credibility of each witness, including Mr Brook. The reasons for the Commission's acceptance of his evidence are set out in chapter 18 of the Jasper report.

Please let me know if you require any further information on any aspect of the complaint or the matters set out above.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

12 December 2017