New South Wales

Office of the Inspector
of the Independent Commission
Against Corruption

Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988

OPERATION "HALE"

ICAC re Margaret Cunneen SC & Ors

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PREFACE AND BRIEF EXECUTIVE SUMMARY

"'Mr Ipp says ICAC was wrong to investigate allegations that Ms Cunneen had advised the girlfriend of her son, Sophia Tilley, to fake chest pains at the scene of a car accident to avoid a random breath test.

'I think it was an error of judgment. I think the young woman concerned [in the traffic accident] was shown in her breath tests not to have had any alcohol in her blood,' Mr Ipp told The Daily Telegraph.

'It's hardly serious and the ICAC Act directs ICAC to investigate only serious or systemic corruption or to focus on serious and systemic corruption.

'This was not serious or systemic and I think it's an error of judgment."

The Hon David Ipp AO QC former Commissioner of the ICAC as reported in *The Daily Telegraph 24th April 2015 with the by line of Andrew Clennell – State Political Editor*

INTRODUCTORY NARRATIVE

On the 31st of May 2014, at about 6.10 p.m, on Willoughby Road, Willoughby in Sydney, there occurred a multi vehicle collision.

It was the aftermath of this collision that erupted into a newsworthy event in, for example, The Sydney Morning Herald of the 30th of October 2014 and on The Australian Broadcasting Corporation News of the same date (*five months after the event itself*) following the issue of a public notice by the New South Wales Independent Commission Against Corruption (ICAC) in the following terms:

> *"Home > Investigations > Current investigations > NSW public official – allegations concerning corrupt conduct (Operation Hale) > Media Releases: ICAC public inquiry into allegations concerning alleged corrupt conduct by a senior public official*
>
> ***ICAC public inquiry into allegations concerning alleged corrupt conduct by a senior public official***
>
> *The NSW Independent Commission Against Corruption (ICAC) will hold a public inquiry commencing on Monday 10 November 2014 as part of an investigation it is conducting into allegations that on 31 May 2014 Deputy Senior Crown Prosecutor, Margaret Cunneen SC and Stephen Wyllie, with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, and that Sophia Tilley, with the intention to pervert the course of justice, did pretend to have chest pains, to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol level at the scene of a motor vehicle accident.* (**emphasis added**)
>
> *The public inquiry will start at 10:00 am and will be held in the Commission's hearing room on Level 7, 255 Elizabeth Street, Sydney. It will run from 10 to 12 November 2014.*
>
> *As this matter involves a senior public official involved in the administration of justice in New South Wales, the Commission considered it appropriate for a person from outside New South Wales to preside at the inquiry. Accordingly, Mr Alan MacSporran QC has*

been appointed an Assistant Commissioner to preside at the public inquiry, and Counsel Assisting the Commission will be Mr Michael Fordham SC.
Media contact: ICAC Acting Manager Media, Sue Bolton, 02 8281 5799 / 0417 467 801."

The Sophia Tilley referred to in the media release was the driver of a vehicle which was apparently "T-boned" in the collision on the 31st of May. Stephen Wyllie is her boyfriend; he was not present at the time of the collision though arrived later at the scene, as did Ms Margaret Cunneen SC, Deputy Senior Crown Prosecutor, the mother of Stephen Wyllie. Ms Cunneen by a leasing arrangement with her employer was entitled to full private and personal use of the motor vehicle involved in the collision.

The inquiry into the matter of the perversion of the course of justice, in the end, turned out to be one of the several areas of investigation upon which the ICAC chose to embark in the aftermath of the Willoughby Road collision. The others involved Ms Cunneen only: namely whether in some way she was in breach of the arrangement with her employer as to the use of the motor vehicle by her son's girlfriend and an insurance claim in respect of it, and ultimately whether there was material for consideration by the Director of Public Prosecutions to determine whether Ms Cunneen was in breach of the Code of Conduct of that Directorate.

It is appropriate at this point to identify the other matters involving Ms Cunneen to dispose of them almost with the same dispatch they appear to have been disposed of by the ICAC.

Ms Cunneen, according to a procurement accounting officer leased from the New South Wales State Fleet via the Office of the Director of Public Prosecutions the Ford Mondeo station wagon being driven by Ms Tilley. The lease was for 100% private use and Ms Cunneen made payment by way of salary sacrifice. A partially completed claim form relating to the damage done to the vehicle was in fact completed, and the declaration on it filled in by a departmental officer. There was no question apparently of the propriety of Ms Tilley being a driver of the fully privately leased vehicle nor in the end in relation to the insurance claim.

The second matter considered to be of importance to the ICAC as part of its investigation was as to the use of the "E-Tag" on the vehicle. That was the subject of inquiry by the ICAC on two bases. First to determine whose it was (it was not issued by the DPP; it was Ms Cunneen's). Secondly in order to determine, as far as I can understand it from documentation, when the E-Tag last registered as being used in order to aid the determination of when it was that Ms Tilley may have had her last drink (if she had any drink at all – and that is not a matter for me to decide). One of many problems with this avenue of inquiry for that purpose was that Ms Tilley was driving from the east to the north: the tags on a journey across the harbour or under it are registered at the northern end. No joy there.

For completeness I should mention that the ICAC was at some point concerned to locate evidence in relation to red P plates being on Ms Cunneen's vehicle whilst it was driven by Ms Tilley: that investigative endeavour also came to naught.

I suppose these aspects having been abandoned with the same facility as they were apparently considered of critical importance following upon the Willoughby Road collision, left only the perversion of the course of justice aspect and the allegation of giving of false evidence to the ICAC and, in due course, the suggestion of consideration of disciplinary action for some misconduct.

At the time of preparing this Report the whole of what became Operation "Hale" lies virtually in tatters save for the extraordinary outstanding disciplinary matter.

After certain litigation to which reference will be made, and which found that the ICAC had no jurisdiction to embark upon the "corrupt" conduct aspect of its investigation, and after the abandonment by the ICAC of whatever it was seeking to identify as some wrongdoing in relation to the car arrangements between Ms Cunneen and her employer, the ICAC forwarded, amongst other material, to the Director of Public Prosecutions Mr Lloyd Babb SC, 2274 pages of text and other media messages from Ms Cunneen's mobile phone going back to 2005 to permit his determination of the disciplinary aspect.

By letter dated the 10th of November 2015, however, Mr Lloyd Babb, who, in my view, is in a position of intractable conflict of interest being the Director of Public Prosecutions, and said to be the subject of adverse comment in the texts, informed Ms Cunneen that he would defer deciding upon the disciplinary aspect until after my investigation into the actions of the ICAC and its officers has been completed.

It is to be recalled, for present purposes in brief, that the ICAC issued a media release dated the 27th of May 2015 advising that following the passing of legislation by the New South Wales Parliament consequent upon the adverse decision of the High Court, and having conferred with the DPP on the 19th of May, it proposed to refer to Mr Lloyd Babb SC for consideration whether charges of attempting to pervert the course of justice and giving false evidence to the Commission were available against Ms Cunneen, Mr Stephen Wyllie and Ms Sophia Tilley. Mr Babb referred the matter to the Attorney General (Ms Upton MP) who referred the issue to the New South Wales Solicitor General Mr Michael Sexton SC. The matter was then referred to Mr Gavin Silbert QC, Chief Crown Prosecutor of the State of Victoria. On the 24th of July 2015 the New South Wales Solicitor General Mr Sexton issue a media release stating that the New South Wales Solicitor General, after considering the advice of Mr Silbert, had determined that an indictment should not be found in relation to charges against Ms Cunneen, Mr Wyllie or Ms Sophia Tilley for attempting to pervert the course of justice or giving false evidence to the ICAC.

ADVISORY NOTE

A reader of this Report should have no expectation as to there being revealed all or indeed any details of the motor vehicle accident of the 31st of May 2014. There will not be revealed protected/secret/classified/sensitive/materal from law enforcement agencies relating to any person. The fact that other agencies had an involvement where relevant may be referred to.

The structure of my inquries into the conduct of the ICAC and its Officers in connection with Operation "Hale" has been straightforward. First, I have interviewed nobody from the ICAC. All information relating to what it did is based upon material that the ICAC has provided to me. Secondly, I have interviewed Ms Cunneen and Ms Tilley. Thirdly, I have made enquiries of the Deputy Registrar of the Local Court in the Downing Centre in

relation to the issue of a warrant and, fourthly, I have had communication with the Director of a national investigative agency that led to the provision to me of material which will be the subject of discussion later. The investigation by me into the whole affair was initiated as provided by the *ICAC Act* by myself and I was later joined by Ms Cunneen, Mr Wyllie and Ms Tilley as complainants. What began as an audit became an inquiry and/or investigation.

Whilst this is a discrete Report, for any person interested in the whole culture of integrity maintenance and corruption prevention, there should also be read the *Cunneen* judgments of the Supreme Court of NSW and Court of Appeal (10 November and 5 December 2014) and the judgment of the High Court (15 April 2015): ([2014] NSWSC 1571; [2014] NSWCA 421; [2015] HCA 14); the Report from the Independent Panel constituted by the Hon. Murray Gleeson AC and Mr B McClintock SC and my Report under s.77A of June 2015 forming part of or collateral to the Independent Panel's Report (June 2015). Additionally there are the recently presented Annual Reports of both the ICAC and of my Inspectorate (October 2015).

Appendix 1 hereto contains the relevant part of the ICAC's legislation dealing with the functions and powers of the Commission. Appendix 2 contains the relevant part of the legislation dealing with the functions and powers of the Inspector.

Other sections of the legislation will be set out where necessary during the course of this Report.

SOME BACKGROUND & CONTEXT INTO WHICH TO PLACE OPERATION "HALE"

I set out a summary of Investigations conducted by ICAC in the 2 years prior to its announcement of its public inquiry in Operation Hale and more recently.

1. **Operation Misto:** ICAC investigated allegations that a former IT Manager. Mr Roberts, issued false invoices over a period of 8 years (2005 - 2007; 2010 - 2011 and 2012 - 2013) to 3 separate universities (Newcastle, Sydney and Macquarie) whilst working at those universities. The false invoices amounted to a total of $146,165 of which $113,715 was paid to Mr Roberts by the Universities

involved. The public inquiry was held over 3 days in February 2015. The Report was published on 25 June 2015. ICAC made corrupt conduct findings against Mr Robert and a Mr Killalea, the principal of the private company which issued the false invoices. It also recommended that the advice of the DPP be sought with respect to the prosecution of those 2 persons for several offences under *the Crimes Act 1900* (NSW) , including obtain money by deception ,create false instrument and dishonestly obtaining funds and for the offence of giving false and misleading evidence to ICAC during a compulsory examination (s.87 *ICAC Act 1988*) There is currently no record on the ICAC website as to the matter being referred to the DPP for consideration of prosecution action.

ICAC also made two corruption prevention recommendations to the University of Sydney and one recommendation to all of the universities to help prevent the recurrence of the conduct exposed in the investigation.

2. **Operation Jarah:** ICAC investigated allegations that a former Ausgrid engineer, Phillip Cresnar, solicited and received benefits totalling about $252,651 from Ausgrid contractors and subcontractors in exchange for partially exercising his public official functions and that he also disclosed confidential information acquired in the course of his official functions. The public inquiry was held over 6 days in January 2015. The Report was published on 3 June 2015. ICAC made corrupt conduct findings against Mr Cresnar and several other persons. It also recommended that the advice of the DPP be sought with respect to the prosecution of those persons for several offences under the Crimes Act 1900 including receiving corrupt commissions and under the ICAC Act 1988, including giving false or misleading evidence at a compulsory examination and disclosing information about a compulsory examination. On 17 July 2015, a brief of evidence was forwarded to the DPP for consideration of prosecution action. As at the time of writing this Report, ICAC is still waiting for advice from the DPP as to whether there is sufficient evidence to prefer charges. The ICAC also made three corruption prevention recommendations to Ausgrid to help prevent the recurrence of the conduct exposed in the investigation.

3. **Operation Yaralla:** This was a referral from Parliament to ICAC and involved allegations about consultants with whom Sydney Local Health District had commercial dealing relating to Yaralla Estate matters Concerns were that there were relationships between the consultant companies and members of the Liberal Party which may have led to corrupt conduct. ICAC found no evidence of corrupt conduct and so there was no public inquiry. The Report was published in October 2014.

4. **Operations Credo and Spicer:** In Credo, ICAC investigated allegations that persons with an interest in Australian Water Holdings Pty Ltd (AWH) obtained a financial benefit through adversely affecting the official functions of Sydney Water Corporation (SWC) and also whether public officials and others were involved in the falsification of a Cabinet Minute relating to a public private partnership proposal made by AWH intended to mislead the NSW Government Budget Cabinet Committee and to obtain a benefit for AWH.

   In Spicer, ICAC investigated allegations that certain members of parliament and others corruptly solicited, received and concealed payments from various sources in return for certain members of parliament and others favouring the interests of those responsible for the payments. It is also alleged that certain members of parliament and others solicited and failed to disclose political donations from companies, including prohibited donors, contrary to the *Election Funding, Expenditure and Disclosures Act 1981.*

   The public inquiry in Credo ran from 17 March 2014 to 16 April 2014 and in Spicer from 28 April to 20 May 2014 and then from 6 August to 12 September 2014. The Reports are yet to be published – the delay arising from litigation which resulted in the High Court decision in *Cunneen* [2015] HCA 14.

5. **Operation Spector:** ICAC investigated allegations that between February 2012 and February 2013, a former RailCorp Manager, Joseph Camilleri, corruptly solicited and received about $1.6 million from various RailCorp subcontractors and employees and that in 2012, his sister, Carmen Attard, an employee at Housing NSW, corruptly solicited and received funds in the amount of about

$180,000 from other Housing NSW employees. The public inquiry was held over 8 days in February 2014. The Report was published in October 2014. It made corrupt conduct findings against Mr Camilleri, Ms Attard and several others and recommended that the DPP consider prosecution of those persons for various offences including corruptly soliciting and receiving benefits in breach of s.249B(1) of *the Crimes Act 1900* and in addition, the prosecution of Mr Camilleri for the offence of destruction of documents in breach of s. 88(2)(a) of the ICAC Act (Mr Camilleri). The brief was forwarded to the DPP on 17 December 2014 and the ICAC is awaiting its advice as to whether there is sufficient evidence to prosecute.

ICAC also recommended the consideration of disciplinary action against Ms Attard with a view to her dismissal.

6. **Operation Verdi:** ICAC investigated allegations that a former Chancellor of the University of New England, John Cassidy, provided confidential and/or sensitive information, that he acquired in the course of his official functions, in connection with the sale of the university-owned Tattersalls Hotel, to his business associate, or otherwise made use of the information, for the benefit of himself and another. The public inquiry held over 5 days in July 2014. The Report was published on 30 October 2014. Corrupt conduct findings were made but as ICAC considered Mr Cassidy's conduct involved disciplinary matters rather than criminal offences, there was no recommendation made to refer the matter to the DPP. As Mr Cassidy was no longer employed at the University by the time of the findings, ICAC did not have to consider whether any disciplinary action should be taken.

7. **Operations Cyrus, Cabot and Meeka:** ICAC investigated the conduct of Edward Obeid and others between 1995 and 2011 in relation to Circular Quay retail lease policies (Cyrus) and the conduct of Edward Obeid and others in relation to influencing the granting of water licences and the engagement of Direct Health Solutions Pty Limited (Cabot and Meeka). The public inquiry was held between 28 October and 25 November 2013. A Report in Operation Cyrus was published separately to the Report in Operations Cabot and Meeka. Both were published in June 2014.

In Cyrus, corrupt conduct findings were made against several persons, including Edward Obeid. A brief of evidence was forwarded to the DPP and on 19 November 2014, the DPP advised that there was sufficient evidence to charge with Mr Obeid with the offence of misconduct in public office. The matter is currently before the Supreme Court.

In Cabot and Meeka, corrupt conduct findings were made in relation to Edward Obeid and a brief was forwarded to the DPP on 7 October 2014 for the consideration of prosecution of Edward Obeid for the offence of misconduct in public office. ICAC is awaiting the DPP's determination of whether proceedings will be commenced.

8. **Operation Cavill:** ICAC investigated allegations of corrupt conduct by former Mayor of Ryde Local Council, Ivan Petch and other Councillors. The public inquiry was held over 11 days in July 2013 and September 2013. The Report was published on 30 June 2014. Corrupt conduct findings were made against a number of people, including Mr Petch and a brief was forwarded to the DPP. In July 2015, a number of persons were charged with varying offences including misconduct in public office, blackmail, give false and misleading evidence to ICAC. One of the matters has been set for trial in early 2016. ICAC also recommended the consideration of disciplinary action in relation to Mr Petch's conduct with a view to his dismissal.

