



Office of the Inspector of the
Independent Commission Against Corruption

**Report pursuant to sections 57B(5) and 77A
of the *Independent Commission Against
Corruption Act 1988* concerning an audit
under section 57B(1)(d) thereof into the
Independent Commission Against
Corruption's procedures for dealing with
counsel assisting in investigations and
inquiries under Part 4 of the Act**

(Special Report 20/02)



Office of the Inspector of the
Independent Commission Against Corruption

19 December 2019

Our ref: A1 2019 12

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

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Mr Speaker

I attach a Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B(1)(d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act.

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

Yours sincerely,

A handwritten signature in blue ink that reads 'B. R. McClintock' with a horizontal line underneath.

Bruce R McClintock SC
Inspector, Independent Commission against Corruption

**REPORT PURSUANT TO SECTIONS 57B(5) AND 77A OF THE
INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988
CONCERNING AN AUDIT UNDER SECTION 57B(1)(D) THEREOF INTO
THE INDEPENDENT COMMISSION AGAINST CORRUPTION'S
PROCEDURES FOR DEALING WITH COUNSEL ASSISTING IN
INVESTIGATIONS AND INQUIRIES UNDER PART FOUR OF THE ACT**

Executive Summary

1. This is a report pursuant to sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* (“the Act”) concerning an audit of the procedures of the Independent Commission Against Corruption (“the ICAC” or “the Commission”) which I carried out under section 57B(1)(d) of the Act. That provision specifies as one of my functions as Inspector “to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities”. The subject of this audit is ICAC procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act.

2. In association with that audit I have examined the conduct of counsel assisting in one Commission inquiry, Operation Spicer, and have concluded such conduct was, in some instances, inappropriate and unfair to the persons whose conduct was being examined by the Commission. The ICAC conducted the Operation Spicer public inquiry in 2014 well before the introduction of the current three Commissioner model in 2017 and the appointment of the present Chief Commissioner and Commissioners. Having audited the Commission’s current procedures in relation to counsel assisting in the conduct of investigations under Division 2 of Part 4 of the Act and compulsory examinations and public inquiries under Division 3 of Part 4, I am satisfied that those procedures are presently operating satisfactorily, appropriately and in accordance with the relevant legislation. I am also confident that the inappropriate conduct I have identified in Operation Spicer below is unlikely to be repeated. I propose for the remainder of my term as Inspector to monitor the conduct of ICAC public inquiries to satisfy myself that counsel assisting continues to conduct such inquiries fairly and appropriately.

3. Counsel assisting has a critically important role in ICAC investigations and public inquiries and, indeed, sets the tone of the process. When counsel assisting behaves unfairly, the process and the findings of the Commission will be undermined and be seen to be unfair, or there is, at least, a serious risk that that will be perceived to be the case. It is fundamental to both the just and effective performance of the Commission's important public functions that it behaves fairly towards those who come before it and is perceived to have done so towards persons who may ultimately be the subject of adverse findings by it. It will be recalled that while the Commission may not make findings that a criminal offence has been committed, it may make findings of serious corrupt conduct. See section 74B and section 74BA of the ICAC Act. It is important that any such finding not be vitiated or undermined by any public perception that the Commission has not behaved fairly in coming to such a conclusion.

Rationale for Investigation

4. At the time I took up my appointment as Inspector of the ICAC on 1 July 2017, there were two complaints outstanding which raised questions concerning the conduct of Mr Geoffrey Watson SC as counsel assisting in ICAC's Operation Spicer. The complainants were (through their solicitors) the Honourable Mike Gallacher, the former Minister for Police and Emergency Services and Dr Andrew Cornwell, former member for the Legislative Assembly seat of Charlestown 2011-2014 and his wife Ms Samantha Brookes. Operation Spicer was an ICAC investigation into allegations that a number of NSW Liberal Party candidates had solicited and received political donations which were not declared as required by the *Election Funding Expenditure and Disclosures Act 1981* ("EFED Act") or were otherwise unlawful under that Act. The Commission submitted to Parliament its report into Operation Spicer on 30 August 2016. I will describe these complaints in question in more detail below. After my appointment, I also received a complaint about aspects of Mr Watson's conduct from the Honourable Marie Ficarra by letter dated 6 December 2017, but it is unnecessary to refer to it further in this Report.
5. A significant influence on my decision to undertake this investigation is my perception that there is continuing concern about Mr Watson's conduct as counsel

assisting in Operation Spicer, even though the hearings took place in 2014. Several members of the Parliamentary ICAC Committee raised Mr Watson's examination of Mr Darren Williams during my evidence to that Committee on 18 October 2019 and sought my views about it. I set out in [8] below the relevant passage of Mr Watson's examination of Mr Williams. My examination of the relevant transcript of the public inquiry in Operation Spicer establishes that that examination was not an isolated instance of the conduct of counsel assisting in that inquiry. I will set out examples below. I consider that Mr Watson's conduct caused serious damage to the public standing of the Commission which may well have reduced its ability to perform its important public function of attacking corruption in this State. These concerns were my motivation, first, to examine Mr Watson's conduct to determine whether he had performed his role in a manner appropriate for counsel assisting in a public inquiry by the ICAC, secondly, if he had not done so, to explain why it was not appropriate so that both the agency and the public understood the reasons for that conclusion and, I hope, thereby to reduce the likelihood of repetition by future counsel assisting and, thirdly, to examine the present procedures of the Commission to determine whether there was any risk of repetition of such conduct.

Mr Gallacher's Complaint

6. Mr Gallacher's complaint was set out in letters to my immediate predecessor Mr John Nicholson SC, Acting Inspector of the ICAC, from his solicitors dated 25 November 2016 (Attachment A) and 6 March 2017 (Attachment B). Following my review of outstanding complaints after my appointment, I wrote to Mr Gallacher's solicitors on 5 September 2017 (Attachment C) and received a reply from them on 9 October 2017 (Attachment D) in effect withdrawing the complaint.
7. On 17 October 2017, I received a letter from Mr Gallacher himself dated 9 October 2017 (Attachment E). The contents of that letter concerned me for a number of reasons and on 8 November 2017, I wrote to Mr Gallacher (Attachment F) raising the possibility of carrying out an investigation into the first of the three matters raised by him of my own initiative under section 57B(2) of the Act. As I said in that letter, that matter involved "the propriety of the conduct of Mr Watson in putting the question he did to Mr Williams and the consequent responsibility of the

Commission for that conduct, its failure to support the question with evidence and the failure to withdraw the allegations made against you by Mr Watson”.

8. Mr Gallacher’s allegations against Mr Watson centred upon the following exchange on 2 May 2014 during the Operation Spicer public inquiry when Mr Watson was examining Mr Darren Williams:

No, and, so you asked this question do I ring Nathan, that’s Nathan Tinkler isn’t it?---Yes.

Do I ring Nathan Tinkler or Troy, that’s Troy Palmer isn’t it?---Correct.

They’re both from the Tinkler Group?---Yes.

So I’ll read it again, “Do I ring Nathan Tinkler or Troy Palmer”?---Yes.

What about in the context of an email chain titled “Which entity will I give Mike Gallacher”?---I don’t recall.

*Oh come on, Mr Williams. **You know that you can go to gaol for giving false evidence don’t you?---Yes.***

But you do appreciate that if you avoid answering a question that’s the same thing as giving misleading evidence?---Yes, I honestly cannot recall this, this correspondence.

You see we get a lot of it down here, it’s really a coward’s corner I don’t recall, Mr Williams, isn’t it? I want you to stretch your mind. Do you want a break? We can take a five or 10 minute for you to - - -?---No, it’s fine.

No. What do you mean? Don’t dismiss it like that. This is your big chance, Mr Williams, to give this an innocent complexion. Don’t dismiss it. I’ll give you if you like five minutes, 10 minutes to think about what this might mean?---To my - - -

Do you want time?---To my recollection I can’t recall.

Do you want time?---No.

*Yeah. Well we'll press on. **Don't say in due course you weren't given a chance, Mr Williams.** And let's see what Mr Sharpe said in response, this is who to contact "NT" that would be Nathan Tinkler wouldn't it?---
Yes.*

And you did do that didn't you?---I can't recall whether I did or I didn't it was four years ago.

***You see just so it's clear and I want you to know, Mr Williams, we don't go off half copped [sic], we wouldn't put something as serious to you as this without knowing plenty of stuff.** The truth is you had a close longstanding personal connection with the Shadow Minister Mike Gallacher?---Yes.*

It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the Eightbyfive business, correct?---No.

***Well can I tell you by the end of this you're going to regret having giving [sic] that answer, Mr Williams.**_We'll press on. I tender that email.*

THE COMMISSIONER: Yes. Exhibit S48. (Operation Spicer Transcript 2/5/14 pp 3095-3096)(the emphasis is mine)

9. The consequences of this examination for Mr Gallacher were very serious. To quote his 9 October 2017 letter to me (Attachment E):

The trauma of being accused of corrupt behaviour without any prior warning by Counsel Assisting while I was conducting an attestation class inspection as Minister for Police on the parade ground of the New South Wales Police Academy in Goulbourn devastated both me and my family. Four weeks later, my wife was diagnosed with a serious illness and weeks later a further member of my family sought the assistance of a medical professional due to the impact these events had.

10. As a direct result of Mr Watson's examination¹, Mr Gallacher resigned as Minister for Police later the same day, 2 May 2014 and as a member of the Parliamentary Liberal Party. He sat as a crossbencher for the remainder of his term in the Legislative Council.
11. In response to my letter of 8 November 2017 (Attachment F) Mr Gallacher indicated to me by letter dated 20 November 2017 (Attachment G) that he had no objection to my undertaking an own motion investigation. Accordingly, on 22 November 2017, I wrote to the Honourable Peter Hall QC, Chief Commissioner of the ICAC a letter raising my concerns (Attachment H). The Chief Commissioner responded by letter dated 4 April 2018 (Attachment I).
12. After considering all the material referred to, I came to the conclusion that the criteria set out in section 57B (1)(b) & (c) were not established and that therefore I could not make any findings either against Mr Watson nor the then Commissioner. My reasons are set out in a letter dated 30 August 2018 to Mr Gallacher (Attachment J), as follows:

After lengthy consideration I have decided not to take your complaint and the investigations which I commenced of my own initiative any further, subject to one qualification which I make below.

My reasons are principally that if there were any misconduct involved in the conduct of Mr William's public examination, it seems to be the sole responsibility of Mr Watson, counsel assisting. As I said in my letters to your solicitor of 5 September 2017 and to you on 8 November 2017, counsel assisting is not an officer of the Independent Commission Against Corruption and, therefore, I have no power to deal with misconduct by him.

I have sought the views of the ICAC on this matter and enclosed its response to me for your information. I have come to the view that there is no basis, such as an inadequate failure to supervise Mr Watson, upon which I could ascribe

¹ I express my reasons for concluding that Mr Watson's examination caused Mr Gallacher's resignation and for rejecting Mr Watson's argument that it did not at [56]– [62] below.

his conduct to the ICAC so as to enable me to proceed under sections 57B(1)(b) and (c) of the ICAC Act and make findings of misconduct against it.

That said, I have unresolved concerns about Mr Watson's conduct in asking the impugned questions of Mr Williams. In particular, I find it hard to see how the allegation that you and Mr Williams "hatched a corrupt scheme" was warranted by the document upon which the ICAC relies to justify it. I am also concerned about the denunciatory nature of the question which I do not regard as appropriate for a public enquiry of this nature. One, amongst a number of reasons, for that concern is the possibility that serious adverse consequences may flow to persons who have not had a chance to answer the denunciation.

I consider the best way of dealing with these issues is for me to exercise my powers under sections 57B(1)(a) and (d) of ICAC Act, which provides that amongst my principal functions are:

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

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

Consequently I propose later this year to initiate an audit and assessment to determine how the ICAC is presently dealing with counsel assisting, whether it prescribes standards and whether those standards are appropriate so that to the extent possible witnesses and persons involved in ICAC inquiries are dealt with fairly to the extent that is consistent with the performance by the ICAC of its important public functions .

13. I informed the Chief Commissioner of these matters by letter dated 31 August 2018 (Attachment K):

I refer to the attached letter I have sent to Mr Michael Gallacher concerning his complaint about the Commission. You will note that I have decided not to take his complaint or my own initiative investigation further, subject to one qualification.

In my letter to Mr Gallacher I have indicated that I may conduct an audit pursuant to sections 57(1)(a) and (d) of the ICAC Act, into the manner in which the Commission presently manages counsel assisting during public hearings. Specifically, the audit would consider whether the Commission prescribes standards of conduct for counsel assisting and whether those standards are appropriate so that persons involved in ICAC public inquiries are dealt with fairly to the extent that is consistent with the exercise of the Commission's functions and, if such standards do not exist, whether they should be introduced.

I would appreciate any views you have on this matter and also any policy or procedure documents that you can provide me which guide or inform the Commission's conduct in public hearings.

14. My letter to Mr Gallacher dated 30 August 2018 (Attachment J) came up in the course of my evidence before the Parliamentary Committee on the Independent Commission against Corruption on 18 October 2019. That evidence was the subject of an article in the Australian on 25 October 2019 as a result of which I received two emails from Mr Watson on that date (Attachments L & M). I replied to Mr Watson on the same day (Attachment N) and then sent a lengthy letter to Mr Watson on 28 October 2019 raising a series of questions about his conduct in asking the questions set out in [6] above (Attachment O). Mr Watson replied by letter dated 13 November 2019 (Attachment P). Mr Watson's response to the issues I raised is in the following terms:

17. I suspect that you have been given some misinformation about the events surrounding Mr Gallacher. I am not having a shot at you - I merely point out that the complainant has a very strong interest in damaging me. Much of what you have been told is false.

18. In the first place, very careful consideration was given before Mr Gallacher was named as a person of interest. Mr Gallacher was only named after a decision had been taken by ICAC. It was not my decision.

19. *First, some history. The ICAC investigators had uncovered evidence relating to Mr. Gallacher's connections with a Newcastle development company, Buildev, and its two principals, Darren Williams and David Sharpe. This included records which demonstrated a close personal connection between those parties as at particular times. To the best of my recollection, no-one at ICAC had formed a strong view about this information - but it needed investigation.*

20. *Accordingly, Mr Gallacher was brought in one evening for a compulsory examination. When asked open-ended [sic] about his connections with these parties, Mr Gallacher gave evidence which was patently incorrect. After a short meeting with the legal and investigative team, I recommended to the Commissioner that that the compulsory examination be terminated.*

21. *I recall that Mr Gallacher was brought in for a second compulsory examination during which he corrected some of the evidence given in respect of the first compulsory examination. But during that second compulsory examination Mr Gallacher gave further evidence which we understood to be inconsistent with objective information. Still, there was nothing hard and fast against Mr Gallacher, and he remained merely a witness in the overall investigation.*

22. *Before the hearing commenced a good deal more information surrounding Mr Gallacher emerged which suggested that he could have been involved in critical events which constituted a breach of election funding laws. This information included emails and text messages. As the investigation developed another person associated with Buildev, Nathan Tinkler, came to be regarded with suspicion that he was involved in breaches of the election funding laws. We knew that Mr Tinkler was the source of funds which had been paid and used by the Liberal Party, but at that time there was no apparent link between Mr Tinkler and Mr Gallacher.*

23. *Before I opened the inquiry there were discussions as to whether or*

not Mr Gallacher would be mentioned adversely. My recollection is that the discussions involved Commissioner Latham, Assistant Commissioner Hamilton and maybe other members of the Executive. A decision was made that the evidence was insufficient to mention Mr Gallacher adversely.

24. Before the public hearing opened I was telephoned by the barrister representing Mr Gallacher, Arthur Moses SC. Mr Moses sought information as to whether Mr Gallacher would be adversely mentioned. Of course, I was bound by confidentiality rules and, even though Mr Moses is in my chambers, I declined to tell him much - although I did point out that notice would be given to those persons who were likely to be persons of interest.

25. The public hearing opened and evidence was taken. Much of the evidence focused upon activities in the Central Coast region of New South Wales and the conduct of a politician powerful in that area, Christopher Hartcher. The interest in the Hunter Region at that stage related to a complicated plan promoted by Buildev to develop another coal loader at Newcastle Harbour - a plan which had support from the Labor politician, Joe Tripodi. But, as happens in investigations, it became apparent that there were also problems with election activities by the Liberal Party in the Hunter Region - an area where Mr Gallacher had particular influence. We slowly became aware that there were meetings between Mr Gallacher, Mr Hartcher and the people from Buildev.

26. Earlier I mentioned that evidence is occasionally taken after hours from potential witnesses. One evening a witness was brought in, Hugh Thompson. He was a leading figure in the Liberal Party in the Hunter Region. Mr Thompson had an impressive background - he was a youngish (I think in his thirties) and had been a solicitor at a leading law firm. Mr Thompson came before that compulsory examination at around 6.30 pm and, shortly after being sworn in, broke down crying claiming that he needed to get something off his chest. During the course of that examination Mr Thompson told us of several irregularities in the Hunter Region, some of which involved Mr Gallacher. I am sure you could get a copy of that

compulsory examination from ICAC if you wish to see it.

27. *At around 8.30 pm we broke up for the night without making a decision as to what should be done with this information. The next day I met with the Commissioner and it was decided that we needed to do more to attempt to corroborate and verify Mr. Thompson's evidence. The investigative team was given instructions to pursue that.*

28. *Then, a couple of days later, Amanda Tibbey (counsel for one of the directors of Buildev, David Sharpe) had a conference with my junior, Greg O'Mahoney. Mr O'Mahoney was quite surprised by what he was told and shown, and brought Ms Tibbey into see me in the room set aside for counsel assisting. Ms Tibbey told me that Mr Sharpe wished to come clean to tell the whole story. I was given an email which directly implicated Mr Gallacher in a scheme approved by Mr Tinkler for the provision of funds to be paid to an entity so that they could be illicitly used during the election. We knew by other means that money had been paid by a company controlled by Mr Tinkler (Patinack Farms) to a business conducted by Tim Koelma (Eightbyfive). We already knew that Mr Koelma had strong connections with Christopher Hartcher and the Liberal Party. We also knew that Mr Koelma and Eightbyfive had been used by Mr Hartcher and other prohibited donors as a conduit of money to the Liberal Party.*

29. *I no longer have the email shown to me by Ms Tibbey, but I believe it is published in the ICAC Report. My recollection is that it showed an exchange between Mr Sharpe and Mr Williams about obtaining information to provide to Mr Gallacher as to the name of an entity to which money would be paid. The communication involved Mr Tinkler and the name of the entity (although I recall it was misspelt) was Patinack Farm. The timing of the phone call could be linked with other records that we had involving Mr Gallacher, and the commencement of payments by Patinack Farm to Eightbyfive. In other words, the email provided the link that we had previously been missing.*

30. *My recollection is that this occurred in the morning on a day when I*

was resuming questioning Darren Williams. A decision had to be made as to how to use the email given I needed to question Mr Williams about it. I went to see the Commissioner. I cannot now recall whether a formal meeting was convened or who else was present. But I can say that a decision was made that it was necessary to mention Mr Gallacher adversely and to put these matters to Mr Sharpe. I also believe that the Commissioner made private contact with the Premier of New South Wales, Michael Baird. I believe Mr Baird contacted Mr Gallacher.

31. Meanwhile I directed the ICAC legal team to make contact with Mr Gallacher's lawyers to tell them that Mr Gallacher would be adversely mentioned and that they should attend the Inquiry. I believe the lawyers had been attending each day, but I needed to make sure that they were there - had they not been available on that particular day I would have had to have deferred mentioning Mr Gallacher or dealing with that email. Mr Gallacher's lawyers, including Mr Moses, attended ICAC that day.

32. I continued to question Mr Williams and I came to the particular email. I questioned him about it and I used the words about which complaint is now made.

33. I agree that I could and should have worded that matter differently and better. It was an excess which occurred in the heat of the moment. I have never held myself out as perfect. I do offer a few excuses which could explain why my conduct was a little more excitable than usual:

- By the time I asked those questions I had been working seven days a week for several weeks. I was exhausted. By the time I asked those questions of Mr Williams I think I had been cross-examining him for some time. Mr Williams was a most obstructive witness, constantly retreating behind a memory lapse (ICAC later found him to have been a dishonest witness). I was frustrated and cranky.*

- Right at the time I was asking those questions I was under considerable amount of personal pressure. My wife, [REDACTED], had*

been intimidated. On one occasion about a week before she had gone to walk our dog. We live in a very quiet area. A large man got out of a car and followed her - about 10 metres behind. He whistled a particular tune. He followed her on her walk, around the block, and back to home. She was upset and she rang me and I brushed her aside. I still regret that. Later - I think on the day before I asked those questions of Mr Williams - it had happened again: the same man, whistling the same tune. I was wrong when I had brushed her worries aside, and I was now concerned for her safety. You need to understand that the persons behind Mr Williams were wealthy and powerful and ruthless. It was a genuine threat.

34. *As I say, I accept that I could and should have worded all of this better. But, in context, it was not a matter of great moment. No objection was taken to it by counsel for Mr Williams or counsel for Mr Gallacher². The Bar Association looked into this matter and dismissed the complaint against me. As part of that investigation statements were obtained from the Commissioner - Megan Latham. She rejected the suggestion that there was something wrong with what I said. Commissioner Ipp also gave a statement describing the different role of counsel assisting and how it was important that persons be placed squarely on notice that they were likely to be the subject of criticism. It might also be helpful if you go back to ICAC and ask it whether it regards the comments made by me as being out of line.*

35. *Finally, contrary to things said about me in The Australian, a great deal of evidence was presented to ICAC which implicated Mr Gallacher in a series of actions which constituted breaches of election funding laws. This included oral evidence, financial records, emails and text messages. And contrary to things said about me in The Australian, ICAC proceeded to make four serious adverse findings against Mr Gallacher. Contrary to what was said in The Australian, I did not end Mr Gallacher's career - the evidence did.*

² This is true in the sense that no objection was taken by counsel for Mr Gallacher at the time Mr Watson asked the question, but that was because Mr Moses was not present. He objected forcefully when he did appear after learning of the question. See [59] below.

15. In fairness to Mr Watson I should quote an earlier paragraph of his letter to me so that the pressure he was under at the time is understood:

12. This is physically and mentally draining. The circumstances can also be emotionally draining. During some of the inquiries the hostility in the hearing room was palpable. Once senior barrister sat behind me and regularly muttered "you are a cunt" or "you are a lying cunt" on a regular basis. (In fact, these words were picked up on the sound system and the transcription staff complained about the bad language - Commissioner lpp had to haul the barrister into line on several occasions.) There was also general hostility in the courtroom caused, no doubt, by some of the heightened emotions of those under attack. In fact, I have never experienced anything like the hostility that was present at ICAC. You must remember that, as counsel assisting, virtually every other barrister in the room is against you - and there is a lot of ganging up. I think I am pretty resilient to the kind of bullying that goes on at the Bar, but not all counsel assisting might be so. It is really quite important that the presiding Commissioner controls the hearing room, but it is not always possible.

16. At the Parliamentary ICAC Committee hearing on 18 October 2019 I indicated to the Committee that I would respond to several matters raised with me in writing. I did so by letter dated 25 November 2019 and enclosed memorandum (Attachment Q). My letter relevantly was in the following terms:

1. I consider, as I said to the Committee, that the conduct of counsel assisting in asking the questions which he did on 2 May 14 (Operation Spicer T3096) was inappropriate and unfair. I have now received from Mr Watson material putting his side of the story and which I will include in my pending audit report concerning issues arising out of the ICAC's management of counsel assisting. Having considered that material, I maintain my view of Mr Watson's conduct.

2. It follows, therefore, the fact that Mr Gallacher was compelled to resign as a result of those questions (which were not then supported by evidence) was unfair, as I said in my evidence to the Committee.

3. *This was, however, a failure of process and not a failure of substance, nor a continuing systemic failure. That failure of process does not seem to me to have had any effect on the ICAC's ultimate decision about Mr Gallacher's conduct.*

4. *This is because, while the ICAC did not make any findings of corrupt conduct (in terms) against him, it did make several findings of serious wrongdoing in that he had knowingly attempted, in effect, to breach the electoral laws of New South Wales. In those circumstances, it would have been difficult, I imagine, for him to continue to be a Minister of the Crown once the ICAC findings became public. Those findings have not, to my knowledge, ever been challenged. I note references by Mr Chris Merritt in his Legal Affairs column in The Australian on 22 November 2019 to advice that the Electoral Commission received from the Crown Solicitor that Patinack Farm and Gazcorp were not property developers within the meaning of the electoral laws. I am investigating that claim with ICAC but my initial view is that even if that is the case, it does not affect the majority of the findings.*

5. *I do not believe any additional protection or protocol is necessary for Mr Gallacher or for persons who find themselves in a similar position to Mr Gallacher in future. One reason is, as I have said above, that the failure was not a continuing systemic one and the risk of repetition is minimal. Another reason is that Mr Gallacher's position was amply protected by able senior counsel who represented him in Operation Spicer. That barrister strongly disputed those allegations and put Mr Gallacher's case with vigour and aggression as well as attacking the conduct of counsel assisting.*

Dr Cornwell and Ms Brookes

17. On 23 July 2014, Mr Watson had a meeting in his chambers with Dr Cornwell, who, as I have said, was the Liberal member for Charlestown, Mr Robert Mangioni, his solicitor, Mr Greg O'Mahoney, junior counsel assisting and an ICAC principal lawyer Mr Don McKenzie, so Mr Mangioni asserts in the complaint he made on behalf of Dr Cornwell and Ms Brookes dated 11 December 2017 (Attachment R).

18. The circumstances that led to this meeting do not matter but at the start, so Mr Mangioni alleges, Mr Watson dictated and Mr O'Mahoney wrote out in longhand a document as follows:

I undertake to seek an order from the Independent Commission Against Corruption with the effect that nothing said to me today and no document produced to me today will be used against Mr Andrew Cornwell. I am confident that I will be able to obtain such an order.

19. This document was then signed by Watson, O'Mahoney and McKenzie and delivered to Mangioni. Dr Cornwell, who was absent while this was going on, then joined the meeting and signed a statement which revealed matters of which the ICAC had apparently not previously been aware and which subsequently figured prominently in the public inquiry in Operation Spicer.

20. It is unnecessary for the purposes of this report for me to describe the precise basis of the complaint made by Mr Mangioni on behalf of Dr Cornwell and Ms Brookes - it is set out in Attachment R. I dismissed the complaint by letter dated 12 September 2018 (Attachment S). Nevertheless, in fairness to him I should set out Mr Watson's response from his letter dated 13 November 2019 (Attachment P):

36. I am at a disadvantage here because I do not know what has been put to you - but reading between the lines I can tell that what has been told to you is seriously wrong.

37. Again, some background. Andrew Cornwell was a Liberal candidate for a seat in the Hunter Region. He, and his father, had been called into ICAC for compulsory examination as to sources of election funding. During that time evidence was given by Mr Cornwell explaining the source of particular funds (as it turns out, that evidence was quite false).

38. Some days later the solicitor representing Mr Cornwell, Robert Mangioni, attempted to arrange for an additional compulsory examination. This was upon the basis that Mr Cornwell had further evidence that he wished to provide to ICAC. I have forgotten now what the problem was, but a compulsory examination could not be organised. In those circumstances Mr Mangioni contacted by junior, Greg O'Mahoney,

and asked that there be a private conference between himself and representatives of ICAC.

39. Mr O'Mahoney discussed it with me and we agreed there could be no harm in meeting Mr Mangioni. Mr O'Mahoney organised a conference in my chambers. On the part of ICAC three people were engaged - Greg O'Mahoney, Don McKenzie (a senior solicitor from ICAC), and myself. The meeting started at around 5.00 pm. I cannot now remember the date, but I have a good recollection of the events.

40. At the outset, Mr Mangioni asked that Mr Cornwell be given "whistle blower protection". None of us knew what he meant, and we told him we could make no such promise. Mr Mangioni then asked for our undertaking that Mr Cornwell would not be called as a witness at the public hearing - but we quickly squashed that and told him that it was inevitable that Mr Cornwell would be giving evidence. Mr Mangioni then went on to produce a written statement from Mr Cornwell relating to events surrounding his election funding.

41. I do not understand what you mean when you say that we gave an undertaking as an "inducement" to Mr Cornwell providing a statement. In fact, it was the opposite. Mr Mangioni was extremely eager to give this statement to us, but between the three of us we pointed out that it was dangerous for him to do so because such a statement does not acquire the same protection as it would had it been produced during the course of compulsory examination. None of us had the power to make an order that the material be received subject to the privilege offered by the Independent Commission Against Corruption Act 1988. Still Mr Mangioni pressed us to read the statement. We were all hesitant. One of us - I do not know whether it was me - suggested that we could provide an undertaking to try to seek an order retrospectively from a Commissioner giving the statement the protection it would have acquired had it been presented during a compulsory examination. This was written out by hand by Mr O'Mahoney, signed by all of us, and provided to Mr Mangioni - I do not now have a copy of it, but I am sure you can get a copy of it from ICAC.

42. *This was not an inducement and it was not even a promise. We thought it was the right and decent thing to do.*

43. *The three of us then read the unsigned statement. It gave a detailed account of how Mr Cornwell had received money from a wealthy developer in the Hunter Region, Hilton Grugeon. We told Mr Mangioni that we would provide it to ICAC.*

44. *Mr Mangioni then asked if we would prefer to have it signed - and, of course, we agreed that would be preferable. Mr Mangioni told us that Mr Cornwell was sitting downstairs in the foyer of my building and he went to bring him to my chambers to sign the statement.*

45. *When Mr Cornwell came to my chambers he soon broke down into uncontrollable tears. Amongst other things he told us that he felt that his family and he were under a physical risk from Mr Grugeon.*

46. *While he was crying I felt embarrassed for Mr Cornwell and I did something which I would nearly always do in the same circumstances - I offered him a drink. I opened a bottle of wine. There was a friendly conversation. I specifically recall a discussion about cricket (Mr Cornwell was a good cricketer) and I specifically recall discussing with Mr Mangioni that he had worked at Allens with my wife.*

47. *I am aware that there have been allegations that I said certain things during that meeting. I do not know what you have been told, but I deny that I said anything inappropriate. In particular I deny having said anything about promoting Mr Cornwell as a "hero" or anything about "white hats" or "black hats". In particular I deny saying that I would protect Mr Cornwell's reputation - I knew nothing about him except his father was a struck-off solicitor who had engaged in very shady property deals.*

48. *As it turns out, Mr Cornwell's statement was a fabrication. He proceeded to lie on oath to ICAC at the public hearing. He was caught out and exposed as a liar. The whole meeting had been set up to try to trick us - and to some extent, for a limited period of time, it succeeded. In the end it backfired.*

The Role of Counsel Assisting

21. It will be apparent from the letter quoted in [16] above that I have come to certain conclusions concerning Mr Watson's conduct in his examination of Mr Williams. I have also done so in relation to the 23 July 2014 meeting the subject of Mr Mangioni's complaint on behalf of Dr Cornwell and Ms Brookes. I explain the basis for those conclusions and the reasons why I feel it is necessary to express them in this report below, but I emphasise that, as counsel assisting, Mr Watson was not an officer of the Commission and therefore I have no power to make any findings against him under section 57B of the ICAC Act and I will not do so. "Officer of the Commission" is defined by section 3 of the Act to mean a Commissioner, Assistant Commissioner, member of ICAC staff or a person engaged by the Commission under section 104B to provide the Commission with services, information or advice. Counsel assisting are engaged under section 106 of the Act which grants power to the ICAC to engage counsel assisting and not section 104B.

22. In his book *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry-Powers and Procedures*, the present ICAC Chief Commissioner says this:

The position of counsel assisting has in a general sense been equated that of a Crown Prosecutor in that it is his or her duty to perform his or her functions in a fair and even-handed way. . . . The comparison is valid in the sense that ultimately, a commission of inquiry is concerned to establish the truth of matters it investigates and hence care must be exercised in seeking evidence both for and against any working hypothesis and in providing a fair opportunity for those who may be the subject of adverse findings to be heard and deal with them. That of course does not limit the role of counsel assisting in the development of plans and strategies with commission investigators to flush out evidence on an issue.

23. At the time of the Operation Spicer public inquiry, the New South Wales Bar Rules provided in respect of counsel assisting the following:

72. A barrister who appears as counsel assisting an inquisitorial body such as the Independent Commission Against Corruption . . . must act in accordance with rule 62, 64 and 65 as if the body were the Court referred to in those Rules and any person whose conduct is in question before the body were the accused referred to in Rule 64.

24. Rules 62, 64 and 65 respectively provided at the time in question as follows:

62. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts . .

64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

25. The *Legal Profession Uniform Conduct (Barristers) Rules 2015* establish the standards presently governing the conduct of counsel assisting:

97. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.

98. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.

99. A barrister who appears as counsel assisting an investigating/inquisitorial tribunal must not argue any proposition of fact or law which the barrister does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.

100. A barrister who appears as counsel assisting an investigating tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear [other than certain stated exceptions]

26. It is important that counsel assisting behaves with moderation. As Salmon LJ said in discussing inquisitorial tribunal processes:

An opening statement will also assist the Press in reporting the proceedings. The statement should be an impartial summary of the investigation and avoid any comments likely to make sensational headlines. It should be emphasised that until the evidence has been heard it would be wrong to draw any conclusions³.

27. These remarks apply with equal force to counsel assisting's conduct in eliciting evidence at a public inquiry. While publicity and sensational headlines may be an inevitable accompaniment of many ICAC public inquiries, that should not be because of counsel assisting's behaviour but rather a result of evidence elicited fairly and dispassionately.

28. Further, counsel assisting should carry out his or her duties with independence and bring his or her own judgement to bear on decisions as to the conduct of the investigation or inquiry, no doubt in consultation with the relevant Commissioner. See *Bretherton v Kaye & Winneke* [1971]VR 111, 125; Hall op.cit. p. 494. Crucially, counsel assisting should not be a mere mouthpiece for a body such as the Commission and should not be perceived by observers to be so. This is crucial because inevitably investigating bodies such as the Commission or Royal Commissions or the police force tend to want to conclude an investigation with a finding of guilt or a charge. It can be very hard at the end of, say, a year-long investigation to say that nothing happened or, in the case of the ICAC, there was no corrupt conduct. That is why counsel assisting's independence is important--counsel is the gatekeeper whose duty it is to assess the evidence and put or permit

³ Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon Para 111.

only submissions fairly based on it and, when appropriate, to say no adverse finding should be made. One final point concerning independence: there is a real risk of “capture” of counsel by the organisation for whom he is working, which increases the longer he or she works with it and the more enquiries he or she appears in.

Conduct of Counsel Assisting in Operation Spicer

29. I consider that Mr Watson’s conduct as shown in the passage of evidence I have set out in [8] was inappropriate and unfair to the witness he was examining at the time and to Mr Gallacher. It must have been obvious that putting such a question to Mr Williams would inevitably have serious consequences for Mr Gallacher, specifically, that he would be required to stand aside or resign as a Minister. Yet, he was not present either in person or by counsel, had no notice of the allegation and no opportunity to answer it. See [54]-[62] below. This seems to me a serious lapse of procedural fairness. Further, whatever Mr Watson’s subjective intention, any reasonable lay observer would have thought what occurred had elements of unfairness. The tone of the questions is sneering, contemptuous, verges on bullying and is inconsistent with the duty of fair conduct imposed on counsel assisting. I say this knowing that emotions can run high in ICAC hearings, as in court rooms, that counsel can be under immense stress and pressure for the reasons Mr Watson mentions in his letter to me (Attachment P), that witnesses may lie, obfuscate and evade and, consequently, the level of frustration felt by counsel may be very high. Other counsel involved in the matter may also behave badly, as I accept happened in the Operation Spicer public inquiry, as Mr Watson says, and it can be very hard to stop oneself responding to the provocation. That said, counsel assisting is performing a significant public function and should be held to a higher standard than a barrister representing a witness at such an enquiry.

30. Moreover, I believe remarks such as *You see we get a lot of it down here, it’s really a coward’s corner* and *You see just so it’s clear and I want you to know, Mr Williams, we don’t go off half copped [sic], we wouldn’t put something as serious to you as this without knowing plenty of stuff*, putting aside their unacceptably hectoring tone, must inevitably have given the appearance to a reasonable observer that Mr Watson’s independence as counsel assisting had been compromised.

Whatever the reality was, the appearance of identification with the Commission is obvious. The same must also be said about Mr Watson's role in offering the inducement to Dr Cornwell. That should have been left to the Commission staff in consultation with the Commissioner at the time. I regard his involvement as inappropriate.

31. There is a further matter about which I wish to comment. It is caught by Mr Watson's words "I'll give you if you like five minutes, 10 minutes to think about what this might mean". The Commissioner was in control of the proceedings, not counsel assisting. It is inappropriate for counsel assisting, particularly when he has chosen to conduct the proceedings adversarially, to give the impression that he is running the show. The reason is that observers may come to believe that he is making decisions, not the Commissioner, which itself detracts from the force of any findings which may ultimately be made.

32. While I do not regard Mr Watson's questions as appropriate or fair, that does not mean that ICAC's ultimate conclusions about Mr Gallacher were wrong. The findings in question, while they did not involve corrupt conduct, were of serious attempts to evade the electoral laws of this State and lack of frankness in his evidence to the Commission. Thus, the ICAC found:

a. Mr Hartcher, Mr Koelma, the Hon Michael Gallacher MLC, Troy Palmer and Mr Williams were parties to an arrangement whereby, between July 2010 and March 2011, Patinack Farm made payments totalling \$66,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling \$33,000, exceeded the applicable caps on political donations. Although the payments to Eightbyfive were made by Patinack Farm, the arrangement was organised through Buildev, a property developer (chapter 20). [Report p19]

- b. *In about November 2010, Mr Gallacher sought a political donation from Mr Sharpe of Buildev by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or Buildev would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations (chapter 25). [Report p20]*
- c. *In late 2010, Mr Gallacher, Mr Hartcher and Mr Williams of Buildev were involved in an arrangement whereby two political donations totalling \$53,000 were provided to the NSW Liberal Party for use in its 2011 election campaigns for the seats of Newcastle and Londonderry. To facilitate this arrangement, on 13 December 2010, Mr Palmer, a director of Boardwalk Resources Limited, a company of which Mr Tinkler was the major shareholder, drew two cheques totalling \$53,000 payable to the Free Enterprise Foundation. These were provided to Mr Hartcher who arranged for them to be sent to Mr Nicolaou. Mr Nicolaou sent the cheques to the Free Enterprise Foundation. The Free Enterprise Foundation subsequently sent money to the NSW Liberal Party, which included the \$53,000. Of the \$53,000, some \$35,000 was used to help fund Timothy Owen's 2011 election campaign in the seat of Newcastle and \$18,000 was used towards the purchase of a key seats package for Bart Bassett's 2011 election campaign in the seat of Londonderry. Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buildev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading the Election Funding Act laws relating to the accurate disclosure to the Election Funding Authority of political donations (chapter 26). [Report p20]*
- d. *Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Luke Grant for his work on Mr Owen's 2011 election campaign. He did so with the intention that the Election Funding Act laws*

in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority would be evaded (chapter 27). [Report p21]

- e. In assessing Mr Gallacher's evidence, the Commission has taken into account the matters dealt with in the following chapters. The Commission does not consider Mr Gallacher was always a truthful witness and places no reliance on his evidence unless it is corroborated by other reliable evidence or objective facts. [Report p122]*

- f. The Commission is of the opinion that, at his compulsory examination, Mr Gallacher tailored his evidence to create a false impression with the intention of distancing himself from Buldev, Mr Sharpe and Mr Williams. The Commission is satisfied that the payments for attending the New Year's Eve function were political donations within the meaning of s 85(2) of the Election Funding Act because they were a contribution, entry fee or, function. The Commission finds that, in about November 2010, Mr Gallacher sought a political donation from Mr Sharpe by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or Buldev would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations. [Report p124]*

33. As I say in my letter quoted in [16] (Attachment Q), while I consider Mr Watson's conduct to be inappropriate and unfair to Mr Gallacher, that was, however, a failure of process and not a failure of substance, nor a continuing systemic failure. That failure of process does not seem to me to have had any effect on the ICAC's ultimate decision about Mr Gallacher's conduct which could be supported independently of Mr Watson's questions to Mr Williams. That said, it was a significant failure of

process which damaged the public standing of the Commission and should not have happened.⁴

34. Unfortunately, the examination of Mr Williams is not the only example of the conduct of Operation Spicer which I consider unsatisfactory. Consider this-on 14 May 2014, Mr Watson was leading evidence from a Mr Koelma, a significant witness in the Operation Spicer inquiry. During that morning, Mr Watson asked the following questions and obtained the answers indicated from the witness:

Oh. I think you better tell us again about that as I will give you every chance, Mr Koelma? Sure

can I just remind you even if you relent now tell the truth people might go easy on you. It's time to get out, Mr Koelma? I'm- - -

Do you want to take that advice? I'm not sure what you're driving at. I- - -

Whoa, whoa, whoa. Look, at lunchtime you can take a cab out to Malabar and have a good look at what I'm talking about?

Mr Naylor: I object Commissioner.

Mr Watson: Well sorry I shouldn't have said that to you Mr Koelma. (Tr 4151-4152)

That question, despite Mr Watson's expression of regret, was reported on the Sydney Morning Herald website within minutes of it occurring, under the headline: *Take a cab out to Malabar: ICAC witness Tim Koelma warned he could be jailed for lying*. The opening sentence of the article was: *A lunchtime visit to a Sydney jail was suggested to a key witness at a corruption inquiry as a reminder of the consequences of lying*. I regard this as a threat and an entirely inappropriate one. The passage and its reporting are not likely to have enhanced the reputation of the Commission for fair conduct of its public inquiries.

⁴ These matters were the subject of an article in the Australian on 25 October 2019 by Mr Chris Merritt as to which see [17] of the memorandum attached to my 25 November 2019 letter to Ms Tanya Davies (Attachment Q)

35. On 11 August 2014 at T5063 counsel assisting was examining a witness called Tim Owen:

*And you went down there in your own car and you met Mr McCloy in his car?
---Correct.*

I think he's got a pretty flash car, pretty distinctive car? ---No, I can't remember.

Anyway so you got into the car with him? ---Um, either that or he came over to my car.

*All right. And so we've had g'day I'm who I am and then what happened next?
---He just handed over a thin envelope effectively.*

What, no foreplay? ---Not really.

Just hands over - - -? ---So to speak.

He, g'day I'm Jeff McCloy and just handed you an envelope? ---Yes, and I said hi, I can't really remember the length of the, the gist of the conversation to be honest with you.

And what did you say? ---I said well what's in it I think and he said there's a little bit of, you know to ho help your campaign there's a bit of cash for your, your workers. [my emphasis]

36. Sexualised references such as this are, in my view, inappropriate. They trivialise and debase what is a serious occasion when a witness' reputation and career may be at stake.

37. A similar, and equally inappropriate, reference appears at T3100, the transcript of the public inquiry on 2 May 2014:

What were you doing, discussing some of the moves that were displayed by the Wallabies against the French at the football or what?---Just, I don't recall what the discussions were about in detail. Well, why would you be in this much contact with Mr Hartcher? I mean were you personal friends?---Not, not, not close personal friends, no.

Well, then why, why are you ringing each other day in day out like two young lovers?---(No Audible Reply)

MR HENSKENS: I object to that.

MR WATSON : Oh, don't, don't bother.

THE COMMISSIONER: Well, all right, well, it's flourish. Let's, let's move on.

MR HENSKENS: It's offensive, it's more than a flourish, it's offensive.

MR HENSKENS: No, it was offensive and it ought not to have been used. WATSON: All right. Well, I'll withdraw that and I'll apologise.

THE COMMISSIONER: It might, it might- - -

MR WATSON: And I'll apologise to Mr Henskens as well- - THE COMMISSIONER: All right. Let's go on.

MR WATSON: - - -being the only person in the room who was offended by it. But the thing is that, why then are you in this constant contact with Hartcher, what could it be about?---!, I've had contact with Mr Hartcher and many Members of Parliament for many years.[my emphasis]

-

If it was a flourish it was an inappropriate one.

38. On 2 April 2019 Mr Watson called a witness, a barrister⁵:

And you're a barrister?---Yes.

*And you're going to give evidence in this, **I haven't dragged you along just because you beat me in that case last week, I want you to know that. Ms Chysanthou, I think you've been told that we wanted to ask you about the background to a document?---Yes.**[my emphasis]*

I accept that members of the legal profession who heard that would have thought it was an attempt at humour, but I am not sure the members of the public who were present would have. In any event, it was inappropriately flippant for an

⁵ I appeared as counsel for Ms Chysanthou at this hearing.

occasion as serious as an ICAC public inquiry where, as I have said reputations and careers are at stake. I am not suggesting that counsel assisting must behave like a humourless automaton or with po-faced solemnity, but the examples given in [34], [35], [37] and [38] go beyond what is acceptable.

39. Of equal concern are the remarks which Mr Watson apparently made to an Australian Financial Review journalist and which were reported in that journal on 25 July 2014:

*Watson says he is aware of how irritating his questions can be and that **yes, he does it on purpose. "I am trying to actually upset them. It's the equivalent of slipping in a bouncer."***

Former ICAC commissioner David Ipp, who first recruited Watson and presided over the hearings into Obeid's coal licences, says he always thought Watson's experience of insurance fraud cases could be handy. He says it is inappropriate to judge Watson by the standards of normal courtrooms. By the applicable legislation, he says, the procedure at ICAC hearings is inquisitorial, it is not the adversarial procedure that governs a courtroom.

Rules of evidence do not apply. Witnesses are confronted with unexpected evidence such as wiretaps and other secret surveillance material. Ipp says the different standards are acceptable to Parliament because no one is facing actual criminal charges. But the practical effect of this is to transform the ICAC hearing room into a much rougher place than the standard courtroom.

*"The criticisms of Geoffrey have to be seen in that context," Ipp says. "However he has behaved, some other barristers have also behaved in extraordinary ways that one wouldn't ordinarily see in a courtroom. Some witnesses and some barristers give themselves licence to behave in an obnoxious and rude way. **And this has occurred virtually daily over a period of months. In that context, Geoffrey's reactions are perfectly understandable. They are just the result of fatigue and frustration and pressure.**" [my emphasis]*

40. I am unable to see how Mr Watson's description of his purpose as to "upset" the witness is consistent with his duties as counsel assisting. It is no part of his role to upset witnesses--many might think that approach would be less likely to get to

the truth than permitting the witness to give evidence in a calm and rational manner, challenging him or her where appropriate. To the extent that he carried that purpose into action it was inappropriate and unfair. The excuse given by the former Commissioner is not acceptable—few barristers have not suffered fatigue, frustration and pressure in the course of running trials and I have never heard it suggested as an excuse to bully a witness or make crass sexual references. In any event, there are far more gruelling experiences for a barrister than being counsel assisting at an ICAC public inquiry, appearing for a person charged with a serious indictable offence being an obvious one.