   ICAC also recommended consideration of prosecution for breaches by a number of persons of *the Election Funding, Expenditure and Disclosures Act 1981*. The Electoral Commission took over that part of the prosecution and announced on 26 August 2015, that there was insufficient evidence to commence proceedings.

9. **Operation Dewar:** ICAC investigated allegations that the then NSW State Emergency Service (SES) Commissioner, Murray Kear, took detrimental action against a Deputy Commissioner in reprisal for making allegations to him that another SES Deputy Commissioner had engaged in corrupt conduct and that he showed favour to that Deputy Commissioner. There were also allegations that the SES Commissioner made false statements to ICAC. The public inquiry was held

over 4 days in December 2013. The Report was published in May 2014. Corrupt conduct findings were made and a brief for consideration of prosecution action was forwarded to the DPP on 10 September 2014. On 3 February 2015, the DPP advised that there was sufficient evidence to prosecute Mr Kear for breach of section 20 of the *Public Interest Disclosures Act* 1994, taking detrimental action in reprisal for a person making a public interest disclosure. The hearing is set for February 2016.

The ICAC also recommended the consideration of the taking of action against Mr Kear for disciplinary offences of misconduct with a view to his dismissal.

10. **Operation Nickel:** ICAC investigated allegations that a former heavy vehicle competency-based assessor acting on behalf of Roads and Maritime Services (RMS), Christopher Binos, solicited benefits (cash payments) from applicants for heavy vehicle licences, and conducted fraudulent heavy vehicle assessments. The public inquiry was held over 2 days in October 2013 and the Report was published in January 2014. ICAC made corrupt conduct findings against Mr Binos and several other persons. A brief of evidence was forwarded to the DPP for consideration of prosecution action. Mr Binos was charged with corruptly receiving benefits in breach of s.249B(1) of *the Crimes Act.* He has pleaded guilty and the sentence is to be heard in February 2016. The DPP determined that there was insufficient evidence to charge the other persons involved.

ICAC also made one corruption prevention recommendation to the Roads and Maritime Services.

11. **Operation Torino:** ICAC investigated allegations concerning the possession and supply of steroids and other matters involving a Corrective Services NSW corrections officer, Mr Di-Bona. There was no public inquiry. The Report was published in September 2013. The DPP determined that there was sufficient evidence to charge Mr Di-Bona with 5 counts of giving false and misleading evidence at a compulsory examination in breach of s.87(1) of *the ICAC Act.* He pleaded guilty and on 20 November 2014, he was sentenced to a term of imprisonment of 12 months with a non parole period of 6 months, of which 4 of

the terms were to be served concurrently and the fifth was to commence on 20 April 2015. The sentence was confirmed on appeal.

12. **Operation Tilga:** ICAC investigated allegations concerning the process relating to the supply of security services to several NSW public authorities. The public inquiry was held over 24 days between June and August 2012. The Report was published on 26 September 2013. Corrupt conduct findings were made against a number of persons. A brief was forwarded to the DPP and on 17 April 2015, the DPP determined that there was sufficient evidence to charge Peter Diekman with corruptly giving benefits in breach of s.249B(2) of the Crimes Act and Robert Huskic with corruptly receiving benefits in breach of s.249B(1) and using false documents in breach of s.254(b)(iii). Those matters are presently before the Court. The DPP advised that there was insufficient evidence to charge Daniel Paul against whom corrupt conduct findings had also been made.

ICAC made 11 corruption prevention recommendations to help NSW government agencies address weaknesses in the procurement and management of security services.

13. **Operation Jasper:** ICAC investigated the circumstances surrounding a decision made in 2008 by the then Minister for Primary Industries and Minister for Mineral Resources, the Hon. Ian Macdonald MLC, to open a mining area in the Bylong Valley for coal exploration, including whether the decision was influenced by the Hon. Edward Obeid MLC. Corrupt conduct findings were made against several persons, including Edward Obeid MLC and Ian MacDonald. A brief was forwarded to the DPP and ICAC is waiting for its decision as to whether there is sufficient evidence to charge any persons in relation to the conduct investigated by ICAC.

On 30 October 2013, ICAC released a corruption prevention report concerning Operations Jasper and Acacia (see below) in which it made 26 recommendations to reduce opportunities and incentives for corruption in the state's management of coal resources.

On 18 December 2013, ICAC released a separate report dealing with certain matters identified in the Parliamentary terms of reference for Operation Acacia

and similar matters identified in the letter of 30 January 2013 from the Premier of NSW in relation to Operation Jasper. The Commission's recommendations in this report included that the NSW Government considers enacting legislation to cancel the coal exploration licences for Doyles Creek, Mount Penny and Glendon Brook, which it in fact ultimately did.

14. **Operation Acacia:** ICAC investigated the circumstances surrounding the issue of an invitation to Doyles Creek Pty Ltd to apply for, and allocation of, an exploration licence. The public inquiry was held over 37 days between March and May 2013. The report was published on 30 August 2013. Corrupt conduct findings were made against several persons, including Ian MacDonald and John Maitland and a brief was forwarded to the DPP. The DPP determined that there was sufficient evidence to charge Mr MacDonald, Mr Maitland and Craig Ransley persons with offences which include s.178BB of *the Crimes Act,* making and publishing false and misleading statements, s. 87 of *the ICAC Act,* giving false and misleading evidence to ICAC and the offence of misconduct in public office. Those matters are presently before the Court and a trial has been set down in the Supreme Court on 14 March 2016. The DPP determined that there was insufficient evidence to charge Andrew Poole, against whom ICAC made corrupt conduct findings.

15. **Operation Indus:** ICAC investigated the circumstances in which Moses Obeid provided the Hon. Eric Roozendaal MLC with a motor vehicle in 2007. The public inquiry was conducted over 4 days from November 2012. The Report was published in July 2013. A corrupt conduct finding was made against Moses Obeid and recommendations were made for the referral of the matter to the DPP for consideration of prosecution of offences of providing false and misleading evidence contrary to s. 87 of *the ICAC Act.* A brief was forwarded to the DPP and ICAC is still awaiting the DPP's decision as to whether prosecution action will be taken.

Since the High Court Decision in Cunneen, ICAC has conducted the following public inquiries (the Reports are yet to be published):

1. **Operation Elgar:** ICAC commenced public hearings in Operation Elgar on 9 November 2015). ICAC is investigating allegations that, between February 2012 and July 2013, Mr Meeth, a public official employed as the Head of Projects (ICT) at Sydney University, corruptly exercised his official functions for the benefit of IT consulting service Canberra Solutions Pty Ltd.

   It is alleged that Mr Meeth acted partially and dishonestly by engaging certain ICT contractors through Canberra Solutions, although this company was not a NSW Government-accredited C100 company as required under the university's directions for the recruitment of ICT contractors.

2. **Operation Sonet:** ICAC investigated allegations that an acting ICT Manager of Tafe South Sydney West Institute, dishonestly obtained over $1.7 million from the institute.

3. **Operation Yancey:** ICAC investigated allegations concerning the abuse of procurement processes by Department of Justice Asset Management Branch Deputy Director,Capital Works, Anthony Andjic, in the awarding of a contracts to refurbish NSW courthouses in 2013.

4. **Operation Vika:** ICAC investigated allegations concerning allegations of corrupt payments related to the supply of catering and other products to the NSW Rural Fire Service between 2009 and 2015.

5. **Operation Tunic:** ICAC investigated allegations that former Mine Subsidence Board district manager, Darren Bullock, received corrupt payments or other benefits as an inducement or reward for showing favourable treatment to building contractors. Further, whether Mr Bullock disclosed confidential MSB tender information to a building contractor and breached MSB financial delegations, policies and/or procedures relating to the awarding of contracts and the making of payments to a building company.

This summary provides a backdrop or canvas of the work of the ICAC against which Operation "Hale" may be judged.

If one combines the words "attempt to pervert the course of justice" and "Deputy Senior Crown Prosecutor, SC", that skeletal exercise could sustain a view that that was sufficient to engage the attention of the ICAC. However when the flesh is added, including that it was allegedly one statement, that if it happened at all it had but once and therefore was not systemic in relation to the utterer of the statement whatever view might be held as to seriousness, when the real issue of conflict of interest is thrown into the pot and that all lawfully obtained evidence is examined the reality of the Operation "Hale" in my view is that it does not certainly, in the end, fall within the general range of matters outlined above. At the beginning eyebrows might be raised at the allegation but will be quickly lowered when the substance is considered.

The ICAC BECOMES INVOLVED – A COMPONENT OF FARCE – SUMMONSES & WARRANTS

On 30 June 2014, a Commonwealth agency delivered by hand to ICAC, a letter with the reference: **"DPP Prosecutor possibly involved in corrupt conduct"** and which attached certain information. On 2 July 2014, consequent upon receipt of that information, ICAC initiated a preliminary investigation, the scope of which was identified as:

> *"The Commission is investigating an allegation that on 31 May 2014:*
>
> *(a) Margaret Cunneen, with the intention of perverting the course of justice, counselled Sophia Tilley to "fake chest pains", and*
>
> *(b) Sophia Tilley, with the intention of perverting the course of justice, did fake chest pains,*
>
> *to prevent investigating police from obtaining evidence of Tilley's blood/alcohol level at the scene of the accident.*
>
> *The Commission is also investigating whether in providing information about the circumstances of the accident to a DPP official, or the Treasury Managed Fund*

insurance agency, Margaret Cunneen provided a truthful account of the circumstances of the accident".

During the preliminary investigation phase, ICAC gathered information and evidence using its powers under the Act, including issuing Notices to Produce and obtaining witness statements. At this point I propose only to detail those parts of the investigation which in my view raise questions of legality, propriety and proportionality. (The steps taken are mentioned later in the context of considering the question of conflict of interest).

On 23 July 2014, Commissioner Latham issued Notices to Attend and Produce documents **forthwith** (**emphasis added**) to Margaret Cunneen, Gregory Wyllie, Stephen Wyllie and Sophia Tilley requiring with respect to Gregory Wyllie, Stephen Wyllie and Sophie Tilley the production of the one phone identified in the schedule to his/her specific Notice and with respect to Margaret Cunneen, the production of 2 phones: her DPP-issued work phone and her personal phone. The Notices to Attend and Produce were issued purportedly pursuant to section 22 of *the ICAC Act.*

On 30 July, ICAC investigators simultaneously served at 2 addresses Notices on the relevant persons. To this end, ICAC had conducted surveillance of the 4 "targets" in the days prior to the service of the Notices so as to ascertain their activity patterns. The surveillance was also to note the description of any mobile phone/s used by the particular target. Given the scope of ICAC's preliminary investigation and the nature of the conduct involved, the decision to approve the surveillance must come under scrutiny. The use of scarce public resources in these circumstances as well as the invasion of privacy, particularly in conducting surveillance on Gregory Wyllie, whose connection based on the information before me was only that he was the partner of Margaret Cunneen and the father of Stephen Wyllie, and not otherwise engaged in corrupt conduct, does not seem warranted or justified.

On service of the Notices on 30 July 2014, the phones were produced as requested in the respective Notices. Gregory Wyllie's phone was returned to him that evening. Ms Cunneen's work phone was returned to her within a day or so. Sophia Tilley's phone was returned to her on 2 August 2015.

On 6 August 2014, an ICAC Senior Investigator applied for 2 Search Warrants: one to enter the premises of Margaret Cunneen in order to obtain possession of her personal mobile phone, the very phone which had already been produced by her on 30 July and which at the time of the application for the Search Warrant was still in the possession of ICAC; the other to enter the premises of Stephen Wyllie in order to obtain possession of his phone, which was also still in the possession of ICAC. Both applications disclosed that the particular phone to be seized was in the possession of ICAC and that ICAC officers would attend the premises with the particular phone, which would then be seized under the Warrant.

The application for the seizure of Margaret Cunneen's phone noted that by virtue of section 26 of the ICAC Act (self-incrimination objection taken), text messages on which ICAC was relying in its investigation could not be used in any criminal prosecution of Ms Cunneen. The application noted that the item to be seized is described as a phone (specifics of the phone were detailed) "*that is connected with the matter that is being investigated under* the Independent Commission Against Corruption Act.", the matter being as follows:.

> *"The ICAC is investigating a matter...concerning an allegation that on 31 May 2014 Deputy Senior Crown Prosecutor Margaret Cunneen SC, with the intention to pervert the course of justice, counselled Sophia Tilley to fake chest pains, and that Sophia Tilley, with the intention to pervert the course of justice, did fake chest pains to prevent investigating police officers from obtaining evidence of Tilley's blood alcohol level at the scene of a motor vehicle accident"* and further that *"Documents or things connected with the matter that is being investigated under the ICAC Act, may, within the next following 72 hours, be brought onto the premises..".*

There is no doubt on reading the Application, that the reason for the seizure of the phone was in connection with the events of 31 May 2014 arising from the motor vehicle accident and for no other reason therein specified. This is of significance when I discuss later in my Report the referral of the entirety of Ms Cunneen's personal phone to the Director of Public Prosecutions, Lloyd Babb SC, which comprises 2274 pages of text and other media files, some going back as far as 2005.

The Search Warrants were issued by an authorised officer, namely a Deputy Registrar of the Local Court.

On 7 August 2014, the search warrants were respectively executed and the phones "seized".

Why the necessity to obtain two search warrants for the seizure of phones which were already in the possession of ICAC? Counsel's advice (Mr T. Blackburn SC and Mr P. Kulevski) was sought by me on the question of the legality of the Notices to Attend and Produce forthwith served on Margaret Cunneen, Sophia Tilley, Stephen Wyllie and Gregory Wyllie and also as to the legality of obtaining search warrants to seize items already in the possession of the authority applying for the warrants.

Counsel's joint opinion was:

> *"Was the seizure by officers of the ICAC of two mobile telephones from the home of Ms Cunneen on 31 [sic] July 2014, purportedly pursuant to a notice under sec 22 of the ICAC Act, lawful?*
>
> *Answer: No, the seizure was unlawful.*
>
> *Did the subsequent grant of a search warrant in respect of one of the mobile telephones (the other having been returned), and its execution on 7 August 2014, retrospectively legitimise the earlier unlawful seizure of the telephone?*
>
> *Answer: No, the search warrant did not retrospectively validate the earlier unlawful seizure. It did, however, render the continued detention of the telephone lawful, subject to whether the application for the warrant and the grant itself were lawful. We are of the view that, on the material before us, the search warrant was issued lawfully.*

Counsel further noted that:

> *"It is in passing strange to us however that any person involved in the planning and execution of the Notice could reasonably have thought that it was lawful to, uninvited and without prior notice, attend the home of a recipient of a sec 22 notice and seek to immediately seize items from the home of the recipient under asserted compulsion of the notice.*
>
> *The law on the general issue has been settled for far too long to permit any suggestion that such conduct would be lawful."*

It appears that the reason for the necessity to seize the 2 phones by way of execution of Search Warrants on 7 August 2014, was in effect to obtain the phones (and the data therein) lawfully. This would thus enable the use of the information obtained from the phones in any future proceedings, criminal or otherwise.

It is of concern that the Commissioner issued the Notices in the form that she did, namely, "to attend and produce forthwith" given that this in fact rendered them unlawful. This amounts to an abuse of power and serious maladministration. There seems no doubt that Search Warrants for the seizure of all phones should have been issued in the first instance. This would have avoided the farce which followed and which I now describe.

On 7 August 2014, ICAC Investigators attended at the premises of Margaret Cunneen to execute the Search Warrant. A video and audio recording was made of the seizure. The recording clearly captures the ICAC investigator taking out of his briefcase the phone which is contained in a sealed bag, showing the item to Ms Cunneen and identifying it as the item which he is now seizing. The phone remains in the possession of the ICAC investigator and in its sealed bag at all times. The same farcical scenario was repeated at the execution of the warrant at Stephen Wyllie's premises, which was also recorded (video and audio). In effect, in one hand is held the Warrant and in the other, in a sealed plastic bag taken from the briefcase of the server of the Warrant, the subject matter of the Warrant. That sole object has unlawfully been in the possession of the ICAC and presumably its content harvested during the approximate period of one week of unlawful possession. Really!

On 13 August 2014, Sharon Loder, Executive Director Investigations, recommended the matter be escalated to a full investigation for the following reasons:

- there is evidence or reliable information to suggest the occurrence of corrupt conduct justifying a more complete investigation
- the subject matter of the investigation involves serious conduct (perverting the course of justice) by a Senior Public Official

- the investigation of the matter involves or is likely to involve a public inquiry and/or public report.