Audit of Present ICAC Procedures Concerning Counsel Assisting

41. Motivated by my concern about the matters set out above, I commenced an audit into the manner in which the ICAC is presently dealing with counsel assisting, my obvious concern was to ensure that the problems identified above had been addressed and would not recur.
42. In the course of that audit I have taken the following steps:
 - a. I consulted with the Chief Commissioner and the Commissioners;
 - b. I interviewed a number of counsel who had participated in ICAC hearings both as counsel assisting and as counsel for persons called to give evidence;
 - c. together with my Principal Legal Advisor Ms Zekanovic, I attended a number of ICAC public inquiries principally in Operation Skyline.
43. In addition, I obtained from the Commission and reviewed the following documents which govern the relevant ICAC procedures:
 - a. Operations Manual Policy and procedure IPO3 which deals with compulsory examinations and public inquiries;
 - b. Operation Manual work instruction IPO3-A which deals with security and risk management of Commission hearings;
 - c. Operations Manual work instruction IPO3-C which deals with hearing briefs;
 - d. Operations Manual work instruction IPO3-D which deals with the use of the public website and restricted website for Commission hearings;

- e. Operations Manual policy and procedure IPO4 which deals with witnesses who wish to change their evidence;
- f. Pro forma brief for counsel assisting (which includes the standard directions for public inquiries and section 31B guidelines – *Independent Commission Against Corruption Public Inquiry Procedural Guidelines*). These Guidelines are also attached to the Commission’s *Information for Witnesses* document which is provided to Commission witnesses.

44. The Guidelines referred to in sub-paragraph (f) immediately above refer to section 31B of the ICAC Act which provides:

(1) The Commissioners are to issue guidelines relating to the conduct of public inquiries of the Commission to members of staff of the Commission and counsel appointed under section 106 to assist the Commission.

(2) The guidelines are to provide guidance on the following aspects of the conduct of public inquiries:

(a) the investigation of evidence that might exculpate affected persons,

(b) the disclosure of exculpatory and other relevant evidence to affected persons,

(c) the opportunity to cross-examine witnesses as to their credibility,

(d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,

(e) any other matter the Commission considers necessary to ensure procedural fairness.

(3) The Commission is to arrange for the guidelines to be tabled in both Houses of Parliament and to be published on a website maintained by the Commission.

*(4) In this section: “**affected person**” means a person against whom substantial allegations have been made in the course of or in connection with the public inquiry concerned.*

45. Of the documents referred to [43] the most significant is the Operations Manual Policy and Procedure IPO3 because it deals specifically with a number of matters relevant to counsel assisting under the general topic of planning for, and conduct of, compulsory examinations and public inquiries. Sections concerning counsel assisting include 4.6 (engagement of Assistant Commissioners and counsel assisting), 4.7.2 (the hearing brief), 4.7.3 (prehearing and planning meetings), 4.7.8 (public inquiry opening address), 4.8.1 (public inquiry standard directions & s31B guidelines), and 4.8.10 (closing submissions). The Commission informs me, as follows:

The prehearing planning meetings provided for in section 4.7.2 of IPO3, which are attended by Counsel assisting and the presiding Commissioner (among others), provides an opportunity for the general conduct and strategy of the public inquiry to be settled with counsel assisting. The requirement in section 4.7.7 that counsel assisting's draft opening address is to be provided to the Commission for approval is an appropriate check to ensure both accuracy and appropriateness of the proposed opening address. The daily meetings with counsel assisting provided for in section 4.8.7 can be used to raise any issues with the conduct of the public inquiry and, if necessary, provide an opportunity for the presiding Commissioner to provide direction to counsel assisting in relation to his or her conduct of the public inquiry. The procedure set out in section 4.8.9 relating to closing submissions designed to ensure that all relevant issues are identified and dealt with appropriately in counsel assisting's submissions.

Of note is that the sections of the Operations Manual Policy and Procedure IPO3 referred to in the Commission's response above refer to a previous version of the document. The sections of the document I listed in [43] above reflect the current Operations Manual policy and procedure IPO3 which the Commission updated in March 2019.

46. Clause 4.7.8 of IPO3 operates a significant check on overly exuberant counsel, at least in respect of the opening address:

Counsel assisting is required to prepare a typed opening address for a public inquiry.

Generally, the opening address is to be provided to the case lawyer at least two working days prior to the commencement of the public inquiry. The case lawyer will then distribute the opening for comment and confirmation of accuracy to:

- *The Executive Director Legal*
- *the Chief Commissioner*
- *the presiding Commissioner (if not the Chief Commissioner)*
- *the Executive Director ID*
- *the Executive Director CP (corruption prevention issues are being dealt with)*
- *the Manager Communications and Media (for a light edit)*

The Chief Commissioner and presiding Commissioner, must approve the opening address for a public inquiry.

47. In February 2019 ICAC introduced its Equitable Briefing Policy which, although aimed at increasing the number of female barristers retained by the Commission as counsel assisting, may also be taken as the Commission recognising that using the same counsel assisting may give rise to concern about that counsel's independence as I have highlighted above.

48. But formal procedures, while obviously important, are never enough and selection of counsel and proper control of proceedings by the presiding Commissioner are probably more significant. As the Chief Commissioner said to me in a letter dated 6 September 2018:

There are two important mechanisms to ensure counsel assisting meets appropriate standards of conduct.

The first is the selection of counsel assisting. When considering engaging counsel, the Commission takes into account the nature of the investigation and the calibre and experience of proposed counsel. The Commission's aim in doing so is to ensure that the most suitable persons are appointed as counsel assisting.

The second is that the conduct of counsel assisting in a public inquiry is subject to control and direction by the presiding Commissioner. This acts as an ultimate form of control to ensure the proper conduct of a public inquiry.

49. All counsel I interviewed made clear their belief that conduct of the type that occurred in Operation Spicer which I have outlined above would not now be countenanced by any presiding Commissioner, that they understand the need to be fair and respectful to persons giving evidence while being firm and robust in their examination of such persons, that they understand and comply with the obligation under the section 31B guidelines to disclose exculpatory evidence to the relevant witness or counsel. I was given a specific example of the fairness with which counsel assisting and, indeed, the Commission now behave, from Operation Skyline. It is worth quoting the relevant email from the Principal Lawyer of the Commission (anonymising the references to counsel in question):

The purpose of this email is to draw your attention to a folder of documents that has been uploaded to the Skyline restricted website. The folder is described as Volume XXX and largely contains file notes and other documents produced by Ms YYY in response to a summons to produce documents issued by the Commission.

I note that at TZZZ you made reference to the fact that the Commission has these file notes.

I wish to draw your attention to TAAA when in the course of examining Mr BBB, you mentioned that you may “come back” to the Costs agreement, but did not. I also wish to draw your attention to Direction 17 of the ICAC’s Standard Directions for Public Inquiries which states the following:

The Commission expects that, where it is to be invited to reject or not accept the evidence of the witness on a material fact or issue, on the grounds the witness deliberately gave false evidence, the evidence is unreliable, or the witness has made a mistake on a significant issue, the material grounds of such contention must be put to the witness to allow the witness an opportunity to offer an explanation.

As you are aware Mr BBB will attend the Commission on 6 August 2018 to give evidence. In light of the matters set out above, including the nature of

documents contained in Volume DDD, I invite you to give consideration to seeking leave to further examine Mr BBB on 6 August 2018.

Isolated Incident or Systemic Failure

50. The conduct of counsel in Operation Spicer which I have considered in this Report occurred over 5 years ago and, so far as I am aware, there has been no repetition of the kind of conduct represented by the passages of transcript I have quoted above. In that time the ICAC has completed at least 8 investigations and currently has 5 underway. In none of the many days of public hearings has anything similar occurred. It seems obvious to me that the lack of repetition indicates that this is not a systemic issue and certainly not a continuing systemic one.

Counsel assisting as an officer of the Commission

51. In the *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC by the Joint Parliamentary Committee on the Independent Commission Against Corruption* which was tabled on 20 November 2019 there are a number of references to considering in a future review of the ICAC legislation the possibility of amending legislation so that counsel assisting in ICAC enquiries becomes an officer of the Commission. My continuing view is that such a change should not be made for the reasons expressed by the Hon AM Gleeson AC, QC and myself in the report we prepared in 2015 into jurisdiction of the ICAC. See the Hon AM Gleeson AC and Bruce McClintock SC *Independent Panel-Review of the Jurisdiction of the Independent Commission Against Corruption 30 July 2015* p62:

- i. *it has been suggested that the Act be amended to provide that counsel assisting be included within the definition of "officer of the Commission" within section 3. Counsel assisting may be appointed by the Commissioner under section 106 of the Act and, at present, are not relevantly officers of the ICAC. The consequence of such an amendment would be to render counsel's conduct the subject of section 57B(1)(b) so that the Inspector has power to deal with complaints of abuse of power, propriety and other forms of misconduct on the part of counsel. The implicit suggestion is that*

the Inspector's powers are presently inadequate in this respect. Another proposal is that counsel assisting be a statutory appointment.

- ii. *It is plain that the responsibilities of the ICAC and of the Commissioner include appropriate supervision and control of any person engaged by the ICAC to assist its investigations. That responsibility extends to supervision of counsel assisting generally and during the conduct of any public inquiry. It follows that the role of the Inspector in an appropriate case extends to examining complaints about alleged shortcomings in the ICAC's or the Commissioner's discharge of its responsibility for the management of all aspects of its investigation. It should also be kept in mind that counsel are subject to professional rules and oversight. The Panel has noted the provisions of the Legal Profession Uniform Conduct (Barristers) Rules 2015, and in particular rules 96-100, which came into force on 1 July 2015.*

52. The Rules referred to are quoted in [25] above.

53. There may be a further reason why such a change should not be adopted. It is that very many barristers would be unwilling to accept a brief to act as counsel assisting in an ICAC enquiry if they were required to be an officer of the ICAC. That status implies the possibility of direction of counsel by the ICAC which many would regard as inimical to the independent role that barristers are required to fulfil. I doubt whether I would have accepted a brief as counsel assisting in such circumstances when it was open to me to do so before my appointment as Inspector. I am sure many barristers would feel the same.

Mr Watson's response to this report

54. As I am required by section 79A(3) of the Act, I provided Mr Watson with a draft of this report and gave him an opportunity to respond to it⁶. My letters to him dated 6 December 2019 are Attachment T. His reply to me dated 13 December 2019 was in the following terms (so far as is relevant):

1. *I refer to your letter dated 6 December 2019 enclosing your draft Report.*
2. *I do not accept that you are acting without personal animus, and I do not accept that your Report is a proper exercise of your statutory powers and*

⁶ I also provided a draft copy of this report to the Commission.

duties. You (and your predecessors) have consistently (and correctly) ruled that the Inspector has no power in the present circumstances. Your present investigation and Report is no more than providing yourself with a means of indirectly doing that which you are not permitted to do directly. The idea that you are conducting an "audit" of the retention of counsel assisting generally cannot be genuine given that I am the only person to whom you have spoken and the only person placed under review.

- 3. For this reason you should withdraw your draft Report. The Report as currently framed is outside the scope of your statutory powers.*
- 4. My guess is that you will not do that. Experience teaches that there is little point in me attempting to persuade you to change your mind. For that reason I will limit my submission to three critical matters:*

- Surely you should submit your draft Report to both ICAC and the Hon Megan Latham for comment. Given this is supposedly an "audit" those measures must be taken. Apart from anything else, it is very likely that your Report will lead to commentary adverse to ICAC, and possibly to the former Commissioner.*
- You should correct the factual error which you have proposed repeating: Mr Gallacher did not resign because of any questions asked by me; he stood aside following a conversation with the Premier, Michael Baird. The reason was that he had become a person of interest in the Inquiry. That occurred before I asked the questions. You have no factual basis for your assertion to the contrary*

55. I note that Mr Watson does not provide any specific answer to the criticisms I have expressed above as set out in the draft report, nor any response to the questions as to his conduct I raised in my letter to him dated 28 October 2019 (Attachment O) .

56. Mr Watson asserts in the last paragraph of that letter that Mr Gallacher did not resign because of any questions posed by him, but rather because of a conversation between him and the then Premier, Mr Mike Baird which preceded

Mr Watson's questions. My inquiries indicate that there was no such discussion with the then Premier until after the question was put by Mr Watson as quoted in [8].

57. Mr Gallacher was at that time of Mr Watson's examination of Mr Williams in Goulburn at the NSW Police Academy but was subsequently made aware of the allegation that had been made against him.
58. Shortly thereafter, Mr Moses SC (at T3101-3107, see T3101.11-3102.40 in particular) sought leave to appear in the public inquiry on behalf of Mr Gallacher and raised a number of concerns about Mr Watson's questions. He also indicated that Mr Gallacher would like to inform the Premier if there was an allegation to be made against him given his position as a Minister. He referred to a previous protocol between the former Commissioner of ICAC that the Premier would be notified if there was an allegation against a Minister.
59. Specifically, at 3102T Mr Moses informed the Commission in the following terms:

Now, I told him that the Minister would like to tell the Premier if there was an allegation to be made against him, given the position that he held, and he said that he should tell the Premier that he is on the witness list. And I then informed Counsel Assisting there was a previous protocol between the previous Commissioner here that I was told of that the Premier would be notified if there was an allegation, and Mr Watson said he was not sure whether that protocol still existed.

*Now this is extraordinary. Counsel Assisting is here to assist the Commission but Counsel Assisting also has his own obligations and what has just happened here is inappropriate and unfair. This is not how this Commission conducts itself and with respect my learned friend owed obligations to me in respect of this matter. This is not a show, this is not, this is not a show for my learned friend to make jokes about or badger witnesses or harass witnesses. This is about conducting an inquiry. Justice Young made it very clear in the decision in *Shaw v The Police Integrity Commission* what Counsel Assisting's obligations were and he certainly said it was not to engage in jury rhetoric*

and that's all we're hearing at the moment. But this is outrageous.

It is difficult to see that Mr Moses overstated the position.

60. In response Mr Watson SC stated (T3106.40-48):

As part of that preparation I made the decision to deploy that particular email chain probably around about 20 past 9.00 this morning. I was in two minds about it. It was soon after that that I asked the Council's, sorry, the Commission's legal staff to contact Mr Gallacher's lawyers to say they should be here today, and they are. I would have thought that this will give them the opportunity to hear the allegations (not transcribable) play out. It's quite seriously the case this information has come to us very recently.

61. Immediately prior to the lunch adjournment Mr Moses sought confirmation as to whether Mr Watson SC was maintaining the allegation against Mr Gallacher, to which Mr Watson SC's replied "Oh, yes." (T3145.20-29). Mr Moses then said "the position of the Minister will be which will be announced shortly will be that he'll stand aside as Minister pending the outcome of the inquiry" (T3145.32-35). Subsequently, but on the same day, Mr Gallacher and the then Premier, Mr Baird spoke by telephone and Mr Gallacher informed the Premier of the allegation that had been made by Mr Watson and that it was being maintained. The Premier then informed Mr Gallacher that he would need to resign as a Minister and not just stand aside during the enquiry. In response Mr Gallacher indicated that he would resign. Mr Gallacher subsequently resigned from his position as Minister for Police and Emergency Services.

62. This sequence of events is confirmed by the transcript references set out above and, in my view, confirms that Mr Gallacher resigned because of Mr Watson's questions, as quoted in [8] above of which he had no prior notice.

Conclusion

63. Taking all these matters into account I consider both that the Commission's current procedures and protocols in respect of counsel assisting in the conduct of public inquiries are appropriate and I consider that the risk of repetition of the conduct I have referred to above is minimal. Consequently, I believe legislative

change is unnecessary as is any additional protection for witnesses. Nevertheless, I propose to continue to monitor these matters during the remainder of my term as Inspector to ensure that that continues to be the case.

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

A handwritten signature in blue ink that reads "B. R. McClintock". The signature is written in a cursive style with a horizontal line underneath the name.

Bruce R McClintock SC
Inspector, Independent Commission against Corruption
19 December 2019

Attachment A

| THOMPSON ESCLICK |
S O L I C I T O R S

Our ref: PCT: GAL1421

FILE COPY

25 November 2016

Inspector of the Independent Commission Against Corruption
PO Box 5341
SYDNEY NSW 2001

Attention: Mr John Nicholson SC, Acting Inspector

By email: oiicac_executive@oiicac.nsw.gov.au
Original and Supporting Material following by Hand

Dear Inspector,

Re: Complaint to the Inspector of the Independent Commission Against Corruption on behalf of the Honourable Michael Gallacher MLC

We act for the Honourable Michael Gallacher MLC.

This letter is a formal complaint to you as the Inspector, made on behalf of our client Mr Gallacher, concerning the conduct of the Independent Commission Against Corruption (“ICAC”) in relation to its dealings pertaining to Mr Gallacher in the ICAC investigation code-named “Operation Spicer”.

1. We are instructed to write to you as the Inspector on behalf of Mr Gallacher and respectfully request that you exercise your jurisdiction under Part 5A of the *Independent Commission Against Corruption Act 1988* (NSW) to conduct an investigation into the following matters:
 - a) Whether the Commission had in its (or its officers) possession, on or before 2 May 2014, evidence which supported the allegation made against Mr Gallacher by Counsel Assisting in the Commission’s public hearing that day and, if so, what that evidence was (“**the First Matter**”).
 - b) What steps were taken by the Commission and its officers during the adjournment of the public hearing in and from May 2014 including:
 - i. what decisions were made, or instructions given, by the Commission or by or to the its officers in relation to seeking to obtain evidence that

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-
- sought to implicate Mr Gallacher in relation to alleged illegal and corrupt conduct;
- ii. what were witnesses told by investigators in relation to Mr Gallacher when statements were sought from them;
 - iii. whether witnesses were offered inducements or promises to give evidence adverse to Mr Gallacher and, if so, which witnesses and what was the content of those inducements or promises;
 - iv. the circumstances in which Mr Thomson came to be provided with an inducement, and the content of that inducement, to sign the statement which made adverse comments against Mr Gallacher;
 - v. whether the statement Mr Thomson signed following the giving of that inducement was consistent with prior information he had given to the Commission relevant to Mr Gallacher; and
 - vi. whether the Commission (or its officers) had in its possession, prior to the handing down of its report on Operation Spicer ("**the Report**"), information which was exculpatory of Mr Gallacher or would have been of assistance to Mr Gallacher's legal team in cross-examining Mr Thomson or making written submissions to the Commission ("**the Second Matter**").
- c) Whether the adverse findings made against Mr Gallacher by the Commissioner in the Report were improperly made or in excess of the Commission's jurisdiction, including by reason of:
- i. an absence of a reasonable basis in the material before the Commission for making those the findings;
 - ii. an absence of probative evidence sufficient to support the findings;
 - iii. the findings being supported by irrational and illogical reasoning;
 - iv. a denial of procedural fairness including by the Commission (or its officers) not providing relevant material to Mr Gallacher's legal representatives; and
 - v. the existence of a conflict of interest on the part of the Commission, including officers of the Commission, including because they had an interest in seeking to avoid criticism (particularly public criticism) against themselves or their employer (the Commission) for serious allegations having been made against Mr Gallacher on 2 May 2014 which led to his resignation as a Minister of the Crown were subsequently not pursued in the hearing, not the subject of any evidence being tendered let alone disclosed (despite repeated requests), no retraction of the allegation by the Commission, and no findings made exonerating Mr Gallagher of the allegation. This conflict of interest may
-

have contributed to the manner in which evidence was collected against Mr Gallacher after 2 May 2014 (“**the Third Matter**”).

Enclosed with this letter is:

1. a submission document from Counsel acting for Mr Gallacher;
2. an addendum document containing submissions relating to the adverse findings made against Mr Gallacher in the Report; and
3. a folder of supporting documents which is indexed (“**Supporting Material**”).

Yours faithfully
THOMPSON ESLICK



Peter Thompson
Encl.

**COMPLAINT TO THE INSPECTOR
OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION
ON BEHALF OF
THE HONOURABLE MICHAEL GALLACHER MLC**

SUBMISSIONS

There are three matters upon which Mr Gallacher complains to the Inspector.

The First Matter: whether the Commission had in its (or its officers) possession, on or before 2 May 2014, evidence which supported the allegation made against Mr Gallacher by Counsel Assisting in the Commission's public hearing that day and, if so, what that evidence was.

1. Mr Gallacher was the subject of a very serious allegation made against him during the public hearing of Operation Spicer. The allegation was that Mr Gallacher *"hatched a corrupt scheme to make donations to the Liberal Party using the Eightbyfive business"* (the relevant portion of the transcript is extracted in paragraph 4 below).
2. Following the publication of the Report it appears that there was no basis for making such a serious allegation. Not only does the Report make no mention of the serious allegation but the evidence that was said to support it being made at the time has never been adduced before the Commission or provided to Mr Gallacher's legal representatives. It is Mr Gallacher's concern, now that the public hearing has completed and the Report been published, that there may have been no such evidence or the evidence in the possession of the Commission at the time fell short of supporting such a serious allegation.
3. The circumstances in which this allegation was made against Mr Gallacher were unusual. The allegation was not made at the commencement of the public hearing as part of any opening statement, but by Senior Counsel Assisting during the course of the examination of a witness, Darren Williams, on the fifth day of the public hearing in Operation Spicer (2 May 2014).
4. The transcript records the exchange as follows

Question *"You see just so it's clear and I want you to know, Mr Williams, we don't go off half copped [sic], we wouldn't put something as serious to you as this without knowing plenty of stuff. The truth is you had a close longstanding personal connection with the Shadow Minister Mike Mr Gallacher?"*

Answer *"Yes".*

Question *"It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the EightbyFive business, correct?"*

Answer *"No",*

Counsel Assisting then made the statement:

“Well can I tell you by the end of this you’re going to regret having giving [sic] that answer, Mr Williams.”¹

5. As can be seen from the opening remarks to the first question in the above exchange, Senior Counsel was, at the time of making the allegation, at pains to suggest that this allegation was not made idly and was in fact supported by material or information in the possession of the Commission. It is to be noted that there were no findings of corruption by the Commission in its report.
6. Furthermore, this serious allegation appears to have been made with the acquiescence and authority of the Commission. There was an exchange that occurred on 2 May 2014 between Senior Counsel for Mr Gallacher, Mr Arthur Moses SC and the Commissioner about the allegation and the Commissioner disclosed that she had been informed at 7:00pm the night before of material that was not previously available to the Commission which allowed Counsel Assisting to make the allegation.²
7. At the time the allegation was made it was immediately and extensively reported. The making of the allegation came to the attention of Mr Gallacher (who was then the Minister for Police and Emergency Services) when addressing cadets at the Police Academy in Goulburn. As a consequence of the allegation having been made, Mr Gallacher immediately resigned as Minister for Police and Emergency Services (and also as the Leader of the Government in the Legislative Council, Vice-President of the Executive Council, Minister for Industrial Relations, and Minister for the Central Coast) in order to ensure that the Police Force, Emergency Services and the Government’s reputation and functioning were not adversely impacted upon whilst the Inquiry proceeded. The resignation of Mr Gallacher had serious personal and professional consequences to him.
8. Following the allegation being made, there were repeated requests made by Mr Gallacher’s legal representatives, including from Senior Counsel, during the course of the public hearing, and through correspondence between Mr Gallacher’s solicitors and the Commission’s lawyers, for the information or evidence that the Commission had relevant to that serious allegation. No evidence or information in that regard has ever been provided to Mr Gallacher or his legal representatives. On the contrary, during the public hearing requests for the allegation to be withdrawn were refused.
9. Extracts of the transcript from the public hearing where these requests were made and the Commission’s response to them, together with the letters written by Mr Gallacher’s legal representatives to the Commission’s lawyers and the Commission’s lawyers’ response to those letters are included in the **Supporting Material** at Tabs 1 and 2.
10. In response to a request made during the public hearing on 6 May 2014 for *“the evidence that the Commission had in it’s [sic] possession at the time it made the*

¹ 3096T (2 May 2014).

² 3105-3106T.

*allegation*³ Counsel Assisting stated “*we have sworn testimony from a reliable person which implicates Michael Gallacher*”⁴.

11. The alleged “*sworn testimony from a reliable person*” was never produced or tendered at the public hearing. Mr Gallacher’s legal team were, at all times, denied access to it and remain unaware of what that “*sworn testimony*” was. As noted above, if it existed, it never formed part of the evidence at the public hearing.
12. Furthermore, on 6 May 2014⁵ concerns were raised with the Commission that the making of the allegations had serious consequences. In the context of that exchange the Commissioner made the observation⁶ “*everyone’s reputations are potentially damaged by allegations put in the course of openings, and we cannot, we simply cannot do much about it until all the evidence is in, and the Commission makes its findings*”.
13. It is Mr Gallacher’s concern, now that the public hearing has completed and the Operation Spicer report published, that the serious allegation has not been withdrawn or otherwise addressed and there is still no indication what this evidence was. Contrary to the Commissioner’s statement quoted above, such evidence was not brought forward or put before the Commission in the public hearing, let alone any finding exonerating Mr Gallacher.
14. In particular, there has not been any disclosure of what was the “*sworn testimony*” or the “*plenty of stuff*” said to have supported the allegations made on 2 May 2014, leading to his resignation as a Minister of the Crown. It is his concern that in fact there may have been no such evidence.
15. The public hearing of the Operation Spicer investigation commenced on 28 April 2014 and ran to 20 May 2014 and was then adjourned for a period of 11 weeks and resumed on 6 August 2014 and continued through to 12 September 2014 when all evidence was completed.
16. Critically, the adjournment on 20 May 2014 was said to be for the purpose of enabling the Commission to investigate information which he said come to its attention which implicated Mr Gallacher. This statement was made by Senior Counsel Assisting on 6 May 2014:

“Commissioner, as I foreshadowed, I am now going to apply to suspend the public inquiry in Operation Spicer. As I will explain in more detail in a moment, the basis for that application is to allow the investigative staff at the Commission time to investigate more material which has come to hand in recent times. The suspension will not operate immediately. We intend to press on and to complete the public inquiry so far as it relates to the activities of EightbyFive... In light of speculation on the subject it does seem an appropriate moment to say that these activities implicate the former

³ 3367-3368T (6 May 2014).

⁴ 3376.20T (6 May 2014).

⁵ 3366.2-3368T.

⁶ 3373.42T.

Minister, Michael Gallacher. It is for this reason that Mr Gallacher will not be called next week.”⁷

17. Mr Gallacher gave evidence in the public hearing when it resumed after the adjournment on two half days on 3 and 4 September 2014. His evidence ran for less than a day (all up) and amounts to only 82 pages of the 7711 pages total transcript of the evidence gathered during the course of the public hearing.
18. A review of the questioning directed to Mr Gallacher shows that little was put to Mr Gallacher by Senior Counsel Assisting of any alleged wrongdoing, involvement or knowledge in the alleged activities being investigated concerning fundraising from prohibited donors. Certainly nothing was put to Mr Gallacher, which would have assisted in identifying what was the “*sworn testimony*” or even what it said relevant to Mr Gallacher and the alleged Eightbyfive scheme. It was also never put to Mr Gallacher that his evidence was in anyway untruthful or inconsistent with other persons evidence. A complete extract of Mr Gallacher’s evidence is included in the **Supporting Material** at Tab 3.
19. It may be suggested, and the Report (in particular Chapter 24) gives this impression, that the “*sworn testimony*” in the possession of the Commission as at 2 May 2014 was that of Mr Hugh Thomson. Mr Thomson was Tim Owen’s campaign manager for the seat of Newcastle during the 2011 election and was involved fundraising for Owen’s campaign. However, there are three reasons why that cannot be the case.
20. First, there is no material that was made available in the public hearing to support a conclusion that Mr Thomson gave any evidence to the Commission that implicated Mr Gallacher before 2 May 2014. On the contrary, there is material to suggest he did not provide any “*sworn testimony*” until after the adjournment on 20 May 2014 and after he was provided with an inducement by Commission investigators. For instance, the signed statement of Mr Thomson was dated 11 August 2014.
21. Secondly, Mr Thomson is not mentioned at all in Senior Counsel Assisting’s initial opening of the public inquiry, but is mentioned in Senior Counsel Assisting’s opening on the resumption of the hearing after the adjournment on 6 August 2014. Senior Counsel Assisting stated: “*now I can say as a matter of certainty that Hugh Thomson was right at the centre of the illegalities. I am able to say this because Mr Thomson admits it. In the end Mr Thomson was offered an inducement by ICAC that in exchange for providing a statement, that statement would not be used against him in criminal proceedings in New South Wales except if he gives false or misleading evidence. Mr Thomson agreed and we have had his cooperation in investigating the matters which occurred during the lead-up to the 2011 State Election.*”⁸
22. This further supports a conclusion that Mr Thomson’s evidence only became available to the Commission during the adjournment and after he received an inducement.

⁷ 3348T (6 May 2014).

⁸ 4773.28T.

23. Thirdly, when one reviews the evidence publicly made available from Mr Thomson, there is no evidence of any knowledge or involvement of Mr Gallacher in the alleged Eightbyfive scheme.

24. As the **first matter** therefore, Mr Gallacher requests that the Inspector investigate whether there was any evidence (including “*sworn testimony*”) in the possession of the Commission on 2 May 2014 which supported the allegation made by Senior Counsel Assisting publicly against Mr Gallacher on that day.

The second matter: what steps were taken by the Commission and its officers during the adjournment of the public hearing in and from May 2014.

25. Following the recent receipt of new evidence Mr Gallacher also has concerns as to what occurred during the course of the adjournment between 20 May 2014 and 6 August 2014. As noted above, the adjournment was said to be needed to allow the Commission to investigate conduct relevant to him.

26. The new evidence has come from four separate people:

- a) Mr Andrew Cornwell, the Liberal candidate for and then member for Charlestown (Tab 4);
- b) Mr Tim Owen, the Liberal candidate for and then member for Newcastle (Tab 5);
- c) Mr Terry Lawler, Chairman of Lawler Partners, an accounting practice in Sydney and Newcastle (Tab 6); and
- d) Ms Colleen Hodges, Secretary of the Newcastle Branch of the Liberal Party (Tab 7).

27. Those persons were each contacted by the Commission’s investigators during the adjournment. Two of them, Mr Owen and Mr Cornwell were called to give evidence before the public hearing.

28. In summary, that evidence reveals:

- a) Mr Cornwell was told by Mr Thomson after Mr Thomson had been interviewed by the Commission that the Commission were “*after*” Mr Gallacher, and Mr Cornwell should “*blame any problems on Gallacher*”.
- b) After Mr Cornwell was formally interviewed by persons from the Commission he was taken aside by Counsel Assisting and informed that the Commission “*needed more on Gallacher*”.
- c) Mr Owen, when he was contacted by persons from the Commission, was told that the Commission was after “*Hartcher and Gallacher*” and told “*you’d better be prepared to come clean on these people in the public hearings*”.

- d) Mr Lawler, when he was interviewed by persons from the Commission, was told that Mr Gallacher was "*the person we're after*".
 - e) Mr Lawler was not contacted again by the Commission after he provided information that did not implicate Mr Gallacher in the events that the Commission were investigating.
 - f) Ms Hodges was not contacted again by the Commission after she was interviewed by persons from the Commission and gave evidence exculpatory of Mr Gallacher confirming that he was not actively involved in the fundraising of the Newcastle campaign.
29. This gives rise to and supports the following legitimate concerns held by Mr Gallacher.
30. First, there is a concern that what occurred during that adjournment (given, for the reasons outlined above there was no evidence which supported the serious allegation which had been made against Mr Gallacher) was that the Commission and its officers appeared to be primarily focused on trying to make good this allegation. As a consequence, there is a concern that the Commission's investigators did not fairly or objectively investigate matters relating to Mr Gallacher. As summarised above, the new evidence is to the effect that the Commission's investigators made statements to the effect that the Commission wanted evidence that was adverse to Mr Gallacher and, it would seem, were not interested in exculpatory evidence.
31. Those circumstances raise a concern that the Commission's investigators were focused solely on attempting to find evidence that may be against or adverse to Mr Gallacher and as such embarked on a course of conduct where they failed to fairly and objectively search for and obtain evidence.
32. Secondly, and further to the first point, there is a concern that the Commission (or persons acting on its behalf such as investigators) endeavoured to encourage witnesses to give evidence against Mr Gallacher, including by way of pure supposition. It is not clear whether the motivation for this may have been the Commission's desire to support the serious public allegation made against Mr Gallacher which was not the subject of any evidence let alone finding..
33. Thirdly, as noted above, there is a particular concern with respect to the manner in which Mr Thomson came to give his evidence after the adjournment. The new evidence, in particular that of Mr Cornwell (Tab 4) gives rise to reason to believe that during the course of an interview or discussions Mr Thomson had with by Commission investigators Mr Thomson was encouraged to give evidence adverse to Mr Gallacher furthermore, that he was offered an inducement to do so.
34. When Mr Thomson came to give evidence at the public hearing it also became apparent he had only signed his statement two days before he was called. His statement is dated 11 August 2014⁹ and he gave his oral evidence on 13 August

⁹ Z19.

2014. Also, in questioning from Senior Counsel for Mr Gallacher it was revealed that the draft of that statement had only been prepared a week earlier.¹⁰

35. Attempts by Mr Gallacher's legal representatives to question Mr Thomson as to the circumstances in which he was provided with the inducement, or the process by which the statement came to be prepared with ICAC investigators, were rejected by the Commissioner.¹¹
36. Also, requests made at the time by Mr Gallacher's legal representatives for any prior statement or "testimony" from Mr Thomson were denied with Mr Gallacher's legal representatives being informed by the Commissioner that Mr Thomson's statement was the "*sum total of the information that the Commission has from Mr Thomson*"¹² (see the exchange in the transcript in the **Supporting Material** at 5050T behind Tab 1).
37. The above matters also lead to a fourth concern, that the Commission had in its possession material which would have been exculpatory of Mr Gallacher or assisted Mr Gallacher's legal team in cross-examining witnesses, in particular, Mr Thomson. The new evidence supports this concern.
38. For instance, Mr Lawler and Ms Hodges both gave evidence exculpatory of Mr Gallacher and neither were called before the public hearing or even contacted again by the Commission. Further, the evidence of Mr Cornwell and Mr Owen, if known at the time of Mr Thomson giving evidence would have been of assistance to Mr Gallacher's legal representatives. That is in addition to information as to any prior statements made by Mr Thomson and the circumstances, including inducement, in which he came to give a statement to the Commissioner as outlined above.
39. Some of these concerns, so far as they were known by Mr Gallacher and his legal representatives at the time, were sought to be raised before the Commission before the Report was published. Following the completion of evidence Mr Gallacher's legal representatives made detailed submissions to the Commission. Those submissions are still subject to an order under s 112 of the *Independent Commission Against Corruption Act 1988* (NSW). Mr Gallacher and his legal representatives do not wish to inadvertently breach that section and therefore respectfully request that the Inspector exercise his power under s 57C to require full access to those submissions from the Commission.
40. Accordingly, Mr Gallacher asks the Inspector to investigate as a **second matter**:
 - a) what decisions were made, or instructions given, by the Commission or by or to its officers in relation to seeking to obtain evidence that sought to implicate Mr Gallacher in relation to alleged illegal and corrupt conduct;
 - b) what were witnesses told by investigators in relation to Mr Gallacher when statements were sought from them;

¹⁰ 5187.37T.

¹¹ See, e.g. 5178-5179T.

¹² 5050T.19-21.

- c) whether witnesses were offered inducements or promises to give evidence adverse to Mr Gallacher and, if so, which witnesses and what was the content of those inducements or promises;
- d) the circumstances in which Mr Thomson came to be provided with an inducement, and the content of that inducement, to sign the statement which made adverse comments against Mr Gallacher;
- e) whether the statement Mr Thomson signed following the giving of that inducement was consistent with prior information he had given to the Commission relevant to Mr Gallacher; and
- f) whether the Commission (or its officers) had in its possession, prior to the handing down of its Report, information which was exculpatory of Mr Gallacher or would have been of assistance to Mr Gallacher's legal team in cross-examining Mr Thomson or making written submissions to the Commission.

The third matter: whether the adverse findings made against Mr Gallacher by the Commissioner in the Report were improperly made or in excess of the Commission's jurisdiction.

- 41. The hearing of evidence in the hearing of Operation Spicer completed on 12 September 2014.
- 42. Following the completion of evidence at the public hearing, Mr Gallacher's legal representatives made substantial submissions to the Commission. Again, Mr Gallacher and his legal representatives do not wish to inadvertently breach s 112 and therefore respectfully request that the Inspector exercise his power under s 57C to obtain those submissions, among other things.
- 43. The submissions were not the subject of any reply submissions and were only briefly, selectively and in broad terms referred to in the Report.
- 44. The Commission delivered its report on operation Spicer on 30 August 2016. The report was tabled in Parliament at approximately 10:00am that day and was made publicly available within 30 minutes of that happening.
- 45. Notwithstanding Mr Gallacher's submissions the Operation Spicer report made a number of adverse comments, purported to be findings, against Mr Gallacher. These "findings" were made notwithstanding that no recommendations were made against Mr Gallacher or any finding was made that he engaged in corrupt conduct.
- 46. The statements/findings included:

relevant to alleged EightbyFive scheme

"The Commission finds that Mr Hartcher, Mr Koelma, Mr Gallacher, Mr Palmer and Mr Williams were parties to an arrangement whereby, between

July 2010 and March 2011, Patinack Farm made payments totalling \$66,000 to EightbyFive. These payments were ostensibly for the provision of services by EightbyFive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party's 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling \$33,000, exceeded the applicable caps on political donations. Although the payments to EightbyFive were made by Patinack Farm, the arrangement was organised through Buldev, a property developer.”¹³

“The Commission finds that Mr Hartcher's SMS text message and his diary entry were a result of information given to him by Mr Gallacher. The Commission finds that Mr Williams provided Mr Gallacher with the name of the entity to be used in the agreement with Eightbyfive and that Mr Gallacher immediately passed the name of the entity on to Mr Hartcher so that Mr Hartcher could, in turn, pass it on to Mr Koelma.”¹⁴

relevant to the Boardwalk Resources donation

“The Commission finds that in Late 2010 Mr Gallacher, Mr Hartcher and Mr Williams of Buldev were involved in the arrangements whereby two political donations totalling \$53,000 were provided to the NSW Liberal Party for use in its 2011 election campaigns for the seats of Newcastle and Londonderry... of the \$53,000 some \$35,000 was used to help fund Mr Owen's 2011 election campaign.... Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buldev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading Election Funding Act laws relating to the accurate disclosure of political donations to the electoral funding authority.”

relevant to payments made to Luke Grant

“The Commission finds that Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Mr Grant for his work on Mr Owen's 2011 election campaign and that he did so with the intention that Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority would be evaded.”¹⁵

relevant to the New Year's Eve function

“The Commission finds that, in about November 2010, Mr Gallacher sought a political donation from Mr Sharpe by inviting him to attend a New Year's

¹³ Report, pp 105-106.

¹⁴ Report, p 99.

¹⁵ Report, p 139.

Eve political fundraising function for which Mr Sharpe or Buildev would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations.”¹⁶

relevant to Mr Gallacher’s credit

“The Commission does not consider Mr Gallacher was always a truthful witness and places no reliance on his evidence unless it is corroborated by other reliable evidence or objective facts.”¹⁷

47. As is dealt with further in more detail in the addendum to Mr Gallacher’s complaint, it is Mr Gallacher’s submission there on any reasonable review of the evidence which was before the Commission at the public hearing, the evidence did not support such adverse “findings” being made against Mr Gallacher.
48. These statements which have been included in the published report have caused him reputational and professional damage, in circumstances where it is otherwise difficult for him to adequately redress that damage as these findings were made in effect as “aside comments” not in relation to any finding being made of “corrupt conduct” or to support any recommendation made by the Commission.
49. It is Mr Gallacher’s submission that those adverse comments were included in the report in excess of jurisdiction of the Commission including in circumstances where:
 - a) the evidence relevant to Mr Gallacher was, on any reasonable, objective and proper view of it, not capable of supporting the conclusions made adverse to him;
 - b) at best, the conclusions were made drawing inferences from evidence which, on any reasonable, objective and proper view of that evidence, were not open to be made, and when there were more logical and alternative inferences to be drawn completely consistent with Mr Gallacher’s non-involvement in the alleged event;
 - c) there is an apprehension that it was done to avoid any further adverse criticism being made against the Commission for making allegations against a senior Minister which were not able to be supported either at that time they were made or subsequently. This gives rise to a conflict of interest on the part of the Commission, including officers of the Commission. That is, there was an interest in seeking to avoid criticism against themselves or the Commission for making unsubstantiated serious allegations which lead to the resignation of a senior member of the Legislative Council and a Minister of the Crown. The new evidence and matters set out in respect of the first matter and second matter above provide a basis for the concern of the apprehension and conflict of

¹⁶ Report, p 124.

¹⁷ Report, p 122.

interest. Furthermore, the statements were included in circumstances where the Commission did not and could not make any finding of corrupt conduct.

50. Accordingly, as the **third matter** Mr Gallacher asks the Inspector to investigate whether the adverse “findings” made against Mr Gallacher by the Commissioner in the Report were improperly made or in excess of the Commission’s jurisdiction, including by reason of:

- a) an absence of a reasonable basis in the material before the Commission for making those the findings;
- b) an absence of probative evidence sufficient to support the findings;
- c) the findings being supported by irrational and illogical reasoning;
- d) a denial of procedural fairness including by the Commission (or its officers) not providing relevant material to Mr Gallacher’s legal representatives; and
- e) the existence of a conflict of interest on the part of the Commission, including officers of the Commission, including because they had an interest in seeking to avoid criticism (particularly public criticism) against themselves or their employer (the Commission) for serious allegations having been made against Mr Gallacher on 2 May 2014 which led to his resignation as a Minister of the Crown, were subsequently not pursued in the hearing, not the subject of any evidence being tendered let alone disclosed (despite repeated requests), no retraction of the allegation by the Commission, and no findings made exonerating Mr Gallagher of the allegation. This conflict of interest may have contributed to the manner in which evidence was collected against Mr Gallacher after 2 May 2014.



A.R. MOSES SC
New Chambers

25 November 2016

(Counsel for the Honourable Michael Gallacher MLC)



R.L. GALL
Eight Selborne Chambers

**COMPLAINT TO THE INSPECTOR
OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION
ON BEHALF OF
THE HONOURABLE MICHAEL GALLACHER MLC**

ADDENDUM

Commentary on the adverse findings directed to Mr Gallacher as published in the Operation Spicer Report (“the Report”)

Introduction

1. There are four main sets of factual findings directed to Mr Gallacher in the Report. They are found under the general headings or topics used in the Report, as follows:
 - a) “*Eightbyfive and Patinack Farm*” (Chapter 20);
 - b) “*The Boardwalk Resources donations*” (Chapter 26);
 - c) “*The seat of Newcastle*” – “*Mr Grant*” (Chapter 27); and
 - d) “*The New Year’s Eve fundraiser*” (Chapter 25).
2. There is also a finding in the Report suggesting that Mr Gallacher’s evidence was not always truthful. That is also dealt with separately below.

General commentary on standard of proof and quality of evidence

3. The Report asserts that it made findings on the balance of probabilities (the requisite civil standard) bearing in mind the principles enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336. However, it is submitted that the Commission, when making these ‘factual findings’ adverse to Mr Gallacher, in fact failed to give consideration to and properly apply the standard of proof (despite its general assertion to the contrary on p 168 of the Report) when assessing and weighing up the evidence.
4. Set out below is a narrative summarising what appears to have been the reasoning of the Commission to arrive at these ‘factual findings’, and a commentary on the ‘evidence’ relied upon, which it is submitted shows that the evidence was far from meeting the requisite standard to support the findings made.

Eightbyfive and Patinack Farm

5. The Commission made findings that “*Mr Hartcher, Mr Koelma, Mr Gallacher, Mr Palmer and Mr Williams were parties to arrangement whereby between July 2010 and March 2011 Patinack Farm made payments totalling \$66,000 to Eightbyfive. These payments were extensively for the provision of services by Eightbyfive to Patinack Farm but were in fact political donations to help fund the NSW Liberal*

Parties 2011 Central Coast Election campaign. The Parties to this arrangement intended to evade the disclosure requirements of the Electoral Funding Act".¹

6. Arriving at that finding, relevant to Mr Gallacher, the Report made statements that "Mr Gallacher was involved in that arrangement";² "[inferred] from evidence that Mr Gallacher asked Mr Williams for the name of the entity that would be used to channel funding through Eightbyfive for the NSW Liberal Party 2011 state election";³ found that "Mr Williams provided Mr Gallacher with the name of the entity to be used in the agreement with Eightbyfive and that Mr Gallacher immediately passed the name of the entity [Patinack Farm] onto Mr Hartcher so Mr Hartcher could in turn pass it on to Mr Koelma".⁴
7. It is Mr Gallacher's submission that such findings were not properly supported by the evidence, and on a proper and objective review of the evidence, were also not able to properly inferred from the evidence. In making these findings, the Commission seems to have ignored the evidence contradictory to the position it took as stated in the Report.
8. There is no evidence referred to in the Report of there being any direct communication between Mr Williams and Mr Gallacher, and/or Mr Gallacher and Mr Hartcher, passing on the name of the entity that the Commission found was chosen to be billed by Eightbyfive (i.e. Patinack Farm). The Commission seems to have made this finding, about this 'passing' of the name, by asserting Mr Gallacher had involvement in these events because it is said (in summary), firstly, the fact that he attended a breakfast meeting at the Tallulah Café on 28 May 2010 and, secondly, because he was mentioned in the "which entity" email (as defined below). Therefore it is concluded by the Commission that he was involved in the passing of the name for Eightbyfive to invoice as part of the alleged Eightbyfive scheme.

Tallulah Café Meeting

9. Relevantly to the Tallulah Café meeting it is said in the Report:
 - a) On 28 May 2010 Mr Gallacher was at a breakfast meeting with Mr Hartcher, Mr Sharpe and Mr Williams at the Tallulah Café⁵ and this is about the time that the "Eightbyfive scheme" came to be discussed between Mr Koelma and Mr Williams at the meeting in Buldev's offices on 17 May 2010. However, the relationship between the Tallulah Café meeting and the Eightbyfive scheme was not established. The evidence was from all who attended the meeting at the Café that it was a meeting where the Buldev representatives were showing the plans for the Mayfield site and according to Mr Sharpe other projects as well, to Mr Gallacher and Mr Hartcher. No one gave evidence to suggest that the so-called Eightbyfive scheme was discussed at that meeting.