Mr Roy Waldon, the Solicitor to the Commission, agreed with the recommendation for escalation of the matter to full investigation status. Dr Robert Waldersee, Executive Director, Corruption Prevention, did not agree with the recommendation but was of the view that: *"There is, therefore, nearly enough for discipline of Cunneen already....But it is not clear that the behaviour justifies exposure through a public inquiry. I struggle to see that it is of a seriousness to meet the intent of our act, and it certainly is not systemic. Therefore I would prefer the matter and information be referred to* [redacted] *(the DPP?) for disciplinary action."* (the redaction, effected by the ICAC is curious).

In response to Ms Loder's recommendation, the matter was escalated to a full investigation and "Operation Hale" was progressed. Compulsory examinations of a number of witnesses were conducted (further details are provided below).

On 31 October 2014, ICAC announced by way of Media Release that it would be holding a Public inquiry into the matter. What followed is now well publicised and the subject of much commentary.

By way of Summons dated 4 November 2014, Margaret Cunneen, Stephen Wyllie and Sophia Tilley commenced proceedings in the Supreme Court seeking *inter alia* a Declaration that ICAC was exceeding its jurisdiction in conducting an investigation. On 10 November Hoeben CJ at CL dismissed the Summons. [see *Cunneen and Ors v Independent Commission Against Corruption* [2014] NSWSC 1571.

By way of Summons dated 11 November 2014, Margaret Cunneen, Stephen Wyllie and Sophia Tilley sought leave to appeal the Decision. That appeal was heard on 18 November and on 5 December, the Court of Appeal constituted by Bathurst CJ, Basten JA and Ward JA upheld the appeal by a majority of 2:1 (Bathurst CJ dissenting). (See *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421) .

By way of Application dated 9 December, ICAC sought special leave to appeal to the High Court. On 15 April 2015, the High Court constituted by French CJ, Hayne, Kiefel, Gageler and Nettle JJ by majority granted special leave to appeal and then dismissed the appeal with costs. (see *Independent Commission Against Corruption v Cunneen & Ors* [2015] HCA 14).

30 OCTOBER 2014 TO 15 APRIL 2015 – ICAC & ITS INSPECTOR

On 30th of October 2014 the ICAC issued the public statement set out on page 1.

On the 31st of October I wrote to the Commissioner in the following terms: (I have omitted one irrelevant paragraph)

> *"Dear Commissioner,*
>
> *Re: OPERATION HALE: Ms M Cunneen SC & Anor*
>
> *The existence of this Operation involving the above came to my notice upon perusal, yesterday afternoon, of the press reports and consequential reading of ICAC's website.*
>
> *The events are alleged to have occurred on 31 May 2014 and there is to be a public hearing commencing on 10 November.*
>
> *In your Commission's own Press Release it is stated "As this matter involves a senior public official involved in the administration of justice in New south Wales, the Commission considered it appropriate for a person from outside New South Wales to preside at the inquiry. Accordingly, Mr Alan McSporran QC has been appointed an Assistant Commissioner to preside at the public inquiry, and Counsel Assisting the Commission will be Mr Michael Fordham SC."*
>
> *In the light of the opening statement of the Press Release quoted, I would have thought that I, as Inspector, and in the light of my career in the administration of justice in NSW, should have been informed of this particular ICAC investigation. As it happens, I have met Ms Cunneen once socially some years ago (after my retirement) and have no recollection of her having appeared before me whilst I held judicial office.*

In the absence of further material, the ICAC Press Release, and the Press coverage this morning which I have seen (SMH and ABC) could reasonably lead to the view that ICAC has abrogated to itself the task of investigating whether there has been an attempt to pervert the course of justice, something which a reasonable person would expct the NSW Police to carry out.

Accordingly, pursuant to s.57B generally but especially ss.(2), (3), 4(b) and s.57C of the ICAC Act 1988, I require production to me of – to put it starkly – everything that constitutes and documents or otherwise evidences ICAC's investigation, from the first intimation of the alleged events of 31 May 2014 to date, including a copy of the brief to Counsel Assisting, Copy applications for any surveillance or other (including Search) warrants, affidavits in support, and material elicited upon execution should be provided. I require copies of section 22 Notices and any material produced. If any non-public hearings or examinations have hitherto been conducted, I require the transcripts thereof and copies of any exhibits. This material I will receive on a Highly Protected basis until circumstances permit otherwise.

Unredacted transcript of the public hearing and exhibits should also be available.

In the event of proceedings being commenced elsewhere concerning this matter and to which the ICAC is a party, copies of Court Process documents and affidavits or cognate material should also be provided.

Noting that but two days have thus far been set aside for public hearing, I anticipate compliance with my request with the usual promptness.

Yours sincerely,"

On the 31st of October the Commissioner wrote to me as follows:

"Dear Inspector,

HIGHLY PROTECTED

I refer to your letter of 31 October 2014 concerning Operation Hale.

The Commission's jurisdiction over this matter derives from s 8(2)(g) and s 9(1)(a) of the Independent Commission Against Corruption Act 1988. The allegation may also constitute corrupt conduct under s 8(1)(c) and s 9(1)(c) of the Act.

Officers of the Commission are in the process of collating the material to which you seek access. It will be provided as soon as time and resources allow.

The only material that I am not at liberty to provide at this stage is material which was disseminated to me by a Federal agency pursuant to s 68(ea) of the Telecommunications (Interception and Access) Act 1979 (Clth). Unfortunately, s 67 of that Act prohibits me from communicating that material to you, since such a communication does not fall within the scope of a "permitted purpose".

I note that all of the relevant evidence relating to the investigation, including the material that I am currently obliged to withhold, will be in the public domain within the next fortnight. Any assessment of whether the Commission has engaged in maladministration in relation to this concluded the public inquiry and furnished its report.

I appreciate your assurance that you will receive the material on a highly protected basis. No doubt, you would appreciate that the contents of this letter must also remain confidential.

Yours sincerely,"

On Monday and Tuesday the 3rd and 4th of November my Office received many enquiries from journalists.

On Monday the 3rd of November I received the following communication from the Commissioner by email:

"Dear Inspector,

The Commission has just received an enquiry from a journalist, seeking comment upon an e-article appearing today in Crikey, penned by Alex Mitchell. The article refers to the fact that you have written to the Commission "asking for an explanation of its decision to conduct the Cunneen Inquiry".

The Commission has responded "no comment" to the journalist's enquiry. He indicated that he would contact your office. I trust your response will be to the same effect.

Yours sincerely,
Megan Latham"

I responded to that email in inconsequential terms referring to the fact that both I and my staff would be attending a conference and a private commitment that week.

The significance however of the Commissioner's email of the 3rd of November lies in the last sentence. I did not yield to the Commissioner's expectation, I am not subject to the Commission in any respect (s. 57B(3)).

It is appropriate however that I do remark that the Alex Mitchell referred to has been a close personal friend of mine for over 15 years; he and his wife and I and mine engage in social activities at least three to four times a year. Apart from our friendship, the only thing that Alex Mitchell and I have in common is an agreement to differ on just about every subject of politics, society and history one can think of. I have no recollection of informing Mr Mitchell that I had written to the Commissioner. It is highly possible that I did; first because I in fact had written to the Commissioner; secondly, I regarded the Cunneen matter as one of immense public interest and, thirdly, as one as coming out of "left field" in the light of the history of the work of ICAC thitherto; fourthly, I have obligations of accountability and transparency to the Parliament and people of New South Wales and, fifthly, as at 3rd November, the affair was hardly secret. Mr Mitchell did not receive from me a copy of my communication to the Commissioner.

By an email dated the 4th of November the Commissioner referred to my "public announcement of an audit of the Hale inquiry" overtaking "yesterday's events" (that is her "expectation" that I make "no comment" in the same way as herself) and required no further reply.

There followed up until the 13th of November further correspondence as to the provision by the Commission to me as Inspector of material I had requested and I note that in a letter dated the 13th of November it was stated "*The Commission is otherwise fully*

occupied with the drafting of the reports arising out of the Spicer and Credo Inquiries. The completion of these reports is a priority because of the looming State election in March 2015". As has been referred to no reports in these matters have been produced by the ICAC as at the time of this Report.

The next communication of significance was one dated the 14th of November 2014 from the Commissioner to myself and it is as follows:

> *"Dear Inspector,*
>
> *Re: Operation Hale*
>
> *As I indicted in my letter to you of 13 November, the documents you have requested are contained within the accompanying seven folders.*
>
> *There are a few observations that I wish to make in the light of recent publicity surround this investigation and in the light of the decision of Hoeben J in Cunneen & Ors. v ICAC [2014] NSWSC 1571.*
>
> *You will recall that in my letter to you of 31 October 2014, I acknowledged your assurance that these documents would be treated on a highly protected basis and I referred to the fact that the contents of the letter itself must remain confidential. The necessity for that confidentiality arises from the reference in the letter to material disseminated to the Commission by a Federal agency pursuant to the Telecommunications (Interception and Access) Act 1979 (Clth) (the TIA Act). Under that Act, neither the existence of product obtained by a warrant, the contents of any intercept, the warrant itself or any information in support of the warrant (the material) may be disseminated by the originating agency, except in accordance with its provisions. An agency receiving the material from an originating agency cannot further disseminate the material unless it is within the ambit of a "permitted purpose".*
>
> *I remain of the view (consistent with the legal advice I have received) that communication of this material to you at this time is not within a "permitted purpose".*
>
> *Your public statement on 3 November that you had "initiated what is known as an audit of this inquiry" which required the Commission to hand over "all material that is lawfully*

can provide to me as to its investigation and inquiry" (Fairfax media) is capable of inferentially disclosing to others the existence of the material. I am obliged to bring this to your attention in the interests of avoiding any inadvertent breach of the TIA Act. I am also concerned to avoid any disclosures which could prejudice this investigation.

As you are aware, the plaintiff's summons was dismissed by Hoeben J. His Honour rejected the plaintiff's contentions that the Commission is acting beyond jurisdiction in investigating the allegations, that it took into account an irrelevant consideration and that it exceeded its powers in deciding to conduct a public inquiry as part of the investigation. To the extent that you appeared to be asserting in your letter of 31 October that the Commission may be acting contrary to law, in an unreasonable, unjust oppressive or improperly discriminatory manner, or on wholly or partly improper motives, that proposition has also been rejected by Hoeben J (see [115] and [116]). His Honour also rejected the contention that the allegations ought be investigated by the NSW police (see[64]).

As a result of the plaintiff's solicitor disclosing in an affidavit filed in the proceedings that Ms Cunneen had given evidence in a compulsory examination, the Commission's solicitor yesterday wrote to the solicitor alerting him to the existence of a suppression order made under s 112 of the ICAC Act in those proceedings where he also represented Ms Cunneen. That order prohibited disclosure of the fact of the compulsory examination and the contents of her evidence. Ms Cunneen's solicitor did not seek a variation of the order for the purpose of filing the affidavit. The transcript of the compulsory examination is included in the documetns provided to you.

As you would be aware, all officers of the Commission and the office of the Inspector are bound by s 111 of the ICAC Act and cannot divulge or communicate, directly or indirectly, any information acquired by reason of the person's functions under the Act, except for the purposes of the ICAC Act or otherwise in connection with the exercise of the person's functions under the Act or in the limited circumstances set out in s 111(4). It is primarily for that reason that all communications passing between the Commission and the office of the Inspector have traditionally been treated confidentially. It also underpins the Commission's policy to refrain from any comment when invited to respond to a media enquiry, lest any coment risks communicating indirectly any information caught by s 111.

I hope this information is of assistance to you.

Yours sincerely,"

Much has been overtaken by events. I will simply state I do not agree that the paragraphs referred to by the Commissioner in the judgment of Hoeben CJ at CL at 115, 116 or indeed 64 support the propositions being asserted. I was not a party to that litigation and it is regrettable that the ICAC seems to take the view that my mere initiation of an inquiry of ICAC reflects an already reached view as to the nature of any conduct which my inquiry might disclose. This communication also seems to me to suggest that in some way I was championing Ms Cunneen's cause, that his Honour, in the eyes of the ICAC, was saying to me to "butt out". As will later become clear I did not hear from Ms Cunneen until after ICAC took the action of issuing its press release on the 27th of May 2015 after its loss in the High Court of Australia.

I was obliged to reinforce this position in a letter to the Commissioner of the 10th of December in which I stated:

> *"I take this opportunity to make one thing quite clear: despite a view that has been expressed to the contrary, my initiating an inquiry or an audit or an investigation is not to be taken as my having any view one way or the other as to whether there has been maladministration or other misconduct on the part of the ICAC or any of its Officers."*

In the meantime of course the Court of Appeal had handed down its decision favourable to Ms Cunneen on the 5th of December 2014 ([2014 NSWCA 421]) within three hours of which a media release was issued by the ICAC as follows:

> *"ICAC Operation Hale public inquiry*
> *Friday 5 December 2014*
>
> *Today's majority decision of the NSW Court of Appeal with respect to the NSW Independent Commission Against Corruption (ICAC)'s Operation Hale public inquiry fundamentally affects the scope of the Commission's powers to conduct investigations into corrupt conduct.*
>
> *It is critical to the exercise of the Commission's powers generally that the construction of section 8 of the ICAC Act is settled.*

Accordingly, the ICAC will seek leave to appeal to the High Court of Australia.

The Commission will be making no further comment at this stage."

Thereafter I was provided with all relevant information relating to the conduct of the appeal in the High Court.

It will be noted that a great deal of the communications referred to above are concerned with the sensitivity of material being material the obtaining of which is provided for by the *Commonwealth Telecommunications (Interception and Access) Act* 1979. A *modus vivendi* was arrived at between myself and the Commissioner in relation to redactions in respect of telephone intercepts.

I sought the advice of senior and junior counsel and accept that the position taken at the time by the Commission was correct in the light of their advice.

Appendix "C" hereto is an extract from the opinion provided by counsel on this complex issue which will have to be addressed at the Commonwealth level at some time to render both clear and thus the more effective the role of such entitites as Inspectors in relation to the availability of TI product when obtained by a third party.

The next major event of course was the decision of the High Court of Australia in *Independent Commission Against Corruption v Margareet Cunneen & Ors* [2015] HCA 14 delivered on the 15th of April 2015. The ICAC lost and the consequences in terms of publicity, Parliamentary intervention and the like are well known.

As at the time of the delivery of this Report no police action has been taken, certainly as far as Ms Tilley is concerned, arising from the motor vehicle accident itself in the sense that she has not been asked to participate in any court proceedings arising from the collision.

15th APRIL 2015 TO DATE

On the 15th of April 2015, upon the judgment of the High Court having been handed down, the ICAC issued a public statement as follows:

> *"15 Apr 2015 12:17 PM AEST – High Court of Australia decision in ICAC v Cunneen*
>
> *The NSW Independent Commission Against Corruption (ICAC) is currently considering the decision of the High Court of Australia in this matter and will be making a public statement in due course."*

On 16 April 2015 I wrote to the Commissioner as follows:

> *"Dear Commissioner,*
>
> *Re: Operation Hale (Cunneen)*
>
> *I refer to the publication in today's Sydney Morning Herald of the piece by Ms McClymont which, in my view, renders nugatory reliance upon secrecy as to sources in the context of the initiation of the above inquiry.*
>
> *Yesterday the ICAC issued a press release to the effect that it was not proposing to comment upon the judgment of the High Court until it is in a position to issue a public statement.*
>
> *The Honourable David Ipp AO QC and the Honourable Jerrold Cripps QC and many others have not been embarrassed to make public statements about the decision of the High Court. There appears from today's press a wide range of comment, speculation and punditry, including a simplistic view that Parliament can cure the state of affairs which ICAC is now perceived to be in by some amendments to the legislation.*
>
> *The present standing of the ICAC in the eyes of the public whose interests it exists to champion issues of corruption and integrity is, to say the least, unhappy in my view as Inspector.*

I can think of no reason why the ICAC cannot now issue a media release or public statement which in some way could go to explain that the complexities it perceives as flowing from the High Court decision require sober consideration which in fact they are receiving.

To simply draw down the blinds and to be seen to be saying that ICAC will speak when ICAC is ready is an undesirable approach. It is the ICAC's duty to the public forthwith to indicate what it is doing and what it proposes to do and to give some explanation for the course it is taking. It would not be inconsistent with its published media policy to do so.

As I have remarked this Inspectorate's file is still open and I am considering what steps I will take. My consideration is, frankly, thwarted by the silence of the ICAC in this matter.

Yours sincerely,"

On the 20th of April 2015 the following Public Statement was issued by the ICAC:

"Public statement regarding ICAC v Cunneen

The decision in this matter about the scope of section 8(2) of the Independent Commission Against Corruption Act 1988 by the majority of the high Court of Australia adopted a construction of the section that had never previously been argued or accepted since the ICAC's inception.

The narrow construction given to section 8(2) by the Court will substantially damage the Commission's ability to carry out its corruption investigation and corruption prevention functions.

The decision means that the Commission will be unable to investigate or report on several current operations, and will severely restrict its ability to report on Operations Spicer and Credo.

It has the potential to involve the State of NSW and the Commission in costly and protracted litigation involving persons who have been the subject of corrupt conduct findings based on investigations conducted under section 8(2), and will affect current litigation involving such findings.

It also has the potential to call into question the prosecutions and convictions of persons where evidence against them was obtained during Commission investigations based on section 8(2).

In the Commission's view, the narrow construction adopted by the majority in the High Court is contrary to the legislative intention evidenced by the second reading speech when the ICAC Act was first introduced, the analysis of the section in the report of the McClintock review of the ICAC Act and the ordinary meaning of the words used in the section.

In the circumstances, the Commission has made a submission to the NSW Government to consider, as a matter of priority, amending section 8(2) to ensure that the section can operate in accordance with its intended scope and making any such amendment retrospective.

The commission will be making no further comment on this matter at this time."

I referred to that statement in an email to the Commissioner and her solicitor on the 22nd of April as follows:

"Dear Commissioner and Mr Waldon

I refer to the public statement issued by the ICAC on Monday 20 April 2015 concerning the decision of the High Court in ICAC v Cunneeen & others [2015] HCA 14.

It is stated that "the Commission has made a submission to the NSW Government to consider, as a matter of priority, amending section 8(2) to ensure that the section can operate in accordance with its intended scope and making any such amendment retrospective".

I require you to provide me by return with an electronic copy of that submission and any other subsequent submission the ICAC has made to the NSW Government in connection with ICAC's desired amendments to the legislation consequent upon the High Court decision.

Further, am I correct in understanding the third paragraph of the public statement to mean that the ICAC will not be investigating or reporting on several current operations at

all (and if so, which ones?) and that by reason of the asserted severe restrictions reports in Operations Spicer and Credo will be delayed (and if so, till when?) or, on the other hand, is it ICAC's position that it will not investigate or report on several current operations (and if so, which ones?) and will delay its reports in Spicer and Credo until it knows the outcomes of its representations to the NSW Government?"

On the same date I wrote to the Premier in the following terms:

"Dear Premier,

Re: Independent Commission Against Corruption Act 1988;
ICAC v Cunneen & Others [2015] HCA 14;
Office of Inspector of ICAC

I refer to the decision of the High Court of Australia in the appeal brought to it by the ICAC in the matter involving ms Margaret Cunneen SC. I refer further to the public statement issued by the ICAC on Monday 20 April 2015 and the abundant media commentary that has flowed therefrom.

In its public statement of 20 April 2015 the ICAC refers to having made a submission to the NSW Government to consider as a matter of priority amending section 8(2). I have not seen a copy of that submission.

I have publicly stated in my capacity as Inspector, that caution, with respect, should be exercised by the Government to avoid rushing to judgment as to any necessity to amend the legislation. Further it is necessary to have a clear view as to the ends to be attained by any such amendments.

I write first to advise that I may well wish to be heard prior to any decision being made to amend the legislation and secondly, to have your assurance that I will have resources to exploit in making any representations from the perspective of the Office of Inspector. As to this second matter I remind you that the Inspectorate is constituted by myself, a Senior Legal Project Officer and an Executive Support Officer, all on a part time basis and the office is in fact staffed on Wednesday, Thursday and Friday only. It has no separate budget and its expenditures, extremely modest as they are, are met by the Department of Premier and Cabinet.

The ICAC has been represented in the litigation by the Crown Solicitor and thus it is important to avoid any conflict of interest in that office by permitting me to seek independent advice and the legal resources necessary to do so, if necessary to instruct a firm of solicitors to obtain the opinion of senior and/or junior counsel. It is with respect vital that I receive an assurance that my Office will not be compromised in relation to this clearly contentious matter by not having resources to function independently in the making of submissions as to any changes to the law. I would be pleased to hear from you or someone on your behalf without delay in this regard.

Notwithstanding the present staffing limitations referred to above, I am always available to be contacted by email which I can access from my home or via my mobile telephone number.

Further, I would of course make myself free to attend upon you with my Senior Legal Project Officer at a convenient time if it is considered necessary that such a meeting take place. That may well become desirable once the position of the ICAC has been clarified beyond the rather limited expressions used in its public statement of Monday 20 April 2015.

I am,
Yours sincerely,"

I was provided with a copy of the ICAC's submission to the Premier (Confidential) on the 23rd of April by the ICAC's solicitor.

Whilst I appreciate that the reproduction of correspondence might be tedious, I consider it to be essential to expose the relationship between the Commission and this Inspectorate in this extraordinary matter.

On the 27th of April I received an email from the Commissioner in the following terms:

"Dear Inspector,

I refer to your public statements following the judgment in ICAC v Cunneen on Wednesday 17 April. The first of those statements suggested that the Commission was embarrassed by the High Court decision and that was essentially the reason for the

Commission's failure to immediately publicly declare its position. The second comment you made to the media following the Commission's statement on Monday 22 April was that the Commission's view of the High Court decision and its proposed submission to the Premier bore the hallmarks of a "poor loser".

First, let me assure you that the Commission is not in the least embarrassed by the outcome of the Cunneen litigation. As more than one legal commentator has pointed out, it was a matter of statutotry construction that needed resolution, regardless of the specifics of the Cunneen investigation. More importantly, the Commission will not be pressured by the media or any person to make ill informed and intemperate public statements. Either succumbing to such pressure or the appearance of acceding to such pressure would damage the independence of the Commission.

Second, your criticism of the Commission's proposal to retrospectively amend the ICAC Act was made without the benefit of understanding the content of our detailed submission to the Premier. The more disconcerting aspect of these comments is that you have apparently aligned yourself with those in the community and the media who regard the Commission's investigation of Ms Cunneen as improper and unfounded. Given that you announced an audit of this matter well before the Commission's jurisdiction was challenged, I am concerned that you may have compromised your own independence in carrying out that audit. At least one journalist has said that there is now no need to read your report, because we know what will be in it.

It has been announced that you will be interviewed on the Alan Jones programme later this week. It will be even more difficult to maintain the appearance of an independent audit should you be drawn into comments about the Commission's decision to investigate Ms Cunneen.

The Commission welcomes any audit of the use of its powers. However, any appearance of, or actual interference in the operational decisions of the Commission severely compromises its charter to investigate corrupt conduct, without fear or favour.

Finally, the Commission is concerned that your office has adopted an email address which creates the impression that it is the email address of the ICAC Executive. This has produced confusion in some media outlets that have assumed the information has come from the Commission. As you know, the Commission does not selectively inform media organizations. The Commission only ever releases public statements by way of

publication on its website and by circulation to all media outlets. It would be appreciated if the address "ICAC_Executive" is changed to "ICAC_Inspector" to differentiate between our two offices.

Regards
Megan Latham"

Of course at this time I did not have the submission referred to. ICAC had chosen at that time not to provide it.

This email caused me the utmost concern as to its contents. I make the following comments in relation to it. I simply do not understand the reference to "ill informed and and intemperate public statements". By whom, I might ask? The Commission at that time had been remarkably reticent in making any statement about any aspect. I can only assume that the Commission at that time had a view that its "independence" was particularly fragile if just stating its obligations to keep the public informed of the steps it proposed to take, of views being held, of being transparent and accountable, was seen as threatening.

The statement *"given that you announced an audit of this matter well before the Commission's jurisdiction was challenged ...."* is astonishing. The fact that there might be a challenge to the Commission's jurisdiction is irrelevant to my independent power to conduct an audit. I simply do not understand what the Commissioner was talking about. There then follows the statement about *"one journalist"* - I repeat *"at least one journalist"* has prognosticated the content of my report. That journalist or any other journalists, the Commissioner chose not to identify. I then had, and still have, absolutely no idea about whom she was writing.

The Alan Jones reference is an absolute fiction as far as I am concerned and the penultimate paragraph is meaningless at worst or rhetoric at best.

The final paragraph was by coincidence the only one on point in the whole of this communication. Early in May 2015 the Offices of my Inspectorate were to be moved from Bligh Street to Castlereagh Street and the opportunity was to be taken to consider and make any changes to such matters as its addresses particularly the email address.

For myself I must say that as at the 27th of April the format of the email address of my Inspectorate was not at the forefront of my mind. It was however, that is the format of the email address, changed, and there has been no complaint since.

I note that this email is signed "regards".

I must state that I find the ICAC email to be insulting, condescending and to border on insolent and reinforces views I have lately expressed as to the breathtaking arrogance of the Commission.

I did not bother to reflect upon any response to this communication.

On the 14th of May 2015 I wrote to the Commissioner as follows:

> *"Dear Commissioner,*
>
> *Re: Operation Hale (Cunneen)*
>
> *Would you be good enough to advise me as to what action ICAC is proposing to take in relation to Operation Hale in the light of the recent amendment to the Act?*
>
> *At present, I am minded to continue my investigation.*
>
> *I would be happy to meet with you to discuss the matter.*
>
> *Yours sincerely,"*

I received a reply dated the 15th of May:

> *"Dear Inspector,*
>
> *RE: OPERATION HALE*
>
> *I refer to your letter of 14 may 2015.*

The Commission is currently considering the course of action it will take with respect to Operation Hale, in the light of the Independent Commission Against Corruption Amendment (Validation) Act 2015. The Commission expects to be in a position to make a decision next week.

I will inform you of that decision as soon as it is made.

Yours sincerely,"
(**emphasis added**)

(I shall refer to this exchange later).

There was then silence until the 27th of May on which day the ICAC issued the contentious press release relating to its decision to provide evidence to the DPP. The Media Release was as follows:

"Home > Media centre > Media releases > Decision to provide evidence in Operation Hale to the DPP
Wednesday 27 May 2015

Since the NSW Parliament passed the Independent Commission Against Corruption Amendment (Validation) Act 2015 earlier this month, the NSW Independent Commission Against Corruption (ICAC) has been considering its incomplete investigations to determine what, if any, action it should take with each outstanding matter.

The Commission has determined to provide the evidence it has obtained in Operation Hale to the NSW Director of Public Prosecutions (DPP) pursuant to clause 35(4) of Schedule 4 to the Independent Commission Against Corruption Act 1988 (the ICAC Act).

Clause 35(4) provides that "the Commission is authorised (and is taken always to have been authorised) to exercise functions under this Act on or after 15 April 2015 to refer matters for investigation or other action to other persons or bodies, or to communicate or provide evidence given to the Commission to other persons or bodies, even if the matter arose or the evidence was given to the Commission before 15 April 2015 and its validity relies on the validation under subclause (1)".

The Commission conferred with the DPP on 19 May concerning the referral of the evidence in Operation Hale.

Today, the Commission has furnished that evidence to the DPP for consideration of whether charges of attempting to pervert the course of justice and giving false evidence to the Commission are available against Ms Cunneen, Stephen Wyllie and Sophia Tilley.

The Commission has decided to take this step for the following reasons.

The Commission undertook an investigation into the alleged conduct of Ms Cunneen, Mr Wyllie and Ms Tilley after it was provided with information by a Federal law enforcement agency that indicated the commission of an attempt to pervert the course of justice by Ms Cunneen, a NSW deputy senior crown prosecutor, following a motor vehicle accident on 31 May 2014. It was accepted by the courts which examined the allegation in the course of the litigation initiated by Ms Cunneen that the alleged conduct could constitute an attempt to pervert the course of justice.

Any attempt to pervert the course of justice by senior counsel, whether in the course of that person's duties or otherwise, strikes at the heart of the administration of justice and "is apt to give rise to public disquiet about the integrity of the judicial system"; Einfeld v R [2010] NSWCCA 87, Basten JA at [81].

The decision to refer the evidence is being taken by the Commission after an assessment of the reliability of the material which is to hand.

The Commission is of the view that it is in the public interest that the resolutuion of the allegations against Ms Cunneen, Mr Wyllie and Ms Tilley ought not be further delayed. The Commission is unable to finalise its investigation in Operation Hale as a result fo the decision of the High Court in ICAC v Cunneen & Ors [2015] HCA 14 and Part 13 of Schedule 4 to the ICAC Act only allows the Commission to provide to other agencies evidence it has obtained on or before 15 April 2015. Moreover, the pending review of the ICAC Act will not be completed before 11 July 2015.

It is also in the interests of those persons and the administration of justice in NSW that the evidence obtained by the Commission is referred for appropriate action to the DPP. The Commission's referral to the DPP also allows for the appointment of an appropriately qualified independent person from outside NSW to undertake that task.

In addition to considering criminal offences, it may be necessary for the DPP to consider whether disciplinary proceedings should be taken against Ms Cunneen. Accordingly, the DPP is the most appropriate agency for the referral of the material.

The Commission does not intend to comment further at this stage.

Media contact: ICAC Manager Communications & Media, Nicole Thomas, 02 8281 5799 / 0417 467 801"

I wrote in the following terms to the Commissioner on the 27th of May:

"Dear Commissioner

Re: Operation Hale

I refer to your letter of 15 May 2015. I write to express my profound disappointment that the resources of the ICAC appear to have been insufficient to do me the courtesy, which I anticipated from your letter referred to, of informing me by letter or by email of its decision to refer the matter to the DPP. I do not regard a Medianet communication broadcast to the world at large my being informed of that decision "as soon as it is made".

Yours sincerely,"

The ICAC's reply on the same day was:

"Dear Inspector

Re: Operation Hale

I refer to your letter of 27 May 2015.

I regret that you have interpreted the Commission's failure to separately inform you of its decision in this matter, before the release of its public statement, as a sign of discourtesy.

On the contrary, the Commission has acted at all times in the interests of preserving the independence of our two Offices. Any selective pre-release of operational decisions in this matter exposes both our Offices to allegations of influences and/or interference in the performance of their functions, particularly in circumstances where you are undertaking an audit of Operation Hale.

Yours faithfully," (**emphasis added**)

I consider this letter to be as insulting as it is disingenuous and as reflecting a total lack of understanding of the role of the Inspector. I fail to see how a Media Release to the world can be characterized as an "operational decision" on any rational basis and that my receiving advance notice of it compromises the independence of my Inspectorate and ICAC. What is "independence" for otherwise than to be exercised? It would seem that my exercise of my independence is seen by the ICAC as an abuse of it. The Commissioner and the ICAC have struck me in the whole of my term to date as Inspector as being capable of blithely overlooking the profound significance of s.57B(3) *"the Inspector is not subject to the Commission in any respect."*

Not surprisingly the publication of the media release of the 27th of May provoked complaint from Ms Cunneen, Mr Stephen Wyllie and Ms Tilley and questions as to its legality from a journalist, Mr Chris Merritt Legal Affairs Editor, The Australian. The chain of correspondence continued with a letter from myself to the Commissioner dated the 1st of June:

"Dear Commissioner,

A complaint has been made to me by Margaret Cunneen, Mr Stephen Wyllie and Ms Sophia Tilley, both personally and through their legal advisers. I have yet to determine the ambit of the complaint. However, it certainly embraces:

a) the Commission's media release dated 27 May 2015.

b) the attendance on the Director of Public Prosecutions by the Commission on 19 May 2015 (of which I had no notice).

As to the latter, I require the Commission to deliver to this Inspectorate a duplicate of the material delivered to Mr Babb SC or anyone else at the DPP and in the form in which it was delivered. Would you be good enough to identify the persons who attended upon Mr Babb SC in this regard?

In view of the Commission's action in referring the matter to the DPP, I take it that as far as it is concerned, there will be no issue in relation to section 68(eb) of the Telecommunications (Interception and Access) Act, 1979 (Cwth) or any other provision of that Act and that unredacted lawfully intercepted information will be provided.

I require also applications for the warrants and affidavits in support.

During the week, on Mondays and Tuesdays, the office will be staffed by myself and Ms Raice and for the rest of the week (Wednesdays to Fridays), it will be fully-staffed. It can be taken that this state of affairs will continue until the end of June.

I look forward to the making of arrangements for the delivery of the requested materials before the end of this week.

Yours sincerely,"

The reply dated the 2nd of June 2015 was as follows:

"Dear Inspector

Evidence was provided to the Director of Public Prosecutions on 27 May for consideration as to whether there is sufficient evidence to warrant the commencement of criminal proceedings against Margaret Cunneen, Stephen Wyllie and Sophia Tilley. At the same time, other evidence was provided to the DPP for consideration as to whether disciplinary proceedings should be commenced against Ms Cunneen.