¹ Page 106 of the Report.

² Page 98 of the Report.

³ Page 98 of the Report.

⁴ Page 99 of the Report.

⁵ Page 98 of the Report.

And there was no evidence that anyone discussed Eightbyfive at that meeting whatsoever.⁶

- b) It is said in the Report that the arrangement between Eightbyfive and Patinack was entered into soon after the breakfast meeting.⁷ However, there was no evidence of that. The evidence was that the first invoice that Eightbyfive sent to Patinack Farm was on 2 July 2010.⁸ This is 6 weeks after the Tallulah Café meeting with no temporal connection to it. Also as noted above there was no evidence that the Eightbyfive was the subject of any discussion at the Tallulah Café meeting. Indeed it was Mr Koelma's evidence that the name of the business entity to be billed by Eightbyfive was discussed soon after the first meeting that Mr Koelma had with Mr Williams in Buldev's office which was on 17 May 2010.⁹ The so-called passing of the name thereafter, on the evidence that was before the Commission, pre-dated the Tallulah Café meeting. The Commission's Report does not refer to this evidence of Mr Koelma.
- c) As it is understood the way the Commission has arrived at its findings, on this aspect adverse to Mr Gallacher is because it asserts that the arrangement between Eightbyfive and Patinack was entered into soon after this Tallulah Café meeting. And to make this good, the Commission in the Report says that Mr Gallacher's evidence where he said Mr Sharpe asked him a question about Mr Koelma at that café meeting was untrue. The logic of the analysis used by the Commission does not however appear to follow.
- d) It is said in the Report "*the assertion that Mr Gallacher spoke to Mr Sharpe about Mr Koelma was not put to Mr Sharpe and is inconsistent with Mr Sharpe's evidence that he was not aware of Mr Koelma's existence until he was contacted by the Commission for the purposes of the investigation*".¹⁰ The relevance, however, of the above statement to Mr Gallacher knowing about, or being a party to the alleged Eightbyfive scheme, is not explained in the Report. Also, on any logical review of the evidence it could not support the Commission's conclusion that he had such knowledge or involvement. If it is (and it was) Mr Sharpe's evidence that he knew nothing of Mr Koelma or the Eightbyfive, the relevance therefore, if accepted, of Mr Sharpe's evidence that he did not inform Mr Gallacher about Mr Koelma at the Tallulah café meeting becomes irrelevant to place Mr Gallacher with knowledge of Eightbyfive. It would have to follow that if the Commission accepts Mr Sharpe's evidence

⁶ See e.g. Mr Sharpe's evidence on what he remembers of this meeting at 3397T-3399T:

well, basically there was more of a briefing over the projects that we were doing at the time um, we had quite a number. Um, GPT was one of the projects we were looking at at the time, that was quite a significant thing that was under due diligence um, Lee Wharf, which was um, Honeysuckle House um, Singleton ah, rail terminal um, the BHP port project um, North Richmond ah, and there was probably others but that's generally the conversation topic.

⁷ Page 98 of the Report.

⁸ Exhibit S9, p 2583.

⁹ Mr Koelma said at 4184T:

Ah, my recollection is that I had a discussion about that with Darren and at that stage he wasn't sure which entity they had selected. And then I sent the email that was referred to yesterday and thereafter was told that they had selected Patinack Farm.

¹⁰ Page 98 of the Report.

that he did not know of Mr Koelma until after the investigation commenced, it must also accept Mr Sharpe's evidence that he had never heard of Eightbyfive (which was his evidence).¹¹ So, the suggestion that the Tallulah Café meeting was something to do with the Eightbyfive cannot follow.

The alleged passing on of the name Patinack Farm

10. The Commission's 'findings' that Mr Gallacher passed the name of the entity on to Mr Hartcher so he could pass it on to Mr Koelma was not based on evidence of any such communication. It seems only to have been made on inferences the Commission sought to draw from pieces of evidence which, in summary, from the way the Report is written, appears to be:
- a) At 4:29pm on 2 June 2010 Mr Gallacher called Mr Williams' telephone number. However, there was no evidence of what was discussed, or even that there was any actual phone contact between the two.
 - b) At 4:57pm on 2 June 2010 Mr Williams sends Mr Sharpe the "which entity" email. However, no one gave evidence that that email had anything to do with Eightbyfive. See discussion on this further below.
 - c) At 5:17pm on 2 June 2010 Mr Sharpe responds to the "which entity" email to Mr Williams saying "*Ask Nathan as I think it's best to come through patnack...*" There was no evidence that Mr Gallacher was a party to, or even knew of, that communication.
 - d) At 10:47am on 3 June 2010 Mr Williams sent another email to Mr Sharpe "*Do I ring Nathan or Troy...*" However, there was no evidence that Mr Gallacher was a party to or knew of that communication.
 - e) At 10:48am on 3 June 2010 Mr Sharpe sends an email suggesting Mr Williams contact Mr Tinkler. There is apparently a call of four minutes duration later between Mr Williams and Mr Tinkler, and the Commission infers that it was in this call that Mr Tinkler gave permission to use 'Patinack Farm' to channel funding through Eightbyfive. However, Mr Tinkler's evidence was that he denied any knowledge of Eightbyfive.¹² Also, Mr Tinkler gave evidence that he had not given any permission to use Patinack Farm.¹³

¹¹ Mr Sharpe said at 3342T:

I don't know anything about EightbyFive.

¹² See the following exchange between Counsel Assisting and Mr Tinkler at 4494T:

No idea?---No, I have no idea. The first thing I ever heard about any of this was the — when ICAC ah, called up Troy. I don't know anything about an Eightybyfive (as said) or whatever.

A what?---Eightybyfive or whatever that the text referred to. All right. But so you didn't know anything about it?---No.

¹³ See, e.g. Mr Tinkler's evidence in the following exchange with Counsel Assisting at 4497T:

MR WATSON: You knew, Mr Tinkler, didn't you that Buildev was paying money into a campaign associated with Liberal Party politicians and funding it under a subterfuge Patinack Farm Pty Limited, you knew that didn't you?---(No Audible Reply)

You knew that didn't you?---No, I didn't.

You authorised it didn't you?---No, I didn't.

More relevantly, there was no evidence that Mr Gallacher was a party to, or knew anything of, that phone conversation in any event.

- f) Then the Commission refers to a telephone call at 5:27pm on 3 June 2010 from Mr Williams to Mr Gallacher. It is then said that Mr Hartcher and Mr Gallacher were at Parliament House that day. It seems to be the Commission's finding that the name is given by Mr Gallacher to Mr Hartcher. However, there is no evidence that there was any such conversation, and it cannot be inferred that just because Mr Gallacher and Mr Hartcher were in Parliament House on the same day Parliament was sitting that there was a communication to the effect that the Commission seeks to suggest occurred.
- g) At 5:38pm on 3 June 2010 Mr Hartcher sends Mr Koelma an SMS message saying "*Our Newcastle friends say they will ring you tomorrow all fixed.*" The Commission relies heavily on this text message as being a message to mean that Mr Koelma was to be told who Eightbyfive was to invoice. Whether that was the case or not, it is still not evidence that Mr Gallacher had any knowledge or involvement in any such discussions, and it was not put to Mr Hartcher that he did.
- h) The Commission then refers to a diary entry on 3 June 2010 of Mr Hartcher "*Paknac – Nathan*" and the Report says: "*The Commission finds that Mr Hartcher's SMS message and diary entry were as a result of information given to him by Mr Gallacher. The Commission therefore finds that Mr Williams provided Mr Gallacher with the name of the entity to be used in the agreement with Eightbyfive and that Mr Gallacher immediately passed the name of the entity on to Mr Hartcher so Mr Hartcher could, in turn, pass it on to Mr Koelma.*" However, the events as outlined above do not provide evidence of any such communication.

11. The Commission has made the above finding based on an inference as to what it says the evidence suggests occurred, but on an objective review of the evidence that inference is not properly able to be made:

- a) There is no evidence of any communication between Mr Hartcher and Mr Gallacher about the Eightbyfive scheme or Patinack;
- b) The fact that they were at Parliament together and had telephone contact that day is evidence of nothing relevant to the above; and
- c) The Commission's sequence of events also shows that something like 6½ hours transpired between the apparent call from Mr Williams to Mr Tinkler to obtain the name, and Mr Williams then having a telephone call with Mr Gallacher to allegedly pass on the name. The temporal connection between the two calls is substantially lacking.

12. Further, the inference that the Commission seeks to draw from the above evidence is inconsistent with the other evidence before it:

- a) The evidence was that Mr Williams and Mr Hartcher had themselves a long standing relationship that had gone back many years.¹⁴ There was no suggestion or reason therefore that Mr Gallacher would be acting as a ‘go between’ between Mr Williams and Mr Hartcher for the purposes of passing on a name, as they already had contact with each other dating back to 2004.
- b) The evidence was that Mr Gallacher had never heard of Eightbyfive until he read about it in the newspaper after the Electoral Commission inquiry.¹⁵ He was not challenged on that evidence. Also, objectively, what was quite clear from what the Commission revealed is that those that were involved in the alleged “Eightbyfive scheme” – Mr Koelma, Mr Hartcher, Mr Palmer and Mr Williams – had extensive email communications and SMS messaging between them. There was none to or from Mr Gallacher consistent with Mr Gallacher not knowing anything, or having involvement in the alleged scheme.
- c) The Commission relied on the email “*Which entity will I give mike gallagher [sic]*” (“**the ‘which entity’ email**”) – however it did not mention anything about Eightbyfive. The Commission suggested it related to the Eightbyfive scheme – but no one gave evidence that it did, and indeed gave contrary evidence. The author of the email, Mr Sharpe, gave evidence (which was accepted by the Commission) as to not having knowledge of Eightbyfive, and the “*which entity*” email was about discussing which entities could make donations.¹⁶

The “which entity” email

13. It seems quite apparent that the whole ‘case’ which the Commission sets out in the Report against Mr Gallacher on the Eightbyfive matter centres around this “*which entity*” email. However, on proper review of the evidence, this email could not possibly be relied upon to have made the findings that were made that: “*Mr Williams provided Mr Gallacher with the name of the entity used in the agreement with Eightbyfive and that Mr Gallacher immediately passed the name of the entity on to Mr Hartcher so Mr Hartcher could, in turn, pass it on to Mr Koelma*”:

- a) As noted above, the email does not mention Eightbyfive, Mr Koelma, Patinack or Mr Tinkler.
- b) Mr Sharpe was the author of that email, and gave evidence that he knew nothing about Eightbyfive.¹⁷ If one accepts that evidence (which the

¹⁴ See, for example, evidence such as Exhibit S9 at pages 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477 and 2480.

¹⁵ This is what Mr Gallacher said in his compulsory examination which was tendered in the public hearing as Exhibit Z85 and Mr Gallacher was not cross-examined on: (Mr Gallacher CE 31/03/2014) T1086.

¹⁶ Mr Sharpe said at 3342T:

Okay. But, but as a result of those discussions you get an email “Which entity will I give Mike Gallacher.” Can you tell us what you understood that email to mean?---Well I understood that to mean um, an entity for political donations.

¹⁷ Mr Sharpe said at 3342T:

I don’t know anything about EightbyFive.

Commission did), the email could not have had anything to do with that 'scheme'.

- c) Mr Gallacher was not a party to the email, and he knew nothing about it. It was never sent to him, and no one gave evidence it was even discussed with him. The only two people who were party to the email were Mr Williams and Mr Sharpe. Both did not give evidence that it had anything to do with Eightbyfive. As noted above, it was Mr Sharpe's evidence that he knew nothing about Eightbyfive. His evidence was that it was an email about making donations to the Liberal Party following a discussion that Mr Williams had with someone from the Liberal Party to see if Buildev or Mr Tinkler could make donations. He said that request did not come from Mr Gallacher.¹⁸ The Commission did not suggest that Mr Sharpe's evidence was false. The Report makes no reference at all to Mr Sharpe's evidence concerning this email.
- d) The Commission's findings also try to put a temporal link between the email, which is sent at 4:57pm on 2 June 2010 and Mr Hartcher putting in an entry in his diary at 17:38:38 on 3 June 2010¹⁹ which has the words "*Packnac-Nathan*". However, as can be seen, Mr Hartcher's diary entry happened a day later.
- e) And in any event, none of the above is evidence that either Mr Williams or Mr Sharpe even spoke to Mr Gallacher and told him the name 'Patinack Farm'. Further, none of this is evidence that Mr Gallacher passed on that name to Mr Hartcher, or did so in order for Eightbyfive to invoice it under this alleged scheme.
- f) There was also substantial evidence that Mr Gallacher and Mr Williams spoke regularly about all sorts of topics around this time in 2010, which easily explained the telephone communications they had.²⁰ The Commission has just selectively picked some of these telephone calls, without knowing the content of them, to suggest an inferential case.
- g) Also, the evidence was that the first invoice Mr Koelma issued to Patinack Farm was on 2 July 2010. This is a month after the name was apparently being passed to Mr Koelma following the "*which entity*" email. That is not a temporal link to support the inferences the Commission makes.
- h) And further, there was evidence as to how the name came to be passed – none of which involved Mr Gallacher. As noted above, that evidence came from Mr Koelma, who said that it was Mr Williams who informed him that the name was 'Patinack,'²¹ and did so after Mr Koelma's email of 18 May 2010.²²

¹⁸ Mr Sharpe's evidence at 3338T, lines 39-42:

MR O'MAHONEY: I hadn't even noticed it, Mr Sharpe, but is this the case that in the context of the discussions you had and this email which entity will I give Mike Mr Gallacher did you understand that the request for donations was coming from Mr Gallacher?---No, no.

¹⁹ Exhibit S9 p 2564.

²⁰ For example, Mr Tate standing for election, or the 'Fix Our City' rally in Newcastle: see 7007T.

²¹ See above n 9.

²² Exhibit S9 p 2544.

- i) Also, as noted above, it was clear from evidence that was produced in the hearing that those involved in the 'Eightbyfive scheme' had extensive email and text message exchanges – Mr Koelma, Mr Hartcher, Mr Palmer, Mr Williams, etc., but none of these went to, or were even CC'd to, Mr Gallacher, or were from Mr Gallacher.
14. It is submitted that when one looks at the totality of the evidence given at the public hearing relevant to the Eightbyfive scheme and invoicing to Patinack Farm, there was no evidence that would have allowed a finding to be made that Mr Gallacher knew of that arrangement, or participated in it. The reliance that the Commission placed on the "which entity" email to make its inferential case was not justified on a proper review of the evidence.

The Boardwalk Resources donations

15. In Chapter 26 of the Report the Commission sets out findings relating to donations said to have been made by Boardwalk Resources, a company associated with Mr Tinkler.
16. In that chapter it refers to a payment of \$53,000 which the Commission finds was organised by Mr Williams as a donation to the NSW Liberals of which it says \$35,000 found its way to help Mr Owen's election campaign.
17. Relevant to Mr Gallacher, it is found:
- a) *"Mr Williams had a close relationship with Mr Gallacher and Christopher Mr Hartcher and the Commission is satisfied that they were involved in facilitating this donation."*²³
 - b) *"There is also evidence that Mr Gallacher was involved in arranging for the \$53,000 donation."*²⁴
 - c) *"The Commission finds that in Late 2010 Mr Gallacher, Mr Hartcher and Mr Williams of Buildev were involved in the arrangements whereby two political donations totalling \$53,000 were provided to the NSW Liberal Party for use in its 2011 election campaigns for the seats of Newcastle and Londonderry... of the \$53,000 some \$35,000 was used to help fund Mr Owen's 2011 election campaign... Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buildev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading Election Funding Act laws relating to the accurate disclosure of political donations to the electoral funding authority."*²⁵

²³ Page 125 of the Report.

²⁴ Page 128 of the Report.

²⁵ Page 130 of the Report.

18. It is submitted that the findings the Commission has made, as noted above relevant to Mr Gallacher, are not supported by a reasonable and objective review of the evidence.
19. A review of what is said in the Report about Mr Gallacher's alleged involvement is set out in pages 129 to 130 of the Report, and it appears it is based on:
- a) From about September 2010, Mr Thomson and Mr Gallacher had discussions about Mr Owen becoming a Liberal Party candidate;
 - b) Towards the end of November 2010, Mr Thomson sent an email to Mr Gallacher about raising funds for the Owen campaign;
 - c) The asserted 'evidence' of Mr Thomson that he was told in December 2010 by Mr Gallacher that there had been a large donation made in the order of \$120,000;
 - d) That Mr Thomson sent on Monday, 13 December 2010, a text message to Mr Gallacher saying "*how's our big man going with the _120K*";
 - e) The Commission finding that the reference to the "*big man*" in that text was a reference to Mr Tinkler;
 - f) The Commission saying it is satisfied that the timing of events and surrounding conversations recounted by Mr Thomson and Mr Owen connect this "*big man*" message to the \$53,000 payment; and
 - g) The Commission addressing the fact that the relevant payment was \$35,000, and yet the "*big man*" message talked of a \$120,000 payment, by saying "*the monetary difference is not an impediment to the Commissions finding. Mr Thomson understood that the proposed \$120,000 donation was to be split three ways with the Newcastle Campaign to receive \$35,000. A further \$18,000 was used in the Londonderry Campaign. The intended third recipient is not evident and it may well be that for whatever reason the third payment became unnecessary.*"
20. As is evident from the above, there was in fact no evidence of any involvement or discussions between Mr Gallacher or Mr Thomson, or with Mr Owen, Mr Hartcher or Mr Tinkler to suggest that Mr Gallacher was aware, or had been told of, or had any involvement in, any proposed donation by Mr Tinkler/Boardwalk of \$35,000, or indeed of any amount.
21. The findings made against Mr Gallacher on this matter were predicated on what the Commission said was Mr Thomson's evidence, that he first became aware from Mr Gallacher that there was to be a large donation in the order of \$120,000; and the Commission then drawing the conclusion that the "*big man*" message that referred to \$120,000 (which went from Mr Thomson to Mr Gallacher on 13 December 2010), was a reference to that donation, and the reference to "*big man*" was therefore a reference to Mr Tinkler.

22. There are a number of difficulties in the way in which the Commission arrived at those conclusions from the evidence.

23. Firstly, Mr Thomson gave no direct evidence of any conversation that he had with Mr Gallacher where there was a reference to Mr Gallacher telling him there was a "donation of \$120K". It is important to note that Mr Thomson made no reference to any such conversation in the statement prepared two days earlier that he provided to the Commission and which was tendered at the public hearing.²⁶ The Commission, to make its finding, relies on words that he spoke during the course of further questioning by Senior Counsel Assisting at the public hearing. It is important to therefore actually look at that questioning and note what, and how, answers were given by Mr Thomson on that occasion:

And then paragraph 68 refers back to your text message to Mr Gallacher about the "big man" and you say that you believe that you first became aware from Mike Gallacher that there was a large donor?---That's right.

Could you tell us the basis of that belief, was it something you read, something you saw?---Yeah, it was a reasonably precise account um, we leading into the pre-selection - - -

Be careful about we when you say - --?---Sorry, sorry. I leading into the preselection um, very keen to secure Tim as our preferred candidate we had two others, as part of that exercise I talked with Mike about um, how we could make sure and Mike provided advice such as things like doing the ring around of all the local members to make sure that he was known to them and one of those comments also related to Mr Owen's fundability that he was a very, the sort of guy that people would get behind in funding and there was already a large donation that had been made to the order of \$120,000 and that carried through to the pre-selection where I as the President at the time asked having prepped him already each of the nominees to explain how they would fund their campaign and at that point in time when I asked Tim he, he mentioned that he had in principal commitment of more than \$100,000 for that effect.

And the first part of that answer referred to a conversation with Mr Gallacher. Was it Mr Gallacher who first informed you of that - - -?---Yes.

- - - donation? And we're not unrealistic about this we know the precise words will alert your recollection but to the best of your recollection what did he say about it?---Um, that there was already support for Mr, Mr Owen, um, and that he would be able to receive a lot more funding but that there was already \$120,000 commitment.

Well did he say from whom?---I can only draw that I've written in my evidence in which led, what led me to draw that text but I, I cannot specifically recall that.²⁷

24. It was not Mr Thomson who first used the word 'donor' but Senior Counsel Assisting using that word in his questioning. As can be seen from the above extract, Mr Thomson talked about a 'commitment' coming to the Owen campaign. It is submitted by Mr Gallacher that Mr Thomson's understanding of there being a 'commitment' coming to the Owen campaign was entirely consistent with Mr Gallacher's evidence that there had been discussions that Newcastle may be considered favourably by Head Office for a Key Seats Package, giving it a commitment of funding for the election campaign emanating out of Liberal Party Head Office.

²⁶ Exhibit Z19.

²⁷ 5158-5159T.

25. Secondly, Mr Gallacher gave evidence, which was not denied by Mr Thomson, that he and Mr Thomson discussed in December 2010 (at about the time of the Newcastle Liberal Party Branch Christmas party) Mr Gallacher assisting Newcastle becoming eligible for a Key Seats Package out of Head Office, to have it provided with funding for the campaign. This is entirely consistent with any understanding Mr Thomson may have had of Mr Gallacher being involved with some 'commitment' of funding.
26. Mr Gallacher's evidence also was that he understood that the value of such a Key Seat package was about \$120,000.²⁸ The Commission sought to reject that as truthful because it says Mr Stone gave evidence that a Key Seats Package would have a value of somewhere between \$35,000 and \$100,000.²⁹ That rejection of Mr Gallacher's evidence was not logically made, because the evidence was that in late 2010, no Key Seats Packages had been set, and what was being considered at the time were loose possibilities, including the possibility of sharing costs in relation to media services where more than one seat shared a central media outlet.³⁰ Mr Gallacher's belief that the figure involved might have been \$120,000 was entirely feasible.
27. Mr Gallacher's evidence was that, prior to the pre-selection of Mr Owen, he had discussions with Mr Thomson about Newcastle perhaps being eligible to get a Key Seats Package. His evidence was that was the subject of discussion that took place at and around the Newcastle Liberal Party Branch Christmas party barbeque which was held on 8 December 2010, and in telephone conversations around that time. Mr Thomson did not deny that any such conversations took place.³¹
28. Relevant to the above matter, the other objective evidence was that in the period around December 2010 / early 2011, Newcastle was being considered for a Key Seats Package,³² as was Maitland³³ and Charlestown,³⁴ which, coincidentally, are also referred to in the other texts that Mr Owen sends to Mr Thomson about monies

²⁸ 7051T.

²⁹ Page 129 of the Report.

³⁰ See Mr Stone's evidence at 5824T.

³¹ Mr Thomson at 5197T:

So I want to put it to you directly though that Mr Gallacher said to you that he would raise with Mr O'Farrell the possibility of obtaining extra funding for the seat, this is words to the effect of, "To come out of head office for Newcastle via the pitching as a key seat or making a request for some special extra funding"?---I don't recall that conversation.

No. But you're denying are you, sir?---No, I can't deny it either.

³² See, e.g. Stone's evidence at 5824T:

Thank you. Now going back to the discussions that you had with the Newcastle SEC that you referred to yesterday in your evidence, was there consideration at Head Office level at that time as to whether there could be any economies of scale with the advertising component with any keys seats package involving the local media outlet being the Newcastle Herald and indeed NBN so that the costs could be shared between seats such as Newcastle, Charlestown and perhaps Maitland?---Well, there, there was consideration given to those things um, simply because um, in a particular media market there may well be more than one electorate that falls within it so um, by nature of um, ensuring that we um, ran a cost-effective campaign we would prepare newspaper advertisements for example that may contain more than one candidate um, um, TV um, commercials, how to vote cards and the like so it wasn't uncommon to feature more than one candidate in a piece of material for that reason.

Yeah, sure. And indeed, in terms of the key seats package it wasn't something that was set in stone, it was able to be, if I can use the word manipulated or altered in order to suit particular seats and what particular seats required?---That's correct, yeah.

³³ Parker T5400.

³⁴ Stone T5823.

coming in, which is in the chain leading up to the “big man” text. This is all entirely consistent with the texts relating to Key Seat commitments (see, for example, Mr Owen’s text to Mr Thomson “Hugh, the 120 was split 3 ways as suspected. May want to speak to MG!”,³⁵ Mr Thomson’s text back to Mr Owen, “Do you know who between?”, Mr Owen’s text back to Mr Thomson, “No, he just rang and said nothing more” (which was Mr Hartcher), and then Mr Thomson’s text in reply, “I suspect RP and AC”.³⁶ It was accepted that the reference to “RP” and “AC” were references to Robyn Parker, the Liberal candidate for Maitland, and Andrew Cornwell, the Liberal candidate for Charleston.

29. The evidence also revealed that the arrangements for Key Seats Packages being considered by Head Office in the Liberal Party in late 2010 was fairly loose (and was not going to eventuate anyway into funding until 2011);³⁷ and funding was still ‘up for grabs,’ and there was consideration being given as to whether there could be sharing of a Key Seats Package across electorates, such as Newcastle, Maitland and Charlestown, for example, for joint media.³⁸

Key Seats packages

30. The Commission in the Report says this reference to “120k” in the text could not be a reference to a Key Seats Package, because while the value of a Key Seats Package could exceed \$100,000 – this was not the position for Newcastle.³⁹ However, that does not mean that Mr Thomson appreciated anything like that when he wrote the

³⁵ See also Mr Owen’s evidence at 5104T:

But at that stage you, earlier you gave evidence I think and correct me if I’m wrong that you understood that the package was going to be split between Charlestown and Maitland, is that right?---Well, there was, there was a broader sum of money coming to the Hunter of which the Newcastle electorate might get some.

Correct. And you understood that monies were already going to, part of that package was already going to go to Charlestown and Maitland, correct? --That was my understanding.

³⁶ Exhibit Z13 pp 23-26.

³⁷ Mr Stone at 5823T:

*And the key seats package or that seat being Charlestown did not come through until about January 2011?--
-Well, the materials that were, that comprised the target seat package were only started, we only started rolling them out in perhaps late 2010/early 2011, so it was intended for the intensive period of the campaign that the materials would be rolled out.*

Thank you. And you’re also aware that there was consideration in about early December 2010 for Newcastle to be a key seat?---Yes.

³⁸ Mr Stone at 5824T/10-25:

Thank you. Now going back to the discussions that you had with the Newcastle SEC that you referred to yesterday in your evidence, was there consideration at Head Office level at that time as to whether there could be any economies of scale with the advertising component with any keys seats package involving the local media outlet being the Newcastle Herald and indeed NBN so that the costs could be shared between seats such as Newcastle, Charlestown and perhaps Maitland?---Well, there, there was consideration given to those things um, simply because um, in a particular media market there may well be more than one electorate that falls within it so um, by nature of um, ensuring that we um, ran a cost-effective campaign we would prepare newspaper advertisements for example that may contain more than one candidate um, um, TV um, commercials, how to vote cards and the like so it wasn’t uncommon to feature more than one candidate in a piece of material for that reason.

Yeah, sure. And indeed, in terms of the key seats package it wasn’t something that was set in stone, it was able to be, if I can use the word manipulated or altered in order to suit particular seats and what particular seats required?---That’s correct, yeah.

³⁹ Page 129 of the Report.

text, or that even Mr Gallacher appreciated anything like that when he spoke to Mr Thomson in December 2010 about Newcastle possibly obtaining a Key Seats Package or share of one.

31. Also, that reasoning of the Commission counts against its ultimate reasoning to make adverse comments about Mr Gallacher.
32. The text message talks about \$120,000. The Boardwalk donation was only \$53,000, so this discrepancy is stark. The Report does not deal with it, other than to say:

The Commission is satisfied that the timing of events and the surrounding conversations recounted by Mr Thomson and Mr Owen compellingly connect the “big man” message to the \$53,000 payment. The monetary difference is not an impediment to the Commission’s finding. Mr Thomson understood that the proposed \$120,000 donation was to be split three ways, with the Newcastle campaign to receive \$35,000. A further \$18,000 was used in the Londonderry campaign. The intended third recipient is not evident and it may well be that, for whatever reason, the third payment became unnecessary.⁴⁰

33. The Commission in the Report also agreed that it should reject that the \$120,000 referred to in that text had anything to do with a Key Seats Package, because it says Mr Thomson did not want to purchase a Key Seats Package for Newcastle.⁴¹ It is stated, “*In any event, Mr Thomson did not want to purchase a key seats package for Newcastle.*” This it is said is borne out by the steps that Mr Thomson took to secure the \$35,000 for use on the Newcastle campaign, rather than allowing it to be used to purchase a Key Seats Package.⁴² However, that ignores the evidence even of Mr Thomson, that at the time of the “big man” text, it was his understanding that Newcastle was to receive \$35,000 for the purposes of buying into a target seat package and that \$35,000⁴³ was coming to Mr Hartcher’s office in the Central Coast that was to then be sent to Paul Nicolaou in Head Office.⁴⁴ So, even on Mr Thomson’s evidence, at the time the “big man” text was being written, he was expecting, or at least exploring, the opportunity for Newcastle for a Key Seats Package, and he understood funding was coming in to buy into it. This evidence is not addressed in the Report.
34. In fact, the timing of this text message was entirely consistent with Mr Thomson wanting to obtain \$35,000 for a buy-in to a Key Seats Package, and at the same time chasing up Mr Gallacher to chase up Mr O’Farrell to support a Key Seats deal for Newcastle.
35. Also, as noted above, the text message was written in a sequence of text messages where Mr Owen’s evidence was that he thought they had to do with the Key Seats

⁴⁰ Page 130 of the Report.

⁴¹ Page 129 of the Report.

⁴² Page 129 of the Report.

⁴³ See Mr Thomson’s statement (Exhibit Z19) at paras [68] and [69].

⁴⁴ See Mr Henry’s evidence at 7547T:

Would you accept as a probability that it was you who sent those cheques on page 4, and if you look at page 6 by Express Post down to Sydney to Mr Nicolaou?---Well, if they were the, if they were the cheques that were given to me by Ray then they probably would have been in that Express Post bag.

package commitment, being one that would be split between the adjacent electorates of Newcastle, Charlestown and Maitland.⁴⁵

Timing of payment

36. The Report also states (at page 130) that Mr Thomson's evidence of his understanding (i.e., it being a donation from Mr Tinkler) must be correct because it is said the money came from Mr Tinkler's company on the very day that Mr Thomson sent the "big man" text. That reasoning overlooked, however, that the evidence would suggest that the amount that came from Boardwalk Resources was \$53,000, and that being the amount was known to Mr Thomson even before he sent the text message:

- a) Mr Thomson's evidence was that he was aware that Newcastle was to receive \$35,000 from the \$120,000. He was told it was a donation, and it would end up at Head Office for the purpose of buying into a target seats package.⁴⁶
- b) He says the \$35,000 was sent or given to Chris Hartcher's office on the Central Coast, and either he or Tim Owen was told that the cheque would be able to be picked up at Chris Hartcher's office, and he had some recollection that Mr Owen went there to get it on the same day.⁴⁷
- c) The evidence suggested that this cheque was, in fact, drawn by Mr Palmer, and sent down by Express Post to Paul Nicolaou at 4:10pm on 13 December 2010. Mr Thomson's text message is not sent until 5:14pm.⁴⁸

37. Therefore, the evidence suggests on any reasonable view of it, that that payment in fact actually occurred prior to the SMS message being sent, which is at 5:41pm on 13 December. By 4:10pm, the cheques had come from Mr Palmer to Mr Hartcher and then on to Paul Nicolaou's office, and Mr Thomson was told of them. The suggestion therefore in the Report that this text message was consistent with Mr Thomson chasing up the donation that had not yet come through is not factually supported.

The likelihood of Mr O'Farrell being the "big man"

38. The Commission says the reference to "big man" could not have been a reference to Mr O'Farrell. The evidence, however, was overwhelming that Mr Gallacher used that

⁴⁵ See above n 30.

⁴⁶ Mr Thomson's statement (Exhibit Z19 paras [68], [75] and [78]) stated the following:

I was aware that Newcastle was to receive \$35,000 from the \$120,000 (Exhibit Z19 at para [78]) and I was told that the donation was to end up at head office for the purpose of buying into a target seats package (Exhibit Z19 at para [68]), the \$35,000 was sent or given to Chris Mr Hartcher's office on the central coast. Either Tim or I were told the cheque could be picked up at Chris Mr Hartcher's office (Exhibit Z19 at para [75]).

⁴⁷ Mr Thomson's statement (Exhibit Z19) at para [73] stated the following:

I later understood that the \$120,000 donation was to be split amongst a few seats and Newcastle was to receive \$35,000. The \$35,000 cheque at some stage was sent or given to Chris Hartcher's office in the Central Coast. Either Tim Owen or I were told the cheque could be picked up from Chris Hartcher's office. I had some recollection that Tim Owen went to the Central Coast but he was told the cheque was not available. I later found out that the cheque had been sent to Head Office by Chris Hartcher's office. I believe I was told this by Tim Owen.

⁴⁸ Exhibit Z13 page 13.

expression to refer to Mr O'Farrell (and it was entirely open therefore for the Commission to have concluded that Mr Thomson used that same expression back to him). The evidence was that Mr Thomson had spoken to Mr Gallacher prior to the pre-selection quite extensively about trying to obtain support from Barry O'Farrell, and Mr Thomson himself was using his own colloquial expressions for Barry O'Farrell in those communications, such as "BOF".

39. The Commission's report also does not address the fact that the text message that was sent from Mr Thomson to Mr Gallacher referred to "our big man". Mr Gallacher says he did not know Mr Tinkler.⁴⁹ There was no evidence that Mr Thomson or Mr Gallacher spoke about Mr Tinkler.⁵⁰ And Mr Tinkler's evidence was that he had never spoken to or even knew Mr Gallacher.⁵¹ So, again, it was perfectly open to conclude that whatever Mr Tinkler was to Mr Thomson and Mr Gallacher, he was not "our big man", whereas Barry O'Farrell could easily and most sensibly have been described in that way between the two of them.

40. In the Commission's findings it is also suggested that Mr O'Farrell was not involved in allocating funding for Key Seats. However, that statement in the Report overlooked the evidence of Mr Gallacher that he recalled speaking to Mr O'Farrell about a Key Seats Package for Newcastle, and Mr O'Farrell's evidence on that was, "*If Mr Gallacher raised it with me it would be unexceptional and I would have continued my practice to send him down to Head Office.*"⁵² It in fact was Mr Gallacher's evidence (given before Mr O'Farrell gave evidence) that after he spoke to Mr O'Farrell he had been referred to Head Office.⁵³ This is entirely consistent with Mr O'Farrell's later evidence. Also, the following perhaps might be noted.

41. Whilst Mr O'Farrell might not have been 'doling out' the Key Seats Packages personally, he was the head of the party, and had also been the National Secretary. He had a staff member who sat on the Key Seats Committee.⁵⁴ It made perfectly logical sense that Mr O'Farrell would certainly have been keeping an eye on which

⁴⁹ 7078T.

⁵⁰ See Mr Gallacher's evidence at 7084T:

Just ask questions about this, I'll just ask you one question about this. Is this the case you've never spoken about Mr Tinkler to Mr Thomson, is that the position?---I've never spoken to him about Mr Tinkler, Mr Thomson about Mr Tinkler.

⁵¹ 4500T.

⁵² Mr O'Farrell at T7421.

⁵³ Mr Gallacher gave evidence at 7052T:

Well no, not about Newcastle. Did you speak to Mr O'Farrell about obtaining a Key Seats Package for Newcastle?---Yes, I believe I did.

Thank you. Go on, Mr Watson.

MR WATSON: And what did Mr O'Farrell say?---I can't recall whether it was he or another person who told me that any decisions would have to be made by Liberal Party Headquarters.

⁵⁴ Mr O'Farrell at 7418T and 7430T:

Would you have any nuts and bolts role, that is being the person who suggested we should fund Smithfield or we should fund Illawarra?---I'm not aware of having done that. I certainly had two Parliamentary representatives ah, Don Harwin and Chris Hartcher, reflecting my usual factional balance on the, on the key seats committee and I also had a member of my staff who sat in on that committee and that was - his role, the latter's role was effectively to make sure that my activities as Leader of the Opposition in terms of my diary and the mechanics was gelling with the overall State target seat or key seat campaign.

That staffer's name was?---Jaymes Boland-Rudder.

electorates were obtaining Key Seats funding, and that other politicians would have been lobbying him accordingly (as Mr O'Farrell himself accepts – "*it would be unexceptional if Mr Gallacher raised it with me*").

42. The "*big man*" text is also entirely consistent with the fact that there would have been discussions between Mr Gallacher and Mr O'Farrell about supporting Newcastle if Mr Owen was pre-selected, including for Key Seats funding, which would have been passed on to Mr Thomson even before Mr Owen's pre-selection, which Mr Thomson would have then been chasing up within days of Mr Owen being pre-selected, consistent with the timing of the "*our big man*" text.
43. The link therefore that the Commission tries to draw, that the text relates to the Boardwalk donation, is an extremely tenuous one. It is submitted that it was not one supported by a proper consideration of the evidence, and in any event, not one supporting the finding made in the Report against Mr Gallacher that Mr Gallacher was involved in the arrangements resulting in the donation from Boardwalk Resources to the New South Wales Liberal Party.

The seat of Newcastle – Mr Grant

44. Relevant to the issue of the payments that were made to Mr Luke Grant to work on the Owen Newcastle campaign, the Commission states in its report that "*there was a significant issue for determination as to whether Mr Gallacher was involved in arranging for Mr McCloy and Mr Grugeon to pay Mr Grant for working on Mr Owens election campaign*".
45. The Report dealt with this "issue" at pages 136 to 139. At page 139 of the Report, the Commission made this finding:

The Commission finds that Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Mr Grant for his work on Mr Owens 2011 election campaign and that he did so with the intention that Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for disclosure of political donations to the Election Funding Authority would be evaded.

46. The Commission made that finding without evidence before it from either Mr McCloy or Mr Grugeon that they had been approached by Mr Gallacher to arrange to pay Mr Grant, or for any donation whatsoever, and in circumstances where both gave evidence that this did not happen.
47. Notwithstanding the lack of direct evidence to support the finding the Commission sought to make, it made the finding by referring to what is said were other pieces of evidence which "*do not negate*" such a finding being made.⁵⁵ That, it is submitted, was inappropriate reasoning.
48. In adopting that somewhat 'skewed' reasoning, the Report made reference to the following to make adverse findings against Mr Gallacher:

⁵⁵ Page 137 of the Report.

- a) Mr Gallacher knew Mr Grant;
- b) Mr Gallacher having first introduced Mr Grant to Mr Owen;
- c) Mr Grant giving evidence that he recalled a brief discussion with Mr Gallacher, which he thinks may have been in February 2011, where Mr Gallacher asked “*you’re being looked after?*”, which Mr Grant took to mean, everything is progressing;
- d) Mr Owen’s understanding that Mr Thomson and Mr Gallacher were going to manage the funding of his campaign; and
- e) That Mr Owen did not deny that he told Mr Grant that Mr Gallacher would sort something out to ensure that Mr Grant was paid.

49. However, none of the above was, in fact, evidence of any knowledge or involvement by Mr Gallacher in the arrangements that have been put in place leading to Mr Grant being paid to work on the Owen campaign, which was through invoices being issued to companies associated with Mr McCloy and Mr Grugeon.

Mr Thomson’s evidence was not evidence of Mr Gallacher’s involvement or knowledge

50. There was no evidence of any such knowledge or involvement on Mr Gallacher’s part. The Inspector’s attention is drawn to the written submissions made by Mr Gallacher to the Commission. The Commission instead relied upon Mr Thomson’s ‘suspicions’ that Mr Gallacher was involved in the arrangements for Mr Grant’s funding, notwithstanding that Mr Thomson gave no evidence in support of such ‘suspicions’.

51. At page 137 of the Report, it was stated “*Mr Thomson told the Commission that he had discussions with Mr Owen and Mr Gallacher about paying Mr Grant and that the means by which payment would be made was worked out by Mr Gallacher and Mr Owen.*” However, that statement is not correct. Mr Thomson gave no such evidence. The apparent evidence that the Commission refers to in support of that statement was identified in the Report as the statement by Mr Thomson: “*as best I can recall it [it] was Mike Gallacher’s idea for McCloy and Grugeon to pay Luke Grant to work on Tim Owen’s campaign*” and “*I don’t believe anyone else, other than Mike Gallacher would have approached Jeff McCloy and Hilton Grugeon for money. Michael Gallacher knew these men very well*”.⁵⁶

52. That was not evidence by Mr Thomson of any conversation between Mr Gallacher and Mr Thomson, or even between Mr Gallacher and anyone else, that he would be working out the arrangements to pay Mr Grant. It is quite clear that the evidence of Mr Thomson that he gave on the subject rose no higher than some belief as to what he thought happened, without him having any knowledge that it did happen.

⁵⁶ Mr Thomson’s statement (Exhibit Z19) at paras [38] and [185] (see also the Report at page 138).

The other evidence also was not evidence of Mr Gallacher's involvement or knowledge

53. There was no evidence of any involvement knowledge, or even discussions with Mr Gallacher, about the funding arrangements for Mr Grant working on the campaign.
54. The fact that Mr Gallacher knew Mr Grant was not evidence of that. Also, the reliance the Commission placed on the fact that Mr Gallacher had introduced Mr Grant to Mr Owen was also not evidence of that. It also ignored the evidence that this introduction occurred some five or six months prior to Mr Owen making the decision that he wanted Mr Grant to work on the campaign.
55. The evidence was that Mr Gallacher introduced Mr Owen to Mr Grant sometime in mid to late 2010.⁵⁷ The evidence was that Mr Owen approached Mr Grant to work on the campaign in early 2011.⁵⁸
56. The evidence also was that it was Mr Owen who asked Mr Grant to work on the campaign, and it is only then that topic of his remuneration was raised.⁵⁹
57. Further, the evidence was quite overwhelming that Mr Gallacher was not involved in any of those arrangements concerning the payment of Mr Grant:
- a) Mr Grant's evidence was also quite clear that he had discussed the figures that were to be paid to him with Mr Owen, not Mr Gallacher. Mr Grant actually

⁵⁷ Mr Grant's evidence was that it was at a time when Mr Owen and Mr Grant were both being considered for pre-selection (See Mr Grant's evidence at 4914T), so it must have occurred prior to Mr Owen's pre-selection later that year.

⁵⁸ See Mr Grant's evidence in his confidential examination at 1247PT (tendered as Exhibit Z8).

⁵⁹ Mr Grant's evidence at 4919T – 4920T:

When did you first become aware that they were going to be responsible for paying for you and the work you did on the campaign?---As best I can remember it was towards the back end of February, 2011?---Yeah.

And tell us about how you became aware of this?---Um, I had, I had emailed Hugh before to get some further information on how I got paid because um, I was occasionally commuting from Melbourne, I was hiring a car, I had accommodation and other expenses to meet, so I was starting to pay for these and we had an agreement um, that I'd be paid. So um, I was kind of looking for, you know, when this would start to happen. And I think I wrote to him and he wasn't, he wasn't exactly sure of the circumstances ah, that he would pay me um, so I think I, I chased him once or maybe twice before. Um, I might have said to you before, Mr O'Mahoney, I'm, I'm, I am hopeless at looking after my best interests, I don't know how to ask for a pay rise um, things like that, so it's not something that was necessarily something I was comfortable with, but I did ask him a couple of times and it was I think an email exchange towards the end of February um, where all that came to light ...

The subject is invoicing. You say, "Hi, mate," and it's dated 23 February, 2011?---Okay.

Just have a quick read of that. You say, "I'm starting to organise accommodation et cetera for next week, wanted to start invoicing whoever - - -?---Yeah. - - -I invoice. Can you give me the details?" Is a question you asked Mr Thomson?---Yes. You mention that you started working over the phone with Tim in January? --Yes. I presume that's Mr Owen?---Yes. And you say, "We agreed on 12,500 per month for two months and I'm happy to do this in four amounts of 6,250- - -?---Ah hmm. - - -if that works for all concerned?"---Yeah. Is this – does that jog your memory, is this the email that you sent through chasing up Mr Thomson to get going with the paying?---Yeah. And let's just look at his response to you. "Mate, I've got 20K lined up at the moment, two times 10K, and they'll both be happy to pay in a single instalment." Just stopping there, did you know who the "they" were there? ---No. At this point in time you didn't?---Not that I, not that I can recall, Mr O'Mahoney, no.

gave evidence that he had no discussions with Mr Gallacher about payments to him.⁶⁰

- b) The evidence was in fact that it was Mr Thomson who was the one that organised the actual funding. The evidence of Mr Owen was that he asked Mr Thomson to organise those payments,⁶¹ and Mr Thomson then sent an email to Mr Grant on 23 February 2011 at 12:10pm to Mr Grant where he says “got 20K lined up?”⁶²
- c) On presentation of that evidence, it is submitted Mr Thomson tried to disingenuously suggest that before he sent that email it was “possible” that he may have telephoned Mr Gallacher.⁶³ The Commission had all the telephone records and there was no evidence of any telephone communication between Mr Gallacher and Mr Thomson at all at that time.
- d) Mr Grugeon’s evidence was that it was Mr Thomson who told him he could make the payment to Mr Grant, and there would be nothing wrong under the law.⁶⁴
- e) Mr McCloy’s evidence was that it was Mr Thomson who asked him for money to pay “an employee” (which he later learnt was Mr Grant) that was working on Owen’s campaign,⁶⁵ that the invoice from Mr Grant to McCloy Administration was dreamt up by Mr Thomson,⁶⁶ and Mr Gallacher never asked him for any money.⁶⁷

60 Mr Grant’s evidence at T4931/39-T4932/4:

And you weren’t aware from discussions I assume that what was being referred to in respect of Mr Gallacher whether that was something that he would have to deal with with the Head Office or the office of Barry O’Farrell, you did not, that was not something that was said to you, you don’t know how he is going to deal with it? Answer: Correct, I did not know

... and it wasn’t something that you had a conversation with Mr Gallacher about, correct? Answer: (No Audible Reply)

Commissioner: With Mr Gallacher directly, it wasn’t a conversation you had with him? Answer: In relation to these circumstances?

“Correct, correct?” Answer: No

61 See Mr Owen’s evidence at 5059T – T5060.

62 Z19.

63 See Mr Thomson’s statement (Exhibit Z19) at para [184].

64 Mr Grugeon gave evidence at 5283T as follows:

And what did, we’re not holding you to the precise words but what did Mr Thomson ask you?---I can’t recall the precise words, sir, but the proposal was that I could make that payment and that that would not be wrong under the law.