I met with Mr Babb on 19 May. No material was provided to Mr Babb on that occasion. As the evidence concerning possible disciplinary action was to be referred pursuant to s53 of the Independent Commission Against Corruption Act 1988 it is necessary, under that section, to first consult with the person to whom the referral is to be made. It was also appropriate that Mr Babb be informed of the existence of intercepted information disseminated to the Commission by another agency so that he could assure himself that

he had authority under the Telecommunications (Interception and Access) Act 1979 (the TIA Act) to receive and deal with that information.

I am providing you with a copy of the material provided to the DPP in relation to consideration of criminal proceedings and disciplinary action but excluding certain material which is subject to the TIA Act.

Yours sincerely"

The correspondence continued with a letter from myself of the 4th of June:

"Dear Commissioner,

Re: Operation Hale

Thank you for your letter of 2 June 2015 and the material provided with it.

I note your position in relation to Section 68 of the TIA Act.

I note also your reference to Section 53(5) of the ICAC Act in the context of you calling on Mr Babb on 19 May.

I have some further inquiries.

First, would you be good enough to inform me when it was that "material was provided to Mr Babb" and by whom, that is the particular officer of the ICAC.

Secondly, in the press release issued on 27 May 2015 references is made to information being provided to the Commission "by a Federal Law Enforcement agency". Which Federal Law Agency is being referred to? There have been references, as you know doubt know, in the press variously identifying the ACC or the AFP. It would aid the obviation of speculation if the agency could be identified to this Inspectorate. If you do not feel free as a matter of law or practice convention or otherwise to provide that information would you be good enough to explain why?

Finally whilst I appreciate the amount of material that has been forwarded to me, I cannot locate the following:

Any documentation that records the first occasion on which the matter of the motor vehicle accident on the 31 May 2014 came to the attention of the ICAC and the manner in which it did so. Further, would you be good enough to identify any document that for the first time records the decision on the part of the ICAC to conduct the investigation now known as Operation Hale and the documentation of the process leading to the decision.

Yours sincerely,"

And a response dated the 10th of that month:

" Dear Inspector

Re: Operation Hale

The material provided to the DPP was delivered by Patrick Broad, one of the Commission's lawyers, on 27 May 2015. The material was delivered to Ms Fiona Parsonage, the executive officer to the Director.

The "Federal Law Enforcement agency" is the [redacted]*. I am enclosing a copy of the Commissioner's letter to you of 24 November 2014 and the letter from the ACC dated 30 June 2014 enclosed with that letter.*

The first [redacted] *this matter came to the Commission's attention was on 2 July 2014 when* [redacted]*, manager of the Sydney office of the* [redacted]*, attended the Commission. I understand that was when the* [redacted] *letter dated 30 June 2014 was provided to the Commission. Mr* [redacted] *disseminated to the Commission the telecommunications interception information at that time.*

The Operation Hale investigation plan records that the decision to conduct a preliminary investigation was made on 2 July 2014."

Next was a request for a certain further and better particulars on my part of the action taken by the Commissioner under s.53 of the ICAC Act in the following terms: (22nd of June 2015)

"I refer to your letter of 10 June 2015.

Section 53(3):

(a) Did the Commission when referring the matter to the DPP, "recommend what action should be taken by" the DPP, and

(b) fix a time within which that action should be taken? If the answer to either is in writing, might I be provided with a copy please. If either was only oral, what was the substance of each?

Section 53(4):

Reference is made in relation to this subsection to your letter of 2 June 2015. Am I correct in understanding that when you met with Mr Babb on 19 May you provided him with information concerning the Telecommunications (Interception and Access) Act 1979? If the answer is in the affirmative, am I correct in assuming that the information was again provided to Mr Babb by Mr Broad on 27 May 2015?

Section 53(5):

I assume that you did take into account views expressed by Mr Babb. What were those views? If there is a written record of them, might I be provided with a copy please.

Section 53(6):

Was the information communicated to Mr Babb on the understanding referred to in this subsection? If so, how was that understanding manifested – orally and/or in writing? If the latter, would you please provide me with a copy of any documentation of the existence of that understanding.

Section 54(1):

When the Commission referred the matter did it require the DPP to submit to the Commissioner a Report or Reports in relation to it and the action taken by the DPP? If that requirement was in writing, might I have a copy thereof. If that direction was oral, what was the substance of its terms?

Section 54(2):

Did the Commission direct the DPP as to the "nature" of any Report? If so, if in writing might I have a copy? If orally, what was the substance of the direction?

Section 54(3):

Was such a time fixed as is referred to in the subsection? If so, what is that time?

Section 55:

I take it that as at the date of this letter, nothing has occurred that would require any action on the part of the ICAC under this section. If the situation is to the contrary, would you please provide appropriate details and copies of any documentation.

Section 57:

I advise that I would expect to be informed in writing of any action taken under this section."

This generated a response of the 23rd of June as follows:

"Dear Inspector

Re: Operation Hale

I refer to your letter of 22 June May 2015.

The Commission referred two matters to the DPP arising from this operation.

One matter was referred for the purpose of consideration being given to whether there is sufficient evidence to warrant the commencement of criminal proceedings against Ms Cunneen, Ms Tilley and Mr Wyllie for offences of attempting to pervert the course of justice (s 319 Crimes Act 1900) and giving false and misleading evidence to the Commission (s 87 ICAC Act). This referral was made pursuant to s 14(1A) and clause 35(4) of Schedule 4 of the ICAC Act.

The other matter was referred for the purpose of consideration being given as to whether or not there had been any breaches by Ms Cunneen of the Office of the Director of Public Prosecutions code of conduct. This issue arose from information obtained by the Commission during the course of its investigation but was not itself the subject of investigation by the Commission. This referral was made pursuant to s 53 and clause 35(4) of schedule 4 of the ICAC Act. The referral was not made on a confidential basis and no recommendation was made as to what action should be taken by the DPP.

(emphasis added) *At the meeting of 19 May, Mr Babb was informed of the existence of telecommunications interception information disseminated to the Commission by the* [redacted] *so that he could assure himself that he had authority under the Telecommunications (Interception and Access) Act 1979 to receive that information with respect to consideration of criminal proceedings. The specific information was provided by Mr Broad on 27 May. This telecommunications interception information is not relevant to the issue of disciplinary proceedings referred under s 53 of the ICAC Act.*

At the meeting of 19 May, Mr Babb agreed to receive and consider the material concerning possible disciplinary issues. No written record was kept of this meeting.

The Commission has not required Mr Babb to submit a report under s 54 in relation to the disciplinary matter. The Commission has however requested that Mr Babb inform the Commission whether any disciplinary proceedings are undertaken and the outcome of any such proceedings.

Nothing has occurred that would give rise to any further action by the Commission under s 55."

On the 1st of October it was confirmed at my request that the material provided to the DPP was not provided to any agency or person except the Commission's legal representatives and to myself.

The information provided in a physical sense by the ICAC to the DPP was provided by Mr Broad on the 27th of May. That material was constituted by what was recorded on five discs including 2,274 pages of text and other format messages from Ms Cunneen's phone dating back to 2005.

Of those text messages the Director of Public Prosecutions informed Ms Cunneen that he was concerned with SMS listed on an extraction report as "*1, 6, 8, 16, 20, 25 and 25* (sic)." Three were outgoing from Ms Cunneen and three were incoming from a personal friend who happens to be a journalist, Janet Fife-Yeomans. They are dated from February to June 2012, three years before the motor vehicle accident in Willoughby Road, three years before a Federal agency was moved to refer something in the aftermath of that motor vehicle accident to the ICAC. It is upon these SMS that apparently Mr Lloyd Babb

himself still in an acute position of conflict of interest, or a delegate within his Office, who would equally be compromised, has to decide whether or not disciplinary action is called for. This state of affairs can be contrasted with some interest to a statement in an Investigation Plan dated the 1st of August 2014 that Mr Patrick Broad had checked the two phones used by Ms Cunneen "from date of accident to date of seizure": so close to the date of the accident and so close in time to the date on which the Director of the Commonwealth agency delivered his letter to the ICAC.

Further to my references on pp 35-36 and the letters dated 14 and 15 May 2015, I set out, first a communication from the Commissioner dated 2nd December 2015 and my reply dated 3rd December. The article in *The Australian* by Ms Markson is Appendix G to this Report.

"Dear Inspector,

Re: Report into Operation Hale

In the Australian newspaper of today's date, it is reported that you intend to furnish your report into Operation Hale to the Parliament on Friday 4 December. Since your announcement of an audit into that investigation, the Commission has provided you with all the material that was within the Commission's power to provide. I note that there are no outstanding requests for information and the Commission has not been provided with any notice of adverse comments or findings in respect of its conduct of the investigation. You would, of course, appreciate that the Commission and Commisson officers are entitled to procedural fairness by way of an opportunity to respond to any criticism in advance of the finalisation of the report. Such an opportunity allows for the existence of any misgivings or doubts about the validity of the exercise of the Commission's powers to be re-evaluated, dispelled or confirmed, as the case may be.

Could you confirm that you are correctly quoted in the article? I would appreciate particulars of the occasion upon which you "suggested a meeting" with me. I have no written record of a request for a meeting. It would assist me to answer an accusation that has been leveled against me which I presently regard as unwarranted. I note that you are reported as stating that the meeting did not take place, not that I refused to meet with you, as Ms Markson claims. I would therefore appreciate confirmation from you of the fact that I did not refuse an invitation, suggestion or direction to meet with you on a

specified occasion in connection with Operation Hale. I am confident that, had such an invitation been extended by you, I would not have declined it without a reasonable excuse and would only have done so in writing.

I have at all times maintained a respectful and professional relationship between the Commission and the Office of the Inspector. If you are of a different view, I expect to be informed of the manner in which, and at the time, it is said to have occurred, so that I may respond accordingly. Otherwise, I am put in the invidious position of having to defend myself against accusations that are unspecified as to time and context, and which may be capable of a ready explanation.

Yours sincerely,"

On 3 December I responded to the Commissioner as follows:

"Dear Commissioner,

Re: Operation Hale (Cunneen)

I refer to your letter (by email) of the 2nd of December relating to the report in The Australian with the by-line of Sharri Markson.

I was contacted by Ms Markson and only the words attributed to me "what you've asked ... didn't happen" accord quite accurately with what I said to her.

As you are aware, the reportage and the sub-heading is no doubt, the work of the journalist, her sub-editor etcetera within News Limited. Statements attributed to others, of course, I am in no position to make any comment about.

I enclose a copy of my communication to you dated 14 May 2015 raising the matter of a meeting. Your response to that letter is dated 15 May – copy enclosed.

Yours sincerely,"

DISCIPLINARY PROCEEDINGS

As has been mentioned, by reference to a letter dated the 2nd of June 2015, certain matters were drawn to the attention of Mr Lloyd Babb SC, the Director of Public prosecutions. This followed upon a meeting which had taken place on the 19th of May. It is interesting to observe that the meeting was between the former Crown Advocate and the present Director of Public Prosecutions (Mr Babb), a former Crown Prosecutor, District Court Judge and Supreme Court Judge, the Hon. Megan Latham and the subject was a current Deputy Senior Crown Prosecutor, Ms Cunneen SC, who was well known to them both. No record or note exists as to what was said at the meeting on the 19th of May.

On the 23rd of June 2015 the Commissioner wrote the letter to me set out above, page 42.

As is now known of course, the pursuit of criminal proceedings turned out to be futile and there was thus left the disciplinary matter which had not been investigated by the ICAC. Nonetheless, the ICAC provided to Mr Babb five discs of material, one of which is of special interest because it is labelled "*Operation Hale – E14/1466 Journalist Disclosures – exhibits*".

This disc contains 2,274 pages of material constituted by SMS and other mediums extracted from Ms Cunneen's telephone made up of a "Full Report" and eight extract reports in relation to named journalists. The Full Report goes back to 2011 and indeed there are photographs and other material from 2005! I add the photographs are anodyne family and social event pictures.

I repeat that the Commissioner has made it clear to me that whilst the issue of any alleged breaches by Ms Cunneen of the Office of the Director of Public Prosecutions Code of Conduct arose from information obtained by the Commission during the course of its investigation, it was *not* the subject of investigation by the Commission. I have no information that suggests that it was contemplated prior to the meeting with Mr Babb on the 19th of May that it would be the subject of investigation.

Nonetheless the short point is, material obtained by the ICAC from Ms Cunneen's phone going back to 2005 was used for the sole purpose of a reference to the DPP for consideration of disciplinary matters unrelated to anything up to that time with which ICAC had concerned itself.

Section 53 of the legislation is as follows:

> *"53 Referral of matter*
>
> *(1) The Commission may, before or after investigating a matter (whether or not the investigation is completed, and whether or not the Commission has made any findings), refer the matter for investigation or other action to any person or body considered by the Commission to be appropriate in the circumstances.*
>
> *(2) The person or body to whom a matter is referred is called in this Part a* ***"relevant authority"*** *.*
>
> *(3) The Commission may, when referring a matter, recommend what action should be taken by the relevant authority and the time within which it should be taken.*
>
> *(4) The Commission may communicate to the relevant authority any information which the Commission has obtained during the investigation of conduct connected with the matter.*
>
> *(5) The Commission shall not refer a matter to a person or body except after appropriate consultation with the person or body and after taking into consideration the views of the person or body.*
>
> *(6) If the Commission communicates information to a person or body under this section on the understanding that the information is confidential, the person or body is subject to the secrecy provisions of section 111 in relation to the information."*

It is arguable that what was referred to the DPP in relation to the disciplinary matters could not have been referred under s 53 because it was not "a matter" which a reasonable reading of the whole section would point to, in the predominant factual matrix, the attempt to pervert the course of justice aspect.

Further, if that not be correct, if it be the case that the wording of the section "before ... investigating a matter ..." (ie before investigating a disciplinary matter) encompasses the situation where there was to be no investigation at all, then it was arguably open for the disciplinary matter to be referred.

What to my mind simply cannot be explained or justified is the provision to the DPP of the five discs of all material (although a great deal of that related to the perversion of the course of justice aspect) but especially of the disc usefully for the DPP labelled "Journalist Disclosures" for a period going back to 2005. I am reinforced in expressing my gravest reservations as to the fairness and propriety of this step when I note that the DPP has concerned himself with but six text messages from 2012 between Ms Cunneen and a journalist friend. I am also concerned of course, as I have said, about the difficulty of Mr Babb's position when those texts are relating to him and a case in which he was involved as counsel in the Court of Criminal Appeal and in which Ms Cunneen was the prosecutor at trial which took place in 2012. The referral, as is conceded by the Commissioner was not on a confidential basis and no recommendation was made as to what action should be taken by the DPP.

What I would regard as the stark unfairness of nine years of the private affairs of Ms Cunneen and those of her friends (whether journalists or not) being placed before the DPP to fish for what turns out to be apparently six minnows in circumstances where the ICAC itself was not interested enough to even contemplate an investigation, virtually beggars belief.

It is not for me to advise the DPP. No doubt he will take into account (or someone else he might feel constrained to approach on so delicate a matter), the whole history of Operation Hale and have applied to the task a well balanced sense of reality and proportion.

This aspect of the conduct of the ICAC I describe, and I believe any ordinary reasonable person would describe, as unreasonable, unjust and oppressive.

Ms Cunneen was directed to take leave from October 2014 on pay. She returned on 21 May 2015 after the ICAC private hearings and the High Court result in April. She was briefed to prosecute a homicide trial and opened to the jury. Three days into that trial by reason of the reference to the DPP as set out in the ICAC's media release of 27 May 2015, the DPP withdrew Ms Cunneen resulting in a disruption to the administration of justice and an additional, and as now can be seen, unwarranted imposition upon all those involved in that trial.

At the time of this Report, Ms Cunneen is performing her duties as a Deputy Senior Crown Prosecutor.

Mr Babb is not to be envied, nor his surrogate if any, the task of reaching a decision in relation to six text messages from 2012 passed on to his Directorate almost with indifference, in my opinion, by the ICAC.

This also is one of the more distasteful components of the whole affair.

ICAC MEDIA RELEASE WEDNESDAY 27 MAY 2015

This media release has been set out at page 35 of this Report. It is of such significance that it will be attached to the Report as Appendix E.

A complaint was received by me from Mr Merritt raising the issue of whether or not the ICAC itself in the publication of this media release was in breach of s.111 of the ICAC Act.

That section states:

"111 Secrecy

(1) This section applies to:

(a) a person who is or was an officer of the Commission, and

(b) a person who is or was an Australian legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such an Australian legal practitioner in the exercise of the Australian legal practitioner's functions as counsel to the Commission, and

(c) a person who conducts a review under section 104D, but only in relation to the person's functions under that section, and

(d) a person or body referred to in section 14 (3), 16 (4) or 53 (6), and

(e) a person who is or was an officer of the Inspector.

(2) A person to whom this section applies shall not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:

(a) make a record of any information, or

(b) divulge or communicate to any person any information,
being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both."

The opinion of counsel was sought in relation to this issue and what they have to say is Appendix D to this Report. I agree with the conclusion to which counsel came namely that the ICAC was not in breach of its own Act in publishing the media release.

Standing alone there is nothing remarkable about a reference to the Director of Public Prosecution pursuant to cl 35(4) of Schedule 4 to the *ICAC Act* introduced by the *ICAC Amendment (Validation) Act* and s.53 of the *ICAC Act*. The details of the reference and what has thus far followed have already been discussed.

However, I am of the view that the media release as a publication to the world at large, was more than a mere instance of the conveying of information.

The media release was in my opinion an indictment.

Counsel briefed by me as will be seen in Appendix D describe the media release as "a robust defence" of the actions taken by the ICAC. And so they might. And so might it be said that if anything needed to be defended robustly it was the actions up until that time of the ICAC and the actions of the ICAC in the publication of the media release itself.

It is a complex legal document that carries a clear message once the references to legislation and case law are set to one side, the message is that it was the view of the ICAC essentially that the evidence was in its hands and was enough to secure a conviction.

In my opinion there was absolutely no requirement in the public interest or otherwise for ICAC to do anything more than, in about four or five sentences, inform the media and the public of its decision consequent upon the ruling of the High Court and the amendment of the legislation to refer to the Director of Public Prosecutions the material it had obtained. A statement that the reference was for the consideration of "criminal offences" and if necessary disciplinary matters would have been sufficient.

However, there is a sting, in my opinion, in the sentence "The decision to refer the evidence is being taken by the Commission after an assessment of the reliability of the material which is to hand" (**emphasis added**).

That sentence is after the paragraph which refers to the decision of the Court of Criminal Appeal of New South Wales in *Einfeld v The Queen* [2010] NSWCCA 87. The *Einfeld* case of course has the misfortune of enjoying notoriety because the appellant was a convicted criminal who had been sentenced to a substantial term of imprisonment; he had been a Queen's Counsel and a member of the Judiciary. The gravity of his conduct is revealed in the judgment of the Court of Criminal Appeal and the judgment of the trial judge (James J) [2009] NSWSC 119. What Basten JA said at para 81 in *Einfeld* was:

> *"81 ... First, it is beyond question that for a senior legal practitioner and former judge of a superior court to commit offences against the administration of justice is apt to give rise to public disquiet about the integrity of the judicial system. These were offences to which the present status of, and the offices formerly held by, the applicant were of great significance."*

Certainly any sensible member of the public would not disagree with such a fundamental proposition. (Basten JA found against the ICAC in the Cunneen appeal).

What some "insiders" would know, but most of the public would not, is that the Bench in the *Einfeld* appeal was constituted by Basten JA, Hulme J and the current Commissioner of the ICAC when sitting as a Judge of the Supreme Court, Latham J. Further, the recipient of the reference the subject of a media release of the 27th of May 2015, namely the DPP Mr Lloyd Babb SC, successfully appeared for the Crown in the *Einfeld* appeal.

It is not surprising that the observation of Basten JA in all the circumstances would readily have come to the mind of the author of the media release.

There is a further unnecessary sting in the statement *"It was accepted by the courts which examined the allegation in the course of the litigation initiated by Ms Cunneen that the alleged conduct would constitute an attempt to pervert the course of justice"* (**emphasis added**). Is it being more than hinted at that there was something sinister, improper or unfair about the fact that Ms Cunneen had exercised her rights to challenge the ICAC?

Does an examination of the judgments at first instance, and of the Court of Appeal warrant the statement that "It was accepted by the courts ..."? Views may differ as to whether the language of the media release in this regard falls just short of an assertion of guilt. In my opinion, by reference to some extracts from each court as follows, that the media release goes too far is an available description.

Hoeben CJ at CL:

"... It was also accepted by the parties that in relation to the preliminary question and in relation to the final orders, the allegations by the defendant in its summonses to the plaintiffs had to be taken at their highest, i.e, that the factual matters therein set out would be established." (para 16)

COURT OF APPEAL DECISION

Bathurst CJ:

"For these reasons the alleged conduct falls within s.8(2) of the Act. This of course does not involve forming any view as to the merits of the underlying allegation." (para 27)

Basten JA:

"Assuming that the advice given by the first and second applicants was acted upon by the third applicant and assuming that, as a result, the police were dissuaded from undertaking a blood alcohol reading in respect of the third applicant at the scene of the accident, it could not be said that the police officer acted otherwise than honestly and impartially in taking steps in accordance with his or her understanding of the circumstances. There was no suggested breach of public trust, in the sense of statutory power being used for an extraneous purpose, nor any allegation of the misuse of information acquired in carrying out an official function." (para 92)

"...On one view, given what is known from the allegation, the preferable course to public exposure might have been a report with a recommendation that the Director of Public Prosecutions take whatever action was deemed appropriate in the circumstances. However, senior counsel for the Commission submitted that the Court should draw no inferences as to the scope of the evidence or the seriousness of the conduct from the mere statement of the allegation."(para 105)

"On one view, there is an implicit assumption in this passage that such investigations should not be conducted "in secrecy" and it would be a "surprising result" if a decision to hold a public hearing was, in the circumstances of the case, "entirely unreasonable". However, as explained above, there might be very

pressing reasons why the subjection of a public official to an examination in public in circumstances where no conclusions had yet been reached would speak powerfully against such a course. To refer to the possibility of a final report revealing the nature of the conduct is not a factor which counts in favour of a public hearing. The damage which can be done to a reputation, possibly rendering the continued holding of public office untenable, in circumstances where denials may later be accepted or, apparently serious conduct may be held to be a minor infraction, tend in favour of caution in exercising the power to hold a public inquiry".(para 114)

"It may be accepted that the Commission would not act under s.31 unless satisfied that the allegations were sufficient to "warrant further investigation". However, that is not the test: the question is whether they were sufficient to warrant the holding of a public inquiry. Further, there is question as to whether the primary Judge was correct to assume that the applicants had to meet "the high threshold of legal irrationality" in order to obtain relief. There is a difference between serious unreasonableness and irrationality".(para 116)

Ward JA:

"I agree with Basten JA's conclusion for the reasons that his Honour gives, that the conduct the subject of the allegation described in the s.35 summons is not conduct that could adversely affect the exercise of the official functions by the investigating police officers at the scene of the motor vehicle accident. Therefore, the alleged conduct does not fall within the definition of corrupt conduct s.8(2) and ICAC does not have the jurisdiction to conduct the investigation".(para 193)

The reality is reflected in the observation made by the Chief Judge at Common Law. The media release in my opinion is dangerously close to asserting that the facts had been established, that guilt would inevitably be found and a punishment would be imposed.

My conclusion in relation to this media release is that it is another example of unreasonable, unjust, oppressive maladministration on the part of the ICAC. It was a last ditch stance of defiance and the tenor of the publication reflects a concluded view on the

part of ICAC on whatever Ms Cunneen and others had said or done that reflects poorly on its standing and objectivity. It is an abuse of the powers reposed in it.

I add that this release remained on the ICAC's website until about 1st of September the explanation for its removal was provided by the ICC's solicitor on 21st September as follows:

> *"due to lack of continuing relevance."*

A search of the site for "Cunneen" produces "no results". A search for Operation Hale produces only references to Mr T. Hale SC and matters in which he appeared for clients before the Commission.

THE QUESTION OF CONFLICT OF INTEREST

It will be recalled that in the announcement that there was to be a public inquiry (see p1) it was stated: *"As this matter involves a Senior Public official involved in the administration of justice in New South Wales, the Commission considered it appropriate for a person from outside New South Wales to preside at the Inquiry. Accordingly, Mr Alan MacSporran QC has been appointed an Assistant Commissioner to preside at the public Inquiry, and counsel assisting the Commission will be Mr Michael Fordham SC".*

Pursuant to my enquiry, I was informed on the 28th of August by the solicitor for the Commission of the existence of two relevant delegations under s. 107 of the ICAC Act which were current during the period 1st of June 2014 to the 27th of May 2015. A copy of the first being a delegation to Assistant Commissioner Theresa Hamilton dated the 28th of January 2014 is attached as Appendix F and the second dated the 2nd of October 2014 appointing Mr MacSporran QC as an Assistant Commissioner is attached as Appendix F.

Section 107 of the ICAC Act states:

> *"107 Delegation*

(1) The Commission may delegate to an Assistant Commissioner or an officer of the Commission any of its functions.

(2) The Commissioner may delegate to an Assistant Commissioner or an officer of the Commission any of his or her functions.

(3) An Assistant Commissioner or officer of the Commission may delegate to an officer of the Commission any of the functions delegated to the Assistant Commissioner or officer, subject to any conditions to which the delegation is subject.

(4) The following functions may not be delegated:

(a) a power of delegation conferred by this section,

(b) a function of making a report under this Act,

(c) the power of the Commissioner to issue a warrant for the arrest of a person under section 36 or 100,

(d) the power of the Commissioner to issue search warrants under section 40,

(e) the power of the Commissioner to certify as referred to in section 111 (4) (c).

(5) The following functions may be delegated only to an Assistant Commissioner:

(a) the power to require a public authority or public official to produce a statement of information under section 21,

(b) the power to require a person to attend and produce a document or other thing under section 22,

(c) the power to authorise an officer of the Commission to enter premises under section 23,

(d) the making of an application for an injunction under section 27,

(e) the powers of the Commission or the Commissioner under Division 3 of Part 4 at or in connection with a compulsory examination or public inquiry, except the power to issue a warrant for the arrest of a person under section 36,

(f) the powers of the Commissioner under Part 10 at or in connection with a hearing.

(6) The functions referred to in subsection (4) may however be delegated to an Assistant Commissioner (and to an Assistant Commissioner only) if the Commissioner is of the opinion that there would or might be a conflict of interest or that it would be in the interests of justice to do so.

(7) No person shall be concerned to inquire whether circumstances exist warranting a delegation under subsection (6), and a statement in the instrument of delegation of the Commissioner's opinion referred to in that subsection is sufficient."

It is clear that for the purposes of Operation "Hale" there was no delegation under s.107(6).

In my opinion subs.(7) of s.107 operates only when there has in fact been a delegation under s.107(6). In neither of the appended delegations is reference made to s.107(6) nor was there any expression of any relevant opinion.

The issue is important.

The materials provided by the ICAC indicate that Commissioner Latham on the 27th of October 2014 signed Summones to Appear and Give Evidence in the Public Inquiry in

relation to 11 witnesses including Ms Cunneen, Mr Tilley, Mr Gregory Wyllie and Mr Stephen Wyllie (Messrs Wyllie).

Between the 8th of July 2014 and the 29th of October 2014 Commissioner Latham signed Notices to Attend and Produce Documents for 10 people and institutions including Ms Cunneen, Messrs Wyllie and Ms Tilley. On the 24th of October Commissioner Latham signed Summonses to Appear and Give Evidence in compulsory examinations in respect of three people not relevant for present purposes. Those Summonses for Ms Cunneen, Messrs Wyllie and Tilley were signed by Assistant Commissioner Hamilton.

Commissioner Latham conducted compulsory examinations of four people; Mr MacSporran on the 29th of October conducted compulsory examination of six people and Assistant Commissioner Hamilton conducted compulsory examinations, on the 14th of August 2014, of Ms Cunneen, Ms Tilley and Messrs Wyllie.

The Search Warrant was issued by the Deputy Registrar of the Local Court in the Downing Centre.

At all relevant times Commissioner Latham has been senior to Ms Cunneen from what I understand to be the first year of their professional acquaintance namely 1986 and thereafter when each was a Crown Prosecutor and of course later by virtue of the Commissioner having held judicial office.

I am informed by Ms Cunneen that the persons she describes as partner or the father of her children was the instructor of Commissioner Latham's son in Taekwondo and that Commissioner Latham's personal trainer resided in the house next to Ms Cunneen in Willoughby for a period of about six years between 2005 and 2011. I am informed by Ms Cunneen that there were frequent meetings between her and the Commissioner on those occasions when the Commissioner visited her personal trainer.

Thus it can be said that the relationship between the Commissioner and Ms Cunneen was somewhat more than merely professional but both professional and personal for a

period in excess of 25 years at the time that the ICAC became apprised of the information conveyed to it by the Commonwealth agency in 2014.

This area is tricky. It is of particular concern to Ms Cunneen. Whilst the legal profession might be of some substance in terms of numbers, components of it can be small, intimate and otherwise closely connected. The Directorate of Public Prosecutions in New South Wales for example; the Public Defenders of this State, the several branches of the Judiciary might each be so characterised.

Where, as appears to be the case here, there is and has been for quite a considerable time a close personal and professional relationship a person in the position of Ms Cunneen would be concerned (and is concerned) that a person in the position of the Commissioner might be or appear to be biased or predisposed to bias one way or, to compensate, the other way vis-à-vis Ms Cunneen.

It does not appear that there was any consciousness of the potential for either the fact or the perception of conflict of interest in the Commissioner by reason of her not making a delegation under s.107(6).

As I have stated earlier in this opinion, I have not spoken with the Commissioner on any aspect of Operation "Hale". Bearing that in mind, I nonetheless feel it appropriate to remark upon what otherwise, fairly objectively can be seen as an acute difficulty arising by reason of the acquaintance of the parties, as-it-were.

The Commissioner had power, upon the receipt of the communication from a Commonwealth agency and the identification of Ms Cunneen forthwith to delegate to an Assistant Commissioner whether local or from interstate all relevant powers for the conduct of any form of inquiry. Alternatively, it was open to the Commissioner upon receipt of the information from the Commonwealth, in my opinion, to refer the matter under s.53 to the Director of Public Prosecution without further involving the ICAC. A possible third course would have been to refer to the Director of Public Prosecutions such material as has been obtained from the private hearings.

Leaving to one side for the moment the conclusion reached by the Victorian DPP and the announcement by the Solicitor General of this State, it is my view that the appropriate course would have been the first. I having had the advantage of reading material from the Private Hearings and other documentation am persuaded that so weak is the material available in support of the allegation relating to the perversion of the course of justice and giving of false testimony, (if capable of supporting the allegations at all) the public interest would not have been the prevailing consideration and the matter safely could have been left in the hands of the Director or, in the peculiar circumstances of this whole affair, to a person to whom he could appropriately delegate it.

In all the circumstances I think it was unreasonable to pursue the matter within the jurisdiction of the ICAC as it was then understood.

There is no basis upon which I can make any finding or reach any conclusion fair to anyone with respect to improper motive and I do not do so (see s.57B(4)(c)).

CONCLUSIONS & RECOMMENDATIONS

It is my opinion, having had the benefit of reviewing what I trust would have been all the material available to the ICAC and which has been forwarded to me and which I have otherwise received from the Commonwealth agency, that the opinion of the Hon. David Ipp AO QC set out in the Preface And Brief Executive Summary, is correct.

As I have indicated, whilst it may be understood that the original communication from the Commonwealth agency to the ICAC, in its bare bones might have provided a foundation for initial interest, it should have proceeded no further than, at best, a reference to the DPP.

Indeed, I must say that why the Commonwealth agency chose to refer what it did to the ICAC is itself a puzzle. That with which the Commonwealth agency was concerned had absolutely nothing to do with Ms Cunneen let alone her son and his girlfriend. Whatever was captured by happenstance as having been said or done by Ms Cunneen, finds no support in reliable, credible or cogent material, let alone material elevated to constitute

evidence, of any conduct on her part let alone of her son or his girlfriend warranting the intervention and intrusive exploration by one of the most powerful agencies of this State.

Against the background of the history of matters recently dealt with by it, the ICAC should have, by the application of a fundamental sense of proportion and an acute sensitivity to relative seriousness, concluded that whatever it was was "hardly serious" and exercised its "judgment" otherwise than, as was aptly described by the Hon. David Ipp AO QC erroneously.

From what I have learnt upon the examination of what I presume to be more material than was available to the Hon. David Ipp, whatever it was that was said or done was neither serious nor systemic and at best could be described as trivial.

It is facile to judge a matter by consequences flowing from it but not caused by it. One might speculate upon what would have been the recent history of the conduct of the ICAC in the performance of its vitally important work had not the error of judgment been made.

As stated above I make no finding with respect to anyone as to improper motive under s.57B(4)(c). I cannot prevent, however, others, without the benefit of all the relevant material available to them, from natural and possibly unfair speculation, tittle-tattle and the making of the most questionable suppositions.

Operation "Hale" from my point of view as Inspector, should be seen and, justifiably, can be seen, as the low point in the history of an entity whose functions, properly exercised, constitute an essential safeguard to the integrity of the governance of this State.