65 McCloy at 5320T:

And, Mr McCloy, was it the case that you agreed that to make a pledge or promise of \$10,000 to the campaign?---In one form thereabout, yes.

Well let’s go to it. What did you say, what did you say in response to the sales pitch put by Hugh Thomson?---Would you donate \$10,000 I said yes.

All right. So he asked for a specific sum?---It was a sum that, as I understand it to pay an employee who was working on the campaign.

All right. Well so he was asking you specifically in respect of payment of a person who was working on the campaign?---Yeah.

Do you remember the name of that person?---I do now Luke Grant.

66 McCloy at 5327T:

58. In the Report the Commission sought to rely upon statements Mr Grant gave during his evidence which went to what he thought was happening. For example, at page 137 of the Report, there is reference to some evidence Mr Grant gave as follows: *"I got a call at one point from Hugh Thomson and I raised it with him and he said ... Mike's sorting something out there"*. The Commission stated in the Report: *"during his [Mr Grant's] evidence at the public inquiry, when Mr Grant was asked why his work agreement had not been reduced to writing, he said that it did not need to be in writing because he trusted those with whom he was dealing: the potential incoming police Minister"* and *"a pretty fine individual as a candidate."* The Commission then also sought to rely upon the evidence that Mr Grant gave when being cross-examined that he recalled having one discussion with Mr Gallacher, outside David Jones, where he was asked by Mr Gallacher *"you're being looked after"*, which Mr Grant took to mean that *"everything is progressing"*.
59. The statement in the Report which says that Mr Grant gave evidence that he got a call at one point from Hugh Thomson and raised it with him, and he said *"Mike is sorting something out there"*, was not evidence of Mr Gallacher having any such involvement. This is apparent when one looks at what was the evidence given by Mr Grant on this issue. It is submitted that the proper reflection of his evidence at the public hearing was that he assumed Mr Gallacher was sorting something out.⁶⁸ The matters the Commission sought to rely upon in the Report actually came from Mr Grant's compulsory examination, of which (as Mr Grant's evidence at the public hearing illustrates) was based on uncertain and vague recollections and not on any direct knowledge on his part of anything. The events at the public hearing concerning this 'evidence' 'played out' in the following way.
60. When Counsel Assisting asked a question of Mr Grant suggesting that there was a direct conversation with Mr Thomson telling Mr Grant that Mr Gallacher was sorting something out for Mr Grant's payment, this resulted in an objection taken by Mr Gallacher's legal representatives. Mr Grant was then taken by Counsel Assisting to his evidence at his confidential examination ("CE"), which then became subsequently tendered. In the CE, this exchange was recorded: *"And what discussions did you have with him [a reference to Owen] or with anyone about pay?"* Answer *"Um, initially he took it away. I understood he took it to Gallacher and after some time he said Gallacher will sort something out and again please forgive me for not being completely accurate or confident that I have recollections but Gallacher and then I*

So it's a legal payment in your mind if this invoice is, by the looks of it, operating under the subterfuge that Mr Grant was providing marketing consulting to McCloy Administration. Is that right?---It's a legal payment from the point of view is that it was a donation to the Liberal Party, the donation came from McCloy Administration Pty Limited.

But it doesn't say donation, does it?---No, sir, it's not my invoice, it's dreamt up by Hugh Thomson.

⁶⁷ McCloy at 5329T:

Michael Gallacher, did you give him any cash?---No.

⁶⁸ See Mr Grant's evidence at 4931T – 4932T:

Question: *"... and it wasn't something that you had a conversation with Mr Gallacher about, correct?"* Answer: *(No Audible Reply)*

Commissioner: *"With Mr Gallacher directly, it wasn't a conversation you had with him?"* Answer: *"In relation to these circumstances?"*

Question: *"Correct, correct?"* Answer: *"No"*

got a call at one point from Hugh Thomson and I raised it with him. He said um, Mike's sorting something out there".⁶⁹

61. It is clear from Mr Grant's evidence that his recollection of this conversation with Mr Thomson or Mr Owen, even at the time he gave information at the CE, was very vague. When he was questioned on this exchange as recorded in the CE at the public hearing, he was asked this question "Do you stand by that evidence? Is that your recollection that that was said?" Answer "Yeah yeah, I don't believe I said something different. We've got to the point what happened first. In the point that happen first I thought I said was Gallacher and then also went to Thomson. I don't see how I contradicted myself" (our emphasis).
62. In further examination by Mr Moses, however, it became clear that Mr Grant was not giving any evidence of any discussion that he had with Mr Gallacher or any knowledge of what involvement Mr Gallacher had at all. This exchange occurred: "So, if you read if you could for me after the words 'I understand you took it to Gallacher' right down the bottom if you could for me just that page 1247." And then the question "Was that something that Mr Thomson said to you something that you understood based on something that Mr Thomson sent you?" Answer "Mr Moses, let me answer in this way and if it is not clear I'm doing my best with memory... three years ago but... the initial conversation was with Mr Owen who took it to Mr Gallacher at some point when I mentioned it to Thomson it was he was throwing the ball to Mr Gallacher is my best recollection of how that happened." Question "And that's something that they told you that is Mr Owen said that he was going to speak to Mr Gallacher about it and said yes, he did and Mr Thomson led you to believe that it was something that Mr Gallacher was going to deal with, correct?" Answer "Yes, correct." Question "And you weren't aware from the discussions I assume that what was being referred to in respect of Mr Gallacher as to whether that was something that he would need to deal with the head office or the office of Barry O'Farrell. You did not. That was not something that was said to you. You don't know how he was going to deal with it." Answer "Correct. I did not know." Question "And it wasn't something that you had a conversation with Mr Gallacher about." Answer "No."
63. And then Mr Grant clarified this further by saying the only conversation he had with Mr Gallacher in relation to these matters was not much of a conversation other than it was outside the now-closed David Jones, and he said "you're being looked after."
64. With respect to the way in which the Report has interpreted the evidence of Mr Grant, it is not evidence of any direct knowledge by Mr Grant of Mr Gallacher being involved in the arrangements, or of Mr Thomson having any discussions with Mr Gallacher on the subject of Mr Grant being paid by prohibited donors.
65. Mr Grant's evidence was not evidence of any knowledge on his part as to what if any involvement Mr Gallacher had in the arrangements that led to him being paid by the developers. It rose no higher that he thought Mr Gallacher would have been involved. He accepted that he had no knowledge of that, and said that he had no idea whether Mr Gallacher was involved or not.⁷⁰ He also said that he did not recall mentioning a

⁶⁹ Exhibit Z8.

⁷⁰ Mr Grant T4931 – see quoted above.

figure to Mr Gallacher.⁷¹ Mr Thomson also gave no evidence of any direct conversation with Mr Gallacher on the subject.

66. As noted above, the effect of Mr Thomson's evidence to implicate Mr Gallacher can be seen only from what he said in his statement that is he did not believe anyone else other than Mr Gallacher would have approached Mr McCloy or Mr Grugeon for the money. That was a very self-serving statement from Mr Thomson.
67. Mr Thomson's belief, in any event, was not even correct. The evidence before the Commission was that at the time that Mr McCloy and Mr Grugeon were approached to give money to Mr Grant, which was on 23 February 2011, Mr Thomson had already met with them on 17 February 2011 and received donations directly from them for the Owen campaign.⁷² The evidence was therefore that only 6 days earlier Mr Thomson had been soliciting money from Mr McCloy and Mr Grugeon. The suggestion that he was therefore not in a position to have approached them to fund payments for Mr Grant was incorrect.
68. The Commission also then sought to rely upon Mr Owen's evidence to suggest that it was not inconsistent with the finding the Commission wanted to make. But again, Mr Owen gave no evidence of any actual knowledge of Mr Gallacher being involved in the arrangements. His recollection was that it was Mr Thomson who was involved.
69. It is submitted that it is important to note what was the evidence of Mr Owen on this subject, and the way in which he came to be questioned by Counsel Assisting on this topic. This puts into some context Mr Gallacher's present complaint about how the Commission had conducted itself, in trying to encourage witnesses to give evidence against Mr Gallacher.
70. An extract from Mr Owen's evidence on the subject with some relevant passages highlighted:

Well, could I just ask you this, do you know for a fact whether Mr Grant was doing any other work for any other candidate in the Hunter?---Not for a fact, no.

Now did you say when Mr Grant asked you about his payment, did you say something to him along these things, that Michael Gallacher will sort something out for you?---Um, that, that could have been the case, I can't particularly remember it but I do remember that um, I was advised, I spoke to Mike Gallacher about um, about Luke coming to work for us and that I was talking to Mike on a couple of occasions as well as Clint McGilvray about the possibility of um, follow-on work for him.

Well, I'm not talking about that, I'm talking about during the campaign itself did you tell Mr Grant that Mr Gallacher would sort something out for him in terms of his pay?---Um, I, I really can't recall, I may have done that um, but I know I spoke to Hugh about it.

The fact that you may have done that, that is speak of Mr Gallacher sorting something out - - -?---Ah hmm.

- - - is that because of conversations you'd had with Mr Gallacher on the subject of Luke Grant?---Um, possibly, possibly.

Well, when you say possibly - - -?---'Cause I know I did speak to him.

- - - I suppose anything's possible but what are the probabilities here? You spoke to

⁷¹ Mr Grant's evidence at 4918T.

⁷² See, e.g., Mr McCloy's evidence at 5319T – 5320T.

Mr Gallacher about Luke Grant did you not?---I did.

And did you ever speak to Mr Gallacher about remunerating Luke Grant? ---Um, I can't remember that but I know I spoke to, I may have done that but I know I spoke to Hugh Thomson about it, if there was a legal way for that to happen or if there was a way that donors could pay.

THE COMMISSIONER: Mr Owen, can I just again clarify something. At the stage at which Mr Grant came on board and you spoke to Mr Gallacher

- - -was it made clear in the context of Mr Grant's wish to be paid, was it made clear at that point that there was or wasn't any money that could be provided by the Liberal Party to fund Mr Grant's contribution to your campaign?---Um, I certainly was under the, under the understanding that the Liberal Party would not be paying for his campaign- - -

Right? but there may be a possibility of again, as I said, as a carrot for him to work follow-on employment in, in some media role should the Government win.

71. As can be seen above, notwithstanding the encouragement put to Mr Owen to agree to the proposition being put to him that he discussed the arrangement with Mr Gallacher, he did not give that evidence beyond agreeing it might have been possible but he had no recollection of that. His clear recollection was however that he discussed it with Mr Thomson.
72. It is submitted that any on any proper review of the evidence there was no basis upon which the Commission could make the finding that Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon the arrangements whereby they would contribute to the payment of Mr Grant to work on the campaign. Both Mr McCloy and Mr Grugeon gave evidence to the contrary, as has been referred to above (see paragraphs [57(d)] and [57(e)] above).

The New Year's Eve fundraiser

73. The Commission found that "*in about November 2010, Mr Gallacher sought a political donation from Mr Sharpe by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or builder would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations.*"⁷³
74. The finding that was made was not one able to be made on the evidence. The Commission spent some time investigating the circumstances behind, and what happened at, the New Year's Eve dinner that Mr Gallacher attended at the Doyle's Restaurant on 31 December 2010. It had a view that because Mr Doyle had sent an email to Mr Sharpe saying it was a "*fundraiser for Mr Gallacher*" that it was in contravention of the electoral funding laws for Mr Sharpe to attend that dinner with his family and to pay to be there. The Commission's view of this matter was flawed and incorrect.
75. Mr Gallacher gave evidence, and indeed produced statements from witnesses (which the Commission did not seek to cross-examine, or seek to refer to when making the finding above) that the function was not a political fundraising function. For example,

⁷³ Page 20 of the Report.

Mr Calabro, who provided a statement, which was tendered as part of Exhibit Z118 (but was not referred to in the Report), stated about his and his wife's attendance at the Doyle's Restaurant for New Year's Eve "*I do not recall it being discussed that it was a fundraising do... It was a social evening with some of Michael and Judy's friends... I recall we ate a lot and we drank a lot and I looked at the fireworks at 9pm and went out and looked at the fireworks at 12 midnight and we had a good night... There were other people in the Restaurant it was busy... Michael's children were there, his son and his daughter and his daughter's boyfriend... There was no formality about the dinner. As far as I can recall there was no suggestion about anything to do with the Liberal party, or fundraising, or anything like that, we just all sat around the table and had a good time... as far as I was concerned this was a function we were attending as Michael's friends with other friends. We were asked to come along as we were going to be in Sydney anyway.*"

76. The finding that the Commission made about the event being a fundraiser was also somewhat inconsistent with the evidence as to how persons who did attend, came to be invited to that function. It was also inconsistent with the evidence that it appears none of the moneys raised from the function found their way to the Liberal Party.
77. It is important therefore to look at actually what was the evidence. Again, the Inspector's attention is drawn to the written submissions made by Mr Gallacher to the Commission (which were not referred to in the Report on this matter).
78. Some of the relevant facts are:
- a) The New Years' Eve function ("**the NYE Function**") was held at the Doyle's Restaurant on New Years' Eve which was open to the public and was packed that night⁷⁴ – those members of the public would have paid in the order of \$500-\$600 per head to be there. Mr Gallacher and his party were just 17 of those people.⁷⁵
 - b) Other than Mr Gallacher's family, in the Gallacher party at the restaurant that night were only 17 people which were made up of Mr Gallacher's personal friends, the Calabros (4 people), and the Circostas (2 people), and then the Sharpe party (11 people – 7 adults, 4 children).
 - c) Other than Peter Doyle's email to Mr Sharpe, no one who attended the fundraiser described the function as a "*fundraiser for Mr Gallacher*". Even when it was first suggested by Mr Doyle (in early 2010) to make his restaurant available, Mr Doyle's evidence was that it was to be for a function to raise money for Restaurant and Caterers ("**RCA**") and the Liberal Party,⁷⁶ with Mr

⁷⁴ Mr Circosta's statement at Z118 page 157 para [23].

⁷⁵ Mr Circosta's statement at Z118 page 151 para [18].

⁷⁶ Mr Doyle's evidence 5507T:

And we've got some information, Mr Doyle, that casting our minds back to New Year's Eve 2010 there was a function held at the, the restaurant at the key. Do you remember that function?---Yes.

And we've got some information that would characterise that function as a Liberal Party fundraiser. Does that accord with your recollection?---Um, was a function for Restaurant and Catering Australia with some proceeds going to the Liberal Party, yes.

Gallacher to be the guest of honour.⁷⁷ As a matter of fact it was not a fundraiser for Mr Gallacher and no money was raised or, it appears, donated to the Liberal Party from it. The Inspector's attention is drawn to the written submissions made by Mr Gallacher to the Commission.

- d) There had been a similar function the year prior sponsored by RCA at Doyles' Restaurant. Initially this function was to be a similar function to that, but the evidence was it did not turn out that way. That was Mr Gallacher's evidence, but the Commission refused to believe him on that evidence. Objectively however this is what occurred. Mr McGilvray who was the person trying initially to find interested persons to attend the function gave evidence that the nature of the function changed mid-way through.⁷⁸ The Report has not referred to that evidence.
- e) Mr Gallacher's evidence was that by October 2010 no one was interested in another New Years' Eve fundraising function and he started to invite people personally to have it as a social function. Those people were the Calabros, Mr Sharpe's family and the Circostas. The Report has not referred to the evidence of the Calabros and the Circostas who were Mr Gallacher's friends attending that night as to how they came to be invited at the same time as Mr Sharpe's family also came to be invited.
- f) There is also no evidence that any of the monies that were paid by the persons attending the function found their way to the Liberal Party. The Circostas actually paid their money direct to Doyle's on the night (\$2,000) and there is no evidence what happened to it. The Calabro and Sharpe parties paid their money into an RCA bank account and there is no evidence of what happened to the monies thereafter; and there was not any evidence that any of it went to the Liberal Party.
- g) The only person who could really say what happened to the moneys was John Hart from RCA. He, although originally on the Commission's witness list, was taken off it and was not called as a witness.

Was it a Liberal Party fundraiser?---It was to raise funds for both the Liberal Party and Restaurant and Catering Australia.

⁷⁷ Mr Doyle's evidence 5509T:

*All right. You just use the expression there guest of honour, just talk us through how that came to be?--
-Um, well, it's, it's a ah, it was something that I said to Mike if you come along bring your wife, you're a star attraction, people want to come to events with potential Ministers as he was going to be and there was a lot of people who wanted to support the Liberal Party, the Labor Party were definitely on the nose and it was an opportunity for not only to him to raise ah, money for the Liberal Party but also for Restaurant and Catering to have a drawcard in his name being there.*

⁷⁸ Mr McGilvray's evidence 5900T:

Well, did he tell you what the purpose of it was?---Um, he, I think initially it was intending to be a fundraiser if I recall but I'm not sure whether it was in the end.

See also:

THE COMMISSIONER: No, I'm just trying to clarify his answer. Mr McGilvray, was it, I just don't know, your answer?---Yeah. I do not know whether it was actually a fundraiser or it was just an event where people paid \$1,000 to go for dinner on New Year's Eve.

79. Mr Gallacher's evidence also was that when he suggested to Mr Doyle to pass on an invite to Mr Sharpe's party he said to have them be charged at cost.⁷⁹ He was not accepted on this evidence. But the fact of the matter is there were 11 people in the Mr Sharpe's party and they only paid for the 7 of them, i.e., \$7,000. There was a discount given because the 4 children were there for free. Therefore the cost split across 11 was about \$636 a head, which, it is submitted, was probably the cost amount, or at least likely similar to what the rest of the public were paying that night to be in Doyles watching the fireworks on New Year's Eve. It perhaps should be noted that the Commission in its report acknowledges that the \$7,000 by the Sharpe party was "*\$1,000 for each adult attendee*".⁸⁰ This statement ignores the cost to Doyles of the 4 children being there. The 4 children obviously occupied seats at tables in the restaurant and ate food, but as is accepted by the Commission, attended free. Therefore there was some discount given to the Sharpe party due at least to the extent of the children's 'free admission'.
80. The Commission relies significantly on the fact that Mr Sharpe ran his payment through the Buildev company accounts as a political payment, to make the adverse findings against Mr Gallacher. However, there was no evidence that Mr Gallacher knew about that internal accounting treatment. And although the Commission relies on the Buildev accounts to suggest that internally within Buildev it was treated as a political payment, Mr Sharpe's evidence was that although this had happened, it should not have happened. He said "*The fairest way was not to do that. It probably was to pay for it personally*" and he described the function as a "*social engagement*" and he said he did not attend the function to lobby "*We had our families there*".⁸¹ That evidence was not referred to in the Report.

⁷⁹ Mr Gallacher at 7034T said:

MR WATSON: What do you mean you understood, understand that now, what was your previous understanding?---My previous understanding was that they would not pay, but they would pay for the cost of the function.

That they would what?---That they would pay for the cost of the function, attending the function.

What do you mean by that?---Simply that- - -

They were going to pay the whole cost of the function?---No, no, that they would pay just the cost of the function, not any profit part of the function.

⁸⁰ The Report at page 124.

⁸¹ Mr Sharpe said at 6115T:

What that was is the New Year's Eve dinner was an investment as it were lobbying Michael Gallacher for Hunter Ports, is that fair enough?---Well, it was a number of things but yeah, you could say that.

Well, I don't want to force those words into your mouth, you said a number of other, of things, what other things?---Oh, well, it was certainly a social engagement, that's what it, you know, that's what it really was um, ah - - -

As social engagement in which you were able to speak to Mr Gallacher about lobbying for Hunter Ports?---Ah, no, we had our families there, it didn't happen like that at all.

All right?---Um, it was just a matter of treating the accounting internally, that's all that is.

Well, but it's not just that. Are you saying that that is a false claim there, that's a wrong and false claim?---Well, no, I'm not, I'm just saying that we had to attribute the um, the costs somewhere within the group and that's where we - - -

And the best way to attribute, the fairest way and the most accurate way was to attribute it, the New Year's Eve dinner, was for lobbying for Hunter 30 Ports, correct?---Um, no, probably the fairest way wasn't to do that, it was probably to pay for it personally um - - -

81. Mr Gallacher was found to have intended to invite Mr Sharpe to this function to raise funds for the Liberal Party. That was not his intention, and the evidence was entirely consistent with that not being his intent.

Criticism of Mr Gallacher's credit

82. Chapter 24 in the Report entitled "*Mr Thomson and Mr Gallacher*" makes an adverse finding is to Mr Gallacher's credit. It says:

In assessing Mr Gallacher's evidence, the Commission has taken into account the matters dealt with in the following chapters. The Commission does not consider Mr Gallacher was always a truthful witness and places no reliance on his evidence unless it is cooperated by other reliance evidence or objective facts.

83. That was a serious statement to have been made publicly and it is submitted to the Inspector that on any proper review of what happened at the public hearing it was not supported by evidence.

84. As can be seen from what is said in Chapter 24 the Commission's statement concerning Mr Gallacher's 'truthfulness' seems to have been formed due to:

- a) Reliance by the Commission on some evidence from Mr Cornwell concerning raffle tickets and Mr Grugeon;
- b) The Commission view that Mr Gallacher's submissions concerning his involvement in the Newcastle campaign being limited was contrary to what the Commission considered the evidence by reference to the fact that Mr Gallacher was actively involved in securing Mr Owen and Mr Cornwell as the nominated candidates for the Liberal Party in the Newcastle and Charleston electorates, and its finding that Mr Gallacher had installed in fundraising activities for the Newcastle campaign; and
- c) The Commission's reliance upon the matters it found relevant to the New Year's Eve fundraiser.

The Inspector's attention is drawn to the written submissions. It is submitted that save in one minor respect the matters referred to in Chapter 24 were not matters of which Mr Gallacher was given notice of prior to the publication of the Report. The notice given was limited to Counsel Assisting suggesting, during cross-examination of Mr Gallacher, that Mr Gallacher's evidence was "*untruthful*" about the New Years' Eve function being a "*family get together*". Of course that was not the effect of Mr Gallacher's evidence. In any event, the evidence on the New Years' Eve function was, in Mr Gallacher's submission, overwhelming that when it happened, and the attendees who were invited, were not invited so as they could make payment as a political donation to the Liberal Party.

85. On the other issue that the Report has raised concerning Mr Gallacher's credit, that is, that he was actively involved in the Newcastle campaign, the Commission has misunderstood Mr Gallacher's submission on that subject and also the evidence.

86. Mr Gallacher never denied that he was actively involved in securing Mr Owen and Mr Cornwell as candidates. The issue that was being discussed in the submissions was that he was not actively involved in their campaigns after they were pre-selected.
87. There was substantial objective evidence to support that position, none of which the Report has made reference to. Again, the Inspector's attention is drawn to the written submissions made by Mr Gallacher to the Commission. Indeed, as noted above, Ms Hodges who actually gave a statement⁸² (tendered by Mr Gallacher's legal representatives) supported the position that Mr Gallacher was not actively involved in the campaign after the pre-selection of Mr Owen. The Commission did not seek to test that evidence. Rather, it just chose to ignore it.
88. It is submitted to the Inspector that on proper review of the evidence it was the fact that Mr Gallacher had very little day-to-day involvement in the Owen and Cornwell campaigns. He was not involved in any fundraising activities and at the highest his alleged involvement in 'fundraising' was that he was lobbying to obtain a Key Seats Package for Newcastle out of Head Office, had told Mr Thomson he would be doing so, and was also referred to in emails Mr Thomson and Mr Tyler prepared as being a person who may be able to have contact with others to secure fundraising.
89. As the evidence has revealed, he had no such contact and no such involvement. The person who was involved in the day-to-day fundraising activities for Mr Owen was of course Mr Thomson.
90. The matters that have been relied upon concerning the New Year's Eve function have already been dealt with above. The evidence does not support findings of untruthfulness on the part of Mr Gallacher concerning those events.
91. On the issue of the Grugeon raffle tickets, in making adverse findings against Mr Gallacher's credit the Report seems to have given emphasis to a suggestion that Mr Gallacher was a person who would evade electoral funding laws because Mr Gallacher had allegedly said to Mr Cornwell he could "*technically sell a few raffle tickets to Mr Grugeon*".

92. The Report says:

Evidence that Mr Gallacher was willing to evade electoral funding laws came from Andrew Cornwell the New South Wales Liberal Party candidate for the seat of Charleston... Andrew Cornwell recounted a conversation that he had with Mr Gallacher about the fundraising with the sale of raffle tickets. Andrew Cornwell told the Commission it was a brief conversation in which Andrew Cornwell explained how he was attempting to raise money by selling raffle tickets to his friends. He said that Mr Gallacher had said to him well you could technically sell a few raffle tickets to Mr Grugeon and no one, that would be an option.

93. In Operation Spicer, the Commission heard evidence over 41 days, hearing evidence from 116 witnesses over 5,000 pages of transcript. The evidence the Commission has relied upon to make an adverse finding against Mr Gallacher's credit is in its totality found over 12 lines of evidence from Mr Cornwell when he first gave evidence

⁸² Exhibit Z118 at pages 142-149.

arising from a leading question from Senior Counsel Assisting. The complete exchange of that evidence is set out below:

Michael Gallacher is somebody you've known for a long time?---A long time.

I think in fact Mr Gallacher may well have been one of the people who encouraged you to run for Charlestown?---Absolutely.

And did you have a conversation with Michael Gallacher about fundraising through the sale of raffle tickets?---Ah, I did.

And could you tell us about that?---Oh, it was a brief conversation um, I was using raffle tickets that I'd sent out to all of my friends across New South Wales and the country and I was telling him that I was doing it and ah, ah, Mike said to me, "Well, you could technically sell a few raffle tickets to Hilton Grugeon and no one, that would be an option."

Well, did you do that?---No.

I raised with you the key seats package. I just want to show you something at page 66 of Exhibit Z3. So sorry, before we do that I'll go back to the conversation about the raffle tickets?---Sure.

Mr Gallacher you say suggested sale to Mr Grugeon?---He did, yes.

Why didn't you take him up on that?---Oh, well, it just, clearly, clearly you can't, he's a prohibited donor so yeah, it's clearly something you couldn't do.⁸³

94. Mr Cornwell apparently provided a statement to the Commission prior to being called to give evidence. Mr Gallacher's legal team called for that statement and it was refused to be provided without Mr Cornwell's consent.⁸⁴ One assumes that there was some evidence in that statement about these events. That statement was never tendered in the public hearing nor made available to the parties.

95. Mr Cornwell was never asked to explain the circumstances in which this conversation took place or when it took place. Mr Grugeon was not asked about this. More importantly, Mr Gallacher was never asked about any alleged conversation with Mr Cornwell when he was cross-examined by Counsel Assisting.

96. The reliance placed on that piece of evidence from Mr Cornwell to make serious adverse credit findings against Mr Gallacher so suggest he was an untruthful witness was completely unjustified and occurred in circumstances where it was not a matter put to Mr Gallacher (in clear denial of procedural fairness).

Further comment on this finding as to Mr Gallacher's credit

97. The findings therefore made to question Mr Gallacher's truthfulness were without foundation or support, and it is submitted were made to avoid the Commission having to deal with Mr Gallacher's evidence that he was not involved in the activities alleged against him.

⁸³ 4872T.

⁸⁴ 4883T.

98. It is submitted that what may have motivated the Commission to make those statements found in Chapter 24 of the Report was to sure up a matter it could point to against Mr Gallacher in circumstances where strong and persuasive arguments could be made that there was no evidence that implicated Mr Gallacher adversely in the activities that were investigated at the public hearing. The Inspector's attention is drawn to the written submissions made by Mr Gallacher to the Commission.
99. Mr Gallacher gave evidence to put into proper context much of the inferential case that the Commission was asserting against him, and to address the innuendo and the suspicions that the Commission sought to make against him.
100. The Commission was not in a position to deal with his evidence other than to say it rejected it. It could only do that by making the adverse credit finding against him. It is submitted it did so without warrant.
101. It needs to be noted that given the delay between the completion of evidence in the public hearing and the publication of the Report there was media speculation as to whether the Commission had evidence to implicate Mr Gallacher, as a journalists themselves were assessing what was in fact the evidence against Mr Gallacher. It is submitted to the Inspector that it would have been apparent to the Commission and its investigation team prior to the publication of the Report, that if the Commission did not make findings adverse to Mr Gallacher there would be criticism levelled at the Commission as to the way in which it dealt with Mr Gallacher during the course of the public hearing including from the media. In that regard, reference is made to, for example, Ms Markson's article in *The Australian* on 21 January 2016, where she said "... ICAC has come under significant criticism for destroying the career of former NSW police minister Michael Gallacher by claiming he "hatched" a corrupt plan to elicit illegal donations from property developers. During the course of ICAC's public inquiry, it produced no evidence to support this claim..."⁸⁵
102. It is submitted that it may be the case that the adverse comments made against Mr Gallacher in the Report were motivated to be included (against the weight of evidence) so that the Commission could seek to avoid what ultimately would have been adverse comments in the media about the fact that the allegations made against Mr Gallacher could not be substantiated.

25 November 2016

⁸⁵ See Tab 8 of the Supporting Material.

Attachment B

THOMPSON ESOLICK
S O L I C I T O R S

Our ref: PCT: GAL1421
Your ref: 2017 C10 01

6 March 2017

Inspector of the Independent Commission Against Corruption
GPO Box 5341
SYDNEY NSW 2001

Attention: Mr John Nicholson SC, Acting Inspector

By email: oiicac_executive@oiicac.nsw.gov.au

Dear Inspector,

**Re: Complaint to the Inspector of the Independent Commission Against
Corruption on behalf of the Honourable Michael Gallacher MLC
Our client: the Honourable Michael Gallacher MLC**

We refer to the complaint provided to your office on 25 November 2016 on behalf of our client, the Honourable Michael Gallacher MLC, relating to matters that arose during the Operation Spicer Public Hearing (“the Complaint”).

Since the Complaint was lodged, it has come to our client’s attention that the NSW Electoral Commission (“NSW EC”) completed its investigation into donations made to NSW Liberal Party candidates in the lead up to the 2011 State election (“the EC Investigation”), and a public statement was issued by the Deputy Chairperson of the NSW EC as to that investigation’s conclusions.

We *enclose* a copy of that statement.

Our client accordingly wishes to supplement the matters he raised in the Complaint, to have the Inspector also take into account the conclusions of the EC Investigation when considering the matters raised in the Complaint.

In that regard, it is respectfully suggested the following should be noted:

Mr Gallacher was a person who became the subject of ICAC’s investigation as being said to be a person involved in the so-called “*Eightbyfive scheme*”, which Counsel Assisting

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stated in his opening address at the commencement of the public hearing was “*a device created to attract and collect prohibited donations*”.¹

Throughout the Public Hearing, ICAC suggested that any arrangement with Patinack Farm and Eightbyfive was a deception, and it was a device to disguise funds being paid from Buildev, which was asserted to be a prohibited donor. It was referred to as “*a corrupt scheme*”² by Counsel Assisting, and asserted to have been “*hatched*” by Mr Gallacher and others.³

As was submitted with the Complaint, it was submitted there was no evidence to support any such allegation, and none was adduced during the Public Hearing. Notwithstanding that, as has already been submitted with the Complaint, the report published following the completion of the Public Hearing made adverse comments against Mr Gallacher stating, amongst other matters, that he was a party to “*an arrangement whereby ... Patinack Farm made payments ... [that] were in fact political donations to help fund the NSW Liberal Party’s 2011 Central Coast election campaign [and] [t]he parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act.*”

Accordingly, the EC Investigation and its conclusions are significant:

Firstly, the investigation was one that involved a review of the evidence before ICAC in the public hearing in Operation Spicer.⁴

Secondly, as the Deputy Chairperson’s statement confirms, the NSW EC received advice (following that investigation, we assume) from the Crown Solicitor’s Office that there was insufficient evidence to prove the “donors” [being, relevantly, a reference to Eightbyfive and Patinack Farm] were property developers according to the *Election, Funding, Expenditure and Disclosures Act 1981 (NSW)* (“**EFED Act**”) definition.

In the Complaint, Mr Gallacher raised serious issues that it was submitted warranted an investigation by the Inspector as to what, if any, evidence ICAC had to make the allegations against him, and also to make adverse and damaging public statements including as to an involvement in the so-called “*Eightbyfive scheme*”.

The NSW EC’s conclusions suggest that there was not evidence before ICAC to have allowed it to even form a suspicion, let alone make findings, that Eightbyfive and/or Patinack Farm were participants in a “*corrupt scheme*” to secure donations from prohibited donors.

The significance of the NSW EC conclusions coming so close to published “findings” made from Operation Spicer, in our submission, does call into question the processes followed by ICAC during its investigation, particularly as they pertained to Mr Gallacher; matters which are central to his Complaint.

Accordingly, in light of the statements made by the NSW EC following its investigation, it is submitted that this is further reason for the Inspector to investigate the matters raised by the Complaint.

¹ Transcript, Public Hearing, 28 April 2014 – page 2655 line 13

² Transcript, Public Hearing, 2 May 2014 – page 3096 line 11ff.

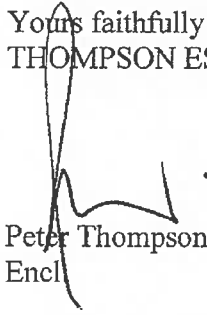
³ As above.

⁴ See Statement by Chairperson, NSW Electoral Commission, 22 September 2016 – pages 1-3.

As indicated in our letter of 25 November 2016, we also remain ready to provide any further information to the Inspector should you need this. We also confirm Arthur Moses SC, who, as you know, is acting for Mr Gallacher, has indicated a willingness to attend and make any further submissions to the Inspector concerning the matters raised in the Complaint, if that would be of assistance to you.

Accordingly, we look forward to hearing from you concerning the status of the Complaint and should you require any further information, please do not hesitate to contact us.

Yours faithfully
THOMPSON ESLICK



Peter Thompson
Encl

Statement

By the Deputy of the Chairperson, NSW Electoral Commission

NSW Electoral Commission concludes investigation into donations made to NSW Liberal Party candidates in the lead up to the 2011 State election

Background

In NSW, donations made to political parties, candidates and other election participants must be disclosed to the NSW Electoral Commission (NSWEC). Since 14 December 2009 property developers have been prohibited from making political donations. Since 1 January 2011 political donations at State elections have been capped.

The ICAC investigated allegations of breaches of the *Election Funding, Expenditure and Disclosures Act 1981* (EFED Act) in relation to political donations made to the NSW Liberal Party in the lead up to the 2011 State election. The allegations included: political donations that were not disclosed as required by the EFED Act; political donations made by prohibited donors such as property developers; political donations that exceeded the cap; as well as donations that were channelled through other entities to evade NSW election campaign financing laws.

Investigation

One matter investigated by the NSWEC was in relation to payments made to the business titled Eightbyfive. For its decision-making concerning that matter the NSWEC was chaired by the Deputy of the Chairperson.

It was suspected that payments had been made by a number of corporations through Eightbyfive to two candidates endorsed by the NSW Liberal Party for the 2011 State general election. The candidates were Christopher Spence and Darren Webber. The donations had not been disclosed and were made by potential property developers.

The payments investigated by the NSWEC were made by the following companies:

- Australian Water Holdings Pty Ltd, between March 2009 and May 2011, for the amount of AU\$183,342.50
- Gazcorp Pty Ltd, between May 201 and March 2011, for the amount of AU\$121,000; and
- Patinack Farm Pty Ltd, between July 2010 and March 2011, for the amount of AU\$66,000.

Determination assessment

To determine whether the payments made by these companies were unlawful political donations the NSWEC needed to establish that:

- Payments made through Eightbyfive to Spence and Webber were political donations made to them as candidates for the 2011 State general election; and
- Payments were made by corporations that were property developers.

Further information

In its report in relation to Operation Spicer¹, the ICAC found that Mr Timothy Koelma registered the business named Eightbyfive in March 2009. Eightbyfive operated until March 2011. It was alleged that Christopher Hartcher (the then member for Terrigal) was involved in the creation of Eightbyfive and its initial agreement with Australian Water Holdings and was subsequently involved in the creation of agreements with Gazcorp and Patinack Farm. Mr Hartcher was updated on the activities of Eightbyfive and was actively involved in those activities concerning Australian Water Holdings, Gazcorp and Patinack Farm.

Following the State election in March 2011, Mr Koelma was employed as a senior policy advisor for Mr Hartcher who was returned at the election as the member for Terrigal.

Eightbyfive entered into agreements with each of a series of entities whereby each entity made regular payments to Eightbyfive, purportedly for the provision of media, public relations and other services and advice. Payments received by Eightbyfive were principally from Australian Water Holdings, Gazcorp and Patinack Farm. In its report, the ICAC noted that Timothy Koelma and representatives of these companies could not produce any documents in relation to the agreements and were not able to substantiate claims by way of documentary evidence that the payments were made for services rendered.

Conclusion

The NSWEC received advice from the Crown Solicitor's Office that there was, in this instance, insufficient evidence to prove that:

- These donors were property developers according to the EFED Act definition; and
- Payments to Spence and Webber were political donations as defined by the EFED Act.

¹ Independent Commission Against Corruption NSW, *Investigation into NSW Liberal Party electoral funding for the 2011 State election campaign and other matters* (2016) www.icac.nsw.gov.au/docman/investigations/reports/4865-investigation-into-nsw-liberal-party-electoral-funding-for-the-2011-state-election-campaign-and-other-matters-operation-spicer/file.

ABOUT THE NSW ELECTORAL COMMISSION

In December 2014, the three member Electoral Commission was constituted. It is separate to the agency led by the Electoral Commissioner. The Commission is an independent, statutory authority. It approves public funding to the political parties and others and enforces the provisions of three NSW Acts. These provisions govern electoral funding, expenditure and disclosures, the conduct of State elections and the lobbying of government officials. The Commission's Chairperson is the Hon Keith Mason AC QC, a former President of the NSW Court of Appeal (1997 to 2008). The Deputy of the Commission's Chairperson is Adjunct Professor Joseph Campbell, a former judge of the NSW Court of Appeal and the Supreme Court of New South Wales (2001 to 2012). Information about this independent Commission's work can view viewed at:

www.elections.nsw.gov.au/about_us/work_of_the_commission.

More information about funding and disclosure laws is available at: www.elections.nsw.gov.au/fd

Attachment C



Office of the Inspector of the
Independent Commission Against Corruption

FILE COPY

5 September 2017

Our ref: C10 2017 06
Your ref: PCT:GAL1421

Mr Peter Thompson
Thompson Eslick Solicitors
65 York Street
Sydney NSW 2000

Attn: Mr Peter Thompson

By email: pct@thompsoneslick.com.au

Dear Sirs

RE: The Hon Michael Gallacher MLC- Complaint against ICAC

I refer to your letters dated 25 November 2016, 6 March 2017 and 11 April 2017 to Mr John Nicholson SC, then Acting Inspector of the Independent Commission Against Corruption (“the ICAC”).

I have been appointed Inspector of the ICAC effective 1 July 2017 and have reviewed each of the letters referred to, as well as the Inspectorate’s file in respect of this matter. I set out below several queries I have in relation to the matters raised in the letters referred to and in the attached material. I appreciate that to some extent these matters are referred to in paragraph 1(a)-(c) of your 25 November 2016 letter but I require further particularity.

In responding to my queries, I ask you to bear in mind that my functions and powers as Inspector are limited to those stated in Part 5A of the ICAC Act. Specifically, I can only deal with (by reports and recommendations to Parliament) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or officers of the ICAC (section 57B(1)(b)) and conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or officers of the ICAC (section 57B(1)(c)). Please note the definition of “maladministration” appearing in section 57B of the ICAC Act.



Office of the Inspector of the
Independent Commission Against Corruption

There are also the following constraints on my powers as Inspector:

- (a) I am not an appeal body, that is, I have no power to reverse or change any decision of the ICAC, nor to find that any such decision was wrong or factually incorrect except in so far as such a power may be relevant to my section 57B functions;
- (b) while I have extensive investigative powers under section 57C of the ICAC Act, such powers can only be exercised in support of the functions set out in section 57B. I am unable to carry out a general investigation into the operations of the ICAC or into the way it conducted any particular investigation, as some parts of your letter dated 25 November 2016 seem to request. Before I can exercise my section 57C powers, I need to come to at least a preliminary view that the conduct complained of is capable of amounting to the types of misconduct referred to in sub-sections 57B(1)(b) and (c);
- (c) counsel assisting in an ICAC inquiry is not an “officer of the Commission” within the meaning of the ICAC Act and, therefore, I have no power to deal directly with allegations of misconduct by counsel. It is possible that a serious failure by a Commissioner (who is an officer of the Commission) or by other ICAC staff to supervise or control counsel who engages in misconduct or impropriety might fall within the provisions I mention above;
- (d) in so far as Mr Gallacher’s complaint relates to the conduct of Mr Watson (and obviously much of it does) I, therefore, have no power to deal with it, unless some form of impropriety etc on behalf of a person who is an officer of the Commission is involved.

Bearing in mind these matters, would you let me know the following:

1. please confirm that Mr Gallacher wishes me to proceed to determine his complaint.



Office of the Inspector of the
Independent Commission Against Corruption

2. I assume from paragraph 24 of the submission of counsel (Messrs Moses SC and Gall) attached to your letter dated 25 November 2016, that Mr Gallacher's specific complaint in relation to this aspect of the matter is that counsel assisting, Mr Watson SC, made an allegation of serious misconduct against him on 2 May 2014 which was not supported by material in the possession of the ICAC at the time. Please confirm that to be the case. Please also state the basis upon which it is asserted such conduct falls within section 57B of the ICAC Act, bearing in mind that Mr Watson was not an officer of the ICAC.

3. In relation to the allegation set out in paragraph 40 of counsels' submission referred to:
 - (i) I repeat the matters set out in paragraph (b) above;

 - (ii) Bearing this in mind, in respect of the matters raised in paragraph 40, please provide a concise statement of the act or acts on the part of the ICAC, or any officer thereof, which your client asserts amount to abuse of power, impropriety or other forms of misconduct or maladministration within the meaning of sub-sections 57(1)(b) & (c). I am aware that there are matters stated in paragraphs 25-40 of counsel's submission which could amount to such matters but it is necessary for me to know precisely how your client puts the allegations he makes.

 - (iii) Please direct your response particularly to the bases upon which it is alleged that the matters set out in the subparagraphs of paragraph 40 amount to abuse of power, impropriety or other forms of misconduct or maladministration within the meaning of section 57B.



Office of the Inspector of the
Independent Commission Against Corruption

4. In relation to the allegation set out in paragraph 50 of counsels' submission:
- (i) I repeat my comments in sub-paragraphs (c)(i) above. Please provide the information requested in sub-paragraphs (c)(ii) & (iii) above in respect of the matters asserted in paragraph 50 of counsels' submission.

 - (ii) As to the matters mentioned in paragraph 50(e), I have some difficulty seeing how they give rise to a conflict of interest as that phrase is commonly understood or constitute conduct of the sort referred to in sub-sections 57B(1)(b) & (c). If this allegation is pressed, please explain the basis upon which it is said these matters amount to a conflict of interest and fall within the provisions I mention.

I look forward to hearing from you no later than 22 September 2017. If that date causes any difficulty, please let me know.

On receipt of your response, I will provide it and your letters referred to and the attached material thereto to the ICAC. See section 79A of the ICAC Act.

Yours sincerely,

B. R. McClintock

Bruce McClintock SC
Inspector: ICAC

Attachment D

THOMPSON ESCLICK
S O L I C I T O R S

Our ref: PCT: GAL1421
Your ref: C10 2017 06

9 October 2017

Mr Bruce McClintock SC
Inspector of the Independent Commission Against Corruption
GPO Box 5341
SYDNEY NSW 2001

By email: oiicac_executive@oiicac.nsw.gov.au

Dear Inspector,

**Re: Complaint to the Inspector of the Independent Commission Against
Corruption on behalf of Mr Michael Gallacher ("Complaint")
Our client: Mr Michael Gallacher**

Thank you for granting us an extension of time to respond to your letter of 5 September 2017 ("**your letter**"). That is greatly appreciated.

We have now had the opportunity to obtain instructions from our client. We are instructed:

1. Our client, whilst maintaining the concerns that were raised the subject of the Complaint, has noted the matters you have raised about jurisdiction.
2. Our client does feel quite strongly about the manner in which he came to be treated by the Commission, and how the investigation proceeded against him, and how in the outcome, although there appeared to be no evidence to support the allegations raised against him, no comment was made by the Commissioner to address that, either at any time during the Commission hearing or when the Report came to be issued. He believes there is jurisdiction for you to investigate some or all of these matters he has raised with you.
3. Our client, whilst noting the above, as you may be aware, is no longer a sitting Member of Parliament and has secured a senior position in the private sector and can see that to proceed with the matter will involve further legal work with the preparation of submissions with associated costs and the utility of that may not warrant that expense or time, including your time to conduct whatever investigation you are able to do within your jurisdiction.

Level 7, 65 York Street, Sydney NSW 2000
PO BOX 185, Queen Victoria Building, SYDNEY NSW 1230
Telephone (02) 9279 2822 Facsimile (02) 9279 4417
ABN 65 202 813 289

Liability limited by a scheme approved under Professional Standards Legislation

In light of these matters, and whilst our client is not wishing to resile from the matters raised in the Complaint, we are instructed that he has decided for reasons of expediency and utility and costs not to proceed further with the Complaint.

Thank you for your letter and please do not hesitate to contact the writer should you have any queries.

Yours faithfully
THOMPSON ESLICK



Peter Thompson

Attachment E

FILE COPY

OFFICE OF THE
INSPECTOR OF ICAC

17 OCT 2017

RECEIVED

9 October 2017

Mr Bruce McClintock SC
Inspector of the Independent Commission Against Corruption
GPO Box 5341
SYDNEY NSW 2001

By email: oiicac_executive@oiicac.nsw.gov.au

Dear Inspector,

Re: Complaint to the Inspector of the Independent Commission Against Corruption

I refer to my solicitors' letter sent to you advising of the instructions that I have now given to the solicitors not to proceed with the complaint further, having regard to the time that has elapsed since I first lodged my complaint, the ongoing impact this matter has had on members of my family and the now imminent additional costs of making further submissions.

Whilst I have given these instructions to my solicitors, I do not wish it suggested though that I am moving away from the complaint I made. It is just with the elapse of time since I first lodged that complaint (nearly 12 months ago) and to hear it is only now being looked at leads me to believe little is going to be achieved by it and all it will serve is that my family will be put under further stress and I to further costs. Given that there has been this delay, I believe the time has come for myself and my family to put these unfortunate events behind us and try and move forward with our lives and not have these events continue to dominate us for another indefinite period.

Whilst I am not wishing to direct any of the following comments to you personally as I appreciate you have only recently been appointed Inspector, I did want to point out for the record that whilst I have instructed my solicitors not to pursue the complaint because of the matters I have just detailed, I do not want it to be left unsaid that I consider it deplorable as to the manner in which I came to be treated by the Commission.

As you would know, a very serious allegation of corruption was made publicly against me back in May 2014 (some 3 ½ years ago now) which has never been withdrawn, although it clearly should have been. No evidence was adduced to support the allegation when made or at any time thereafter. Although my Counsel at the time demanded to see the evidence on which it was based, the Commissioner refused to order that to occur and to this day, that evidence has never surfaced and I am firmly of the belief that it never existed.

Those comments made by Counsel Assisting in May 2014 which the Commission allowed to be made and to not be withdrawn despite the requests from my legal team for that to occur, destroyed my political career and devastated my family.

I appreciate that you have raised issues with my solicitors about what jurisdiction you may have to now investigate these matters, but I do believe these are matters that should be

investigated without me having to be put further legal cost and time to justify the complaints I raised nearly 12 months ago. - I appreciate you were not the inspector at the time so I do reiterate these are not comments directed at you.

The points I would like to make, however, and I appreciate that these may be misdirected in a letter to you, but nevertheless, I wish to make them, are as follows:

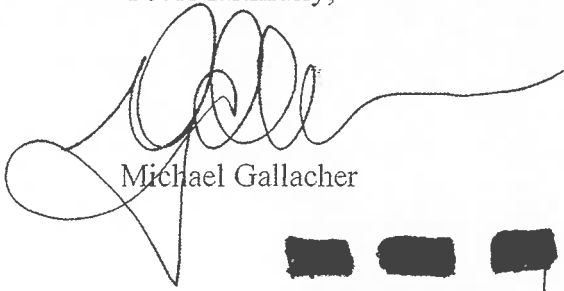
1. Not only did the allegations, when made in May 2014, cause my immediate resignation and led to a substantial loss of salary, I was also forced to stand aside from the Government and sit as an 'independent' in the New South Wales State Parliament. Imagine if you can the humiliation of having to sit like a 'leper' for nearly 2 ½ years on the independent benches of the Legislative Council waiting to be cleared of allegations of corruption by the Commission.
2. It is terribly disappointing that despite an acceptance, following the High Court decision in *ICAC v Cunneen* and the subsequent review by yourself and former High Court Chief Justice Gleeson QC, that changes were needed and subsequently made to how the Commission conducts its investigations in the future, no such acceptance has appeared to occur with the clear injustices of the past being expeditiously addressed.
3. Despite the numerous opportunities the Commission had to publicly withdraw the allegations of corruption against me, it never did. As you can appreciate, once the 'genie was out of the bottle', the Commission was never going to admit it was wrong. When the final report was eventually released, I was found by the Commission to have acted with the 'intent' to avoid electoral funding laws and that it believed I was not a truthful witness. The evidence nowhere supported such statements being made.
4. The Commission provided no substantiation of either of these findings in the report, writing it more really as an observation. Nor did it propose any further action against me. At no stage was the serious allegation of corruption publicly removed and the 'dog whistle' manner in which the Commission's Operation Spicer couched its references to me guaranteed I would not return to Government.
5. Surely, this is the very practice by the Commission that both the High Court and the subsequent review were formed to address.
6. As you may be aware, I have recently left Parliament and have taken on a senior position in the private sector. One could easily be led to believe my transition is proof of my vindication in the public eye. Sadly, one needs to merely investigate the Commission based references that exist in media online and through social media to see these unsubstantiated claims will forever remain unresolved.
7. The trauma of being accused of corrupt behaviour without any prior warning by Counsel Assisting while I was conducting an attestation class inspection as Minister for Police on the parade ground of the New South Wales Police Academy in Goulburn devastated both me and my family. Four weeks later, my wife was diagnosed with a serious illness and weeks later a further member of my

family sought the assistance of a medical professional due to the impact these events had.

8. Please understand, to not proceed with this complaint is one of the toughest decisions I have ever had to make. We have, for nearly 12 months, lived in hope that I would shortly receive notification the complaint investigation was underway. To learn that I have yet to prove whether there are grounds for any investigation to commence reinforces the lack of utility in continuing with this matter. I am afraid this delay has completely wiped out the confidence I have instilled in my family that justice would be done and my comprehensive complaint would set the record straight. I have also read your letter as you 'informing me' that in reality, much of my complaint will not be the subject of investigation at all.

I wish you well in your new role for the future but I would ask you spare a thought for those who have paid a terrible price due to an organisation losing it way.

Yours faithfully,



Michael Gallacher

[REDACTED]
[REDACTED] NSW
[REDACTED]

Attachment F



Office of the Inspector of the
Independent Commission Against Corruption

FILE COPY

8 November 2017

Our Ref: C10 2017 08

Mr Michael Gallacher,
C/- P.O. Box 107
Terrigal NSW 2260

By mail

Dear Sir

Thank you for your letter dated 9 October 2017 which my office received on 17 October 2017. I regret the delay in replying but other commitments prevented me doing so.

First, it is a matter of considerable regret to me that your complaint had not been dealt with by the time of my appointment as Inspector on 1 July 2017. Unfortunately, there were a considerable number of other complaints in the same position as yours. I am attempting to clear the backlog as quickly as I can.

Secondly, your numbered paragraph 8 accurately suggests to me that you may have misunderstood my letter dated 5 September 2017. I assume when you say “much of my complaint will not be the subject of investigation at all”, that you are referring to what I said about counsel assisting not being an officer of ICAC and my inability to deal directly with your allegations against Mr. Watson. That is so, but if a Commissioner permitted counsel assisting to engage in misconduct that would itself be misconduct on the part of the Commission and I would have power to deal with it. While I have formed no views whatever at this stage, if I came to the view, after considering all the material, that counsel assisting engaged in impropriety, I would express that view in my report. In fact, it would be necessary to do so if I were to make a finding against the ICAC.

Thirdly, your assertion that you “have yet to prove whether there are grounds for any investigation” does not accurately reflect the meaning of my letter dated 5 September 2017. I felt it necessary to give everyone who had made a complaint which had not been dealt with when I took office as Inspector, the opportunity to decide whether they wished me to proceed. Many complaints had been outstanding for even longer periods than yours and I realized life may well have moved on for some of the complainants. The second reason was to obtain more details of your complaint. I did not intend to suggest that there were no grounds for investigation. In my view, there are.

Fourthly, I have power to deal with matters “on my own initiative”. I am considering using that power to investigate the matters referred to as “The First Matter” in the submissions of Messrs. Moses and Gall made on your behalf. Put shortly, that involves the propriety of the conduct of Mr. Watson in putting the question he did to Mr. Williams and the consequent responsibility of the Commission for that conduct, its failure to support the question with evidence and the failure to withdraw the allegations made against you by Mr. Watson.

I would prefer, however, to do so in response to a complaint from you and would ask you to consider reviving your complaint to that extent.

I am also aware of the concerns you express in your letter about further publicity and the effect on you and your family if I were to provide a report to Parliament on these matters. If you positively did not wish me to deal with this matter on my own initiative and if you did not wish to revive your complaint, I would take your wishes into account in deciding what course I should follow.

If I were to proceed, the first steps would be for me to give the ICAC an opportunity to respond to the allegations. I am required to do so by section 79A(3) of the ICAC Act. I might then need to obtain a response from you. Realistically, that might mean obtaining Mr Moses’ views. I appreciate that might involve you in further costs, but I hope they would be small.

Would you consider these matters and let me know whether you wish to revive your complaint (to the extent indicated) and, if you do not wish to do so, whether you object to me acting on my own initiative to investigate “The First Matter”?

I look forward to hearing from you.

Yours sincerely,

B. R. McClintock


Bruce McClintock SC
Inspector ICAC

Attachment G

Hand Delivered

20/11/17

FILE COPY

Your Reference : C10 2017 08

20 November 2017

Office of the Inspector of the
Independent Commission Against Corruption.
SYDNEY. NSW 2000

Delivered by Hand

Dear Inspector

Thank you for your letter dated 8 November 2017. Please do not regret the delay in responding as it was welcomed with relief knowing that my correspondence had been considered.

I have discussed the matters raised in your letter extensively with my family and as a result I do not object to you acting on your own initiative to investigate the 'First Matter'.

I have conferred with Mr Moses SC who has agreed to provide you with whatever assistance is required.

Could you please send any further queries to my Solicitors Thompson Eslick, PO Box 185 Queen Victoria Building, Sydney, NSW 1230?

Again, thank you.



Honourable Michael Gallacher

Attachment H



Office of the Inspector of the
Independent Commission Against Corruption

COPY

22 November 2017

Our ref: CR 2018 09

The Hon Peter Hall QC
Chief Commissioner
Independent Commission Against Corruption
GPO Box 500
SYDNEY NSW 2000

By email: rjones@icac.nsw.gov.au

Dear Chief Commissioner

On 25 November 2016, my predecessor, the Acting Inspector Mr John Nicholson SC received a complaint concerning the Commission submitted on behalf of Mr Gallacher, former Minister of Police and Emergency Services. That complaint raised issues with a number of aspects of the conduct of Operation Spicer. Subsequently, Mr Gallacher indicated that he wished to withdraw his complaint. I have, however, determined, with his agreement, to investigate one aspect of it of my own initiative under s.57B(2) of the ICAC Act, as well as s.57B(1)(a) and (d). While I am acting on my own initiative, I have taken into account the matters raised by Mr Gallacher and his counsel in their complaint to Mr Nicholson. I will enclose that complaint and the correspondence in relation to it. Please note in relation to the letter dated 25 November 2016 and the enclosed submission from Thomson Eslick that I am only considering what the letters refers to as “The First Matter”, not the Second or third Matters.

The issue arises out of the examination of a witness Darren Williams by counsel assisting, Mr Geoffrey Watson SC, on 2 May 2014. The passage in question appears at pp 3095.24-3096.13 of the Spicer transcript:

“ You see just so it’s clear and I want you to know Mr Williams, we don’t go off half-copped [sic], we wouldn’t put something as serious to you as this without knowing plenty of stuff. The truth is you had a close long-standing connection with the shadow Minister Mr Gallacher – Yes.

Q. It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the eightbyfive business, correct? – No.

Q. Well I can tell you by the end of this you're going to regret having giving [sic] that answer, Mr Williams At transcript 3104-3106, the then Commissioner indicated in response to counsel Mr Gallacher, Mr Moses SC, that the information upon which the allegations put to Mr Williams by Mr Watson had come into the possession of the Commission on the previous day.

Mr Gallacher's counsel say they attempted on a number of occasions to obtain the information upon which Mr Watson's allegation was based. They claim such information was not provided by the ICAC. At transcript 3367-3368 in response to such a request Mr Watson stated "*We have sworn testimony from a reliable person which implicates Michael Gallacher (3376.20)*".

Mr Gallacher's counsel assert:

- "13. It is Mr Gallacher's concern, now that the public hearing has completed and the Operation Spicer report published, that the serious allegations have not been withdrawn or otherwise addressed and there is still no indication what this evidence was. Contrary to the Commissioner's statement quoted above, such evidence was not brought forward or put before the Commission in the public hearing, let alone any findings exonerating Mr Gallacher.*
- 14. In particular, there has not been any disclosure of what was the 'sworn testimony' or the 'plenty of stuff' said to have supported the allegations made on 2 May 2014, leading to his resignation as a Minister of the Crown. It is his concern that in fact there may have been no such evidence."*

I would appreciate it if you could provide me with the following information:

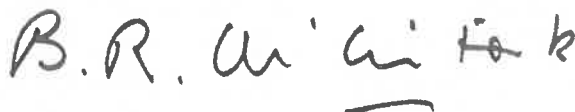
1. Could I have a copy of Exhibit S48 upon which Mr Watson was apparently examining Mr Williams?
2. Please state the information in the possession of the ICAC which formed the basis for Mr Watson's question. To the extent that information is in writing, would you please provide me a copy of the relevant documents.
3. To what was Mr Watson referring by the following words:
 - (a) '*plenty of stuff*'
 - (b) '*sworn testimony*'?I would appreciate a copy of the testimony in question and any documents which might record the information referred to.
4. Was any of the material referred to in paragraphs 2 and 3 above led in evidence during the Spicer hearings? Is the assertion made by Mr Gallacher's counsel and quoted in paragraph 13 above that 'such evidence was not brought forward or put before the Commission in the public hearing' accurate? If that assertion is not accurate would you please provide me with the relevant references to the evidence?

5. Is Mr Gallacher's counsel correct in asserting in [13] quoted above that:
 - a. The Operation Spicer report does not address the allegation put to Mr Williams by Mr Watson.
 - b. The allegation has not been withdrawn.
6. Was the then Commissioner either generally or in specific terms aware of the following:
 - a. That Mr Watson proposed to put to Mr Williams the question quoted above
 - b. Mr Watson's basis for the question.
7. Did or does the Commission have any concerns concerning the propriety of Mr Watson's conduct in putting the question and making the comment which followed? If so, what were those concerns and what steps, if any, did the Commission take to address them?
8. On the assumption that counsel's assertion that the allegation was not followed up by evidence nor the subject of findings in the Operation Spicer report, did the Commission give any consideration to withdrawing the allegation made by Mr Watson? On the same assumption, does the Commission have any concern about the fairness of allowing such an allegation to remain on the record in the circumstances?
9. Speaking generally, does the Commission have any mechanisms to address issues which may arise when an allegation of serious misconduct is put to a witness publicly but not ultimately substantiated?

I should add that while counsel assisting is not an officer of the Commission and therefore is not directly subject to my jurisdiction, I consider that any failure in exercising appropriate control over the conduct of counsel assisting or a failure to address any inappropriate conduct on his part by the ICAC may fall within s.57B of the Act.

I look forward to hearing from you.

Yours sincerely,

Handwritten signature in black ink, appearing to read "B.R. McClintock". The signature is written in a cursive style with a horizontal line under the name.

Bruce McClintock SC
Inspector of the Independent Commission against Corruption

| THOMPSON ESCLICK |
S O L I C I T O R S

Our ref: PCT: GAL1421

25 November 2016

Inspector of the Independent Commission Against Corruption
PO Box 5341
SYDNEY NSW 2001

Attention: Mr John Nicholson SC, Acting Inspector

By email: oiicac_executive@oiicac.nsw.gov.au
Original and Supporting Material following by Hand

Dear Inspector,

**Re: Complaint to the Inspector of the Independent Commission Against
Corruption on behalf of the Honourable Michael Gallacher MLC**

We act for the Honourable Michael Gallacher MLC.

This letter is a formal complaint to you as the Inspector, made on behalf of our client Mr Gallacher, concerning the conduct of the Independent Commission Against Corruption (“ICAC”) in relation to its dealings pertaining to Mr Gallacher in the ICAC investigation code-named “Operation Spicer”.

1. We are instructed to write to you as the Inspector on behalf of Mr Gallacher and respectfully request that you exercise your jurisdiction under Part 5A of the *Independent Commission Against Corruption Act 1988* (NSW) to conduct an investigation into the following matters:
 - a) Whether the Commission had in its (or its officers) possession, on or before 2 May 2014, evidence which supported the allegation made against Mr Gallacher by Counsel Assisting in the Commission’s public hearing that day and, if so, what that evidence was (“**the First Matter**”).
 - b) What steps were taken by the Commission and its officers during the adjournment of the public hearing in and from May 2014 including:
 - i. what decisions were made, or instructions given, by the Commission or by or to the its officers in relation to seeking to obtain evidence that

Level 7, 65 York Street, Sydney NSW 2000
PO BOX 185, Queen Victoria Building, SYDNEY NSW 1230
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- sought to implicate Mr Gallacher in relation to alleged illegal and corrupt conduct;
- ii. what were witnesses told by investigators in relation to Mr Gallacher when statements were sought from them;
 - iii. whether witnesses were offered inducements or promises to give evidence adverse to Mr Gallacher and, if so, which witnesses and what was the content of those inducements or promises;
 - iv. the circumstances in which Mr Thomson came to be provided with an inducement, and the content of that inducement, to sign the statement which made adverse comments against Mr Gallacher;
 - v. whether the statement Mr Thomson signed following the giving of that inducement was consistent with prior information he had given to the Commission relevant to Mr Gallacher; and
 - vi. whether the Commission (or its officers) had in its possession, prior to the handing down of its report on Operation Spicer ("**the Report**"), information which was exculpatory of Mr Gallacher or would have been of assistance to Mr Gallacher's legal team in cross-examining Mr Thomson or making written submissions to the Commission ("**the Second Matter**").
- c) Whether the adverse findings made against Mr Gallacher by the Commissioner in the Report were improperly made or in excess of the Commission's jurisdiction, including by reason of:
- i. an absence of a reasonable basis in the material before the Commission for making those the findings;
 - ii. an absence of probative evidence sufficient to support the findings;
 - iii. the findings being supported by irrational and illogical reasoning;
 - iv. a denial of procedural fairness including by the Commission (or its officers) not providing relevant material to Mr Gallacher's legal representatives; and
 - v. the existence of a conflict of interest on the part of the Commission, including officers of the Commission, including because they had an interest in seeking to avoid criticism (particularly public criticism) against themselves or their employer (the Commission) for serious allegations having been made against Mr Gallacher on 2 May 2014 which led to his resignation as a Minister of the Crown were subsequently not pursued in the hearing, not the subject of any evidence being tendered let alone disclosed (despite repeated requests), no retraction of the allegation by the Commission, and no findings made exonerating Mr Gallagher of the allegation. This conflict of interest may

have contributed to the manner in which evidence was collected against Mr Gallacher after 2 May 2014 (**"the Third Matter"**).

Enclosed with this letter is:

1. a submission document from Counsel acting for Mr Gallacher;
2. an addendum document containing submissions relating to the adverse findings made against Mr Gallacher in the Report; and
3. a folder of supporting documents which is indexed (**"Supporting Material"**).

Yours faithfully
THOMPSON ESLICK



Peter Thompson
Encl.

**COMPLAINT TO THE INSPECTOR
OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION
ON BEHALF OF
THE HONOURABLE MICHAEL GALLACHER MLC**

SUBMISSIONS

There are three matters upon which Mr Gallacher complains to the Inspector.

The First Matter: whether the Commission had in its (or its officers) possession, on or before 2 May 2014, evidence which supported the allegation made against Mr Gallacher by Counsel Assisting in the Commission's public hearing that day and, if so, what that evidence was.

1. Mr Gallacher was the subject of a very serious allegation made against him during the public hearing of Operation Spicer. The allegation was that Mr Gallacher "*hatched a corrupt scheme to make donations to the Liberal Party using the Eightbyfive business*" (the relevant portion of the transcript is extracted in paragraph 4 below).
2. Following the publication of the Report it appears that there was no basis for making such a serious allegation. Not only does the Report make no mention of the serious allegation but the evidence that was said to support it being made at the time has never been adduced before the Commission or provided to Mr Gallacher's legal representatives. It is Mr Gallacher's concern, now that the public hearing has completed and the Report been published, that there may have been no such evidence or the evidence in the possession of the Commission at the time fell short of supporting such a serious allegation.
3. The circumstances in which this allegation was made against Mr Gallacher were unusual. The allegation was not made at the commencement of the public hearing as part of any opening statement, but by Senior Counsel Assisting during the course of the examination of a witness, Darren Williams, on the fifth day of the public hearing in Operation Spicer (2 May 2014).
4. The transcript records the exchange as follows

Question "*You see just so it's clear and I want you to know, Mr Williams, we don't go off half copped [sic], we wouldn't put something as serious to you as this without knowing plenty of stuff. The truth is you had a close longstanding personal connection with the Shadow Minister Mike Mr Gallacher?*"

Answer "Yes".

Question "*It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the EightbyFive business, correct?*"

Answer "No".

Counsel Assisting then made the statement:

*"Well can I tell you by the end of this you're going to regret having giving [sic] that answer, Mr Williams."*¹

5. As can be seen from the opening remarks to the first question in the above exchange, Senior Counsel was, at the time of making the allegation, at pains to suggest that this allegation was not made idly and was in fact supported by material or information in the possession of the Commission. It is to be noted that there were no findings of corruption by the Commission in its report.
6. Furthermore, this serious allegation appears to have been made with the acquiescence and authority of the Commission. There was an exchange that occurred on 2 May 2014 between Senior Counsel for Mr Gallacher, Mr Arthur Moses SC and the Commissioner about the allegation and the Commissioner disclosed that she had been informed at 7:00pm the night before of material that was not previously available to the Commission which allowed Counsel Assisting to make the allegation.²
7. At the time the allegation was made it was immediately and extensively reported. The making of the allegation came to the attention of Mr Gallacher (who was then the Minister for Police and Emergency Services) when addressing cadets at the Police Academy in Goulburn. As a consequence of the allegation having been made, Mr Gallacher immediately resigned as Minister for Police and Emergency Services (and also as the Leader of the Government in the Legislative Council, Vice-President of the Executive Council, Minister for Industrial Relations, and Minister for the Central Coast) in order to ensure that the Police Force, Emergency Services and the Government's reputation and functioning were not adversely impacted upon whilst the Inquiry proceeded. The resignation of Mr Gallacher had serious personal and professional consequences to him.
8. Following the allegation being made, there were repeated requests made by Mr Gallacher's legal representatives, including from Senior Counsel, during the course of the public hearing, and through correspondence between Mr Gallacher's solicitors and the Commission's lawyers, for the information or evidence that the Commission had relevant to that serious allegation. No evidence or information in that regard has ever been provided to Mr Gallacher or his legal representatives. On the contrary, during the public hearing requests for the allegation to be withdrawn were refused.
9. Extracts of the transcript from the public hearing where these requests were made and the Commission's response to them, together with the letters written by Mr Gallacher's legal representatives to the Commission's lawyers and the Commission's lawyers' response to those letters are included in the **Supporting Material** at Tabs 1 and 2.
10. In response to a request made during the public hearing on 6 May 2014 for *"the evidence that the Commission had in it's [sic] possession at the time it made the*

¹ 3096T (2 May 2014).

² 3105-3106T.

*allegation*³ Counsel Assisting stated “we have sworn testimony from a reliable person which implicates Michael Gallacher”⁴.

11. The alleged “*sworn testimony from a reliable person*” was never produced or tendered at the public hearing. Mr Gallacher’s legal team were, at all times, denied access to it and remain unaware of what that “*sworn testimony*” was. As noted above, if it existed, it never formed part of the evidence at the public hearing.
12. Furthermore, on 6 May 2014⁵ concerns were raised with the Commission that the making of the allegations had serious consequences. In the context of that exchange the Commissioner made the observation⁶ “*everyone’s reputations are potentially damaged by allegations put in the course of openings, and we cannot, we simply cannot do much about it until all the evidence is in, and the Commission makes its findings*”.
13. It is Mr Gallacher’s concern, now that the public hearing has completed and the Operation Spicer report published, that the serious allegation has not been withdrawn or otherwise addressed and there is still no indication what this evidence was. Contrary to the Commissioner’s statement quoted above, such evidence was not brought forward or put before the Commission in the public hearing, let alone any finding exonerating Mr Gallacher.
14. In particular, there has not been any disclosure of what was the “*sworn testimony*” or the “*plenty of stuff*” said to have supported the allegations made on 2 May 2014, leading to his resignation as a Minister of the Crown. It is his concern that in fact there may have been no such evidence.
15. The public hearing of the Operation Spicer investigation commenced on 28 April 2014 and ran to 20 May 2014 and was then adjourned for a period of 11 weeks and resumed on 6 August 2014 and continued through to 12 September 2014 when all evidence was completed.
16. Critically, the adjournment on 20 May 2014 was said to be for the purpose of enabling the Commission to investigate information which he said come to its attention which implicated Mr Gallacher. This statement was made by Senior Counsel Assisting on 6 May 2014:

“Commissioner, as I foreshadowed, I am now going to apply to suspend the public inquiry in Operation Spicer. As I will explain in more detail in a moment, the basis for that application is to allow the investigative staff at the Commission time to investigate more material which has come to hand in recent times. The suspension will not operate immediately. We intend to press on and to complete the public inquiry so far as it relates to the activities of EightbyFive... In light of speculation on the subject it does seem an appropriate moment to say that these activities implicate the former

³ 3367-3368T (6 May 2014).

⁴ 3376.20T (6 May 2014).

⁵ 3366.2-3368T.

⁶ 3373.42T.

Minister, Michael Gallacher. It is for this reason that Mr Gallacher will not be called next week."⁷

17. Mr Gallacher gave evidence in the public hearing when it resumed after the adjournment on two half days on 3 and 4 September 2014. His evidence ran for less than a day (all up) and amounts to only 82 pages of the 7711 pages total transcript of the evidence gathered during the course of the public hearing.
18. A review of the questioning directed to Mr Gallacher shows that little was put to Mr Gallacher by Senior Counsel Assisting of any alleged wrongdoing, involvement or knowledge in the alleged activities being investigated concerning fundraising from prohibited donors. Certainly nothing was put to Mr Gallacher, which would have assisted in identifying what was the "sworn testimony" or even what it said relevant to Mr Gallacher and the alleged Eightbyfive scheme. It was also never put to Mr Gallacher that his evidence was in anyway untruthful or inconsistent with other persons evidence. A complete extract of Mr Gallacher's evidence is included in the **Supporting Material** at Tab 3.
19. It may be suggested, and the Report (in particular Chapter 24) gives this impression, that the "sworn testimony" in the possession of the Commission as at 2 May 2014 was that of Mr Hugh Thomson. Mr Thomson was Tim Owen's campaign manager for the seat of Newcastle during the 2011 election and was involved fundraising for Owen's campaign. However, there are three reasons why that cannot be the case.
20. First, there is no material that was made available in the public hearing to support a conclusion that Mr Thomson gave any evidence to the Commission that implicated Mr Gallacher before 2 May 2014. On the contrary, there is material to suggest he did not provide any "sworn testimony" until after the adjournment on 20 May 2014 and after he was provided with an inducement by Commission investigators. For instance, the signed statement of Mr Thomson was dated 11 August 2014.
21. Secondly, Mr Thomson is not mentioned at all in Senior Counsel Assisting's initial opening of the public inquiry, but is mentioned in Senior Counsel Assisting's opening on the resumption of the hearing after the adjournment on 6 August 2014. Senior Counsel Assisting stated: "*now I can say as a matter of certainty that Hugh Thomson was right at the centre of the illegalities. I am able to say this because Mr Thomson admits it. In the end Mr Thomson was offered an inducement by ICAC that in exchange for providing a statement, that statement would not be used against him in criminal proceedings in New South Wales except if he gives false or misleading evidence. Mr Thomson agreed and we have had his cooperation in investigating the matters which occurred during the lead-up to the 2011 State Election.*"⁸
22. This further supports a conclusion that Mr Thomson's evidence only became available to the Commission during the adjournment and after he received an inducement.

⁷ 3348T (6 May 2014).

⁸ 4773.28T.

23. Thirdly, when one reviews the evidence publicly made available from Mr Thomson, there is no evidence of any knowledge or involvement of Mr Gallacher in the alleged Eightbyfive scheme.

24. As the **first matter** therefore, Mr Gallacher requests that the Inspector investigate whether there was any evidence (including "*sworn testimony*") in the possession of the Commission on 2 May 2014 which supported the allegation made by Senior Counsel Assisting publicly against Mr Gallacher on that day.

The second matter: what steps were taken by the Commission and its officers during the adjournment of the public hearing in and from May 2014.

25. Following the recent receipt of new evidence Mr Gallacher also has concerns as to what occurred during the course of the adjournment between 20 May 2014 and 6 August 2014. As noted above, the adjournment was said to be needed to allow the Commission to investigate conduct relevant to him.

26. The new evidence has come from four separate people:

- a) Mr Andrew Cornwell, the Liberal candidate for and then member for Charlestown (Tab 4);
- b) Mr Tim Owen, the Liberal candidate for and then member for Newcastle (Tab 5);
- c) Mr Terry Lawler, Chairman of Lawler Partners, an accounting practice in Sydney and Newcastle (Tab 6); and
- d) Ms Colleen Hodges, Secretary of the Newcastle Branch of the Liberal Party (Tab 7).

27. Those persons were each contacted by the Commission's investigators during the adjournment. Two of them, Mr Owen and Mr Cornwell were called to give evidence before the public hearing.

28. In summary, that evidence reveals:

- a) Mr Cornwell was told by Mr Thomson after Mr Thomson had been interviewed by the Commission that the Commission were "*after*" Mr Gallacher, and Mr Cornwell should "*blame any problems on Gallacher*".
- b) After Mr Cornwell was formally interviewed by persons from the Commission he was taken aside by Counsel Assisting and informed that the Commission "*needed more on Gallacher*".
- c) Mr Owen, when he was contacted by persons from the Commission, was told that the Commission was after "*Hartcher and Gallacher*" and told "*you'd better be prepared to come clean on these people in the public hearings*".

- d) Mr Lawler, when he was interviewed by persons from the Commission, was told that Mr Gallacher was "*the person we're after*".
 - e) Mr Lawler was not contacted again by the Commission after he provided information that did not implicate Mr Gallacher in the events that the Commission were investigating.
 - f) Ms Hodges was not contacted again by the Commission after she was interviewed by persons from the Commission and gave evidence exculpatory of Mr Gallacher confirming that he was not actively involved in the fundraising of the Newcastle campaign.
29. This gives rise to and supports the following legitimate concerns held by Mr Gallacher.
30. First, there is a concern that what occurred during that adjournment (given, for the reasons outlined above there was no evidence which supported the serious allegation which had been made against Mr Gallacher) was that the Commission and its officers appeared to be primarily focused on trying to make good this allegation. As a consequence, there is a concern that the Commission's investigators did not fairly or objectively investigate matters relating to Mr Gallacher. As summarised above, the new evidence is to the effect that the Commission's investigators made statements to the effect that the Commission wanted evidence that was adverse to Mr Gallacher and, it would seem, were not interested in exculpatory evidence.
31. Those circumstances raise a concern that the Commission's investigators were focused solely on attempting to find evidence that may be against or adverse to Mr Gallacher and as such embarked on a course of conduct where they failed to fairly and objectively search for and obtain evidence.
32. Secondly, and further to the first point, there is a concern that the Commission (or persons acting on its behalf such as investigators) endeavoured to encourage witnesses to give evidence against Mr Gallacher, including by way of pure supposition. It is not clear whether the motivation for this may have been the Commission's desire to support the serious public allegation made against Mr Gallacher which was not the subject of any evidence let alone finding..
33. Thirdly, as noted above, there is a particular concern with respect to the manner in which Mr Thomson came to give his evidence after the adjournment. The new evidence, in particular that of Mr Cornwell (Tab 4) gives rise to reason to believe that during the course of an interview or discussions Mr Thomson had with by Commission investigators Mr Thomson was encouraged to give evidence adverse to Mr Gallacher furthermore, that he was offered an inducement to do so.
34. When Mr Thomson came to give evidence at the public hearing it also became apparent he had only signed his statement two days before he was called. His statement is dated 11 August 2014⁹ and he gave his oral evidence on 13 August

⁹ Z19.

2014. Also, in questioning from Senior Counsel for Mr Gallacher it was revealed that the draft of that statement had only been prepared a week earlier.¹⁰

35. Attempts by Mr Gallacher's legal representatives to question Mr Thomson as to the circumstances in which he was provided with the inducement, or the process by which the statement came to be prepared with ICAC investigators, were rejected by the Commissioner.¹¹
36. Also, requests made at the time by Mr Gallacher's legal representatives for any prior statement or "testimony" from Mr Thomson were denied with Mr Gallacher's legal representatives being informed by the Commissioner that Mr Thomson's statement was the "*sum total of the information that the Commission has from Mr Thomson*"¹² (see the exchange in the transcript in the **Supporting Material** at 5050T behind Tab 1).
37. The above matters also lead to a fourth concern, that the Commission had in its possession material which would have been exculpatory of Mr Gallacher or assisted Mr Gallacher's legal team in cross-examining witnesses, in particular, Mr Thomson. The new evidence supports this concern.
38. For instance, Mr Lawler and Ms Hodges both gave evidence exculpatory of Mr Gallacher and neither were called before the public hearing or even contacted again by the Commission. Further, the evidence of Mr Cornwell and Mr Owen, if known at the time of Mr Thomson giving evidence would have been of assistance to Mr Gallacher's legal representatives. That is in addition to information as to any prior statements made by Mr Thomson and the circumstances, including inducement, in which he came to give a statement to the Commissioner as outlined above.
39. Some of these concerns, so far as they were known by Mr Gallacher and his legal representatives at the time, were sought to be raised before the Commission before the Report was published. Following the completion of evidence Mr Gallacher's legal representatives made detailed submissions to the Commission. Those submissions are still subject to an order under s 112 of the *Independent Commission Against Corruption Act 1988* (NSW). Mr Gallacher and his legal representatives do not wish to inadvertently breach that section and therefore respectfully request that the Inspector exercise his power under s 57C to require full access to those submissions from the Commission.
40. Accordingly, Mr Gallacher asks the Inspector to investigate as a **second matter**:
 - a) what decisions were made, or instructions given, by the Commission or by or to the its officers in relation to seeking to obtain evidence that sought to implicate Mr Gallacher in relation to alleged illegal and corrupt conduct;
 - b) what were witnesses told by investigators in relation to Mr Gallacher when statements were sought from them;

¹⁰ 5187.37T.

¹¹ See, e.g. 5178-5179T.

¹² 5050T.19-21.

- c) whether witnesses were offered inducements or promises to give evidence adverse to Mr Gallacher and, if so, which witnesses and what was the content of those inducements or promises;
- d) the circumstances in which Mr Thomson came to be provided with an inducement, and the content of that inducement, to sign the statement which made adverse comments against Mr Gallacher;
- e) whether the statement Mr Thomson signed following the giving of that inducement was consistent with prior information he had given to the Commission relevant to Mr Gallacher; and
- f) whether the Commission (or its officers) had in its possession, prior to the handing down of its Report, information which was exculpatory of Mr Gallacher or would have been of assistance to Mr Gallacher's legal team in cross-examining Mr Thomson or making written submissions to the Commission.

The third matter: whether the adverse findings made against Mr Gallacher by the Commissioner in the Report were improperly made or in excess of the Commission's jurisdiction.

- 41. The hearing of evidence in the hearing of Operation Spicer completed on 12 September 2014.
- 42. Following the completion of evidence at the public hearing, Mr Gallacher's legal representatives made substantial submissions to the Commission. Again, Mr Gallacher and his legal representatives do not wish to inadvertently breach s 112 and therefore respectfully request that the Inspector exercise his power under s 57C to obtain those submissions, among other things.
- 43. The submissions were not the subject of any reply submissions and were only briefly, selectively and in broad terms referred to in the Report.
- 44. The Commission delivered its report on operation Spicer on 30 August 2016. The report was tabled in Parliament at approximately 10:00am that day and was made publicly available within 30 minutes of that happening.
- 45. Notwithstanding Mr Gallacher's submissions the Operation Spicer report made a number of adverse comments, purported to be findings, against Mr Gallacher. These "findings" were made notwithstanding that no recommendations were made against Mr Gallacher or any finding was made that he engaged in corrupt conduct.
- 46. The statements/findings included:

relevant to alleged EightbyFive scheme

"The Commission finds that Mr Hartcher, Mr Koelma, Mr Gallacher, Mr Palmer and Mr Williams were parties to an arrangement whereby, between

July 2010 and March 2011, Patinack Farm made payments totalling \$66,000 to EightbyFive. These payments were ostensibly for the provision of services by EightbyFive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party's 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling \$33,000, exceeded the applicable caps on political donations. Although the payments to EightbyFive were made by Patinack Farm, the arrangement was organised through Buldev, a property developer."¹³

"The Commission finds that Mr Hartcher's SMS text message and his diary entry were a result of information given to him by Mr Gallacher. The Commission finds that Mr Williams provided Mr Gallacher with the name of the entity to be used in the agreement with Eightbyfive and that Mr Gallacher immediately passed the name of the entity on to Mr Hartcher so that Mr Hartcher could, in turn, pass it on to Mr Koelma."¹⁴

relevant to the Boardwalk Resources donation

"The Commission finds that in Late 2010 Mr Gallacher, Mr Hartcher and Mr Williams of Buldev were involved in the arrangements whereby two political donations totalling \$53,000 were provided to the NSW Liberal Party for use in its 2011 election campaigns for the seats of Newcastle and Londonderry... of the \$53,000 some \$35,000 was used to help fund Mr Owen's 2011 election campaign.... Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buldev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading Election Funding Act laws relating to the accurate disclosure of political donations to the electoral funding authority."

relevant to payments made to Luke Grant

"The Commission finds that Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Mr Grant for his work on Mr Owen's 2011 election campaign and that he did so with the intention that Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority would be evaded."¹⁵

relevant to the New Year's Eve function

"The Commission finds that, in about November 2010, Mr Gallacher sought a political donation from Mr Sharpe by inviting him to attend a New Year's

¹³ Report, pp 105-106.

¹⁴ Report, p 99.

¹⁵ Report, p 139.

Eve political fundraising function for which Mr Sharpe or Buildex would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations.”¹⁶

relevant to Mr Gallacher’s credit

“The Commission does not consider Mr Gallacher was always a truthful witness and places no reliance on his evidence unless it is corroborated by other reliable evidence or objective facts.”¹⁷

47. As is dealt with further in more detail in the addendum to Mr Gallacher’s complaint, it is Mr Gallacher’s submission there on any reasonable review of the evidence which was before the Commission at the public hearing, the evidence did not support such adverse “findings” being made against Mr Gallacher.
48. These statements which have been included in the published report have caused him reputational and professional damage, in circumstances where it is otherwise difficult for him to adequately redress that damage as these findings were made in effect as “aside comments” not in relation to any finding being made of “corrupt conduct” or to support any recommendation made by the Commission.
49. It is Mr Gallacher’s submission that those adverse comments were included in the report in excess of jurisdiction of the Commission including in circumstances where:
 - a) the evidence relevant to Mr Gallacher was, on any reasonable, objective and proper view of it, not capable of supporting the conclusions made adverse to him;
 - b) at best, the conclusions were made drawing inferences from evidence which, on any reasonable, objective and proper view of that evidence, were not open to be made, and when there were more logical and alternative inferences to be drawn completely consistent with Mr Gallacher’s non-involvement in the alleged event;
 - c) there is an apprehension that it was done to avoid any further adverse criticism being made against the Commission for making allegations against a senior Minister which were not able to be supported either at that time they were made or subsequently. This gives rise to a conflict of interest on the part of the Commission, including officers of the Commission. That is, there was an interest in seeking to avoid criticism against themselves or the Commission for making unsubstantiated serious allegations which lead to the resignation of a senior member of the Legislative Council and a Minister of the Crown. The new evidence and matters set out in respect of the first matter and second matter above provide a basis for the concern of the apprehension and conflict of

¹⁶ Report, p 124.

¹⁷ Report, p 122.

interest. Furthermore, the statements were included in circumstances where the Commission did not and could not make any finding of corrupt conduct.



A.R. MOSES SC
New Chambers

25 November 2016

(Counsel for the Honourable Michael Gallacher MLC)



R.L. GALL
Eight Selborne Chambers

Attachment I

Mr. Bruce McClintock SC
Inspector of the ICAC
OIICAC

Via email to: oiiccac_executive@oiicac.nsw.gov.au

Your Ref: CR 2018 09

Dear Inspector,

Re: Operation Spicer – Michael Gallacher

I am writing in response to your letter of 22 November 2017 concerning an allegation (the Allegation) put to Darren Williams by senior counsel assisting the Commission, Geoffrey Watson SC, at the public inquiry on 2 May 2014. The Allegation was framed by Mr Watson during the following exchange with Mr Williams and after Mr Williams had been shown the email chain that became Exhibit S 48 (at 3096T):

....The truth is you had a close longstanding personal connection with the Shadow Minister Mike Gallacher?---Yes.

It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the Eightbyfive business, correct?---No.

Mr Williams was a director and shareholder of Newcastle based Buildev Group Pty Ltd, which, as a property developer, was banned from making political donations. Eightbyfive was a business owned by Timothy Koelma.

The present issue arises from a submission dated 25 November 2016 made to John Nicholson, the Acting Inspector, on behalf of Mr Gallacher (the Submission). I understand that the Submission is primarily concerned with whether there was any evidence to support the making of the Allegation on 2 May 2014. Before addressing the specific matters raised in your letter, there are particular matters in the Submission that require comment.

It is asserted in the Submission that the Commission's Operation Spicer report made no mention of the Allegation. That assertion is incorrect. The Commission found that Eightbyfive was used to receive and channel political donations for the 2011 NSW Liberal Party election campaign. The involvement of Mr Gallacher and Mr Williams is dealt with in chapter 20 of the report. The Commission made the following finding at pages 105-106 of the report:

The Commission finds that Mr Hartcher, Mr Koelma, Mr Gallacher, Mr Palmer and Mr Williams were parties to an arrangement whereby, between July 2010 and March 2011, Patinack Farm made payments totalling \$66,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party's 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling \$33,000, exceeded the applicable caps on political donations.

Although the payments to Eightbyfive were made by Patinack Farm, the arrangement was organised through Buildev, a property developer.

The finding was made against a background of other evidence that Eightbyfive was used to channel political donations from various entities for the benefit of the NSW Liberal Party and certain candidates for the 2011 NSW State election. That evidence is set out in chapters 17, 18, 19 and 20 of the Commission's August 2013 report *Investigation into NSW Liberal Party electoral funding for the 2011 State election campaign and other matters* (the Report).

Paragraph 5 of the Submission states correctly that the Commission did not make a corrupt conduct finding against Mr Gallacher in relation to the Allegation. The reason for the Commission not making a finding of corrupt conduct on the basis of the factual finding is explained in the Foreword to the Report (page 12).

In your letter you sought information relevant to the complaint. The following addresses that request by reference to the numbered paragraphs in your letter.

1. A copy of Exhibit S 48 is enclosed. It is also reproduced at page 100 of the Report. The relevance of the document to the finding against Mr Gallacher is set out at pages 98 to 99 of the Report.
2. The question of what evidence there was to support the Allegation was first raised by Mr Moses SC, senior counsel for Mr Gallacher, on 2 May 2014 (at 3101T). In particular, he raised concern that the email chain shown to Mr Williams (Exhibit S 48) had not been previously provided to Mr Gallacher. The Commission is not, of course, required to provide advance notice of documents or other evidence to parties involved in its investigations. In any event, as explained by Commissioner Latham (at 3104T), the email chain only came into the Commission's possession the previous day. Commission records confirm that to be the case.

During the course of the public inquiry on 2 May, Mr Watson advised that he had only determined that morning to "deploy" the email chain in the public inquiry and that Mr Gallacher's legal representatives had been requested to attend the public inquiry so that they had the opportunity of being made aware of the Allegation (at 3106T). It was also made clear that further investigation would be required which would probably necessitate adjourning the public inquiry (3106T – 3107T).

Later that day, Mr Watson advised that the email chain had only come to his attention the previous day (3205T). He also identified other documentation in evidence in the public inquiry that was relevant to the email chain and the Allegation (3205T – 3206T), some of which is set out below.

The email chain of 2 to 3 June 2010 (Exhibit S 48) shows that at 5:00pm on 2 June 2010 Mr Williams sought information from David Sharpe, the managing director of Buildev, as to the identity of the "entity" to give to Mr Gallacher. At 5:06pm that day Mr Sharpe responded that Mr Williams should ask Nathan Tinkler (another director of Buildev and the owner of Patinack Farm) "*as I think it's best to come through patnack (sic) get right away from property minning (sic) infristructure (sic)*". At 10:47am on 3 June 2010 Mr Williams emailed Mr Sharpe to enquire "*do I ring Nathan or troy (sic)?*" to which Mr Sharpe responded at 8:48am that day "*nt*". Those are the initials of Mr Tinkler.

Other available evidence included telephone records showing that Mr Gallacher rang Mr Williams at 4:29pm on 2 June 2010 and also rang the Buildev switchboard on that day. Other telephone records showed there was contact between Mr Hartcher and Mr Gallacher that day. There was evidence that 3 June 2010 was a parliamentary sitting day

and both Mr Gallacher and Mr Hartcher were at Parliament. Telephone records showed a call between Mr Gallacher and Mr Williams commencing at 5:27pm on 3 June 2010, which lasted for 161 seconds. Telephone records show that at 7:38pm that day Mr Hartcher sent an SMS message to Mr Koelma "Our Newcastle friends say they r ringing u tomorrow. All fixed".

In addition to the above, Mr Watson would have been aware of the following:

- a) Mr Williams compulsory examination evidence of 27 June 2013 that he had known Mr Gallacher since about 2003 (183PT);
- b) Mr William's compulsory examination evidence of 27 June 2013 that he had attended a lunch with Mr Gallacher and others in August 2010 to discuss Buildev projects (179PT – 182PT);
- c) the 28 August 2013 compulsory examination evidence of Troy Palmer, the chief executive officer of the Tinkler Group (which included Patinack Farm), that Eightbyfive had been engaged to provide marketing services without any checks being undertaken to ascertain whether it could provide such services (440PT-443PT) and that Patinack Farm had paid Eightbyfive \$66,000 without receiving anything in return (439PT-440PT);
- d) the 28 August 2013 compulsory examination evidence of Mr Sharpe that he had attended a lunch with Mr Gallacher and others, which was organised by Mr Koelma, to discuss Buildev projects (462PT, 467PT);
- e) the 31 March 2014 compulsory examination evidence of Mr Gallacher that he knew about Buildev from about 2000 and knew and was in contact with Mr Williams and had met Mr Koelma (1078PT-1081PT, 1086PT); and
- f) other evidence tending to show that Eightbyfive was not a legitimate business (see, for example, the 11 February 2014 compulsory examination evidence of Mr Koelma) and that it was used to channel otherwise prohibited political donations to NSW Liberal Party candidates.

Mr Moses again raised the Allegation during the public inquiry on 6 May 2014 (see 3366T onwards). In response, Mr Watson advised that "...we have sworn testimony from a reliable person which implicates Michael Gallacher" (3376T).

Hugh Thomson was the campaign manager for Timothy Owen's election campaign. He gave evidence in a compulsory examination on 30 April 2014. His evidence was that he recollected speaking with Mr Gallacher about Mr Gallacher following up Buildev to pay certain costs associated with Mr Owen's election campaign (at 1114PT). He also told the Commission that it was Mr Gallacher's idea for two property developers, Hilton Grugeon and Jeffrey McCloy, to help fund Mr Owen's campaign by paying for the media services provided by Luke Grant (at 1118PT).