I make the following recommendations:

(1) That the ICAC and its decision makers bring to bear, at the earliest time when it considers itself sufficiently apprised of appropriate information, a sensible consciousness of proportion when determining whether or not it should embark upon a preliminary investigation of material that has come to its attention by whatever means. By "sense of proportion", I am referring to a rational and

balanced observation and decision making process with respect to the matter by itself, and in the context of the ambit of the statutory criteria, and the history of their application in relation to the investigation of conduct asserted to be "corrupt". The failure to do so would be (as it was here) unreasonable, unjust and oppressive in a serious way.

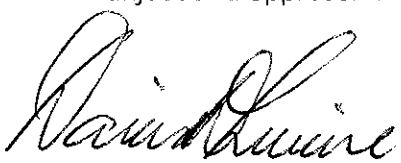
(2) Operation "Hale" evidences a compelling need that from the outset of the ICAC's involvement in any matter, however referred to it, there be sensitivity to the fact of, or the danger of the perception of, a conflict of interest by reason of any relationship that may be exposed or is in fact self-evident, between the ICAC and the persons the subject of its attention. The situation here was and is so stark as to warrant the repetition of the closing sentence of para (1).

(3) As should be abundantly clear, the ICAC should take exquisite care in the exercise of its powers to issue and serve "Notices to Produce". It is the view of this Inspectorate that a "Notice to Produce" forthwith is contrary to law. If something is required immediately the mechanism is a Search Warrant lawfully issued and lawfully executed. The resulting offence to privacy considerations is obvious.

(4) Referrals to other agencies under s.53 or otherwise must be fully documented as must, especially, a meeting such as that which took place on the 19th of May in this matter between the Commissioner and the Director of Public Prosecutions. This is vital in the event that a complaint is made, or the Commissioner on his own initiative, is compelled to require records of so critical and delicate an event. This warrants consideration of legislative amendment – compare s.90(2) of the *Police Integrity Commission Act* 1996.

(5) As to Media Releases, it should by now be obvious that great care and discretion be exercised in the composition of the document, the consideration of the purpose of its release, and the potential of the effect of its release. The Media Release of the 27th of May 2015, in my opinion, as I have stated, was so disproportionate to the merits of the whole enterprise as to amount to an unwarranted indictment of the people involved, an abuse of an undoubted power to keep the public informed, as to warrant the most trenchant of criticism. It was,

especially in the absence of any adverse findings, particularly unreasonable, unjust and oppressive. Nothing like it must happen again.



The Hon. David Levine AO RFD QC

4 December 2015

APPENDIX A

Functions and Powers of the Commission

7 Corrupt conduct

(1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.

(2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).

(3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

8 General nature of corrupt conduct

(1) Corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
(b) bribery,
(c) blackmail,
(d) obtaining or offering secret commissions,
(e) fraud,
(f) theft,
(g) perverting the course of justice,
(h) embezzlement,
(i) election bribery,
(j) election funding offences,
(k) election fraud,
(l) treating,
(m) tax evasion,
(n) revenue evasion,
(o) currency violations,
(p) illegal drug dealings,
(q) illegal gambling,
(r) obtaining financial benefit by vice engaged in by others,
(s) bankruptcy and company violations,
(t) harbouring criminals,
(u) forgery,
(v) treason or other offences against the Sovereign,

(w) homicide or violence,

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

(a) Matters arising in the State or matters arising under the law of the State,or

(b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

12 Public interest to be paramount

In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.

12A Serious corrupt conduct and systemic corrupt conduct

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

13 Principal functions

(1) The principal functions of the Commission are as follows:

(a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

(i) corrupt conduct, or

(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

(iii) conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur,

(b) to investigate any matter referred to the Commission by both Houses of Parliament,

(c) to communicate to appropriate authorities the results of its investigations,

(d) to examine the laws governing, and the practices and procedures of,

public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,

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

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

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

(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,

(i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,

(j) to enlist and foster public support in combating corrupt conduct,

(k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

(1A) Subsection (1) (d) and (f)-(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the Police Integrity Commission Act 1996.

(2) The Commission is to conduct its investigations with a view to determining:

(a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and

(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

(2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.

(3) The principal functions of the Commission also include:

(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and

(b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

(3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

(a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,

(b) opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether consideration should or should not be given to the taking of other action against particular persons,

(c) findings of fact.

14 Other functions of Commission

(1) Other functions of the Commission are as follows:

(a) to gather and assemble, during or after the discontinuance or completion of its investigations, evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish such evidence to the

Director of Public Prosecutions,

(b) to furnish, during or after the discontinuance or completion of its investigations, other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.

(1A) Evidence of the kind referred to in subsection (1) (b) may be accompanied by any observations that the Commission considers appropriate and (in the case of evidence furnished to the Attorney General) recommendations as to what action the Commission considers should be taken in relation to the evidence.

(1B) A copy or detailed description of any evidence furnished to the appropriate authority of another jurisdiction, together with a copy of any accompanying observations, is to be furnished to the Attorney General.

(2) If the Commission obtains any information in the course of its investigations relating to the exercise of the functions of a public authority, the Commission may, if it considers it desirable to do so:

(a) furnish the information or a report on the information to the authority or to the Minister for the authority, and

(b) make to the authority or the Minister for the authority such recommendations (if any) relating to the exercise of the functions of the authority as the Commission considers appropriate.

(2A) A copy of any information or report furnished to a public authority under subsection (2), together with a copy of any such recommendation, is to be furnished to the Minister for the authority.

(3) If the Commission furnishes any evidence or information to a person under

this section on the understanding that the information is confidential, the person is subject to the secrecy provisions of section 111 in relation to the information.

17 Evidence and procedure

(1) The Commssion is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

(2) Th e Commission shall exercise its functions with as little formality and technicality as is possible, and, in particular, the Commission shall accept written submissions as far as is possible and compulsory examinations and public inquiries shall be conducted with as little emphasis on an adversarial approach as is possible.

(3) Despite subsection (1), section 127 (Religious confessions) of the Evidence Act 1995 applies to any compulsory examination or public inquiry before the Commission.

APPENDIX B

FUNCTIONS OF THE INSPECTOR

The presently relevant terms of Part 5A of the ICAC legislation which relate to the Office of the Inspector are:

Part 5A – Inspector of the Independent Commission Against Corruption

57B Principal functions of Inspector

(1) The principal functions of the Inspector are:

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

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

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

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

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

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

(4) For the purposes of this section, conduct is of a kind that amounts to

maladministration if it involves action or inaction of a serious nature that is:

(a) contrary to law, or

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

(c) based wholly or partly on improper motives.

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

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

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

57C Powers of Inspector

The Inspector:

(a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and

(b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and

(c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and

(d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and

(e) may investigate and assess complaints about the Commission or officers of the Commission, and

(f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and

(g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

57D Inquiries

(1) For the purposes of the Inspector's functions, the Inspector may make or hold inquiries.

(2) For the purposes of any inquiry under this section, the Inspector has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the Royal Commissions Act 1923 and that Act (section 13 excepted) applies to any witness summoned by or appearing before the Inspector in the same way as it applies to a witness summoned by or appearing before a commissioner...

(3) The Inspector may engage persons as consultants to the Inspector or to perform services for the Inspector.

57F Incidental powers

(1) The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.

APPENDIX C

COUNSEL'S OPINION (EXTRACTS) – TIA Act

16. *It is important to recognise at the outset that the TIA Act is a very comprehensive law, which from its terms and subject matter appears to be intended as a complete statement of the law governing the circumstances in which communications passing over a telecommunications system may be intercepted, and how any such intercepted communications are to be dealt with, including their storage and rights and duties in respect of access to those communications. As part of that comprehensive statement, the TIA Act deals expressly with the powers and rights of various State bodies and agencies in respect of the subject matter and the extent to which concurrent operation of various State laws is permitted.*

17. *Sub-section 7(1) of the TIA Act contains a general prohibition on the interception of communications passing over a telecommunications system. Sub-sections 7(2), 7(4) and 7(5) of the TIA Act then provide for specific circumstances where such interception is authorised. One such circumstance, and presumably the method by which the ACC intercepted the presently relevant material, is where the interception occurs pursuant to a warrant: sub-s 7(2)(b).*

18. *Section 63 of the TIA Act contains a further prohibition of, relevantly, the communication to another person or the making of a record of intercepted information save as when authorised elsewhere in Part 2-6 of the TIA Act. Importantly, this further prohibition applies equally to lawfully intercepted information and information that was intercepted in contravention of the prohibition in sub-s 7(1) of the TIA Act. In other words, a person who is in possession of lawfully intercepted information is under the same restraints in communicating that information as a person who had unlawfully obtained the information in the first place.*

19. *A person who contravenes either sub-s 7(1) or sec 63 of the TIA Act is guilty of an offence against the relevant provision: sub-s 105(1) of the TIA Act. By sub-s 105(2) of the TIA Act that offence is an indictable offence punishable on*

conviction by imprisonment for a period not exceeding two years, subject to the confined circumstance where, in accordance with sub-s 105(3) of the TIA Act a court exercising summary jurisdiction may hear and determine the charge, in which case the maximum penalty is six months imprisonment.

20. *Further, Part 2-10 of the TIA Act gives jurisdiction to the Federal Court, or a court of a State or Territory, to grant remedial relief to an aggrieved person in respect information unlawfully intercepted or communicated in breach of sub-section 7(1) or sec 63 of the TIA Act, including an award of punitive damages, even if the defendant has also been convicted of an offence under the legislation. This is without limit to any liability under State or Territory law that is capable of operating concurrently with the Part: sec 107D.*

21. *These provisions underscore the seriousness with which the interception and communication of telecommunications information is dealt with by the legislation and why any attempt to intercept, or more relevantly for present purposes, communicate, such information must be strictly squared with the requirements of the legislation.*

22. *Critical to determining the present question is a proper understanding of the operation of Part 2-6 of the TIA Act which provides for the only authorised situations in which intercepted information may be communicated as an exception to its prohibition in sec 63.*

23. *Section 68 of the TIA Act provides for the ability of an agency that originally obtained lawfully intercepted information, called the "originating agency", to communicate that to another agency in defined circumstances, and, once again underscoring the gravity of the matter, such communication must occur through the chief officers of the agencies, or another officer authorised by the chief officer. For the purposes of Part 2-6 of the TI Act, by tracking through the definitions in sec 5, an agency is one of the following authorities:*

    a. *A Commonwealth agency, which means only the following:*

        i. *the Australian Federal Police; or*

        ii. *the Australian Commission for Law Enforcement Integrity; or*

iii. *the ACC; or*

b. *an eligible authority of a State, which means in the case of NSW:*

i. *the Police Force; or*

ii. *in the case of New South Wales – the Crime Commission, the ICAC, the Inspector of the ICAC, the Police Integrity Commission or the Inspector of the Police Integrity Commission.*

23. *The Police Forces of the other States are also included, as well as some analogue bodies to the NSW agencies in the case of Victoria, Queensland, Western Australia, and South Australia.*

24. *Therefore, an originating agency can only communicate intercepted information to another one of the defined agencies. Further, sec 68 proscribes, agency by agency, the limited circumstances in which it can be done. It is worth noting here that the TIA Act separates the ICAC from the Inspector of ICAC and treats them as two separate agencies. This reflects the separate treatment accorded to them by the ICAC Act (see eg sub-s 57B(3) of that Act), but in any event makes it clear that they are each to be judged independently for the purposes of Part 2-6 in determining what information can be communicated to them, and how and by whom it may be communicated.*

25. *In the case of the ICAC, para 68(ea) of the TIA Act provides that the chief officer of the originating agency may only communicate information obtained by the originating agency "if the information relates, or appears to relate, to a matter that may give rise to an investigation by the ICAC – to the Commissioner of the ICAC".*

26. *In the case of the Inspector of the ICAC, para 68(eb) of the TIA Act provides that the chief officer of the originating agency may only communicate information obtained by the originating agency to the Inspector "if the information relates, or appears to relate, to a matter that may give rise to an investigation by the Inspector of the ICAC".*

27. *If an eligible authority of a State has had information communicated to it by sec 68 of the TIA Act, or indeed if it obtained the information upon its own application for a warrant, then it must comply with sub-s 67(1) of the TIA Act in dealing with that information. Sub-section 67(1) of the TIA Act provides:*

> *An officer or staff member of an agency may, for a permitted purpose, or permitted purposes, in relation to the agency, and for no other purpose, communicate to another person, make use of, or make a record of the following:*
>
> *(a) lawfully intercepted information other than foreign intelligence information;*
>
> *(b) interception warrant information.*

28. *Therefore, a communication may only be made for a permitted purpose "in relation to the agency" and for no other purpose. Section 5 of the TIA Act comprehensively sets out the permitted purposes "in relation to" each agency.*

29. *In relation to ICAC, para 5(da) provides that a permitted purpose relevantly "...means a purpose connected with (i) an investigation under the ICAC Act into whether corrupt conduct (within the meaning of that Act) may have occurred, may be occurring or may be about to occur; or (ii) a report on such an investigation".*

30. *The ICAC may therefore only communicate the information it has received for the purposes of conducting an investigation under Part 4 of the ICAC Act. It may not communicate the information for any other purpose.*

31. *Section 5 of the ICAC Act also provides what a permitted purpose in relation to the Inspector is. In para 5(db) the TIA Act such a permitted purpose is on connected with what is effectively a restatement of the principal functions of the Inspector provided for in sub-ss 57B(1)(b) and 57B(1)(c) of the ICAC Act. It is tolerably plain therefore that the Commonwealth Legislature was well aware of the constituent statutes of the various State corruption authorities, and the relationship between the Inspector of the ICAC and the ICAC and other State analogues, and specifically tailored the TIA Act to include some of the functions of*

the agencies and not others. Another example of this in the legislation is contained in Part 2-5, where detailed preconditions are proscribed for when an eligible authority of a State may be declared as an agency for the purposes of warrants and the communication of information, and some specific allowances are made to permit agencies to comply with State legislation concerning the provision of information to responsible Ministers e.g. sec 36.

32. *The above establishes that:*

    a. *there are stringent limitations on when one agency may communicate information it has intercepted to another agency; and*

    b. *there are stringent limitations on the purpose or purposes for which the originating agency or the recipient agency may communicate the intercepted information; and*

    c. *the TIA Act displays by its structure and terms an engagement with the State legislation establishing and regulating the eligible authorities upon which it is conferring various privileges or powers and imposing obligations.*

33. *It is not a permitted purpose under the TIA Act for the ICAC to communicate information to the Inspector for the purposes of the Inspector fulfilling his functions under Part 5A of the ICAC Act. The only permitted purpose that the ICAC may communicate the information for is in conducting its own investigations under Part 4 of the ICAC Act.*

34. *We have considered the argument that, given the relationship between the Inspector and the ICAC under the ICAC Act, then it is a "purpose connected" with an investigation that the Inspector be permitted to access the information in order to "investigate the investigation" but are of the view that such an argument must fail given that the TIA Act, in successive provisions, neatly juxtaposes the separate functions of the ICAC with those of its Inspector. The whole scheme of Part 2-6 is against the notion that the ICAC may communicate the information to*

its Inspector. Part 2-6 deals with a limited number of agencies, a number of whom are State Corruption or Crime Commission bodies and their overseers and secs 67 and 68 clearly operate on the basis that it is for an originating agency to determine whether another agency is to receive the information and then that agency is to communicate the information only for the purposes of their own defined principal functions. Given that an originating agency is required to apply for the warrant, there are sound policy reasons why only that agency can determine whether another agency is to receive the information, possessed as it may be of knowledge that would inform the exercise of such a discretion, such as the potential for prejudice to an ongoing investigation.