I note that the Commission made a finding at page 139 of the Report that Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Mr Grant for his work on Mr Owen's election campaign with the intention of evading the Election Funding Act laws relating to the prohibition on property developers making political donations and the requirements for disclosure of political donations. The evidence upon which that finding was based is set out in chapter 27 of the Report.

3. When making references to "plenty of stuff" and "sworn testimony", Mr Watson would have been aware of the evidence referred to above.
4. Evidence consistent with that set out at 2 a) to f) above, the evidence in Exhibit S 48 and the relevant telephone records was given during the public inquiry and is referred to in the Report. Mr Gallacher was examined on the Allegation when he gave evidence at the

public inquiry on 3 and 4 September 2014 (see in particular 7004T-7011T and 7020T-7022T). In addition, the Allegation and the public inquiry evidence relating to it was covered in counsel assisting's submissions which were provided to Mr Gallacher.

5. The Allegation was not withdrawn. It is addressed in the Report and was the subject of an adverse factual finding against Mr Gallacher— see above.
6. I am not aware from the available material whether Commissioner Latham was aware of Mr Watson's intention to put to Mr Williams on 2 May 2014 that he and Mr Gallacher were involved in a corrupt scheme. Given that the Commissioner was aware on 2 May 2014 that Exhibit S 48 had been received by the Commission the previous day (3104T) and had previously presided at the compulsory examinations of Mr Koelma, Mr Gallacher and Mr Thomson, it is likely that she was aware of the basis for the Allegation.
7. The question put to Mr Williams by Mr Watson was an appropriate question having regard to the evidence available to the Commission.
8. Given the evidence before the Commission and the factual finding made against Mr Gallacher, the issue of whether consideration was given to withdrawing the Allegation did not arise.
9. The usual mechanism for addressing issues that arise where serious allegations are put to a witness during a public inquiry that are not ultimately established is to deal with the matter in the public report. This is because it is usually only after having considered all the relevant evidence, the submissions of counsel assisting and any submissions in response that the Commission is able to determine that the allegation is not made out. There may be instances where it becomes obvious during the course of a public inquiry that there is no cogent evidence capable of sustaining an allegation. In such circumstances counsel assisting the Commission or the presiding Commissioner may make a statement in the public inquiry to that effect.

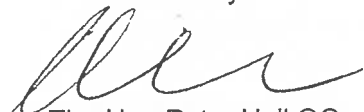
Enclosed with this letter are copies of the following:

- a) Exhibit S 48;
- b) Mr Williams compulsory examination evidence of 27 June 2013;
- c) Mr Palmer's compulsory examination evidence of 28 August 2013;
- d) Mr Sharpe's compulsory examination evidence of 28 August 2013;
- e) Mr Koelma's compulsory examination evidence of 11 February 2014;
- f) Mr Gallacher's compulsory examination evidence of 31 March 2014; and
- g) Mr Thomson's compulsory examination evidence of 30 April 2014.


I have not provided a copy of the public inquiry transcript referred to in this letter or the Report as they are available from the Commission's public website.

I hope the above information is of assistance. Please let me know if you require any further information to enable you to complete your consideration of this matter.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

 April 2018

Attachment J



Office of the Inspector of the
Independent Commission Against Corruption

30 August 2018

Our ref: C10 2017 10

Mr Michael Gallacher
[REDACTED]
[REDACTED]

Dear Mr Gallacher

After lengthy consideration I have decided not to take your complaint and the investigations which I commenced of my own initiative any further, subject to one qualification which I make below.

My reasons are principally that if there were any misconduct involved in the conduct of Mr William's public examination, it seems to be the sole responsibility of Mr Watson, counsel assisting. As I said in my letters to your solicitor of 5 September 2017 and to you on 8 November 2017, counsel assisting is not an officer of the Independent Commission Against Corruption and, therefore, I have no power to deal with misconduct by him.

I have sought the views of the ICAC on this matter and enclosed its response to me for your information. I have come to the view that there is no basis, such as an inadequate failure to supervise Mr Watson, upon which I could ascribe his conduct to the ICAC so as to enable me to proceed under sections 57B(1)(b) and (c) of the ICAC Act and make findings of misconduct against it.

That said, I have unresolved concerns about Mr Watson's conduct in asking the impugned questions of Mr Williams. In particular, I find it hard to see how the allegation that you and Mr Williams "hatched a corrupt scheme" was warranted by the document upon which the ICAC relies to justify it. I am also concerned about the denunciatory nature of the question which I do not regard as appropriate for a public enquiry of this nature. One, amongst a number of reasons, for that concern is the possibility that serious adverse consequences may flow to persons who have not had a chance to answer the denunciation.

I consider the best way of dealing with these issues is for me to exercise my powers under sections 57B(1)(a) and (d) of ICAC Act, which provides that amongst my principal functions are:

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

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

Consequently I propose later this year to initiate an audit and assessment to determine how the ICAC is presently dealing with counsel assisting, whether it prescribes standards and whether those standards are appropriate so that to the extent possible witnesses and persons involved in ICAC inquiries are dealt with fairly to the extent that is consistent with the performance by the ICAC of its important public functions.

Yours sincerely,

B. R. McClintock

Bruce McClintock
Inspector: ICAC

Attachment K



Office of the Inspector of the
Independent Commission Against Corruption

31 August 2018

Our Reference: C10 2017 11

The Hon Peter Hall QC
Chief Commissioner
Independent Commission Against Corruption
GPO Box 500
Sydney NSW 2001

Via email: rjones@icac.nsw.gov.au

Dear Chief Commissioner

I refer to the attached letter I have sent to Mr Michael Gallacher concerning his complaint about the Commission. You will note that I have decided not to take his complaint or my own initiative investigation further, subject to one qualification.

In my letter to Mr Gallacher I have indicated that I may conduct an audit pursuant to sections 57(1)(a) and (d) of the ICAC Act, into the manner in which the Commission presently manages counsel assisting during public hearings. Specifically, the audit would consider whether the Commission prescribes standards of conduct for counsel assisting and whether those standards are appropriate so that persons involved in ICAC public inquiries are dealt with fairly to the extent that is consistent with the exercise of the Commission's functions and, if such standards do not exist, whether they should be introduced.

I would appreciate any views you have on this matter and also any policy or procedure documents that you can provide me which guide or inform the Commission's conduct in public hearings.

Yours sincerely,

A handwritten signature in black ink that reads 'B. R. McClintock'.

Bruce McClintock
Inspector: ICAC

Attachment L

Bruce McClintock

From: Geoffrey Watson <watson@newchambers.com.au>
Sent: Friday, 25 October 2019 8:40 AM
To: OIIAC_Executive
Subject: Today's The Australian

Please forward this email to the Inspector:

Dear Inspector – I have seen a large article in today's The Australian (page 23) which causes me some dismay. I am aware it is not your article and that it, true to the practices of The Australian, will involve selective quoting, but I still think I am entitled to contact you about it.

Mr Gallacher has not been cleared or vindicated. He was found by ICAC to have acted corruptly in multiple circumstances; he was not falsely accused. In particular, Mr Gallacher was found to be involved in the inception of a corrupt scheme involving Mr Williams.

Contrary to the impression created by the article, a great deal of care was taken before Mr Gallacher was adversely mentioned; his name was only raised after documents (emails, including his emails) were produced by a witness during the hearing.

To the extent it is said that some questions by me "crossed the line", those matters were investigated by the Bar Association and the allegation was rejected. I know that the Bar Association conclusion does not bind you, but it was the product of a thorough process, including giving me the opportunity to defend my position.

The reference to zealotry is especially unfortunate.

I would like the opportunity to present my side of the story to you.

GMW

Geoffrey Watson

NEW/CHAMBERS

Level 34 / 126 Phillip Street
Sydney NSW 2000 Australia
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F +61 2 92331850
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Attachment M

Bruce,McClintock

From: Geoffrey Watson <watson@newchambers.com.au>
Sent: Friday, 25 October 2019 5:14 PM
To: OIICAC_Executive
Subject: FW: Scan Data from FX-12DECE
Attachments: 25102019164122-0001.pdf

Dear Inspector

I have now seen the transcript of your evidence before the Committee.

I am very disappointed and a little surprised.

I know that this is not your only job, and I know (as well as anybody) that mistakes can be made - but your evidence was wrong and it has been used against me by Merritt and The Australian. Don't laugh that off - you can bet it will get an airing on Alan Jones very shortly. Your evidence has been used to damage me.

I will set out the two principal errors: You said there was "no evidence" presented against Gallacher and that no findings were made against him. That is wrong on both counts.

There was a great deal of evidence presented. It is detailed in the Report (see especially paras 25, 26 and 27). It was oral as well as documentary evidence, including Gallacher's own emails.

Not only that, the evidence persuaded ICAC to make a series of findings adverse to Gallacher. I have attached the summary of ICAC's findings. You can look at the report for yourself and see that Gallacher was found to have worked in conjunction with Williams to develop a scheme to evade the election funding laws. There were other incidents as well. It is true that there were no findings of corrupt conduct - but the reason for that (as explained in the report) was because of the decision in Cunneen. ICAC went on to say that it could still make factual findings, and it did, and they were very damning of Gallacher.

You were also critical of the thing you called the "impugned question". That was fully investigated by the Bar Association and it was ruled not to have "crossed the line". I can get you the papers if you doubt that (I threw them out, thinking this rubbish was behind me, but I guess the Bar Association has copies).

Incidentally, I appreciate that the questions and comments quoted were not my best moment - I accept that. But what you don't know is that at that same time my family was subject to intimidation from persons closely associated with the person I was questioning. About a week before Michele had been walking our dog. We live in a quiet street. A big man got out of a car, walked ten metres behind her, whistling. She rang me, worried. I brushed it off. "Calm down" I told her. Then a week later it happened again, same man, same tune. She was really upset this time and rang me. I was in the hearing and couldn't take her call. I rang back at lunchtime. I had to console her and then resume my questioning.

I did let my standards slip, and maybe I was too weak. But these were not normal circumstances.

Is there anything you can do to correct this? If you can't there will be no hard feelings - I am not a zealot.

GMW

Geoffrey Watson

Level 34 / 126 Phillip Street
Sydney NSW 2000 Australia
DX 187 SYDNEY

T +61 2 91512040

F +61 2 92331850

<https://clicktime.symantec.com/3QygwsAiHXwACqkTRy4HYfj7Vc?u=www.newchambers.com.au>

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LIABILITY LIMITED BY A SCHEME APPROVED UNDER PROFESSIONAL STANDARDS LEGISLATION

-----Original Message-----

From: ApeosPort-VI C7771 <printers@newchambers.com.au>

Sent: Friday, 25 October 2019 4:41 PM

To: watson@newchambers.com.au

Subject: Scan Data from FX-12DECE

Number of Images: 3

Attachment File Type: PDF

Device Name: ApeosPort-VI C7771

Device Location:

Attachment N

Bruce McClintock

From: OIICAC_Executive
Sent: Friday, 25 October 2019 5:56 PM
To: Geoffrey Watson
Cc: Angela Zekanovic
Subject: RE: Scan Data from FX-12DECE

Dear Geoffrey

I have drafted a lengthy response to the email you sent earlier today which I hope to send Monday. A large part of that response is requests for further information as to the questions you put to Mr Williams on 2 May 2014. But, having just read your second email, I want to deal with your assertion that my evidence was wrong immediately. I did not say there was no evidence presented against Gallacher during Spicer--of course there was and there were findings made against him as a result of that evidence. I was aware of that when I gave my evidence. What I said or at least intended was that you did not back up your question with the evidence for example that you referred to as the basis for your questions to Williams on 6 May 2014 "sworn evidence from a reliable person". If I am wrong, you will have an opportunity to correct me when responding to the letter I will send on Monday.

The words "impugned questions" were only shorthand to refer to the questions about which Gallacher had complained. They do not imply any judgment on my part. I do not believe they could be read any other way.

I will let you have a copy of my letter to Gallacher about which Mr Hoenig was questioning me with the letter I will send you on Monday. I did not have it before me during my evidence.

Finally, I cannot "correct" my evidence. Right or wrong, it is what I said. I understand, however, there to be a protocol which State Parliament has to enable people the subject of adverse comment there to have their version included in Hansard. I do not know whether it applies to Committee hearings but you may wish to investigate that so you can respond to anything Mr Hoenig said or I said in response.

Yours sincerely

Bruce McClintock
Inspector ICAC

-----Original Message-----

From: Geoffrey Watson <watson@newchambers.com.au>
Sent: Friday, 25 October 2019 5:14 PM
To: OIICAC_Executive <oiicac_executive@oiicac.nsw.gov.au>
Subject: FW: Scan Data from FX-12DECE

Dear Inspector

I have now seen the transcript of your evidence before the Committee.

I am very disappointed and a little surprised.

I know that this is not your only job, and I know (as well as anybody) that mistakes can be made - but your evidence was wrong and it has been used against me by Merritt and The Australian. Don't laugh that off - you can bet it will get an airing on Alan Jones very shortly. Your evidence has been used to damage me.

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Not only that, the evidence persuaded ICAC to make a series of findings adverse to Gallacher. I have attached the summary of ICAC's findings. You can look at the report for yourself and see that Gallacher was found to have worked in conjunction with Williams to develop a scheme to evade the election funding laws. There were other incidents as well. It is true that there were no findings of corrupt conduct - but the reason for that (as explained in the report) was because of the decision in Cunneen. ICAC went on to say that it could still make factual findings, and it did, and they were very damning of Gallacher.

You were also critical of the thing you called the "impugned question". That was fully investigated by the Bar Association and it was ruled not to have "crossed the line". I can get you the papers if you doubt that (I threw them out, thinking this rubbish was behind me, but I guess the Bar Association has copies).

Incidentally, I appreciate that the questions and comments quoted were not my best moment - I accept that. But what you don't know is that at that same time my family was subject to intimidation from persons closely associated with the person I was questioning. About a week before Michele had been walking our dog. We live in a quiet street. A big man got out of a car, walked ten metres behind her, whistling. She rang me, worried. I brushed it off. "Calm down" I told her. Then a week later it happened again, same man, same tune. She was really upset this time and rang me. I was in the hearing and couldn't take her call. I rang back at lunchtime. I had to console her and then resume my questioning.

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Is there anything you can do to correct this? If you can't there will be no hard feelings - I am not a zealot.

GMW

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Sent: Friday, 25 October 2019 4:41 PM
To: watson@newchambers.com.au
Subject: Scan Data from FX-12DECE

Number of Images: 3
Attachment File Type: PDF

Device Name: ApeosPort-VI C7771

Attachment O



Office of the Inspector of the
Independent Commission Against Corruption

28 October 2019

Our Reference: A1 2019 03

Mr Geoffrey Watson

By email: watson@newchambers.com.au

Dear Geoffrey

I refer to your initial email of 25 October 2019 concerning the evidence I gave before the parliamentary Committee on 18 October 2019. As I indicated in my email to you of the same day, I have a series of questions concerning your examination of Mr Williams in 2014 during the Operation Spicer public hearing to which I would appreciate your response .

I attach a copy of my letter dated 30 August 2018 to Mr Gallacher. I was contacted some weeks ago by Arthur Moses SC on behalf of Mr Gallacher--he asked me whether my letter to Mr Gallacher was confidential and whether he could disclose it to other people. I indicated that it was not confidential, and that I had no objection to its disclosure. I was not aware, however, that it would be provided to Mr Hoenig and become the subject of questions when I was giving evidence before the Parliamentary ICAC Committee. As I indicated in my evidence, I stand by the views I expressed in my letter to Mr Gallacher. Specifically, the concerns I mention in the fifth paragraph of the letter about your conduct remain unresolved. I do not recall saying anything different in my evidence last week.

As I indicated to Mr Gallacher, I have initiated an audit under section 57B(1)(a) & (d) of the ICAC Act as described in the last paragraph of my letter. You will see from my description of the audit that it does not directly involve you or your conduct, although the unresolved concerns to which I refer above did prompt the audit. Also, as stated, you were not, as counsel assisting, an officer of the Commission. As such, I have no statutory power to determine whether your conduct falls within the concepts mentioned in section 57B(1)(b) of the Act, that is, abuse of power, impropriety or other forms of misconduct and I will not make any such determination.

I would be interested in any general comments you may have on how the ICAC deals with counsel assisting and any suggestions for improvement that you may have. I note that you have recently appeared before the ICAC representing a witness in the Operation Aero Enquiry. I would value any insights you may have.

While the way you questioned Mr Williams is not the subject of the audit, it is possible that I will refer to it because it is the core reason why I have undertaken the audit. It may be hard to avoid doing so because my letter to Mr Gallacher has now been made public.

I will obviously consider your side of the story before I form any concluded views about the propriety of your questions if, indeed, I come to that point. Also, it is my practice to provide any report I prepare in draft to persons whose conduct is considered in it. I would do so in your case. While I will consider any material you may wish to provide to me, it would assist me if you could respond to the following matters:

1. What was the information in the possession of the Commission upon which you relied to put the following matters to Mr Williams:

Q. you see just so it's clear and I want you to know, Mr Williams, we don't go off half copped [sic], we wouldn't put something serious to you as this without knowing plenty of stuff. The truth is you have a close long-standing personal connection with the Shadow Minister Mike Mr Gallacher?

A. Yes

Q. it was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the EightbyFive business, correct?

A. No.[T3096 2/5/14]

2. What was the “scheme” to which you referred in your question? How was it “corrupt”? What information enabled you to put that proposition to Mr Williams?
3. What was your forensic purpose in putting that proposition to Mr Williams?
4. Putting aside any question of propriety, I would be interested to know why you put the question in the form you did, that is, as a conclusion (“you hatched a corrupt scheme”) rather than putting, for example, the actions of Williams and Gallacher or the communications between those two men upon which you relied for the conclusion. Would that not have been a better way to elicit admissions from Williams rather than putting a conclusion which it must have been obvious he would deny?
5. I note you made the following statement immediately after the question I have quoted above:

well I can tell you by the end of this you're going to regret having giving [sic] that answer, Mr Williams. [T3096 2/5/14]

What was your forensic purpose in telling Mr Williams that? Did you consider it was appropriate to make such a statement in a public forum to a witness? Was it part of your purpose to intimidate Mr Williams? Did you consider whether or not it was part of your purpose, that such a statement might be perceived by the witness as an attempt to intimidate or bully him?

6. On 6 May 2014, in response to a request for the evidence in support of the allegation you put to Mr Williams you said (T3367-3368) “we have sworn testimony from a reliable person which implicates Michael Gallacher” (T3376.20). To what testimony

were you referring? What was the basis for your assertion that the person in question was “reliable”? How did the testimony in question implicate Mr Gallacher? Was such evidence led in the public hearing?

7. I am concerned that Mr Gallacher received no notice that his conduct would be impugned in the way you did so impugn it as I set out above. Do you agree that he had no such notice? Did you consider the possibility of raising the allegation or the information to Mr Gallacher to obtain his answer, if any, to it before you raised the matter publicly?
8. Did you consider the possibility that there might be serious adverse consequences for Mr Gallacher flowing from your question? If so, what consideration did you give to that issue? This is something I would expect any person acting as counsel assisting to do before making a serious allegation of misconduct in a public forum.
9. In retrospect is there anything you would have done differently? If so, what?
10. What lessons do you consider there are for counsel who subsequently serve as counsel assisting at the ICAC from the matters I raise above? I would welcome your views.
11. Would you be prepared to give me whatever Bar Council or PCC report you refer to in your email as rejecting the complaint against you?

I appreciate that these issues occurred over five years ago and you may not have access to all the relevant materials. To the extent that you do not, please let me know and I will attempt to supply them to you from the material in my possession or in the possession of the ICAC using my power under the legislation to obtain documents from it.

Finally, your conduct in meeting Dr Cornwell (and Robert Mangioni) in your chambers on 23 July 2014 and in providing an undertaking signed by yourself as an inducement to provide a statement to the ICAC has also been the subject of complaint to me (which I dismissed for the same reason I dismissed the Gallacher complaint). I would welcome any comment you may wish to make about events at that meeting. In particular, I would welcome your views as to whether your conduct was appropriate for counsel assisting or, indeed, wise.

I look forward to hearing from you.

Yours sincerely,

B. R. McClintock

Bruce McClintock
Inspector, Independent Commission Against Corruption



Office of the Inspector of the
Independent Commission Against Corruption

30 August 2018

Our ref: C10 2017 10

Mr Michael Gallacher
C/- P.O. Box 107
Terrigal NSW 2260

Dear Mr Gallacher

After lengthy consideration I have decided not to take your complaint and the investigations which I commenced of my own initiative any further, subject to one qualification which I make below.

My reasons are principally that if there were any misconduct involved in the conduct of Mr William's public examination, it seems to be the sole responsibility of Mr Watson, counsel assisting. As I said in my letters to your solicitor of 5 September 2017 and to you on 8 November 2017, counsel assisting is not an officer of the Independent Commission Against Corruption and, therefore, I have no power to deal with misconduct by him.

I have sought the views of the ICAC on this matter and enclosed its response to me for your information. I have come to the view that there is no basis, such as an inadequate failure to supervise Mr Watson, upon which I could ascribe his conduct to the ICAC so as to enable me to proceed under sections 57B(1)(b) and (c) of the ICAC Act and make findings of misconduct against it.

That said, I have unresolved concerns about Mr Watson's conduct in asking the impugned questions of Mr Williams. In particular, I find it hard to see how the allegation that you and Mr Williams "hatched a corrupt scheme" was warranted by the document upon which the ICAC relies to justify it. I am also concerned about the denunciatory nature of the question which I do not regard as appropriate for a public enquiry of this nature. One, amongst a number of reasons, for that concern is the possibility that serious adverse consequences may flow to persons who have not had a chance to answer the denunciation.

I consider the best way of dealing with these issues is for me to exercise my powers under sections 57B(1)(a) and (d) of ICAC Act, which provides that amongst my principal functions are:

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

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

Consequently I propose later this year to initiate an audit and assessment to determine how the ICAC is presently dealing with counsel assisting, whether it prescribes standards and whether those standards are appropriate so that to the extent possible witnesses and persons involved in ICAC inquiries are dealt with fairly to the extent that is consistent with the performance by the ICAC of its important public functions.

Yours sincerely,

B. R. McClintock

Bruce McClintock
Inspector: ICAC

Attachment P

RECEIVED
19 NOV 2019

BY:

GEOFFREY WATSON SC

13 November 2019

Bruce McClintock SC
Inspector of the Independent Commission Against Corruption
GPO Box 5341
SYDNEY NSW 2001

Dear Inspector

Counsel assisting audit

1. I respond to your letter dated 28 October 2019.
2. As I read it, your letter raises two broad subjects with which I will deal separately:
 - My views as to the way in which counsel assisting is retained by ICAC, and whether the current arrangements can be improved; and
 - Two instances where you wish my comments upon matters which occurred while I was counsel assisting.

ICAC's relationship with counsel assisting

3. I think the current system, subject to two comments, works very well. I will start with the positives.
4. I think it is desirable that ICAC maintains its current policy to go to the private Bar to select counsel assisting. The alternative would be for ICAC to receive greater funding and keep this work in-house. I feel that the current system is to be preferred for the following reasons:
 - Going to the independent Bar for counsel gives ICAC a deal of flexibility in the selection of counsel. Occasionally, there is a need to utilise counsel with knowledge of speciality areas of law (planning law is the most obvious, but there are instances where barristers have particular knowledge of election law or health law, etc).
 - Seeking counsel from the private Bar also allows utilisation of highly skilled and experienced barristers – ICAC has little difficulty in attracting barristers to do its work, even at reduced fees (a matter to which I will return).
 - I am afraid that experience shows that the "*in-house counsel*" model never really works. Better quality lawyers are nearly always attracted to private practice and the utilisation of someone in-house has multiple problems, including a reduction in independence.

New Chambers
Level 34 / 126 Phillip Street, Sydney NSW 2000
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5. That leads me to a second proposition – the current model works well *because* of the independence acquired by going to the private Bar:
 - My own experience is that sometimes the legal team and investigative team at ICAC have, for all the right reasons, become too close to a particular investigation. Sometimes it needs an outsider to speak up to say that a line of inquiry is unwarranted or misdirected.
 - The same occurs in respect of legal issues. I have had personal experience of matters where it had been assumed by ICAC that a particular legal argument was open when, in fact, the point was debateable or not open at all.
6. The way in which ICAC retains independent counsel, rather than appointing them as an officer of ICAC, also has its advantages in terms of the maintenance of independence. I see no good reason why that should change. I know that I would have hesitated before taking an appointment as counsel assisting if I felt that that meant that my role had transformed into that of an officer of ICAC or a public servant. It might affect insurance coverage.
7. And I also believe that the current way in which counsel is retained, usually through a simple brief to appear in a matter in accordance with published terms of reference, works very well. I have worked under this system at other places and in other inquiries. In my opinion the current system works well for the following reasons:
 - The head of the Legal Department at ICAC, Roy Waldon, is excellent. He is experienced, calm and thoughtful. While ever you have a quality person at the head, the legal team is certain to work reasonably well.
 - The lawyers who work in the legal team at ICAC are, like those in any law firm, of mixed strengths and abilities – but there is no doubting their general enthusiasm and dedication. Based upon a broad experience of having worked on the instruction of several different kinds of government authorities, I would rate ICAC's legal team near the top.
 - All of this works well in the briefing process because the barrister can speak to committed lawyers. Sure, there were times when I was disappointed because things came to me too late – but that is not an experience unique to being briefed by ICAC.
8. As part of your audit I sense that you were looking at the issue of the nature and extent of the control exercised by the Commissioner over counsel assisting. I have worked under several different commissioners at a number of different places, and there is no consistency in the approach – it varies from Commissioner to Commissioner. I will make these general observations:
 - ICAC exerts a comparatively strong Executive control over the actions of counsel assisting. Counsel assisting may have immediate control over the conduct of a day's hearing, but that is all. Counsel assisting is *not* permitted to make any of the key decisions, and all of those are presented to the Commissioner (which, I understand, is then presented to the Executive). Instructions are then given to counsel assisting. This system works well.
 - I will give an example of this. *Before* I opened an inquiry at ICAC I was required to provide a written version of my opening well before it was to be presented. There were several reasons why this was so. It meant that ICAC retained control over the direction of the inquiry and it could ask that specific issues be added or deleted from the proposed opening. Controversial statements could be eliminated. Most importantly, it allowed a group of people with detailed knowledge of the matter to fact check the opening. Similarly, I always provided my closing submissions to ICAC well before they were submitted to the affected parties. The reasons were the same. I have had matters added, deleted and corrected to my work as a consequence of this process – and I thought it was a positive thing.

- Similarly, the lawyers at ICAC and the investigative team attached to a particular inquiry put forward proposals to counsel assisting and, in a collaborative environment, it is decided which ideas will be put forward to the Commissioner and the Executive.
 - As you would know from your experience as Inspector, all of this material is documented and minuted, so there is little or no chance for counsel assisting to go rogue.
 - Again, it depends upon the personality of the particular Commissioner, but I have also experienced direct intervention in the way that I was conducting proceedings at ICAC. For example, I recall matters adjourning so that Commissioner Ipp could speak to me to suggest that I conduct my questioning in a different fashion. Often my questions were rejected (especially by Commissioner Ipp) without objection. This was usually on the basis that my questions fell outside the terms of reference.
9. So far I have been strongly supportive of the way in which the relationship works between counsel assisting and ICAC and, I guess, generally that is so. I may be the wrong person to ask about these matters because I have a strong positive response to the abilities and integrity of the three Commissioners under whom I worked (Commissioners Ipp, Hamilton and Latham) and the other senior members of the ICAC organisation. I also maintain a high regard for members of the legal and investigative teams.
10. There are, however, two areas where I think things could be improved.
11. In hindsight I think that the demands on counsel assisting need to be reassessed because, certainly when I was working there, the demands were just too great:
- David Ipp (as you would have experienced yourself) is extremely efficient. He demands the same of others. I was told by Commissioner Ipp that public money was being expended so the inquiry had to move with speed. I was also told that some people were funding their own lawyers, and we owed it to them to move as speedily as possible. We sat five days per week. We sat ordinary Court hours.
 - But an ICAC public hearing is not like an ordinary Court hearing for counsel assisting. The role of counsel assisting is *extremely* demanding. Counsel assisting is on his or her feet for most of the time. Ninety percent of all questions asked during an ICAC investigation will be asked by counsel assisting. To be ready to ask those questions, counsel assisting needs to have mastered and organised literally thousands of pages of documents.
 - I found that preparing for a five day work week required work on *both* Saturdays and Sundays. Maybe I absorb things a little more slowly than others, but I suspect other counsel assisting have had the same experience. During the inquiries in which I was engaged I did not have a day off for weeks and weeks – I worked every weekday and both Saturday and Sunday for months.
 - And the public does not know this, but there are often compulsory examinations carried out *before* 10.00 am and *after* 4.00 pm. After a full day's hearing I have been at ICAC questioning potential witnesses as late as 8.00 pm – only to go home, eat, sleep and get up to prepare for the next day's full hearing.
12. This is physically and mentally draining. The circumstances can also be emotionally draining. During some of the inquiries the hostility in the hearing room was palpable. Once senior barrister sat behind me and regularly muttered "*you are a cunt*" or "*you are a lying cunt*" on a regular basis. (In fact, these words were picked up on the sound system and the transcription staff complained about the bad language – Commissioner Ipp had to haul the barrister into line on several occasions.) There was also general hostility in the courtroom caused, no doubt, by some of the heightened emotions of those under attack. In fact, I have never experienced anything like the hostility that was present at ICAC. You must remember that, as counsel assisting, virtually every other barrister in the room is *against* you – and there is a lot of ganging up. I think I am pretty resilient to the kind of bullying that goes on at the Bar, but not all counsel assisting

might be so. It is really quite important that the presiding Commissioner controls the hearing room, but it is not always possible.

13. All of this means that the work environment is, generally speaking, too punishing for counsel assisting. I would suggest that an audit should include consideration of the following:
- A proper assessment of the demands on counsel assisting, including the hours of work. If these are excessive or involve regular weekend work, then the sitting days or the workload must be reduced in some fashion. I would recommend a maximum four day week for the public hearing.
 - In larger inquiries senior counsel should also be briefed with a junior – that is often not the case (I was lucky to get a junior in three of the inquiries in which I was engaged). The idea that there are two minds working on a problem is of enormous advantage when the issues are factually dense or legally complicated.
 - All of these are occupational health and safety matters. Surely ICAC has such a person who could make a rational assessment of the demands being placed upon counsel assisting.
14. Finally – and with some hesitation – I raise the matter of fees. The rate at which ICAC pays counsel assisting is too low. The rate should be increased so that, at least, it matches the daily rate paid by the State Crown (especially given that the demands on counsel assisting are likely to be much, much greater than counsel in an ordinary case).

Matters relating to my conduct

15. As I see it your letter seems to be critical of my conduct in two separate instances – one relating to Mr Gallacher and the other relating to Mr Cornwell. It is appropriate that I deal with them separately.
16. Before I do so I should point out two things:
- I have had to do much of this from recollection. The events occurred years ago now, and I have not kept the records. I do not have the transcript (and there were more than 7,000 pages of transcript in those investigations involving Mr Gallacher and Mr Cornwell).
 - I am uncomfortable with providing you with free access to my Bar Association disciplinary records. As you may know, these have previously been used against ^{me} by journalists at *The Australian*. I am very sensitive about those records. I do not have copies – I thought this was all behind me and threw it all out ~~about~~ months ago. If you really need to see them I will make arrangements about it – but I can assure you that *all* of the complaints were dismissed (and, if you want, I will swear an affidavit or statutory declaration to that effect).

Michael Gallacher

17. I suspect that you have been given some misinformation about the events surrounding Mr Gallacher. I am not having a shot at you – I merely point out that the complainant has a very strong interest in damaging me. Much of what you have been told is false.
18. In the first place, *very* careful consideration was given *before* Mr Gallacher was named as a person of interest. Mr Gallacher was only named after a decision had been taken by ICAC. It was not my decision.
19. First, some history. The ICAC investigators had uncovered evidence relating to Mr Gallacher's connections with a Newcastle development company, Buildev, and its two principals, Darren Williams and David Sharpe. This included records which demonstrated a close personal connection between those parties as at particular times.

To the best of my recollection, no-one at ICAC had formed a strong view about this information – but it needed investigation.

20. Accordingly, Mr Gallacher was brought in one evening for a compulsory examination. When asked open-ended about his connections with these parties, Mr Gallacher gave evidence which was patently incorrect. After a short meeting with the legal and investigative team, I recommended to the Commissioner that that the compulsory examination be terminated.
21. I recall that Mr Gallacher was brought in for a second compulsory examination during which he corrected some of the evidence given in respect of the first compulsory examination. But during that second compulsory examination Mr Gallacher gave further evidence which we understood to be inconsistent with objective information. Still, there was nothing hard and fast against Mr Gallacher, and he remained merely a witness in the overall investigation.
22. Before the hearing commenced a good deal more information surrounding Mr Gallacher emerged which suggested that he could have been involved in critical events which constituted a breach of election funding laws. This information included emails and text messages. As the investigation developed another person associated with Buildev, Nathan Tinkler, came to be regarded with suspicion that he was involved in breaches of the election funding laws. We knew that Mr Tinkler was the source of funds which had been paid and used by the Liberal Party, but at that time there was no apparent link between Mr Tinkler and Mr Gallacher.
23. Before I opened the inquiry there were discussions as to whether or not Mr Gallacher would be mentioned adversely. My recollection is that the discussions involved Commissioner Latham, Assistant Commissioner Hamilton and maybe other members of the Executive. A decision was made that the evidence was insufficient to mention Mr Gallacher adversely.
24. Before the public hearing opened I was telephoned by the barrister representing Mr Gallacher, Arthur Moses SC. Mr Moses sought information as to whether Mr Gallacher would be adversely mentioned. Of course, I was bound by confidentiality rules and, even though Mr Moses is in my chambers, I declined to tell him much – although I did point out that notice would be given to those persons who were likely to be persons of interest.
25. The public hearing opened and evidence was taken. Much of the evidence focused upon activities in the Central Coast region of New South Wales and the conduct of a politician powerful in that area, Christopher Hartcher. The interest in the Hunter Region at that stage related to a complicated plan promoted by Buildev to develop another coal loader at Newcastle Harbour – a plan which had support from the Labor politician, Joe Tripodi. But, as happens in investigations, it became apparent that there were also problems with election activities by the Liberal Party in the Hunter Region – an area where Mr Gallacher had particular influence. We slowly became aware that there were meetings between Mr Gallacher, Mr Hartcher and the people from Buildev.
26. Earlier I mentioned that evidence is occasionally taken after hours from potential witnesses. One evening a witness was brought in, Hugh Thompson. He was a leading figure in the Liberal Party in the Hunter Region. Mr Thompson had an impressive background – he was a youngish (I think in his thirties) and had been a solicitor at a leading law firm. Mr Thompson came before that compulsory examination at around 6.30 pm and, shortly after being sworn in, broke down crying claiming that he needed to get something of his chest. During the course of that examination Mr Thompson told us of several irregularities in the Hunter Region, some of which involved Mr Gallacher. I am sure you could get a copy of that compulsory examination from ICAC if you wish to see it.
27. At around 8.30 pm we broke up for the night without making a decision as to what should be done with this information. The next day I met with the Commissioner and it was decided that we needed to do more to attempt to corroborate and verify Mr Thompson's evidence. The investigative team was given instructions to pursue that.

Please
read
post scriptum

28. Then, a couple of days later, Amanda Tibbey (counsel for one of the directors of Buildev, David Sharpe) had a conference with my junior, Greg O'Mahoney. Mr O'Mahoney was quite surprised by what he was told and shown, and brought Ms Tibbey into see me in the room set aside for counsel assisting. Ms Tibbey told me that Mr Sharpe wished to come clean to tell the whole story. I was given an email which directly implicated Mr Gallacher in a scheme approved by Mr Tinkler for the provision of funds to be paid to an entity so that they could be illicitly used during the election. We knew by other means that money had been paid by a company controlled by Mr Tinkler (Patinack Farms) to a business conducted by Tim Koelma (Eightbyfive). We already knew that Mr Koelma had strong connections with Christopher Hartcher and the Liberal Party. We also knew that Mr Koelma and Eightbyfive had been used by Mr Hartcher and other prohibited donors as a conduit of money to the Liberal Party.
29. I no longer have the email shown to me by Ms Tibbey, but I believe it is published in the ICAC Report. My recollection is that it showed an exchange between Mr Sharpe and Mr Williams about obtaining information to provide to Mr Gallacher as to the name of an entity to which money would be paid. The communication involved Mr Tinkler and the name of the entity (although I recall it was misspelt) was Patinack Farm. The timing of the phone call could be linked with other records that we had involving Mr Gallacher, and the commencement of payments by Patinack Farm to Eightbyfive. In other words, the email provided the link that we had previously been missing.
30. My recollection is that this occurred in the morning on a day when I was resuming questioning Darren Williams. A decision had to be made as to how to use the email given I needed to question Mr Williams about it. I went to see the Commissioner. I cannot now recall whether a formal meeting was convened or who else was present. But I can say that a decision was made that it was necessary to mention Mr Gallacher adversely and to put these matters to Mr Sharpe. I also believe that the Commissioner made private contact with the Premier of New South Wales, Michael Baird. I believe Mr Baird contacted Mr Gallacher.
31. Meanwhile I directed the ICAC legal team to make contact with Mr Gallacher's lawyers to tell them that Mr Gallacher would be adversely mentioned and that they should attend the Inquiry. I believe the lawyers had been attending each day, but I needed to make sure that they were there – had they not been available on that particular day I would have had to have deferred mentioning Mr Gallacher or dealing with that email. Mr Gallacher's lawyers, including Mr Moses, attended ICAC that day.
32. I continued to question Mr Williams and I came to the particular email. I questioned him about it and I used the words about which complaint is now made.
33. I agree that I could and should have worded that matter differently and better. It was an excess which occurred in the heat of the moment. I have never held myself out as perfect. I do offer a few excuses which could explain why my conduct was a little more excitable than usual:
- By the time I asked those questions I had been working seven days a week for several weeks. I was exhausted. By the time I asked those questions of Mr Williams I think I had been cross-examining him for some time. Mr Williams was a most obstructive witness, constantly retreating behind a memory lapse (ICAC later found him to have been a dishonest witness). I was frustrated and cranky.
 - Right at the time I was asking those questions I was under considerable amount of personal pressure. My wife, ██████████ ██████████, had been intimidated. On one occasion about a week before she had gone to walk our dog. We live in a very quiet area. A large man got out of a car and followed her – about 10 metres behind. He whistled a particular tune. He followed her on her walk, around the block, and back to home. She was upset and she rang me and I brushed her aside. I still regret that. Later – I think on the day before I asked those questions of Mr Williams – it had happened again: the same man, whistling the same tune. I was wrong when I had brushed her worries aside, and I was now concerned for

her safety. You need to understand that the persons behind Mr Williams were wealthy and powerful and ruthless. It was a genuine threat.

34. As I say, I accept that I could and should have worded all of this better. But, in context, it was not a matter of great moment. No objection was taken to it by counsel for Mr Williams or counsel for Mr Gallacher. The Bar Association looked into this matter and dismissed the complaint against me. As part of that investigation statements were obtained from the Commissioner – Megan Latham. She rejected the suggestion that there was something wrong with what I said. Commissioner Ipp also gave a statement describing the different role of counsel assisting and how it was important that persons be placed squarely on notice that they were likely to be the subject of criticism. It might also be helpful if you go back to ICAC and ask it whether it regards the comments made by me as being out of line.
35. Finally, contrary to things said about me in *The Australian*, a great deal of evidence was presented to ICAC which implicated Mr Gallacher in a series of actions which constituted breaches of election funding laws. This included oral evidence, financial records, emails and text messages. And contrary to things said about me in *The Australian*, ICAC proceeded to make four serious adverse findings against Mr Gallacher. Contrary to what was said in *The Australian*, I did not end Mr Gallacher's career – the evidence did.

Andrew Cornwell

36. I am at a disadvantage here because I do not know what has been put to you – but reading between the lines I can tell that what has been told to you is seriously wrong.
37. Again, some background. Andrew Cornwell was a Liberal candidate for a seat in the Hunter Region. He, and his father, had been called into ICAC for compulsory examination as to sources of election funding. During that time evidence was given by Mr Cornwell explaining the source of particular funds (as it turns out, that evidence was quite false).
38. Some days later the solicitor representing Mr Cornwell, Robert Mangioni, attempted to arrange for an additional compulsory examination. This was upon the basis that Mr Cornwell had further evidence that he wished to provide to ICAC. I have forgotten now what the problem was, but a compulsory examination could *not* be organised. In those circumstances Mr Mangioni contacted by junior, Greg O'Mahoney, and asked that there be a private conference between himself and representatives of ICAC.
39. Mr O'Mahoney discussed it with me and we agreed there could be no harm in meeting Mr Mangioni. Mr O'Mahoney organised a conference in my chambers. On the part of ICAC three people were engaged – Greg O'Mahoney, Don McKenzie (a senior solicitor from ICAC), and myself. The meeting started at around 5.00 pm. I cannot now remember the date, but I have a good recollection of the events.
40. At the outset, Mr Mangioni asked that Mr Cornwell be given "*whistle blower protection*". None of us knew what he meant, and we told him we could make no such promise. Mr Mangioni then asked for our undertaking that Mr Cornwell would not be called as a witness at the public hearing – but we quickly squashed that and told him that it was inevitable that Mr Cornwell would be giving evidence. Mr Mangioni then went on to produce a written statement from Mr Cornwell relating to events surrounding his election funding.
41. I do not understand what you mean when you say that we gave an undertaking as an "*inducement*" to Mr Cornwell providing a statement. In fact, it was the opposite. Mr Mangioni was extremely eager to give this statement to us, but between the three of us we pointed out that it was dangerous for him to do so because such a statement does not acquire the same protection as it would had it been produced during the course of compulsory examination. None of us had the power to make an order that the material be received subject to the privilege offered by the *Independent Commission Against Corruption Act 1988*. Still Mr Mangioni pressed us to read the statement. We were all hesitant. One of us – I do not know whether it was me –

suggested that we could provide an undertaking to try to seek an order retrospectively from a Commissioner giving the statement the protection it would have acquired had it been presented during a compulsory examination. This was written out by hand by Mr O'Mahoney, signed by all of us, and provided to Mr Mangioni – I do not now have a copy of it, but I am sure you can get a copy of it from ICAC.

42. This was *not* an inducement and it was not even a promise. We thought it was the right and decent thing to do.
43. The three of us then read the unsigned statement. It gave a detailed account of how Mr Cornwell had received money from a wealthy developer in the Hunter Region, Hilton Grugeon. We told Mr Mangioni that we would provide it to ICAC.
44. Mr Mangioni then asked if we would prefer to have it signed – and, of course, we agreed that would be preferable. Mr Mangioni told us that Mr Cornwell was sitting downstairs in the foyer of my building and he went to bring him to my chambers to sign the statement.
45. When Mr Cornwell came to my chambers he soon broke down into uncontrollable tears. Amongst other things he told us that he felt that his family and he were under a physical risk from Mr Grugeon.
46. While he was crying I felt embarrassed for Mr Cornwell and I did something which I would nearly always do in the same circumstances – I offered him a drink. I opened a bottle of wine. There was a friendly conversation. I specifically recall a discussion about cricket (Mr Cornwell was a good cricketer) and I specifically recall discussing with Mr Mangioni that he had worked at Allens with my wife.
47. I am aware that there have been allegations that I said certain things during that meeting. I do not know what you have been told, but I deny that I said anything inappropriate. In particular I deny having said *anything* about promoting Mr Cornwell as a "hero" or anything about "white hats" or "black hats". In particular I deny saying that I would protect Mr Cornwell's reputation – I knew nothing about him except his father was a struck-off solicitor who had engaged in very shady property deals.
48. As it turns out, Mr Cornwell's statement was a fabrication. He proceeded to lie on oath to ICAC at the public hearing. He was caught out and exposed as a liar. The whole meeting had been set up to try to trick us – and to some extent, for a limited period of time, it succeeded. In the end it backfired.

Conclusion

49. I believe I have answered all of the issues raised by you, but if anything requires elaboration or clarification, please do not hesitate to contact me.

Yours faithfully


GEOFFREY WATSON SC

P.S. since sending this by email I noticed an error in paragraph 24 – at the time of the call Mr Moses had not yet entered my chambers – although I think he may have expressed an interest to do so

Gmw

Attachment Q



Office of the Inspector of the
Independent Commission Against Corruption

25 November 2019

Our Reference: G3 2020 04

Ms Tanya Davies
Chair, NSW Parliamentary ICAC on the Committee
Parliament of New South Wales
6 Macquarie Street
SYDNEY NSW 2000

Dear Ms Davies

I attach a memorandum which deals with a number of matters arising out of my evidence before the Parliamentary Committee on the ICAC on 18 October 2019, as requested during that evidence.

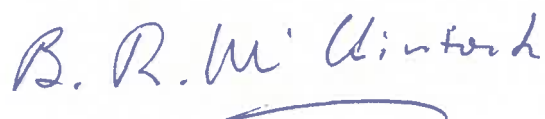
I summarise the significant points I make in the memorandum as follows:

1. I consider, as I said to the Committee, that the conduct of counsel assisting in asking the questions which he did on 2 May 14 (Operation Spicer T3096) was inappropriate and unfair. I have now received from Mr Watson material putting his side of the story and which I will include in my pending audit report concerning issues arising out of the ICAC's management of counsel assisting. Having considered that material, I maintain my view of Mr Watson's conduct.
2. It follows, therefore, the fact that Mr Gallacher was compelled to resign as a result of those questions (which were not then supported by evidence) was unfair, as I said in my evidence to the Committee.
3. This was, however, a failure of process and not a failure of substance, nor a continuing systemic failure. That failure of process does not seem to me to have had any effect on the ICAC's ultimate decision about Mr Gallacher's conduct.
4. This is because, while the ICAC did not make any findings of corrupt conduct (in terms) against him, it did make several findings of serious wrongdoing in that he had knowingly attempted, in effect, to breach the electoral laws of New South Wales. In those circumstances, it would have been difficult, I imagine, for him to continue to be a Minister of the Crown once the ICAC findings became public. Those findings have not, to my knowledge, ever been challenged. I note references by Mr Chris Merritt in his Legal Affairs column in The Australian on 22 November 2019 to advice that the Electoral Commission received from the Crown Solicitor that Patinack Farm and Gazcorp were not property developers within the meaning of the electoral laws. I am investigating

that claim with ICAC but my initial view is that even if that is the case, it does not effect the majority of the findings.

5. I do not believe any additional protection or protocol is necessary for Mr Gallacher or for persons who find themselves in a similar position to Mr Gallacher in future. One reason is, as I have said above, that the failure was not a continuing systemic one and the risk of repetition is minimal. Another reason is that Mr Gallacher's position was amply protected by able senior counsel who represented him in Operation Spicer. That barrister strongly disputed those allegations and put Mr Gallacher's case with vigour and aggression as well as attacking the conduct of counsel assisting.

Yours sincerely

A handwritten signature in blue ink that reads "B. R. M. McClintock". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Bruce McClintock
Inspector, Independent Commission Against Corruption

MEMORANDUM

Introduction

1. At page 11 of the transcript of my evidence to the Committee on 18 October 2019 I offered to provide a written response to an issue which had been raised with me during the course of the hearing, principally by Mr Ron Hoenig MLA. This memorandum provides that response. In addition, I have had the opportunity to read the Committee's *Review of the 2017-2018 Annual Report of the ICAC and the Inspector of the ICAC*, published on 20 November 2019. The Review raises several issues related to the question I am addressing and because the Committee intends to hear evidence from me in early 2020 in connection with my 2018-2019 Report, I will make some points about those issues so that the Committee members understand my position and may question me about it at the hearing.

Conduct of Counsel Assisting in the Spicer hearing.

2. It will be recalled that counsel assisting, Geoffrey Watson, asked the following questions of a witness, Mr Williams, at an ICAC hearing on 2 May 2014:

You see just so it's clear and I want you to know, Mr Williams, we don't go off half copped [sic], we wouldn't put something as serious to you as this without knowing plenty of stuff. The truth is you had a close longstanding personal connection with the Shadow Minister Mike Gallacher? – Yes

It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the eight by five business, correct? – No

Well I can tell you by the end of this you're going to regret having giving [sic] that answer, Mr Williams. We'll press on. I tender that email.

3. Mr Gallacher was (ably) represented at the Operation Spicer inquiry by Mr Arthur Moses SC who protested vociferously and repeatedly about Mr Watson's question and repeatedly asked for the evidence upon which Mr Watson was relying – an example is at p.7011 of the transcript of 3 September 2014.
4. In my letter to Mr Gallacher (I attach a copy for ease of reference) dated 30 August 2018 I said:

... I have unresolved questions about Mr Watson's conduct in asking the impugned questions of Mr Williams. In particular, I find it hard to see how the allegation that you and Mr Williams hatched a corrupt scheme was

justified by the document upon which the ICAC relies to justify it. I am also concerned about the denunciatory nature of the question which I do not regard as appropriate for a public enquiry of this nature. One, amongst a number of reasons, for that concern is the possibility that serious adverse consequences may flow to persons who have not had a chance to answer the denunciation.

5. As I indicated to Mr Gallacher and as I indicated to Ms Tanya Davies, the Chair of the Parliamentary ICAC Committee in my letter dated 31 October 2019, I am preparing an audit report considering ICAC's handling of counsel assisting. I propose to present that to the Presiding Officers in December 2019.
6. After that preamble, I wish to make the points set out in the paragraphs which follow.
7. While I do not regard Mr Watson's questions as appropriate or fair, a view I expressed to the Committee during my evidence, that does not mean that ICAC's ultimate conclusions about Mr Gallacher were wrong. The findings in question, while they did not involve corrupt conduct, were of serious attempts to evade the electoral laws of this State and lack of frankness in his evidence to the Commission. Thus, the ICAC found:
 - *Mr Hartcher, Mr Koelma, the Hon Michael Gallacher MLC, Troy Palmer and Mr Williams were parties to an arrangement whereby, between July 2010 and March 2011, Patinack Farm made payments totalling \$66,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling \$33,000, exceeded the applicable caps on political donations. Although the payments to Eightbyfive were made by Patinack Farm, the arrangement was organised through Buildev, a property developer (chapter 20). [Report p19]*
 - *In about November 2010, Mr Gallacher sought a political donation from Mr Sharpe of Buildev by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or Buildev would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations (chapter 25). [Report p20]*
 - *In late 2010, Mr Gallacher, Mr Hartcher and Mr Williams of Buildev were involved in an arrangement whereby two political donations totalling \$53,000 were provided to the NSW Liberal Party for use in its*

2011 election campaigns for the seats of Newcastle and Londonderry. To facilitate this arrangement, on 13 December 2010, Mr Palmer, a director of Boardwalk Resources Limited, a company of which Mr Tinkler was the major shareholder, drew two cheques totalling \$53,000 payable to the Free Enterprise Foundation. These were provided to Mr Hartcher who arranged for them to be sent to Mr Nicolaou. Mr Nicolaou sent the cheques to the Free Enterprise Foundation. The Free Enterprise Foundation subsequently sent money to the NSW Liberal Party, which included the \$53,000. Of the \$53,000, some \$35,000 was used to help fund Timothy Owen's 2011 election campaign in the seat of Newcastle and \$18,000 was used towards the purchase of a key seats package for Bart Bassett's 2011 election campaign in the seat of Londonderry. Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buildev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading the Election Funding Act laws relating to the accurate disclosure to the Election Funding Authority of political donations (chapter 26). [Report p20]

- Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Luke Grant for his work on Mr Owen's 2011 election campaign. He did so with the intention that the Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority would be evaded (chapter 27). [Report p21]
- In assessing Mr Gallacher's evidence, the Commission has taken into account the matters dealt with in the following chapters. The Commission does not consider Mr Gallacher was always a truthful witness and places no reliance on his evidence unless it is corroborated by other reliable evidence or objective facts. [Report p122]
- The Commission is of the opinion that, at his compulsory examination, Mr Gallacher tailored his evidence to create a false impression with the intention of distancing himself from Buildev, Mr Sharpe and Mr Williams. The Commission is satisfied that the payments for attending the New Year's Eve function were political donations within the meaning of s 85(2) of the Election Funding Act because they were a contribution, entry fee or other contribution to entitle a person to participate in a fundraising function. The Commission finds that, in about November 2010, Mr Gallacher sought a political donation from Mr Sharpe by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or Buildev would make a payment. Mr Gallacher knew that they were property developers, and

he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations. [Report p124]

8. These are findings of serious wrongdoing which, so far as I am aware, Mr Gallacher has never challenged, at least by way of court process. Of particular concern are the last two which concern the truthfulness of Mr Gallacher's evidence to the Commission.

Isolated Incident or Systemic Failure

9. This incident occurred over 5 years ago and, so far as I am aware, there has been no repetition of the kind of conduct represented by the questions I have quoted above. In that time the ICAC has completed at least 8 investigations and currently has 5 underway. In none of the many days of public hearings has anything similar occurred. It seems obvious to me that the lack of repetition indicates that this is not a systemic issue and certainly not a continuing systemic one. I should add that had such conduct recurred, I would certainly have learned of it in my capacity as Inspector.
10. For these reasons, that is, the isolated nature of the incident and the fact that representation by counsel is itself an adequate protection, I do not believe it is necessary to give added protection to witnesses before the Commission.

Counsel assisting as an officer of the Commission

11. In the *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC by the Joint Parliamentary Committee on the Independent Commission Against Corruption* which was tabled on 20 November 2019 there are a number of references to considering in a future review of the ICAC legislation the possibility of amending legislation so that counsel assisting in ICAC enquiries becomes an officer of the Commission. My continuing view is that such a change should not be made for the reasons expressed by the Hon AM Gleeson AC, QC and myself in the report we prepared in 2015 into jurisdiction of the ICAC. See the Hon AM Gleeson AC and Bruce McClintock SC *Independent Panel-Review of the Jurisdiction of the Independent Commission Against Corruption 30 July 2015 p62*:

11.4.18 it has been suggested that the Act be amended to provide that counsel assisting the included within the definition of "officer of the Commission" within section 3. Counsel assisting may be appointed by the Commissioner under section 106 of the Act and, at present, are not

relevantly officers of the ICAC. The consequence of such an amendment would be to render counsel's conduct the subject of section 57B(1)(b) so that the Inspector has power to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of counsel. The implicit suggestion is that the Inspector's powers are presently inadequate in this respect. Another proposal is that counsel assisting be a statutory appointment.

11.4.19 It is plain that the responsibilities of the ICAC and of the Commissioner include appropriate supervision and control of any person engaged by the ICAC to assist its investigations. That responsibility extends to supervision of counsel assisting generally and during the conduct of any public inquiry. It follows that the role of the Inspector in an appropriate case extends to examining complaints about alleged shortcomings in the ICAC's or the Commissioner's discharge of its responsibility for the management of all aspects of its investigation. It should also be kept in mind that counsel are subject to professional rules and oversight. The Panel has noted the provisions of the Legal Profession Uniform Conduct (Barristers) Rules 2015, and in particular rules 96-100, which came into force on 1 July 2015.

12. The Rules referred to are in the following terms:

97. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.

98. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.

99. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the barrister does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.

100. A barrister who appears as counsel assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, other than:

(a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to

information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal; or

(b) a barrister may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:

(i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;

(ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal; or

(iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.

13. There may be a further reason why such a change would not be adopted. It is that many barristers would be unwilling to accept a brief to act as counsel assisting in an ICAC enquiry if they were required to be an officer of the ICAC. That status implies the possibility of direction of counsel by the ICAC which many would regard as inimical to the independent role that barristers are required to fulfil. I doubt whether I would have accepted a brief as counsel assisting in such circumstances when I could do so before my appointment as Inspector. I am sure most barristers would feel the same.
14. I look forward to assisting the Committee with this matter at the proposed hearing next year.

Reputational Damage and an Exoneration Protocol

15. In the *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC by the Joint Parliamentary Committee on the Independent Commission Against Corruption* to which I refer above there are references to the issue of reputational impact and methods of dealing with it, for example, by way of some form of exoneration protocol. This is a slightly more general issue than the one raised with me during my evidence by Mr Ron Hoenig and with which this memorandum is intended to deal. Nevertheless, may I make a couple of points.
16. First, there can be no objection to a requirement that the ICAC publish on its website the fact that a person against whom a finding of corrupt conduct has

been made has been subsequently acquitted of related criminal charges. I understand that the ICAC now does so.

17. Secondly, however, the fact that a person has been acquitted of criminal charges does NOT mean that they have been exonerated from the findings of corruption made against them. The reason is that the ICAC is entitled to take account of evidence which is not admissible in criminal proceedings and commonly does so. For example, the privilege against self-incrimination does not apply in ICAC hearings and witnesses can be compelled to answer questions that may well have that effect. That evidence, however, is not admissible in criminal proceedings. Thus, it is quite possible that a person who admitted to the ICAC that he had engaged in corrupt conduct might still be acquitted because such evidence could not be used in the subsequent criminal proceedings. Such an acquittal could hardly be described as an exoneration.
18. Thirdly, an acquittal does not mean, necessarily or even probably, that a finding of corrupt conduct was wrong. It may be that the subsequent court decision was itself wrong. I dealt with such a matter in my *Special report of the Inspector of the Independent Commission Against Corruption entitled "Report concerning a Complaint by Mr Murray Kear about the conduct of the Independent Commission Against Corruption in Operation Dewar (Special Report 18/04)"*, dated June 2018. In this connection, I note the comments of the Australian's legal affairs reporter Mr Chris Merritt in the Australian of 25 October 2019:

But don't forget former emergency services commissioner Murray Kear and businessmen Charif Kazal and John McGuigan. All were wrongly accused. ICAC's allegations against Kazal were thrown out by the DPP. Like McGuigan and his associates, Kear was exonerated in court.

That statement is wrong or, at best, incomplete. As to Mr Kear, see my Special Report referred to above. As to Mr McGuigan, it is incorrect to say that he "was exonerated in court". In fact, both the Supreme Court and the Court of Appeal upheld the findings of corrupt conduct made against Mr McGuigan when challenged by him. *Duncan v. Independent Commission Against Corruption* [2016] NSWCA 143. I am unable to comment concerning Mr Kazal because I represented him prior to my appointment as Inspector in 2017,

19. I look forward to assisting the Committee in relation to this matter as well as with the role of counsel assisting.

25 November 2019

B. R. McClintock

Bruce McClintock

Inspector, Independent Commission against Corruption

Attachment R

Our Ref: RAM 215 5055 APP

11 December 2017

BY HAND

Bruce McClintock SC
Inspector of the Independent Commission Against Corruption
Office of the Inspector
Level 7
255 Elizabeth Street
Sydney NSW 2000

Dear Inspector

Revised Complaint: Dr Andrew Cornwell & Ms Samantha Brookes

We enclose a revised Complaint on behalf of Dr Cornwell & Ms Brookes for your consideration and action.

The treatment of Dr Cornwell & Ms Brookes in Operation Spicer was appalling. Their only remaining avenue of finding some justice around that is you and your Office. Please help.

Yours faithfully

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3437-7856-8199, v. 1

WATSON MANGIONI LAWYERS PTY LIMITED
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Liability limited by a scheme approved under
Professional Standards Legislation

REVISED COMPLAINT TO THE INSPECTOR OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION BY DR ANDREW CORNWELL & MS SAMANTHA BROOKES

A Commissioner who, at a Bar Association seminar to young lawyers describes the exercise of ICAC's broad powers as "a lot of fun", and the questioning of witnesses at ICAC hearings as "like pulling wings off a butterfly".

The commencement of ultra vires investigations, and the repeated exercise of powers in an ultra vires manner, leading to the need for the enactment of legislation to retrospectively validate flawed investigations and findings.

Public inquiries that are conducted more like a circus than a court, encouraging trial by media, and fundamentally undermining the presumption of innocence in the court of public opinion.

Counsel Assisting who are neither objective nor fair, and who appear more concerned with their own public image than with the pursuit of truth.

The overzealous investigation of breaches of laws which, on their face, could never lead to a prosecution.

The deliberate withholding from the DPP of exculpatory evidence, allowing the DPP to initiate prosecutions that should never have been commenced².

These matters are serious. They are not isolated. They have brought ICAC into ridicule and disrepute. And, they have undermined public confidence in the system.

That is the backdrop to this Complaint³. Against that backdrop, the present Complaint warrants rigorous investigation by the Inspector. Only through a proper investigation can the truth of the extremely serious matters now complained of be uncovered, and ICAC be called to account.

To understand the grievance that Dr Cornwell and Ms Brookes have with ICAC, we must start at the end, namely at the findings that were ultimately made against them.

In the ICAC Report regarding Operation Spicer dated August 2016⁴, Commissioner Latham concluded that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Dr Cornwell and Ms Brookes for perjury offences under Section 87 of the ICAC Act, in relation to their following evidence given at the public inquiry:

- (a) in the case of Ms Brookes:
 - (i) that she received a Painting by Mr Newell (known as *Perrin's Boat Shed*) for her birthday in 2010; and
 - (ii) that the Painting was later given to Mr Grugeon as a Christmas gift in return for which Mr Grugeon paid \$10,120; and

¹ "ICAC's Megan Latham: witness exams like pulling wings off butterflies", The Australian, 31 October 2015.

² "ICAC 'omitted' statement from evidence to DPP on Murray Kear", The Australian, 14 November 2015; "ICAC is holding evidence back: DPP", The Australian, 9 September 2016; and "Craig Ransley: Evidence withheld by ICAC", The Australian, 1 December 2017.

³ Terms defined in the body of this Complaint have the same meaning when used in this Preface.

⁴ ICAC Report, Page 163.

- (b) in the case of Dr Cornwell:
- (i) that he gave the Painting to Mr Grugeon as a Christmas present; and
 - (ii) that Mr Grugeon subsequently contacted him and insisted on paying for the Painting, which resulted in Mr Grugeon paying \$10,120 for it.

Those matters were referred to the DPP on 20 February 2017⁵. As is obvious, the referred matters relate entirely to the Painting Transaction.

At its heart, the gravamen of the grievance of Dr Cornwell and Ms Brookes is as follows:

- (a) Dr Cornwell came forward and volunteered the existence, and full details, of the Painting Transaction to ICAC – ICAC was otherwise oblivious to it;
- (b) the Painting Transaction was volunteered to ICAC in circumstances where Dr Cornwell was given an Inducement Undertaking, and the Commissioner also gave him a Letter of Comfort, to the effect, in substance, that the information and documents so volunteered would not be used against Dr Cornwell, or by implication his wife;
- (c) at the time, Dr Cornwell was lauded by Counsel Assisting for his frankness, and congratulated for coming forward;
- (d) but, something happened – it appears, no more than a personal public embarrassment for Mr Watson – and ICAC changed tack;
- (e) the dirty double-cross was swift – and brutal: improperly motivated, and without due investigation, Dr Cornwell and Ms Brookes became targets of a vindictive campaign, driven by Counsel Assisting (Mr Watson and Mr O'Mahoney), but facilitated by ICAC staff (including Mr McKenzie and Mr Riashi), and by the Commissioner herself:
 - (i) the investigation of key exculpatory evidence by ICAC investigators was superficial, or non-existent;
 - (ii) when investigators heard things they didn't like, that were inconsistent with the attack on Dr Cornwell and Ms Brookes, they did not follow through; and
 - (iii) despite the Inducement Undertaking and the Letter of Comfort, and aware of the complete about-face that had taken place, but without any attempt to uncover the truth, the Commissioner allowed Dr Cornwell and Ms Brookes to be attacked in cross-examination, and then vilified in Counsel Assisting's Submissions (contributed to by ICAC staff);
- (f) the evidence in the public inquiry around the Painting Transaction was incomplete in certain material respects, and unreliable in other material respects; and
- (g) nevertheless, the Commissioner ultimately made adverse findings against Dr Cornwell and Ms Brookes, and referred them both to the DPP, regarding the evidence that they gave in the public inquiry in relation to the Painting Transaction, in further breach of the Inducement Undertaking and the Letter of Comfort: this was, it is evident, a vain attempt by the Commissioner to conceal the earlier misconduct, by herself and other ICAC staff.

At every stage, these attacks on Dr Cornwell and Ms Brookes were splashed across the media. They have been publicly humiliated. Their reputations are in tatters. The impact has affected all aspects of their lives. For example, their long-term bank (the CBA) has closed all of their family bank accounts (even including the Dollarmites Club savings account of their 9-year old son)!

⁵ "Prosecutions Outcome Web Table" obtained from <https://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcome>.

Contrast this treatment with that of Mr Owen. He deliberately lied in the Spicer Inquiry to intentionally mislead ICAC. He was caught out⁶. But, he avoided any censure whatsoever in the Commissioner's final ICAC Report, and has not been referred to the DPP⁷.

The detail of this grievance is set out more fully in the body of this Complaint. However, the nexus between the protected information volunteered by Dr Cornwell to ICAC in relation to the Painting Transaction (which had the benefit of both the Inducement Undertaking and the Letter of Comfort), and the position in which Dr Cornwell and Ms Brookes now find themselves, is clear. But for Dr Cornwell volunteering that information, he and Ms Brookes simply would not have been referred to the DPP. Now, as they wait for the DPP to determine whether or not they will be charged with criminal offences, they try as best they can to restore some small part of their reputations shattered under the crushing weight of an ICAC inquiry that went horribly wrong.

Until the DPP responds to ICAC, and both Dr Cornwell and Ms Brookes are cleared of wrongdoing, the suffering and embarrassment caused by ICAC's miscarriage of its duties as set out in this Complaint continues.

A favourable finding by the Inspector as to misconduct by ICAC staff and/or the Commissioner will be a significant first step in ameliorating some of that pain.

A. Introduction

1. This Complaint does not have broad ambit.
2. It is made on behalf of Andrew Cornwell (**Dr Cornwell**) and his wife, Samantha Brookes (**Ms Brookes**). It relates to the experiences of Dr Cornwell and Ms Brookes at ICAC in connection with Operation Spicer.
3. What happened to them is wrong and should not be allowed to happen again.
4. A significant cause of the problem is the scope of the powers that ICAC believed it had, the unbridled manner in which those powers were wielded, the nature of the people who exercised those powers, and the lack of accountability of those people for their actions. Shining the light on these systemic issues should help to protect against this particular history repeating itself.
5. In the Inspector's letter dated 25 August 2017, he advised us that, as Counsel Assisting is not an "*officer of the Commission*" within the meaning of the Independent Commission Against Corruption Act (the **ICAC Act**), he had no power to deal directly with our original allegations of misconduct, insofar as they were made against Counsel Assisting, Geoffrey Watson SC (**Mr Watson**) and Greg O'Mahoney (**Mr O'Mahoney**). Dr Cornwell and Ms Brookes were invited to revisit their Complaint.
6. As such, the scope of this Complaint has now been restricted to the following persons, as officers of ICAC⁸:
 - (a) Commissioner Megan Latham (the **Commissioner**);
 - (b) Don McKenzie, a Principal Lawyer at ICAC (**Mr McKenzie**);
 - (c) the ICAC investigators (including Michael Riashi, a Senior Investigator at ICAC (**Mr Riashi**)), who were responsible for the flawed and biased investigation; and
 - (d) the Executive Director, Investigations Division at ICAC, who was ultimately responsible for the flawed and biased investigation.

⁶ Spicer Inquiry Transcripts, Owen, 12 August 2014, 5139/38-5140/18.

⁷ ICAC Report, Pages 161 to 164.

⁸ ICAC Act, Section 3.

B. Background of Dr Cornwell & Ms Brookes

7. Dr Cornwell holds a Bachelor of Veterinary Science degree. He has worked as a veterinarian since 1993. He was encouraged to run for Parliament as the Liberal Party candidate for Charlestown in the 2011 election. He was successfully elected to Parliament at that time.
8. Dr Cornwell's wife, Ms Brookes, holds a Masters of Business Administration degree. She worked in various executive roles at the University of Newcastle from 1997.
9. In February 2014, the public inquiry known as Operation Spicer was announced by ICAC (the **Spicer Inquiry**). In July 2014, Dr Cornwell was called to give evidence in a private examination. He later volunteered a detailed written statement to ICAC (the **Cornwell Statement**). The provision of the Cornwell Statement led to Ms Brookes also being called to give evidence in a private examination.
10. The evidence provided to ICAC by Dr Cornwell and Ms Brookes, including in the Cornwell Statement, relevantly concerned a \$10,000 cash donation (the **McCloy Payment**) made to Dr Cornwell's election campaign by a property developer, Jeff McCloy (**Mr McCloy**), and the sale of a painting by Ms Brookes to another property developer, Hilton Grugeon (**Mr Grugeon**), for \$10,120 during the course of Dr Cornwell's election campaign (the **Painting Transaction**).
11. When the public hearings in the Spicer Inquiry resumed on 6 August 2014, Counsel Assisting (Mr Watson) made the following remarks about Dr Cornwell⁹:

"... Commissioner, Andrew Cornwell is the Liberal Party Member for Charlestown. Mr Cornwell has given considerable assistance to ICAC. ...

... Mr Cornwell [was an] outstanding candidate for Parliament, ... [he] had a lucrative career and ... [he] was making a sacrifice in seeking political office. [He was not] a career politician, [he was] not [a] party machine [man] and [he was] being enlisted by the Liberal Party because [he was an] outstanding candidate. One can see how [his] experience ... made [him] susceptible to being manipulated by wealthy individuals who wanted political preferences, especially if those wealthy individuals had [the] pre-existing support of elements within the Party machine.

Mr Cornwell has been helpful to ICAC. He has given cooperation. His actions may have been unwise but it would seem to us, this is just an expression of opining between Mr O'Mahoney and myself, but it would seem to us that those actions may have been the product of a degree of inexperience in the face of high pressure tactics from some pretty determined characters. I should add that there is no evidence which suggests that Mr Cornwell actually gave any preferences to Mr McCloy or Mr Grugeon".

12. Dr Cornwell and Ms Brookes gave evidence in the Spicer Inquiry on 7 August 2014.
13. However, only a short time later, and without forewarning, the attitude of ICAC to Dr Cornwell and Ms Brookes had completely transformed. No longer were they considered honest and cooperative. Now, they were considered deceitful and corrupt. An explanation for this unjustified about-face is set out in Section D of this Complaint.
14. On 21 August 2014, Dr Cornwell and Ms Brookes were recalled to give evidence. At that time, they were subjected to a vigorous and personal attack by Counsel Assisting. Among other things, Dr Cornwell was accused of taking bribes and attempting to mislead ICAC, while Ms Brookes was accused of collusion and perjury. Those accusations were repeated in the formal submissions later made by Counsel Assisting

⁹ Spicer Inquiry Transcripts, Opening, 6 August 2014, 4783/46-4783/48 & 4785/08-4785/25.

filed on 10 October 2014 (**Counsel Assisting's Submissions**). Counsel Assisting's Submissions are Attachment 4 to this Complaint.

15. Dr Cornwell's position became untenable. He resigned from Parliament in August 2014. He returned to being a veterinarian.
16. In March 2015, after returning from maternity leave, Ms Brookes was offered, and accepted, a separation package from the University of Newcastle, her then employer of 18 years. Perhaps that was mere coincidence, perhaps not.
17. In pursuing Dr Cornwell and Ms Brookes in the manner in which it did, ICAC improperly exercised powers it did not have (a situation only cured by the passing of retrospective legislation), based on information which Dr Cornwell and Ms Brookes had themselves volunteered to ICAC and of which ICAC was not otherwise aware, to make allegations of corrupt conduct that destroyed Dr Cornwell's and Ms Brookes' reputations and careers, and which at the time could never have been the subject of a prosecution, and in fact never became the subject of a referral to the Director of Public Prosecutions (the **DPP**). The only thing that has been referred to the DPP is an allegation that the evidence that Dr Cornwell and Ms Brookes gave at the public inquiry in relation to the Painting Transaction was false. However, that allegation is not, and never was, sustainable. An explanation for this is set out in Section F of this Complaint.
18. That brief outline may seem an unduly cynical and partisan view of what happened to Dr Cornwell and Ms Brookes. However, any fair-minded examination of the underlying facts will bear out that harsh description. At the least, Dr Cornwell and Ms Brookes deserve a public apology. The Inspector should invite ICAC to provide one.

C. Documentary Support for this Complaint

19. The following documents are annexed to, and form part of, this Complaint:
 - (a) the Cornwell Statement (Attachment 1);
 - (b) the undertaking signed by Counsel Assisting (Mr Watson and Mr O'Mahoney) and by Mr McKenzie (a Principal Lawyer at ICAC) and given to Dr Cornwell on 23 July 2014 as an inducement for Dr Cornwell to provide the Cornwell Statement to ICAC (the **Inducement Undertaking**), and the related letter signed by the Commissioner dated 1 August 2014 by which the Commissioner committed that ICAC would honour that Inducement Undertaking (the **Letter of Comfort**) (Attachment 2);
 - (c) a statement signed by Robert Mangioni (**Mr Mangioni**), Solicitor for Dr Cornwell and Ms Brookes, outlining in detail what happened at the meeting with Counsel Assisting and Mr McKenzie on 23 July 2014 at which the Cornwell Statement was provided to ICAC (the **Mangioni Statement**)¹⁰ (Attachment 3);
 - (d) Counsel Assisting's Submissions in relation to the Spicer Inquiry filed on 10 October 2014 (Attachment 4);
 - (e) the submissions made to ICAC on behalf of Dr Cornwell and Ms Brookes in relation to the Spicer Inquiry filed on 7 November 2014 (the **Cornwell/Brookes Submissions**) (Attachment 5);
 - (f) the supplementary evidence submitted to ICAC on behalf of Dr Cornwell and Ms Brookes in relation to the issue of material uninvestigated errors in the evidence of Rex Newell (**Mr Newell**), a critical witness relevant to ICAC's case concerning the Painting Transaction (the **First Supplementary Cornwell/Brookes Evidence Submission**) (Attachment 6);

¹⁰ The Mangioni Statement was tendered in evidence in the recent Obeid misfeasance in public office case against ICAC, without objection by either ICAC or Mr Watson: see *Obeid v Ipp & Ors* [2016] NSWSC 137 at [29].

- (g) the supplementary evidence submitted to ICAC on behalf of Dr Cornwell and Ms Brookes in relation to the uninvestigated issue of the possible recall of Dr Cornwell's father, Brien Cornwell (**Mr Cornwell Snr**), to give additional evidence at the Spicer Inquiry concerning the Painting Transaction (the **Second Supplementary Cornwell/Brookes Evidence Submission**) (Attachment 7);
- (h) relevant extracts from the report of the Commissioner in relation to Operation Spicer dated August 2016 (the **ICAC Report**) (Attachment 8);
- (i) exhibit Z52 from the Spicer Inquiry, containing an extract of evidence given by Ms Brookes in her private examination at ICAC on 31 July 2014 (the **Brookes Transcript**) (Attachment 9);
- (j) the transcripts of the evidence given by Dr Cornwell in the Spicer Inquiry on 7 & 21 August 2014 (Attachment 10);
- (k) the transcripts of the evidence given by Ms Brookes in the Spicer Inquiry on 7 & 21 August 2014 (Attachment 11); and
- (l) various news articles about ICAC in relation to certain matters mentioned in the Preface to this Complaint (see Footnotes 1 & 2) (Attachment 12).

D. Complaint 1: Breach of the Inducement Undertaking & the Letter of Offer given to Dr Cornwell¹¹

Dr Cornwell's Offer of Assistance

- 20. On 7 July 2014, Dr Cornwell received a summons to appear and give evidence at a private examination before ICAC. That examination took place on 17 July 2014.
- 21. Immediately following Dr Cornwell's examination, Counsel Assisting (Mr O'Mahoney) had a brief discussion with Dr Cornwell, and his lawyer, Mr Mangioni. Counsel Assisting raised three matters¹². First, he acknowledged Dr Cornwell's forthrightness, and Dr Cornwell's willingness to assist ICAC in its investigations, as stated on several occasions by Dr Cornwell during the course of his private examination. Second, he emphasised the importance and benefits of assisting ICAC with its investigations. And third, he asked Dr Cornwell to think about the matters being investigated by ICAC and to come forward with any information which Dr Cornwell believed might be of assistance.
- 22. Dr Cornwell took that conversation seriously. Over the next few days (including the weekend), Dr Cornwell spent a substantial amount of time reviewing his personal records, and discussing relevant matters with Ms Brookes, and Mr Mangioni. Following that review, Dr Cornwell decided to bring certain information forward to ICAC¹³. The result was the Cornwell Statement, a detailed written statement which Dr Cornwell volunteered to ICAC within a week after his first private examination. The Cornwell Statement is Attachment 1 to this Complaint.
- 23. Significantly, the Cornwell Statement brought forward a number of completely new matters, which had not previously been known to ICAC, and which, as a consequence, had not previously been the subject of questioning at Dr Cornwell's private examination the week before, on 17 July 2014¹⁴. The new matters volunteered by Dr Cornwell in the Cornwell Statement included detailed evidence concerning the existence, and circumstances, of the Painting Transaction. There was also new evidence detailed in

¹¹ For further details on this matter, see Paragraphs 6 to 33 of the Cornwell/Brookes Submissions.

¹² Mr Mangioni can provide a statement verifying these facts, if required.

¹³ Spicer Inquiry Transcripts, Brookes, 21 August 2014, 5737/48-5738/07 & 5738/24-5738/29, & Cornwell, 21 August 2014, 5753/27-5754/02.

¹⁴ Dr Cornwell does not have, and cannot get, a copy of the transcript of his private examination. The Inspector should request that transcript from ICAC under Section 57C(b) of the ICAC Act, and can then verify this statement.

depth in the Cornwell Statement on other matters not previously known to ICAC. However, those other matters are not relevant for the purposes of this Complaint.

24. Following the provision of the Cornwell Statement to Counsel Assisting, Dr Cornwell and Ms Brookes were then examined on the subject of the Painting Transaction¹⁵. Those further private examinations concerning the Painting Transaction took place on 31 July 2014.
25. We must digress from the narrative at this point to deal briefly with the critical question of credit regarding Dr Cornwell's evidence in relation to the Painting Transaction. In the ICAC Report¹⁶, the Commissioner concludes that:

"The account given by Andrew Cornwell and Ms Brookes as to how they came to receive \$10,120 from Mr Grugeon is inherently improbable".

That conclusion is fundamentally flawed. That is addressed in detail in Section F of this Complaint. A short response only is necessary here for present purposes.

26. Why would Dr Cornwell have provided a complete *confession* in relation to the McCloy Payment, and yet have provided (what is now said to be) a complete *fabrication* in relation to the Painting Transaction, in the Cornwell Statement? That makes no sense whatsoever. If Dr Cornwell's purpose in making the disclosures to ICAC that are made in the Cornwell Statement was, as is stated in Paragraph 10 of the Cornwell Statement:

"... to voluntarily bring some further matters to the attention of the ICAC, under the full protections for whistleblowers provided by the law ..."

why would he have lied about the Painting Transaction? The Painting Transaction had not been raised by ICAC in Dr Cornwell's private examination on 17 July 2014. Mr Grugeon had not raised it. ICAC did not know about it. Why would Dr Cornwell have raised it in his Statement, and then lied about it? The disclosure was only helpful to him if it were true (if he described the Transaction in a particular way, but the Transaction in fact occurred in a different way, that different way in which the Transaction occurred would not be protected by his disclosure).

27. While it may *seem* improbable, the evidence about the Painting Transaction given by Dr Cornwell in the Cornwell Statement dated 23 July 2014, in his subsequent private examination on 31 July 2014, and in his public examinations on 7 and 21 August 2014, and the corroborating evidence about the Painting Transaction given by Ms Brookes in her private examination on 31 July 2014, and in her public examinations on 7 and 21 August 2014, was true. That evidence was not controverted by any other credible witness. But for some impropriety within ICAC (whether known to the Commissioner or not), that evidence should have been found by the Commissioner to be true, and Dr Cornwell and his wife should not have been referred to the DPP for perjury.

The Glass of Wine Meeting with Counsel Assisting

28. The Cornwell Statement was delivered to Counsel Assisting (Mr Watson and Mr O'Mahoney), and a Principal Lawyer at ICAC (Mr McKenzie), in a private meeting in Mr Watson's chambers on 23 July 2014 (the **23 July Meeting**). The 23 July Meeting was attended by Dr Cornwell (part only) and Mr Mangioni, and by Mr Watson, Mr O'Mahoney and Mr McKenzie.
29. At the commencement of the 23 July Meeting, Mr Watson dictated, and Mr O'Mahoney wrote out in longhand, and then Mr Watson, Mr O'Mahoney and Mr McKenzie signed, the Inducement Undertaking in favour of Dr Cornwell. It was handed to Mr Mangioni. Dr Cornwell was not present. The Inducement Undertaking stated as follows:

¹⁵ Dr Cornwell and Ms Brookes do not have, and cannot get, a copy of the transcripts of their private examinations. The Inspector should request those transcripts from ICAC under Section 57C(b) of the ICAC Act, and can then verify this statement.

¹⁶ ICAC Report, Page 148.

"I undertake to seek an order from the Independent Commission Against Corruption with the effect that nothing said to me today and no document produced to me today will be used against Mr Andrew Cornwell. I am confident that I will be able to obtain such an order".

30. On 1 August 2014, the Commissioner provided a Letter of Comfort to Mr Mangioni on behalf of Dr Cornwell in which she referred to the Inducement Undertaking and confirmed as follows:

"The Commission will honour the undertaking given to you on 23 July 2014 with respect to the information you provided, or that was provided under your direction, and the documentation you provided, or that was provided under your direction, to Counsel Assisting the Commission in the course of that meeting".

The Letter of Comfort, which annexes the Inducement Undertaking, is Attachment 2 to this Complaint.

31. Following the giving of the Inducement Undertaking at the 23 July Meeting, there was discussion between Mr Mangioni and Counsel Assisting around the matters in respect of which Dr Cornwell could assist ICAC with its investigations. Dr Cornwell was not present. Included in the matters discussed were the McCloy Payment and the Painting Transaction. Mr Mangioni provided an unsigned draft of the Cornwell Statement to Counsel Assisting and Mr McKenzie, so that they could see what Dr Cornwell had to say about those matters. Remember that, at that time, the Painting Transaction was not known to ICAC and had not been the subject of questioning at Dr Cornwell's earlier private examination. This initial part of the 23 July Meeting commenced at about 4.00 pm and went for approximately 45 minutes.
32. At Mr Mangioni's request, Dr Cornwell was then invited to join the meeting. When that happened, Mr Watson explained to Dr Cornwell and Mr Mangioni that he, Mr O'Mahoney and Mr McKenzie had reviewed the unsigned Cornwell Statement, that they considered that it contained information which would be of significant assistance to ICAC, that Dr Cornwell had "*done the right thing*" by coming forward to assist ICAC, and that while there were "*some issues*" for Dr Cornwell around the McCloy Payment and the Painting Transaction Mr Watson would "*stake my [Mr Watson's] reputation on protecting your [Dr Cornwell's] reputation*". Mr Watson reiterated that "*we [Counsel Assisting and Mr McKenzie] have a lot of flexibility in the [Commissioner's] Report and the focus of [the] findings*".
33. After receiving these assurances from Mr Watson, and in reliance on them, and on the previously provided Inducement Undertaking from Mr Watson, Mr O'Mahoney and Mr McKenzie, Dr Cornwell signed the Cornwell Statement. It was handed to Mr Watson. To consummate the arrangement, Mr Watson then opened a bottle of wine, and gave a glass to each of the people present, including Dr Cornwell and Mr McKenzie. Informal discussion then ensued, as a second bottle of wine was consumed. Mr Watson regaled those present with stories about other ICAC investigations. There was also discussion around various people anticipated as witnesses in the Spicer Inquiry. This later part of the 23 July Meeting (which Dr Cornwell attended) went for approximately 1½ hours (including the initial ½ hour attending to the formal matters).
34. Full details of what happened at the 23 July Meeting are set out in the Mangioni Statement. The Mangioni Statement is Attachment 3 to this Complaint. Having elected not to object to the Mangioni Statement when it was tendered in Court in unrelated proceedings¹⁷, and having thereby allowed it to be accepted as truthful evidence, ICAC and Mr Watson can hardly now challenge the integrity of the Mangioni Statement.

¹⁷ The Mangioni Statement was tendered in evidence in the recent Obeid misfeasance in public office case against ICAC, without objection by either ICAC or Mr Watson: see *Obeid v Ipp & Ors* [2016] NSWSC 137 at [29].

35. Without limitation, the Inspector should consider whether Mr McKenzie's participation in the 23 July Meeting, and in particular joining in the consumption of wine with a witness at a meeting in which that witness was being induced to act as something of a 'whistleblower', amounts to "impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission" within Section 57B(1)(b) of the ICAC Act?

Counsel Assisting's, Mr McKenzie's & the Commissioner's Dirty Double-Cross

36. On 6 August 2014, Dr Cornwell was summoned by Premier Baird to a meeting to discuss developments at ICAC, specifically the inclusion of Dr Cornwell's name on the witness list for the public hearings in the Spicer Inquiry (the **Premier's Meeting**). The Premier's Meeting was attended by Dr Cornwell, the Premier and the Premier's advisers.
37. At the Premier's Meeting, Dr Cornwell was asked by the Premier to explain himself. He did. His explanation appropriately, and innocently, included details of the 23 July Meeting. Dr Cornwell mentioned the bottles of wine, and the relaxed tone of the Meeting. Dr Cornwell explained that he was doing all that he could to assist ICAC with its investigations, and that he believed that this goodwill was being reciprocated by ICAC.
38. Unfortunately, details of what Dr Cornwell disclosed at the Premier's Meeting were later improperly leaked to Andrew Clennell at The Daily Telegraph (albeit not by Dr Cornwell). On 12 August 2014, a news story was published in The Daily Telegraph, entitled "*Crunch Time Looms for ICAC's Grand Inquisitor*"¹⁸. There was a large photograph of Mr Watson included in the article. Among other things, the article reported that:
- "The word is that Cornwell was walking around Parliament saying that he would be fine out of the [ICAC] inquiry and that he had even had a wine with Watson in his chambers. Watson yesterday confirmed to The Daily Telegraph [that] this meeting occurred".*
39. Neither Dr Cornwell nor Ms Brookes had anything to do with this article. However, they suspect that Mr Watson, Mr O'Mahoney and Mr McKenzie all believed that Dr Cornwell was responsible for the leak. No doubt, the public revelation of the glass of wine meeting with Dr Cornwell was particularly embarrassing for Mr Watson, Mr O'Mahoney and Mr McKenzie. It almost certainly would have attracted the Commissioner's attention. There will inevitably have been internal communications about it within ICAC¹⁹. In any event, almost immediately after this article was published, the attitude of ICAC towards Dr Cornwell and Ms Brookes transformed completely. Mr McKenzie almost certainly, and the Commissioner in all probability, must have been involved in that decision.
40. Just four business days later, on 18 August 2014, Dr Cornwell and Ms Brookes received further summonses to appear and give evidence again at the public hearings in the Spicer Inquiry. There will have been discussions and meetings in which ICAC staff participated, and in which the Commissioner perhaps also participated, in which the change of tack (the complete about-face) would have been discussed and instructions given as to what then to do regarding Dr Cornwell and Ms Brookes. Mr McKenzie would likely have participated in those discussions and meetings. Records of what happened, and why, will exist within ICAC²⁰.

¹⁸ "*Crunch Time Looms for ICAC's Grand Inquisitor*", The Daily Telegraph, 12 August 2014.

¹⁹ Dr Cornwell and Ms Brookes cannot get a copy of any such communications. The Inspector should request copies of those communications from ICAC under Section 57C(b) of the ICAC Act. The Inspector should interrogate relevant officers of ICAC about those communications under Section 57C(d) of the ICAC Act.

²⁰ Dr Cornwell and Ms Brookes cannot get a copy of any such records. The Inspector should request copies of those records from ICAC under Section 57C(b) of the ICAC Act. The Inspector should interrogate relevant officers of ICAC (including Mr McKenzie and the former Commissioner) about those discussions and meetings under Section 57C(d) of the ICAC Act.

41. Without limitation, the Inspector should consider whether the decisions made and the steps taken by ICAC staff at that time (including by Mr McKenzie and Mr Riashi), by reference (among other things) to the motives for those decisions being made and steps being taken (if, as suspected, that was prompted by The Daily Telegraph article), and in particular in light of the Inducement Undertaking and the Letter of Comfort, amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act, or *"maladministration ... by the Commission or officers of the Commission"* within Sections 57B(1)(c) & (4)(c) of the ICAC Act?
42. Without limitation, the Inspector should also consider whether the Commissioner's involvement in the decisions made and the steps taken by ICAC staff at that time, or (if she was not involved) whether her failure to become involved, in particular in light of the Letter of Comfort, amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act?
43. Those further public examinations took place on 21 August 2014. At that time, Dr Cornwell (examined by Mr Watson) and Ms Brookes (examined by Mr O'Mahoney) were subjected to a vigorous and personal attack. Among other things, Dr Cornwell was accused of taking bribes and attempting to mislead ICAC, while Ms Brookes was accused of collusion and perjury, in connection with the Painting Transaction. No longer were Dr Cornwell and Ms Brookes considered honest and cooperative. Now, they were considered deceitful and corrupt.
44. However, those accusations were unjustified. In reality, no new information had come to the attention of ICAC since Mr Watson had said, in his opening on 6 August 2014, that *"Mr Cornwell has given considerable assistance to ICAC. ... His actions may have been unwise ... , but it would seem to us that those actions may have been the product of a degree of inexperience"*. Counsel Assisting, Mr McKenzie and the Commissioner had simply changed their attitude to Dr Cornwell and Ms Brookes, following the article in The Daily Telegraph on 12 August 2014. The new accusations were only superficially investigated by ICAC (a process in which Mr Riashi was involved), and they do not withstand scrutiny, as explained in Sections E and F of this Complaint. Counsel Assisting and Mr McKenzie were not being objective and, in truth, were pursuing an improper agenda against Dr Cornwell and Ms Brookes, in light of the intervening press, which showed Mr Watson, Mr O'Mahoney and Mr McKenzie, and ICAC as an organisation, in a bad light.
45. Without limitation, the Inspector should consider whether ICAC staff and/or the Commissioner caused or contributed to, or were knowingly involved in, the manner in which Counsel Assisting attacked Dr Cornwell and Ms Brookes on 21 August 2014, and if so whether that participation amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act, and whether, by reference (among other things) to the motives for Dr Cornwell and Ms Brookes being so attacked (if, as suspected, that was prompted by The Daily Telegraph article), and in particular in light of the Inducement Undertaking and the Letter of Comfort, that participation amounts to *"maladministration ... by the Commission or officers of the Commission"* within Sections 57B(1)(c) & (4)(c) of the ICAC Act?
46. Without limitation, the Inspector should also consider whether the Commissioner's failure to restrain or control Counsel Assisting in their cross examination of Dr Cornwell and Ms Brookes on 21 August 2014, in particular in light of the Inducement Undertaking and the Letter of Comfort, amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act?
47. Moreover, what happened in those examinations on 21 August 2014, and in the ensuing submissions of Counsel Assisting, was a brazen breach by Counsel Assisting and, to the extent that he was involved in that conduct, Mr McKenzie, of the Inducement Undertaking which they had given to Dr Cornwell in the 23 July Meeting, and a further brazen breach by the Commissioner of the Letter of Comfort which she had given to Dr Cornwell on 1 August 2014, committing ICAC to honour the Inducement Undertaking.

48. Without limitation, the Inspector should consider whether either the Inducement Undertaking or the Letter of Comfort was breached, and if so whether that breach amounts to “*impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission*” within Section 57B(1)(b) of the ICAC Act?

Status of the Undertaking & the Letter of Comfort

49. On 7 August 2015, the Commissioner appeared before the Committee on the Independent Commission Against Corruption (the **Committee**).
50. She was asked whether it was common practice for Counsel Assisting to provide letters of comfort to ICAC witnesses with regards to the use of their evidence. She replied²¹:

“I would not say it was common, no”.

51. She then stated the following²²:

“I think there is a great deal of misunderstanding about what so-called letters of comfort are. The only occasion of which I am aware during my tenure was a very specific written undertaking, which was expressed in very specific terms and was premised upon – and this is something that every undertaking in the legal setting is also premised upon – the person who receives the benefit of the undertaking giving the Commission a full, complete and truthful account. So if that person who receives the benefit of the undertaking does not give a full, complete and truthful account the undertaking is worth nothing”.

This was inevitably a reference to the Inducement Undertaking given by Counsel Assisting and Mr McKenzie to Dr Cornwell, and to the Letter of Comfort given by the Commissioner to Dr Cornwell.