35. *The scheme set up by Part 2-6 which considers the position of the Inspector generally and the circumstances under which he may acquire and communicate any information is neatly contrasted with sub-s 57F(2) of the ICAC Act which provides the Inspector with an exception to the application of sec 40 of the Surveillance Devices Act 2007 (NSW) when he is exercising his functions.*

36. *The Commissioner of the ICAC therefore has an obligation imposed on her by the TIA Act to only communicate the information for a permitted purpose under the TIA Act and yet the Commissioner is also prima facie subject to a duty to comply with sec 57 of the ICAC Act, namely to provide the Inspector with "full access to records of the ICAC and to take or have copies made of any of them" or the requirement to "produce documents or other things about any matter relating to the Commission's operations" when the Inspector so says.*

37. *This is one of those relatively uncommon situations when sec 109 of the Commonwealth Constitution must resolve an "operational inconsistency" between a law of the Commonwealth and a law of a State: see e.g. Commonwealth v Western Australia (1999) 196 CLR 392 at [61]-[62]; Momcilovic v The Queen (2011) 245 CLR 1 at 112-114 [247]-[251]. In any event, the label is unimportant as there is an interrelationship between the different tests of inconsistency all directed at ascertaining whether a "real conflict" exists between the two laws: Jemena Asset Management Pty Ltd v Coinvest Ltd (2011) 244 CLR 508 at [42],[60]. In this case it is not the laws themselves which are inconsistent*

but their operation in particular circumstances. The ICAC Act confers a broad facultative power on the Inspector and deals with a subject matter far different to the TIA Act. The laws themselves do nothing like create conflicting commands – there is no textual collision. It is not the conferral of power on the Inspector which is invalid due to inconsistency. It is the limited, temporal inconsistency in this instance that power conferred on the Inspector has been exercised in relation to a limited class of subject matter upon which the TIA Act is comprehensive, definite and which in its practical operation conflicts so that the Commissioner would be confronted with opposing duties. It is tolerably plain that by the TIA Act the paramount Legislature has expressed completely and exhaustively what the law shall be concerning the communication of telecommunications interception information, and by so specifically regulating conduct does not permit any other conduct inconsistent with its careful proscriptions. It is express on this point – "no other purpose" – there is no need to divine an implicit negative proposition. The purported exercise of power by the Inspector must in this case yield to the strictures of the TIA Act.

38. *There is, of course, as we advised in conference, nothing to prevent the Inspector approaching the CEO of the ACC directly to request that the information that was communicated to the Commissioner of the ICAC also be communicated to the Inspector pursuant to sec 68 of the TIA Act. The purposes for which the Inspector wishes to use and communicate the information are permitted purposes under sec 5 of the TIA Act. We understand that such a request has now been made by the Inspector to the CEO of the ACC.*

39. *In passing we note that a deal of information in our brief concerns the issue that the relevant "Integrity Agencies" in New South Wales, Victoria, Queensland, and Western Australia seem to be concerned that a lacuna exists in the TI Act whereby "the TI Act does not allow for respective Inspectors to have access to TI material for the purposes of conducting an audit". In other words, there is a belief that such information can only be provided when an Inspector is conducting an investigation.*

40. *A great deal of correspondence over the years has passed in relation to the issue and advice has even been provided by various Commonwealth employed lawyers. Some of the debate seems to pay insufficient regard to the distinction between the purpose for which an originating agency may exercise its discretion under sec 68 to communicate the information to a second agency, and what the permitted purposes are for any communication of that information by the second agency pursuant to sec 67 and the definitions in sec 5. The debate is presently irrelevant to the question with which we are confronted and we do not propose to assess the merits of the various opinions expressed, but since the matter has been raised in the brief we pause only to remark that the matter appears to be a simple one in that, in requesting information from an originating agency, an Inspector need only identify for that originating agency how the information relates, or appears to relate, to a matter may give rise to an investigation by the Inspector, but once the information is in the possession of the Inspector, the Inspector may only further communicate the information for purposes that equate to the functions in sub-ss 57B(1)(b) and 57B(1)(c) of the ICAC Act.*

41. *In other words, an originating agency could provide the information to an Inspector if the information was about a matter that may give rise to an investigation, but once in receipt of that information, the Inspector could not further communicate that information for the purposes of an audit."*

APPENDIX D

COUNSEL'S OPINION (Extracts) MEDIA RELEASE 27 MAY 2015

"42. On 27 May 2015, and after its loss in the High Court, the ICAC chose to issue a media release, perhaps unusual in its content, effectively seeking to justify its conduct in commencing Operation Hale and providing an explanation of why the ICAC thought it appropriate to refer the allegations to the NSW Director of Public Prosecutions pursuant to cl 35(4) of Sch 4 to the ICAC Act, introduced by the Independent Commission Against Corruption Act Amendment (Validation) Act 2015 (NSW), by "...providing the evidence it has obtained in Operation Hale to the DPP".

43. In explaining its decision to "...furnish the evidence to the DPP for consideration of whether charges of attempting to pervert the course of justice and giving false evidence to the Commission are available against [Cunneen, Wyllie and Tilley]", the ICAC made the following statement:

> *The Commission undertook an investigation into the alleged conduct of Ms Cunneen, Mr Wyllie and Ms Tilley after it was provided with information by a Federal law enforcement agency that indicated the commission of an attempt to pervert the course of justice by Ms Cunneen, a NSW deputy senior crown prosecutor, following a motor vehicle accident on 31 May 2014. It was accepted by the courts which examined the allegation in the course of the litigation initiated by Ms Cunneen that the alleged conduct could constitute an attempt to pervert the course of justice.*

44. The media release then goes on to describe how serious the alleged offence is when committed by a senior counsel and how it is in the interests of the administration of justice that the DPP be able to investigate the matter.

45. *It is, on any view, a robust defence of the actions taken by the ICAC. Whether it was generally appropriate to issue the media release is not a matter on which we opine. The specific question on which we advise is whether the media release, and specifically the extracted paragraph at [42] above, constituted a breach of sec 111 of the ICAC Act.*

46. *That section relevantly provides:*

111 Secrecy

(1) This section applies to:

(a) a person who is or was an officer of the Commission, and

(b) a person who is or was an Australian legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such an Australian legal practitioner in the exercise of the Australian legal practitioner's functions as counsel to the Commission, and

...

(2) A person to whom this section applies shall not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:

(a) make a record of any information, or

(b) divulge or communicate to any person any information, being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act. Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

47. *For completeness, we note but do not set out the important permissive provisions in sub-s 111(4).*

48. *It can be readily seen that the provision was modelled on the long-standing secrecy provision contained in sec 16 of the Income Tax Assessment Act 1936 (Cth) which has only recently been replaced by the more comprehensive Div 355 of Sch 1 to the Taxation Administration Act 1953 (Cth). We need not recount the comprehensive law in relation to the old sec 16 and what constitutes communication in the exercise of the officer's functions as, in our view, the answer to the present question is tolerably clear that there was no relevant divulgence or communication.*

49. *In particular, we are asked to advise as to whether by referencing information provided by a "Federal law enforcement agency" and disclosing what the ICAC thought it indicated, constituted divulgence or communicating the interception information obtained under the TIA Act in breach of sec 111. (We note that we are not asked to advise on whether the media release constituted a contravention of sec 63 of the TIA Act but we should note that the same answer follows).*

50. *We are of the opinion that the comments in the media release did not constitute a divulgence or communication of the relevant interception information. The ICAC has not disclosed the information or any of its contents. It has stated its opinion about the conclusion it has drawn from considering the material, without disclosing or identifying the substance of any of the material.*

51. *The conduct of the ICAC in this regard, whatever its general propriety, is not in any way dissimilar to the Commissioner of Taxation issuing a media release stating that after considering the secret taxation files provided by Person X under compulsion, the Commissioner has formed the view that Person X has breached various provisions of the taxation legislation and has been assessed accordingly. In neither case has any of the secret information been divulged or communicated, but merely an opinion been*

expressed about what legal conclusions one may draw from the information. If the ICAC had recounted any of the alleged conversations, that would be a different matter.

52. *On a separate matter, we note our discussion in conference that it seems that the ICAC considered itself permitted to communicate the interception information to the DPP in circumstances where it had (correctly) not considered itself able to do so to the Inspector by reason of the TIA Act. The ICAC does not elaborate as to why the former is permitted but the latter not. It cannot be as a result of the new Sch 4 to the ICAC Act that the ICAC identified, as it would also yield to the TIA Act. Perhaps the ICAC considered the provision of the information fell within (a)(i) of the definition of "permitted purpose" in sec 5 of the TIA Act or some other permitted purpose therein. We do not express any view on the matter and we simply raise it for the benefit of the Inspector."*

APPENDIX E

MEDIA RELEASE 27 MAY 2015

"Home > Media centre > Media releases > Decision to provide evidence in Operation Hale to the DPP
Wednesday 27 May 2015

Since the NSW Parliament passed the Independent Commission Against Corruption Amendment (Validation) Act 2015 earlier this month, the NSW Independent Commission Against Corruption (ICAC) has been considering its incomplete investigations to determine what, if any, action it should take with each outstanding matter.

The Commission has determined to provide the evidence it has obtained in Operation Hale to the NSW Director of Public Prosecutions (DPP) pursuant to clause 35(4) of Schedule 4 to the Independent Commission Against Corruption Act 1988 (the ICAC Act). Clause 35(4) provides that "the Commission is authorised (and is taken always to have been authorised) to exercise functions under this Act on or after 15 April 2015 to refer matters for investigation or other action to other persons or bodies, or to communicate or provide evidence given to the Commission to other persons or bodies, even if the matter arose or the evidence was given to the Commission before 15 April 2015 and its validity relies on the validation under subclause (1)".

The Commission conferred with the DPP on 19 May concerning the referral of the evidence in Operation Hale.

Today, the Commission has furnished that evidence to the DPP for consideration of whether charges of attempting to pervert the course of justice and giving false evidence to the Commission are available against Ms Cunneen, Stephen Wyllie and Sophia Tilley. The Commission has decided to take this step for the following reasons.

The Commission undertook an investigation into the alleged conduct of Ms Cunneen, Mr Wyllie and Ms Tilley after it was provided with information by a Federal law enforcement agency that indicated the commission of an attempt to pervert the course of justice by

Ms Cunneen, a NSW deputy senior crown prosecutor, following a motor vehicle accident on 31 May 2014. It was accepted by the courts which examined the allegation in the course of the litigation initiated by Ms Cunneen that the alleged conduct could constitute an attempt to pervert the course of justice.

Any attempt to pervert the course of justice by senior counsel, whether in the course of that person's duties or otherwise, strikes at the heart of the administration of justice and "is apt to give rise to public disquiet about the integrity of the judicial system"; Einfeld v R [2010] NSWCCA 87, Basten JA at [81],

The decision to refer the evidence is being taken by the Commission after an assessment of the reliability of the material which is to hand.

The Commission is of the view that it is in the public interest that the resolutuion of the allegations against Ms Cunneen, Mr Wyllie and Ms Tilley ought not be further delayed. The Commission is unable to finalise its investigation in Operation Hale as a result of the decision of the High Court in ICAC v Cunneen & Ors [2015] HCA 14 and Part 13 of Schedule 4 to the ICAC Act only allows the Commission to provide to other agencies evidence it has obtained on or before 15 April 2015. Moreover, the pending review of the ICAC Act will not be completed before 11 July 2015.

It is also in the interests of those persons and the administration of justice in NSW that the evidence obtained by the Commission is referred for appropriate action to the DPP. The Commission's referral to the DPP also allows for the appointment of an appropriately qualified independent person from outside NSW to undertake that task.

In addition to considering criminal offences, it may be necessary for the DPP to consider whether disciplinary proceedings should be taken against ms Cunneen. Accordingly, the DPP is the most appropriate agency for the referral of the material.

The Commission does not intend to comment further at this stage.

Media contact: ICAC Manager Communications & Media, Nicole Thomas, 02 8281 5799 / 0417 467 801"

APPENDIX F

"INDEPENDENT COMMISSION AGAINST CORRUPTION
DELEGATION OF POWERS UNDER SECTION 107 ICAC ACT

DELEGATION TO THERESA HAMILTON

I, the Hon. Megan Latham, the Commissioner for the Independent Commission Against Corruption, on behalf of the Commission and in my capacity as the Commissioner, pursuant to Sections 107(1) and 107(2) of the Independent Commission Against Corruption Act 1988 (the Act) hereby delegate, subject to the said sections, to Theresa Hamilton Assistant Commissioner for the Independent Commission Against Corruption, the functions conferred o the Commission and the Commissoner by the Act, as specified in the Schedule hereto, subject to the conditions in the said Schedule for the period of her appointment as an Assistant Commissioner.

SCHEDULE

1. *Powers of the Commission and the Commissioner under Division 2 of Part 4 of the Act in connection with investigations.*

2. *Powers of the Commission and the Commissioner under Division 3 of Part 4 of the Act at or in connection with a compulsory examination or public inquiry, except the power to issue a warrant for the arrest of a person under section 36 of the Act.*

3. *Power of the Commission to determine witnesses' expenses under section 51 of the Act.*

4. *Powers of the Commissioner under Part 10 of the Act except the power of the Commissioner to issue a warrant for the arrest of a person under section 100 of the Act.*

5. *Power of the Commission to direct non-publication of evidence under section 112(1) of the Act.*

DATED: 28th January 2014

The Hon. Megan Latham
COMMISSIONER
FOR THE INDEPENDENT COMMISSION AGAINST CORRUPTION"

APPENDIX F

"INDEPENDENT COMMISSION AGAINST CORRUPTION
DELEGATION OF POWERS UNDER SECTION 107 ICAC ACT

DELEGATION TO ALAN JOHN MACSPORRAN QC

I, the Hon. Megan Latham, the Commissioner for the Independent Commission Against Corruption, on behalf of the Commission and in my capacity as the Commissioner, pursuant to Sections 107(1) and 107(2) of the Independent Commission Against Corruption Act 1988 (the Act) hereby delegate, subject to the said sections, to Alan John MacSporran QC, Assistant Commissioner for the Independent Commission Against Corruption, the functions conferred o the Commission and the Commissoner by the Act, as specified in the Schedule hereto, subject to the conditions in the said Schedule for the period of his appointment as an Assistant Commissioner.

SCHEDULE

1. *Powers of the Commission and the Commissioner under Division 2 of Part 4 of the Act in connection with investigations.*

2. *Powers of the Commission and the Commissioner under Division 3 of Part 4 of the Act at or in connection with a compulsory examination or public inquiry, except the power to issue a warrant for the arrest of a person under section 36 of the Act.*

3. *Power of the Commission to determine witnesses' expenses under section 51 of the Act.*

4. *Powers of the Commissioner under Part 10 of the Act except the power of the Commissioner to issue a warrant for the arrest of a person under section 100 of the Act.*

5. *Power of the Commission to direct non-publication of evidence and submissions under section 112(1) of the Act.*

DATED: 2 October 2014

The Hon. Megan Latham
COMMISSIONER
FOR THE INDEPENDENT COMMISSION AGAINST CORRUPTION"

APPENDIX G

"The Australian, Australia
02 Dec 2015, by Sharri Markson

ICAC's LATHAM snubbed inspector

Commissioner Megan Latham refused to meet ICAC inspector David Levine to answer questions about the bungled investigation into prosecutor Margaret Cunneen.

The Australian can reveal Mr Levine, a former Supreme Court judge, sought the meeting with Ms Latham while compiling his report into ICAC's pursuit of Ms Cunneen, which involved Ms Latham allegedly leaking damning private text messages found on ms Cunneen's mobile phone to her boss, Director of Public Prosecutions Lloyd Babb.

Mr Levine confirmed to The Australian that Ms Latham had refused the meeting request.

"What you've asked me is whether I suggested a meeting and whether it took place. Yes, I did; and it did not take place," Mr Levine said. "No meeting took place. It simply didn't happen."
ICAC and Ms Latham did not respond to requests for comment yesterday.

Mr Levine's functions and powers, as set out in Part 51 of the ICAC Act, state that he may require ICAC officers to appear before him to answer questions.

Shooters and Fishers Party MP Robert Borsak questioned how the public could have confidence in an organisation that was not accountable to its own inspector. Mr Borsak said it was a disgrace that Ms Latham did not meet with the inspector.

"It's a clear indication of the lack of accountability of the commissioner and the management of the ICAC," he said.

"You can have absolutely no confidence in not only the organisation but in the leadership of the commissioner."

Mr Borsak said if Ms Latham had found legal grounds to refuse to meet Mr Levine then the ICAC Act needed "major modifications to bring the star chamber into a accountable position".

"Even the commissioner of police is accountable to the premier, so who is she accountable to? he said.

Mr Levine launched an inquiry into ICAC's Cunneen investigation in November last year and NSW Premier Mike Baird is awaiting its completion. Mr Levine said it would be handed to parliament on Friday.

When the High Court ruled ICAC's investigation of Ms Cunneen to be invalid, Ms Latham urged the DPP to pursue criminal charges against Ms Cunneen, issuing a press release recommending this course of action.

The Australian revealed that ICAC leaked Ms Cunneen's private text messages in which she was critical of Mr Babb's performance in an appeal case.

The text messages were sent years earlier and were not relevant to the scope of ICAC's inquiry into Ms Cunneen, which centred on advice she was alleged to have given her son's girlfriend after a car accident.

ICAC inspectors seized Ms Cunneen's mobile phone using a Notice to Produce document, authorised by Ms Latham.

A week later, ICAC applied for a search warrant to seize a mobile phone that was already in its possession. Registrar Stephen Lister granted the warrant.

The Australian has attempted to obtain the documents relating to the authorisation of the search warrant, but ICAC has placed a secrecy provision on the papers."