52. Putting aside for one moment whether or not the Commissioner’s stated position on this is right or wrong, implicit in the Commissioner’s response is an acknowledgment by the Commissioner that, absent a justification that the evidence given by Dr Cornwell and Ms Brookes around the Painting Transaction was not “*a full, complete and truthful account*”, the Inducement Undertaking and the Letter of Comfort had been breached. The feeble basis on which it is now said that Dr Cornwell and Ms Brookes perjured themselves in the public inquiry is addressed in detail in Section F of this Complaint.
53. However, the Commissioner is wrong in her position that the current Inducement Undertaking, and Letter of Comfort, were conditioned on a requirement that Dr Cornwell give “*a full, complete and truthful account*”. That condition is not expressly stated in either document. Nor was it ever discussed at the time that either document was given to Dr Cornwell. Such a condition cannot now be unilaterally imposed on either the Inducement Undertaking or the Letter of Comfort *ex post facto*.
54. Undertakings can be given conditionally or unconditionally²³.
55. The Inducement Undertaking given by Counsel Assisting and Mr McKenzie in the 23 July Meeting, and the Letter of Comfort given by the Commissioner on 1 August 2014, were, as the Commissioner has since confirmed, written in strict and specific legal terms²⁴. There was no condition that Dr Cornwell tell the truth. The Commissioner cannot now make up and rely on conditions that were not included in the Inducement Undertaking or the Letter of Comfort at the time. The Inducement Undertaking, and the Letter of Comfort, were binding in accordance with their terms on the respective signatories to those documents.

²¹ Committee Transcript, 7 August 2015, Page.30.

²² Committee Transcript, 7 August 2015, Page.30.

²³ For example, see Criminal Procedure Act, Section 33(3).

²⁴ Committee Transcript, 7 August 2015, Page.30.

56. Without limitation, the Inspector should consider whether or not the Commissioner's position on the conditionality of the Undertaking and the Letter of Comfort is wrong, and if so whether that misunderstanding infected the manner in which she then acted in Operation Spicer with respect to Dr Cornwell and Ms Brookes, such that it amounts to "*impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission*" within Section 57B(1)(b) of the ICAC Act, or "*maladministration ... by the Commission or officers of the Commission*" within Sections 57B(1)(c) & (4)(a), (4)(b) or (4)(c) of the ICAC Act?
57. That is not to say that Dr Cornwell or Ms Brookes lied when giving their evidence about the Painting Transaction. On the contrary, they both told the truth. That is addressed in Paragraphs 26 & 27 of this Complaint, and in detail in Section F of this Complaint.

E. Complaint 2: Inadequate Investigation of Important Matters to Pursue an Improper Agenda²⁵

ICAC's Improper Agenda

58. After ICAC's about-face on 12 August 2014, ICAC's agenda regarding Dr Cornwell & Ms Brookes changed completely. While that change in agenda was perhaps driven by Mr Watson and Mr O'Mahoney, ICAC was complicit in it.
59. That not only included staff at ICAC acting in accordance with the directions or wishes of Mr Watson and/or Mr O'Mahoney (such as Mr McKenzie and/or Mr Riashi), but as well also included the Commissioner, in the findings that she ultimately made and in the terms of the final ICAC Report.
60. A plethora of decisions were made and steps were taken by ICAC – no doubt influenced by Mr Watson and/or Mr O'Mahoney, but ultimately the actions (or inactions) of ICAC staff (including the Commissioner) – as to what matters would or would not be investigated, and in the end as to how the knowingly incomplete patchwork of evidence should be interpreted.

No Proper Investigation of Mr Beaven's Conduct in relation to the McCloy Payment

61. Bob Beaven (**Mr Beaven**) was a critical witness relevant to ICAC's case concerning the McCloy Payment.
62. Mr Beaven was responsible for dealing with the McCloy Payment after its receipt by Dr Cornwell. He was the SEC Treasurer for Charlestown, charged by the Liberal Party with the responsibility to record and receipt all donations and gifts, and to ensure compliance with all funding and disclosure laws²⁶. Mr Beaven himself admitted that the way that he dealt with the McCloy Payment (banking it first into his own company account, before transferring it into Dr Cornwell's election campaign account) involved a "*subterfuge*" for which he "*took responsibility*"²⁷.
63. Properly investigated, Mr Beaven's conduct may have been wholly exculpatory of Dr Cornwell in relation to the McCloy Payment. However, that conduct does not appear to have ever been investigated more than superficially by ICAC²⁸.
64. Further, in stark contrast to the treatment of Dr Cornwell, Mr Beaven did not attract even a scintilla of criticism in the whole 150 pages of Counsel Assisting's Submissions, let alone the hint of an adverse finding²⁹.

²⁵ For further details on this matter, see Paragraphs 36 to 48 of this Complaint, & Paragraphs 79 to 106 of the Cornwell/Brookes Submissions.

²⁶ Spicer Inquiry Evidence, Exhibit Z128, Page 3.

²⁷ Spicer Inquiry Transcripts, Beaven, 7 August 2014, 4940/22-4940/23.

²⁸ The Inspector should interrogate relevant officers of ICAC (including Mr Riashi) about those investigations under Section 57C(d) of the ICAC Act.

²⁹ The Inspector should interrogate relevant officers of ICAC (including Mr McKenzie) about their involvement in the preparation of Counsel Assisting's Submissions under Section 57C(d) of the ICAC Act.

65. Although the McCloy Payment was not referred to the DPP, the findings made in relation to the McCloy Payment are relevant to the view that an independent observer has of Dr Cornwell in reading the ICAC Report. Had these matters been investigated more fully, no adverse finding may have been made by the Commissioner against Dr Cornwell in relation to the McCloy Payment.
66. Without limitation, the Inspector should consider whether the failure by ICAC staff (including Mr Riashi) to properly investigate the involvement of Mr Beaven in dealing with the McCloy Payment amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act?

No Proper Investigation of the Provenance of Mr Newell's Painting to Mr Cornwell Snr

67. Key to the attacks on Dr Cornwell and Ms Brookes concerning the Painting Transaction, when they gave evidence on 21 August 2014, was the evidence given by Mr Newell, also on 21 August 2014, in relation to the Painting Transaction. Mr Newell was the artist who painted the painting (known as *Perrin's Boat Shed*) which was ultimately sold by Ms Brookes to Mr Grugeon (the **Painting**).
68. At the time that Mr Newell gave evidence, he was 75 years old. He had, at best, a hazy recollection of the events some 4 years earlier in 2010 about which he was being questioned, concerning the provenance of the Painting by him to Mr Cornwell Snr (who, in turn, gave it to Ms Brookes). At worst, there were some stark inconsistencies between the evidence given by Mr Newell (on the one hand) and the evidence given by Mr Cornwell Snr and Ms Brookes and the contemporaneous documentary record (on the other hand). Details of these significant inconsistencies were particularised in the Cornwell/Brookes Submissions³⁰. We will not repeat those matters here. Rather, the Inspector should carefully review the details of those inconsistencies *in situ* in the Cornwell/Brookes Submissions. The Cornwell/Brookes Submissions are Attachment 5 to this Complaint.
69. While ICAC obviously knew, before 21 August 2014, what Mr Newell was going to say about the provenance of the Painting to Mr Cornwell Snr when he gave evidence on 21 August 2014, which formed the basis of their attacks on Dr Cornwell and Ms Brookes when they were called immediately after Mr Newell to give evidence in the public hearings on that day, ICAC made no attempt to corroborate Mr Newell's evidence, either before or after that time. That decision was deliberate. A proper investigation might have revealed exculpatory evidence that was inconsistent with ICAC's planned attack on Dr Cornwell and Ms Brookes³¹.
70. Mr Newell's evidence was the cornerstone of the attacks on Dr Cornwell and Ms Brookes on 21 August 2014. Evidence from third parties which might have highlighted inconsistencies in, or which might have contradicted, Mr Newell's evidence did not fit with ICAC's agenda which, by that stage, was to discredit and embarrass Dr Cornwell and Ms Brookes. So, ICAC did not pursue it. That failure was improper.
71. Without limitation, the Inspector should consider whether the failure by ICAC staff (including Mr McKenzie and Mr Riashi) to properly investigate the provenance of the Painting (for example, by interviewing Mike Webb (**Mr Webb**) or re-interviewing Mr Cornwell Snr) amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act?
72. Significantly, we now know that an ICAC investigator (whom we believe was Mr Riashi) made contact with Mr Webb at around this time (in November 2014) and arranged a meeting to take a statement from him. However, sometime after that appointment was made, ICAC unilaterally cancelled the appointment with Mr Webb – with an apologetic text – without explanation. ICAC made no further attempt to speak to Mr Webb.

³⁰ See Paragraphs 89 to 94 & Appendix 2 of the Cornwell/Brookes Submissions.

³¹ The Inspector should interrogate relevant officers of ICAC (including Mr McKenzie and Mr Riashi) about that failure to investigate under Section 57C(d) of the ICAC Act.

73. It was left to Dr Cornwell and Ms Brookes, at their own expense, and without ICAC's powers of compulsion, relying entirely on the goodwill of relevant third parties, to pursue further evidence on this critical matter.
74. This they did. In due course, they obtained statements from two relevant third parties. Those third parties were Mr Webb (a close friend of Mr Newell), and the CEO of the Newcastle Cruising Yacht Club (the **NCYC CEO**). They each provided unequivocal evidence concerning the timing of the provenance of the Painting to Mr Cornwell Snr, which directly contradicted the evidence given by Mr Newell, proving that certain significant elements of Mr Newell's evidence were fatally flawed³². ICAC could have found out the same information, had its investigators only asked. But, they failed to do so.
75. A statutory declaration from Mr Webb and a letter from the NCYC CEO were provided to ICAC on 5 November 2014, in conjunction with the filing of the Cornwell/Brookes Submissions. That statutory declaration, and letter, are Attachment 6 to this Complaint (the First Supplementary Cornwell/Brookes Evidence Submission).
76. However, even after this exculpatory material was given to ICAC, it did not attract even the merest acknowledgment in the submissions in reply filed by Counsel Assisting in the following week, on 14 November 2014. This failure further demonstrates Counsel Assisting's lack of objectivity in the pursuit of an improper agenda against Dr Cornwell and Ms Brookes.

No Proper Investigation of the giving of Christmas gifts at the time the Painting was delivered to Mr Grugeon

77. Details of the circumstances in which the Painting was given to Mr Grugeon were particularised in the Cornwell/Brookes Submissions³³. We will not repeat those matters here. Rather, the Inspector should carefully review the details of those matters *in situ* in the Cornwell/Brookes Submissions. The Cornwell/Brookes Submissions are Attachment 5 to this Complaint.
78. In short, the gift of the Painting to Mr Grugeon was one of a number of gifts that Dr Cornwell gave to various local businessmen and supporters of his business in the lead up to Christmas in 2010. This was something that Dr Cornwell had done as a business practice over a number of years beforehand. It had little or nothing to do with the fact that, 3 months later, Dr Cornwell was to become the Liberal Party candidate for Charlestown, when the 2011 election was called.
79. The list of recipients always included a number of suppliers of veterinary products. In 2010, it included John & Gwen O'Brien of Jurox Veterinary Pharmaceuticals at Rutherford (the **O'Briens**). That was who Dr Cornwell delivered a Christmas gift to immediately before delivering the Painting to the Hunter Land office of Mr Grugeon at Thornton. But, ICAC never contacted the O'Briens to verify Dr Cornwell's evidence.
80. Linda Harkness (**Ms Harkness**), Mr Grugeon's PA, corroborated that the Painting was dropped off at the Hunter Land reception before Christmas. If there was any doubt about that, the delivery would presumably have been recorded in some sort of delivery log at Hunter Land. However, no attempt was made by ICAC to secure a copy of that delivery log.
81. Dr Cornwell's evidence was that, when he dropped the Painting off at Hunter Land, it had a Christmas card with it³⁴. Ms Harkness was never asked whether or not she had seen that Christmas card. Nor was the Hunter Land receptionist (identified only as Nicky) ever called to give evidence, and asked that question. Presumably, the present had something with it identifying Dr Cornwell as the sender. Otherwise, how would they have known where it came from? How would Mr Grugeon have known who to call?

³² See Paragraphs 89 to 94 & Appendix 2 of the Cornwell/Brookes Submissions.

³³ See Paragraphs 107 to 113 of the Cornwell/Brookes Submissions.

³⁴ Spicer Inquiry Transcripts, Cornwell, 7 August 2014, 4865/34.

82. Once the circumstances in which the Painting was given to Mr Grugeon came into question, the ICAC investigators could, and should, have made these relatively simple enquiries. But, they did not. It is obvious. ICAC had its new case theory. Dr Cornwell and Ms Brookes were lying about the Painting. ICAC staff refused to use ICAC's powers or resources to properly investigate their evidence³⁵.
83. Without limitation, the Inspector should consider whether the failure by ICAC staff to properly investigate the circumstances in which the Painting was given to Mr Grugeon amounts to "*impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission*" within Section 57B(1)(b) of the ICAC Act?
84. As already noted in Paragraph 25 of this Complaint, in the ICAC Report³⁶, the Commissioner concludes that:

"The account given by Andrew Cornwell and Ms Brookes as to how they came to receive \$10,120 from Mr Grugeon is inherently improbable".

This alleged inherent improbability is an incredibly material point. It is the foundation on which the Commissioner ultimately concluded that Dr Cornwell and Ms Brookes lied about the Painting Transaction in their evidence at the public inquiry.

85. Given the eventual significance of this point, it was incumbent on the ICAC investigators to investigate that matter fully, and to share the results of that investigation with the Commissioner. They did not do so. That failure was improper.
86. Further, it is significant that there was, in fact, not one single piece of evidence that was presented by ICAC in the Spicer Inquiry that showed that Dr Cornwell was not telling the truth about the circumstances in which he said the Painting was given to Mr Grugeon. Not one.

No Proper Investigation of Mr Cornwell Snr's Departure Overseas during the Spicer Inquiry

87. Another matter of significance in connection with which ICAC failed to carry out proper investigations concerned Mr Cornwell Snr's departure overseas during the course of the Spicer Inquiry³⁷. Again, this was relevant to the Painting Transaction.
88. Mr Cornwell Snr gave evidence in the public hearings on 6 August 2014. He went overseas on a long-scheduled holiday with his wife on 14 August 2014. In Counsel Assisting's Submissions³⁸, Counsel Assisting sought to draw an inference adverse to Mr Cornwell Snr, and by extension to Dr Cornwell and Ms Brookes, from Mr Cornwell Snr's departure overseas, and his failure to return to give evidence (even though no subpoena was issued) to controvert Mr Newell's contradictory evidence around the provenance of the Painting to him by Mr Newell. However, no such inference is appropriate on the facts.
89. Again, it was left to Dr Cornwell and Ms Brookes, at their own expense, to pursue further evidence on this critical matter.
90. This they again did. In due course, they provided supplementary contemporaneous documentary evidence concerning that matter, together with a detailed explanatory letter, to ICAC on 28 November 2014. This explanatory letter, and supplementary evidence, are Attachment 7 to this Complaint (the Second Supplementary Cornwell/Brookes Evidence Submission).

³⁵ The Inspector should interrogate relevant officers of ICAC about that failure to investigate under Section 57C(d) of the ICAC Act.

³⁶ ICAC Report, Page 148.

³⁷ The Inspector should interrogate relevant officers of ICAC (including Mr McKenzie) about that failure to investigate under Section 57C(d) of the ICAC Act.

³⁸ See Paragraph 400 of Counsel Assisting's Submissions.

91. However, while ICAC uploaded the supplementary evidence as an exhibit in the Spicer Inquiry (Exhibit Z135), it refused to upload the explanatory letter. Perhaps that was to conceal from public view ICAC's failures around this matter as detailed in the letter. We will not repeat those matters here. Rather, the Inspector should carefully review the details of those failures as set out in that letter.
92. One of the failures described in the letter was around the advice given by Mr McKenzie about the likelihood of ICAC needing to recall Mr Cornwell Snr to give evidence in the public inquiry. That matter is dealt with in Section C of the letter. As recorded there, prior to departing overseas on his long-scheduled holiday, on 14 August 2014, Mr Cornwell Snr asked his solicitor to contact Mr McKenzie to make sure that he was not going to be recalled. A contemporaneous text sent at 2.31 pm on 14 August 2014 (Attachment 4 to the letter) records Mr McKenzie's response³⁹:

"... Brien's solicitor has just spoken to principal instructing solicitor at the ICAC hearing who said that likelihood of Brien being recalled based on the evidence heard this morning is nil".

Mr Cornwell Snr left the country on his overseas holiday based on that advice. At approximately 5.40 pm that day, ICAC uploaded a new witness list onto its website. Mr Cornwell Snr's name was on it.

93. Without limitation, the Inspector should consider whether the failure by ICAC staff to properly investigate the circumstances in which Mr Cornwell Snr went overseas at a critical point in the Spicer Inquiry amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act?
94. Without limitation, the Inspector should also consider whether the advice given by Mr McKenzie to Mr Cornwell Snr's solicitor that the likelihood of Mr Cornwell Snr being recalled to give evidence in the public inquiry *"was nil"* amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act, or *"maladministration ... by the Commission or officers of the Commission"* within Sections 57B(1)(c) & (4)(b) or (4)(c) of the ICAC Act?
95. Without limitation, the Inspector should also consider whether Mr McKenzie's involvement in Counsel Assisting's Submissions, or Mr McKenzie's failure to restrain or control Counsel Assisting from including in Counsel Assisting's Submissions⁴⁰ the attempt to draw an inference adverse to Mr Cornwell Snr, and by extension to Dr Cornwell and Ms Brookes, regarding Mr Cornwell Snr's departure overseas, in the circumstances of his advice to Mr Cornwell Snr's solicitor on 14 August 2014, amounts to *"impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission"* within Section 57B(1)(b) of the ICAC Act, or *"maladministration ... by the Commission or officers of the Commission"* within Sections 57B(1)(c) & (4)(b) or (4)(c) of the ICAC Act?

F. Complaint 3: Unjustified Referrals for Perjury to Conceal the Other Improprieties

The Matters Referred to the DPP with respect to Ms Brookes

96. In the ICAC Report⁴¹, the Commissioner concluded that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Brookes for perjury offences under Section 87 of the ICAC Act, in relation to her following evidence given at the public inquiry:

³⁹ The Inspector should interrogate Mr McKenzie about that advice to Mr Cornwell Snr's solicitor, and about whether or not at the time that he gave that advice he knew or expected that Mr Cornwell Snr was likely to be recalled to give evidence at the public inquiry, under Section 57C(d) of the ICAC Act.

⁴⁰ See Paragraph 400 of Counsel Assisting's Submissions.

⁴¹ ICAC Report, Page 163.

- (a) that she received the Painting by Mr Newell for her birthday in 2010 (the **Painting Provenance Charge**); and
 - (b) that the Painting was later given to Mr Grugeon as a Christmas gift in return for which Mr Grugeon paid \$10,120 (the **Grugeon Gift Charge**).
97. Unfortunately, the ICAC Report does not particularise the specific evidence of Ms Brookes that ICAC alleges was false or misleading, and thereby grounds each of the Brookes charges. The ICAC Brief perhaps contained those particulars. Of course, we do not have the ICAC Brief⁴².
98. The offence in Section 87 of the ICAC Act is a modern statutory variety of perjury⁴³. Therefore, in order to make out the offence against Ms Brookes, the DPP must establish, beyond reasonable doubt, the following four elements:
- (a) that Ms Brookes was on oath in a judicial proceeding;
 - (b) that Ms Brookes made a false or misleading statement concerning a matter;
 - (c) that the matter was material to the proceeding; and
 - (d) that Ms Brookes knew that the statement was false or misleading, or made it not believing it to be true.
99. Without any admission (and reserving all of Ms Brookes' rights) with respect to the first three of these elements, Ms Brookes contends that the fourth element is not, and could never have been, satisfied with respect to either of the Brookes charges⁴⁴.
100. Specifically, and in summary, with respect to the Painting Provenance Charge, Ms Brookes contends that:
- (a) the only evidence potentially the subject of the Painting Provenance Charge is the evidence given by Ms Brookes on 7 August 2014;
 - (b) that evidence was clearly informed by the evidence that Ms Brookes had previously given, at the Commissioner's prompting, in her private examination just 7 days earlier, on 31 July 2014;
 - (c) when Ms Brookes gave her evidence on 7 August 2014 in the public inquiry, no evidence had been led in the public inquiry, or was otherwise known to Ms Brookes, that contradicted her genuinely held belief that she may have received the Painting as a gift for her birthday on 14 March 2010; and
 - (d) when Ms Brookes gave her evidence about the provenance of the Painting, both on 31 July 2014 in her private examination, and on 7 August 2014 in the public inquiry, she honestly believed that evidence to be true, and had no reason to doubt that it was true.
101. Further (and without limitation, and again reserving all of Ms Brookes' rights), the DPP case against Ms Brookes with respect to the Painting Provenance Charge suffers from the following material forensic deficiencies:
- (a) Mr Newell, a central witness to the Painting Provenance Charge, passed away in April 2016 (4 months *before* the ICAC Report was issued)⁴⁵; and

⁴² The Inspector should request a copy of the DPP Brief from ICAC under Section 57C(b) of the ICAC Act.

⁴³ *Cassell v R* (2000) 201 CLR 189 per Kirby J at [39].

⁴⁴ What follows is a summary of the key arguments that support this contention. The detailed analysis of these matters is set out in Annexure A to this Complaint.

⁴⁵ The Commissioner should have been aware of this as she finalised the ICAC Report. Mr Mangioni informed Mr McKenzie of this information by email on 19 April 2016. A copy of that email can be provided, if required.

- (b) Mr Newell was, in any event, a very unreliable witness at ICAC in relation to a number of critical factual matters relevant to the Painting Provenance Charge.
102. Specifically, and in summary, with respect to the Grugeon Gift Charge, Ms Brookes contends that:
- (a) Ms Brookes' husband, Dr Cornwell, was responsible for delivering the Painting to Mr Grugeon – Ms Brookes had no involvement in that or in the subsequent exchanges between Dr Cornwell and Mr Grugeon regarding the latter's ultimate purchase of the Painting;
 - (b) Ms Brookes' evidence in the public inquiry on 7 August 2014 as regards the Painting being given by Dr Cornwell to Mr Grugeon as a Christmas gift, but then ultimately being purchased by Mr Grugeon, was clearly evidence based (and said by her several times to have been based) on what Dr Cornwell told her;
 - (c) Ms Brookes had no reason to doubt that her husband was telling her the truth about his exchanges with Mr Grugeon, and she completely believed what he told her;
 - (d) what Dr Cornwell told Ms Brookes about his exchanges with Mr Grugeon was essentially corroborated when Ms Brookes later received a phone call from Mr Grugeon's PA, Ms Harkness, who provided Ms Brookes with details for an invoice to be addressed to one of Mr Grugeon's companies in respect of the Painting;
 - (e) when she gave her evidence on 7 August 2014 in the public inquiry, no evidence had been led in the public inquiry, or was otherwise known to Ms Brookes, that contradicted her genuinely held belief that the Painting was (as Dr Cornwell had told her) given by Dr Cornwell to Mr Grugeon as a Christmas gift, but then was ultimately purchased by Mr Grugeon; and
 - (f) when she gave her evidence on 7 August 2014 in the public inquiry, she honestly believed that evidence to be true, and had no reason to doubt that it was true.
103. Further (and without limitation, and again reserving all of Ms Brookes' rights), the DPP case against Ms Brookes with respect to the Grugeon Gift Charge suffers from the following material forensic deficiencies:
- (a) Dr Cornwell, a central witness to the Grugeon Gift Charge, would be unlikely to give evidence in any prosecution of his wife and, if he did, he could be expected to corroborate the 7 August testimony given by Ms Brookes relevant to the Grugeon Gift Charge; and
 - (b) while there was an opportunity to do so in Operation Spicer, Ms Harkness was not asked about her exchanges with Ms Brookes concerning the preparation of the invoice for the Painting, and any later-obtained evidence would be pure reconstruction.
104. In light of these matters, the DPP could never satisfy its onus of proof to the requisite standard in prosecuting the Brookes charges against Ms Brookes. Accordingly, there was no justification in the Commissioner referring Ms Brookes to the DPP with respect to her alleged perjury at the Spicer Inquiry.
105. It appears that the DPP, and ICAC, now agree with that. On 7 December 2017, ICAC updated its website⁴⁶ to advise that:

⁴⁶ "Prosecutions Outcome Web Table" obtained from <https://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcome>.

“On 5 December 2017, the DPP advised that there was insufficient evidence to prosecute Samantha Brooks. The Commission has accepted that advice”.

106. The DPP did not inform Ms Brookes of its advice. ICAC also did not inform Ms Brookes of the DPP’s advice, or of its decision. ICAC simply annotated its website to note the change. How appalling. After years of having been in the public eye for allegedly having perjured herself in the Spicer Inquiry, ICAC did not even have the decency to write to Ms Brookes personally to inform her of this life-reinstating development.
107. Without limitation, the Inspector should consider whether or not the ICAC’s failure to notify Ms Brookes of its decision to not take further action against her, in all the circumstances, brings into question *“the effectiveness and appropriateness of the procedures of the Commission relating to the ... propriety of its activities”* within Section 57B(1)(d) of the ICAC Act?

The Matters Referred to the DPP with respect to Dr Cornwell

108. In the ICAC Report⁴⁷, the Commissioner concluded that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Dr Cornwell for perjury offences under Section 87 of the ICAC Act, in relation to his following evidence given at the public inquiry:
- (a) that he gave the Painting to Mr Grugeon as a Christmas present (the **Grugeon Present Charge**); and
 - (b) that Mr Grugeon subsequently contacted him and insisted on paying for the Painting, which resulted in Mr Grugeon paying \$10,120 for it (the **Painting Purchase Charge**).
109. Unfortunately, the ICAC Report again does not particularise the specific evidence of Dr Cornwell that ICAC alleges was false or misleading, and thereby grounds each of the Cornwell charges. The ICAC Brief perhaps contained those particulars. Of course, we do not have the ICAC Brief⁴⁸.
110. As already explained, the offence in Section 87 of the ICAC Act is a modern statutory variety of perjury⁴⁹. Therefore, in order to make out the offence against Dr Cornwell, the DPP must establish, beyond reasonable doubt, the following four elements:
- (a) that Dr Cornwell was on oath in a judicial proceeding;
 - (b) that Dr Cornwell made a false or misleading statement concerning a matter;
 - (c) that the matter was material to the proceeding; and
 - (d) that Dr Cornwell knew that the statement was false or misleading, or made it not believing it to be true.
111. Without any admission (and reserving all of Dr Cornwell’s rights) with respect to the first and third of these elements, Dr Cornwell contends that the second and fourth elements are not, and could never have been, satisfied with respect to either of the Cornwell charges⁵⁰.
112. Specifically, and in summary, with respect to the Grugeon Present Charge, Dr Cornwell contends that:

⁴⁷ ICAC Report, Page 163.

⁴⁸ The Inspector should request a copy of the DPP Brief from ICAC under Section 57C(b) of the ICAC Act.

⁴⁹ *Cassell v R* (2000) 201 CLR 189 per Kirby J at [39].

⁵⁰ What follows is a summary of the key arguments that support this contention. The detailed analysis of these matters is set out in Annexure B to this Complaint.

- (a) on 23 July 2014, at the 23 July Meeting, after receiving certain assurances from Mr Watson, and in reliance on them, and on the Inducement Undertaking given by Mr Watson, Mr O'Mahoney, and Mr McKenzie, Dr Cornwell provided the Cornwell Statement to them, for ICAC to use in the Spicer Inquiry: that Statement included detailed evidence concerning the existence, and circumstances, of the Painting Transaction;
- (b) prior to that disclosure, ICAC knew nothing about the Painting Transaction;
- (c) Dr Cornwell's stated purpose in providing the Cornwell Statement to Mr Watson, Mr O'Mahoney and Mr McKenzie in the 23 July Meeting was⁵¹:

"... to voluntarily bring some further matters to the attention of the ICAC, under the full protections for whistleblowers provided by the law ...";

- (d) in circumstances where the disclosure about the Painting Transaction was expressly intended to attract those protections, and would only do so if the disclosure correctly described what in fact happened, and where in other parts of the Cornwell Statement Dr Cornwell had confessed openly to wrongdoing (for example, in relation to the McCloy Payment), an inference can reasonably be drawn that Dr Cornwell's disclosure around the Painting Transaction was also true: there was no other reason for Dr Cornwell to make the disclosure and, if the disclosure were not true, it would not have achieved its stated purpose;
- (e) Dr Cornwell's oral evidence at the public inquiry is entirely consistent with the written evidence set out in the previously provided Cornwell Statement;
- (f) Dr Cornwell's evidence about the circumstances in which the Painting was included in the Christmas presents that Dr Cornwell was intending to give away in December 2010 – that is, by chance – is corroborated by Ms Brookes⁵²;
- (g) Ms Harkness, Mr Grugeon's PA, corroborated that the Painting was dropped off at the Hunter Land reception, that she put it in Mr Grugeon's office, and that it *"sat in ... Mr Grugeon's office for a couple of months before we donated it to charity"*⁵³;
- (h) Mr Grugeon also corroborated that the Painting was dropped off at the Hunter Land reception⁵⁴;
- (i) if Dr Cornwell was doing something knowingly improper, it seems most odd that he would personally deliver the Painting to the Hunter Land office, and leave the Painting at reception in full public view, rather than have it delivered to Mr Grugeon in a more private way: again, an inference can reasonably be drawn that Dr Cornwell's disclosure around the Painting Transaction was therefore true;
- (j) no-one controverted Dr Cornwell's evidence that the Painting had a Christmas card with it when it was dropped at the Hunter Land reception (which is, of course, consistent with it being a Christmas present): Mr Grugeon was not asked about that, nor was Ms Harkness, and the receptionist (identified only as Nicky) was never called to give evidence; and

⁵¹ See Paragraph 10 of the Cornwell Statement.

⁵² Evidence broadly relevant to the Grugeon Present Charge appears at the following transcript references: Spicer Inquiry Transcripts, Brookes, 7 August 2014, 4904/19-4906/31, 4907/31-4908/05, & 4908/39-4908/45; & Brookes, 21 August 2014, 5740/01-5740/24, 5740/45-5741/01, 5741/24-5741/31, & 5744/45-5745/23.

⁵³ Spicer Inquiry Transcripts, Harkness, 19 August 2014, 5621/01-5621/33.

⁵⁴ Spicer Inquiry Transcripts, Grugeon, 14 August 2014, 5305/09-5305/10.

- (k) there is simply no evidence whatsoever that was presented by ICAC at the Spicer Inquiry that showed that Dr Cornwell was not telling the truth about the circumstances in which he said the Painting was given to Mr Grugeon (namely, as a Christmas gift).

113. Specifically, and in summary, with respect to the Painting Purchase Charge, Dr Cornwell contends that:

- (a) the contentions contained in Paragraphs 112(a) to 112(e) of this Complaint are incorporated by reference and are relied on as if set out here in full: the Inspector should carefully re-read those contentions in this context;
- (b) there was no pre-agreement between Dr Cornwell and Mr Grugeon for Dr Cornwell to sell a painting to Mr Grugeon: an explanation of why it will not be possible to prove any such pre-agreement is particularised in the Cornwell/Brookes Submissions⁵⁵. We will not repeat those matters here. Rather the Inspector should carefully review the details of those matters *in situ* in the Cornwell/Brookes Submissions;
- (c) both Dr Cornwell and Ms Brookes gave evidence that it was Ms Brookes, not Dr Cornwell, who made the decision – on the spur of the moment – to include the Painting among the gifts to be distributed by Dr Cornwell in December 2010⁵⁶: this contradicts any suggestion that it was Dr Cornwell's pre-determined scheme to sell the Painting to Mr Grugeon (which the counterfactual envisages);
- (d) when Dr Cornwell gave his evidence on 7 August 2014 in the public inquiry, no evidence had been led in the public inquiry, or was otherwise known to Dr Cornwell, that contradicted his evidence around the Painting Transaction;
- (e) it is inherently more probable that the politically experienced and street-smart Mr Grugeon was the originator of the plan for him to purchase the Painting from Ms Brookes (as Dr Cornwell asserts) than it was that the inexperienced first-time electoral candidate Dr Cornwell was the originator of that plan (as Mr Grugeon asserts), in circumstances where:
- (i) Mr Grugeon and Dr Cornwell hardly knew each other at this time⁵⁷: it is not credible that Dr Cornwell would have had a conversation in these terms with a leading local businessman whom he hardly knew⁵⁸;
- (ii) Mr Grugeon had a practice of concealing donations to politicians: the purchase of a painting matches his *modus operandi* in relation to other payments – for example:
- (A) the payment to Mambare Pty Limited of \$47,080 in connection with Mr Baumann's campaign⁵⁹;
- (B) the payment to Mr Grant of \$9,900 in connection with Mr Owen's campaign⁶⁰; and

⁵⁵ See Paragraphs 121 to 131 of the Cornwell/Brookes Submissions.

⁵⁶ Spicer Inquiry Transcripts, Cornwell, 7 August 2014, 4864/08-4864/10; & Brookes, 7 August 2014, 4904/22-4904/25.

⁵⁷ Spicer Inquiry Transcripts, Cornwell, 21 August 2014, 5747/30-5747/33; Grugeon, 14 August 2014, 5305/31-5306/06; & Exhibit Z25, Pages 1-2 (which is Grugeon, 1 August 2014, 2060PT/41-2061PT/12).

⁵⁸ Mr Grugeon admitted that the idea of the purchase of a painting from Dr Cornwell could have been his own suggestion: Spicer Inquiry Transcripts, Grugeon, 14 August 2014, 5304/05-5304/08. That, of course, is consistent with Dr Cornwell's evidence: see Paragraphs 115 to 116 of the Cornwell/Brookes Submissions.

⁵⁹ Spicer Inquiry Transcripts, Grugeon, 12 September 2014, 7629/06-7630/06.

⁶⁰ Spicer Inquiry Transcripts, Grugeon, 14 August 2014, 5287/01-5289/19.

- (C) the payment to Mr Thomson of \$10,000 in connection with Mr Owen's campaign⁶¹.

The first two payments (like the amount paid by Mr Grugeon to Ms Brookes for the Painting) were uneven amounts to better disguise them;

- (iii) Mr Grugeon had little or no recollection of the Painting Transaction at his private examination on 1 August 2014, just 13 days prior to giving evidence in his public examination on 14 August 2014⁶² (when his memory miraculously improved), and Mr Grugeon appears to have lied about other matters⁶³; and
- (iv) the concept of Dr Cornwell and Mr Grugeon having reached a pre-agreement around a sale of the Painting to Mr Grugeon, prior to the time that the Painting was delivered to Mr Grugeon in December 2010, appears to be an invention created after Mr Grugeon had had the opportunity to carefully consider the evidence given by Dr Cornwell at his public examination on 7 August 2014 (7 days prior to Mr Grugeon, in turn, giving evidence on 14 August 2014); and

- (f) ultimately, if Mr Grugeon testifies (as to which, see Paragraph 114(a) of this Complaint), this matter will come down to Dr Cornwell's word against Mr Grugeon's word: and, even if Mr Grugeon testifies, there is no reason to expect that a jury (or a judge, if the matter is dealt with summarily) would be satisfied *beyond reasonable doubt* that Mr Grugeon's evidence should be believed, and Dr Cornwell's evidence should be rejected, in relation to the Painting purchase.

114. Further (and without limitation, and again reserving all of Dr Cornwell's rights), the DPP case against Dr Cornwell with respect to the Grugeon Present Charge, and the Painting Purchase Charge, suffers from the following material forensic deficiencies:

- (a) Mr Grugeon, a central witness to the Grugeon Present Charge, and the Painting Purchase Charge, has steadfastly refused to assist ICAC and the DPP and give evidence against Dr Cornwell; and
- (b) Mr Grugeon was, in any event, a very unreliable witness at ICAC in relation to a number of critical factual matters relevant to the Grugeon Present Charge, and the Painting Purchase Charge.

115. In light of these matters, the DPP could never satisfy its onus of proof to the requisite standard in prosecuting the Cornwell charges against Dr Cornwell. Accordingly, there was no justification in the Commissioner referring Dr Cornwell to the DPP with respect to his alleged perjury at the Spicer Inquiry.

The Referrals were Unjustified & Malicious

116. In the face of what must have been an obviously overwhelming series of hurdles to the DPP forming a view to prosecute Dr Cornwell or Ms Brookes for perjury in the Spicer Inquiry (as summarised in Paragraphs 96 to 115 of this Complaint), why were those referrals then made?

117. As now seems obvious, from the Commissioner's responses to the Committee on the Independent Commission Against Corruption, given on 7 August 2015⁶⁴ – 1 year *before* she handed down the ICAC Report – it was to create a basis on which she could argue that the Undertaking and the Letter of Comfort given in favour of Dr Cornwell had not been breached: that she could argue that the evidence given by Dr Cornwell and

⁶¹ Exhibit Z19 (which is Thomson's Statement dated 11 August 2014), Paragraphs 192 to 195.

⁶² Exhibit Z25, Pages 1-4 (which is Grugeon, 1 August 2014, 2060PT/06-2063T/19).

⁶³ Exhibit Z23, Pages 4-6 (which is Grugeon, 3 July 2014, 1538PT/22-1540PT/06); & Spicer Inquiry Transcripts, Grugeon, 14 August 2014, 5287/05-5288/11.

⁶⁴ Committee Transcript, 7 August 2015, Page 30.

Ms Brookes was not “a full, complete and truthful account” around the Painting Transaction. But for that, the Commissioner, and ICAC as an organisation, had no reasonable explanation for their manifestly improper treatment of Dr Cornwell and Ms Brookes (as detailed now in this Complaint).

118. The Commissioner's decision to take that course was clearly a deliberate and self-serving cover-up. It was patently wrong. And, it was demonstrably malicious. The Commissioner should be called to account accordingly.
119. Contrast this with how Tim Owen (**Mr Owen**) was treated. He deliberately lied in the Spicer Inquiry to intentionally mislead ICAC. He was caught out⁶⁵. But, he avoided any censure whatsoever in the Commissioner's final ICAC Report, and has not been referred to the DPP⁶⁶. Why? One can only speculate that, in respect of Mr Owen, no undertaking had been given, and no letter of comfort had been given, so the Commissioner had no reason to destroy him.
120. Without limitation, the Inspector should consider whether the Commissioner's decision to refer Dr Cornwell and Ms Brookes to the DPP in respect of the matters referred, in all the circumstances, amounts to “*impropriety [or] other ... misconduct on the part of ... [an] officer of the Commission*” within Section 57B(1)(b) of the ICAC Act, or “*maladministration ... by the Commission or officers of the Commission*” within Sections 57B(1)(c) & (4)(b) or (4)(c) of the ICAC Act?



WATSON MANGIONI

7 December 2017

⁶⁵ Spicer Inquiry Transcripts, Owen, 12 August 2014, 5139/38-5140/18.

⁶⁶ ICAC Report, Pages 161 to 164.

Attachment S



Office of the Inspector of the
Independent Commission Against Corruption

12 September 2018

Our Reference: C46 2015 10

Mr Robert Mangioni
Watson Mangioni Lawyers
Level 23, 85 Castlereagh Street
SYDNEY NSW 2000

By email: rmangioni@wmlaw.com.au

Dear Mr Mangioni,

I refer to previous correspondence in this matter and in particular to your letter dated 11 December 2017 and the revised complaint enclosed therein.

Having considered those materials, I have come to the conclusion that your clients have not established that the Independent Commission Against Corruption (“ICAC”) or any officer thereof engaged in “abuse of power, impropriety and other forms of misconduct” or maladministration as those terms are used in section 57B of the ICAC Act 1988. I will refer to those statutory terms compendiously as “misconduct”. Accordingly, I have decided to dismiss the complaint and will report to Parliament that I have done so in my annual report to the Presiding Officers of each House of Parliament. Further, while I acknowledge that I have power under section 57B(2) of the ICAC Act to carry out an investigation of the type you request on a number of occasions in the revised complaint, I am not prepared to do so in this instance.

I will deal with the matters you raise under your subject headings below. Before I do I wish to make three points, as follows:

1. While counsel assisting is not an officer of the Commission as I have pointed out before (see, for example, my letter to you dated 25 August 2017), I have unresolved concerns about a number of the actions of counsel assisting in this case. I do not consider, however, and your submission has not persuaded me otherwise, that such conduct can be attributed to the ICAC or any officer thereof so to amount to misconduct. Nevertheless, I propose to exercise my powers under section 57B(1)(a) and (d) of the ICAC Act to audit the manner in which the ICAC deals with, instructs and controls counsel assisting. I had already decided to do so as a result of matters which came to my attention as a result of another complaint and will include the conduct of counsel in this case and, particularly, what you say about the meeting in Mr Watson’s chambers on 23 July 2014 in the audit.

2. The essence of your complaint is an assertion of a change of position by the ICAC from that indicated at the meeting in Mr Watson's chambers and stated in the handwritten "undertaking" signed by counsel and the ICAC letter dated 31 July 2014. I do not accept that the ICAC used information supplied in the course of the meeting in question adversely to your client and do not agree that there was any breach of the undertaking. Further, the position stated by (former) Commissioner Latham in her evidence to the Parliamentary Committee seems to me to be correct. Put another way, it was open to the Commission to find that your clients' version of the so-called Painting Transaction was inherently improbable and, therefore they had not been fully frank with the Commission. Having come to that view, the Commission was entitled not to honour the undertaking. This is an independent reason for concluding there was no improper change of position or "dirty double-cross", to use your picturesque phrase. In any event, I do not accept that this amounts to misconduct. I emphasise that I have not come to any conclusion myself about the nature of your clients' conduct and whether as a matter of fact they had been less than frank, only as to the position the Commission was entitled to adopt. As you know I am not a court of appeal and have no power to make findings myself that any ICAC finding was objectively right or wrong unless it involves misconduct. As stated, that does not appear to be present here.

3. I note the following paragraph which appears in paragraph 2(g) of the revised complaint as follows:

(g) nevertheless, the Commissioner ultimately made adverse findings against Dr Cornwell and Ms Brookes, and referred them both to the DPP, regarding the evidence that they gave in the public inquiry in relation to the Painting Transaction, in further breach of the Inducement Undertaking and the Letter of Comfort: this was, it is evident, a vain attempt by the Commissioner to conceal the earlier misconduct, by herself and other ICAC staff.

You do not provide any evidence for your extremely serious allegation that the Commissioner made adverse findings and referred your clients to the Director of Public Prosecutions in a "vain attempt by the Commissioner to conceal the earlier misconduct by herself and other ICAC staff." So far as I can see there is no basis whatever in the material you have provided for that assertion which should not have been made. It is rejected.

A. Complaint 1: Breach of the Inducement Undertaking and the Letter of Offer given to Mr Cromwell

First I note the contents of paragraphs 25-27. The conclusion that the account in question was "inherently improbable" does not appear to me to be flawed, let alone fundamentally so. It was a conclusion obviously open to the Commissioner on the evidence. In any event this is no more than an assertion that an ICAC finding was wrong which does not amount to misconduct.

Secondly, I am unable to see anything that could amount to misconduct on the part of anyone involved on the Commission side in the 23 July meeting. The assertion in paragraph 34 is wrong – consent to the tender of a document does not amount to an admission of truth of the contents of that document.

Thirdly, I do not see on the materials that you have provided that there is a basis for the assertion that the Commissioner breached the undertaking in question or the letter, for the reasons stated above.

I wish to say something about the proposition you advance in paragraph 55 which seems to be that, because the undertaking did not contain a condition that Dr Cornwell tell the truth, the Commission was bound to the undertaking even if it came to the conclusion that Dr Cornwell had lied about the Painting Transaction.

That proposition cannot withstand analysis. It is clear that any obligation the Commission had was abrogated if the Commission came to the view that your client had not been fully frank with it. For these reasons I reject the propositions set out in paragraph 45-57 of the revised complaint.

I see no basis for a finding of misconduct in this material and these arguments.

B. Inadequate Investigation of Important Matters to Pursue an Improper Agenda

There is no basis for the suggestion that the matters which you raise in this section amount to misconduct, still less that they were in pursuit of an "improper agenda". I do not find the matters you raise persuasive. For example, I am unable to see how paragraph 92-95 concerning Mr Cornwell's father's overseas trip could amount to misconduct.

C. Unjustified referrals for Perjury to Conceal the Other Improprieties

I am unable to see how referring a matter to an independent third party, the Director of Public Prosecutions could ever operate to conceal other improprieties. This allegation should not have been made. Further none of the matters you raise in this section persuade me either that there was any misconduct in making the referrals or that they were unjustified and malicious.

For these reasons the revised complaint is rejected.

Yours sincerely,

B. R. McClintock

Bruce McClintock
Inspector, Independent Commission Against Corruption

Attachment T



Office of the Inspector of the
Independent Commission Against Corruption

6 December 2019

Our Reference: A1 2019 09

Mr Geoffrey Watson
By email: watson@newchambers.com.au

Dear Geoffrey

I enclose a draft of my proposed Report insofar as it concerns you and your conduct for your response, which I shall include in the final version, as I am bound to do under section 79A(3) of the ICAC Act.

You will see that I have concluded that your conduct as counsel assisting in Operation Spicer was, in certain respects, inappropriate and unfair. I welcome any matter you may wish to put to me to persuade me to change my mind. I hope you understand that I am not doing this out of any personal animus towards you, far from it, but the circumstances compel me. They are set out in the draft Report.

I look forward to hearing from you by no later than 13 December 2019.

Yours sincerely,

A handwritten signature in black ink that reads 'B. R. McClintock'.

Bruce McClintock
Inspector, Independent Commission Against Corruption



Office of the Inspector of the
Independent Commission Against Corruption

6 December 2019

Our Reference: A1 2019 10

Mr Geoffrey Watson
By email: watson@newchambers.com.au

Dear Geoffrey

By now you will have received, I hope, my draft Report to Parliament.

I attach (as you requested in your 4 December 2019 email) a copy of the ICAC response dated 4 April 2018 to my enquiries about the Gallacher matter.

I also attach copies of the pages of transcript referred to in the draft Report. If you need anything further to assist you in responding to the draft Report please feel free to contact my office.

I also attach a copy of the Australian Financial Review article published in the AFR Magazine on 25 July 2014. It is referred to in [37] of the draft Report.

Finally, you say in your email "I understand that you have met with some of the complainants". I have not.

Yours sincerely,

A handwritten signature in black ink that reads 'B. R. McClintock'.

Bruce McClintock
Inspector, Independent Commission Against Corruption