



Office of the Inspector of the  
**Independent Commission Against Corruption**

**Report concerning the non-  
disclosure of information relating to  
Mr Paul Gardner Brook by the  
Independent Commission Against  
Corruption during Operations  
Jasper and Credo**

**(Special Report 19/01)**

## Executive Summary

1. This is a report pursuant to sections 57B and 77A of the *Independent Commission Against Corruption Act 1988* (“ICAC Act” or “the Act”). It deals with a disclosure issue arising from the Independent Commission Against Corruption (“ICAC” or “Commission”) Operations Jasper and Credo. That issue is whether the Commission should have disclosed to the persons whom it was investigating two matters which may have had an effect on the credibility of an important witness in both enquiries, Mr Paul Gardner Brook.
2. The two matters are:
  - 2.1. The fact that, as a result of an online search, counsel assisting in Operation Jasper became aware that Mr Brook had made knowingly false claims as to his qualifications (including a false claim that he had a law degree) in an online curriculum vitae.
  - 2.2. The fact that the ICAC had in its possession a psychiatrist’s report (supplied to it on Mr Brook’s behalf) which might have been thought to cast doubt on his ability to remember significant events and, thus, his credibility.
3. This issue, which had been the subject of a number of media articles, was referred to by the ICAC Chief Commissioner, the Hon. Peter Hall QC, in evidence to the Parliamentary Committee on the ICAC on 1 June 2018 and was the subject of a complaint to me by Mr John Atkinson.<sup>1</sup>
4. Under current (2018) ICAC procedures (which I set out below), such items of information would now be disclosed to relevant persons. Nevertheless, while it might have been desirable for the ICAC to disclose the matters in question, I have formed the opinion that its failure to do so did not amount to “abuse of power, impropriety and other forms of misconduct” or “maladministration” on the part of the ICAC or any officer thereof within the meaning of s57B(1) (b) and (c) of the ICAC Act.

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<sup>1</sup> Transcript of the evidence can be accessed via <https://www.parliament.nsw.gov.au/ladocs/transcripts/2047/Transcript%20Review%20of%20the%202016%2017%20Annual%20Reports%20of%20the%20ICAC%20and%20Inspector%201%20June%202018.pdf>

5. I will also consider whether, if the material had been disclosed to and relied upon by those subject to the enquiries, it would have had any significant adverse effect on the assessment of Mr Brook's evidence and whether the findings made in the relevant reports would have been affected by disclosure and an opportunity to cross examine Mr Brook on those matters and to make submissions in relation to them. In my view, all the findings made by the ICAC to which Brook's evidence was relevant were supported by evidence other than that of Mr Brook and could have been made independently of his evidence, so I consider it improbable that disclosure would have made any difference.
6. In reaching these conclusions, I have assessed the nature of the undisclosed materials, issues arising from the manner in which ICAC became aware of that material and the other evidence in the inquiries. I have also noted the findings made by Foster J in the Federal Court in *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd & Ors* (3) [2018] FCA 1019. In that judgment delivered on 6 July 2018, His Honour upheld Mr Brook's credibility, preferring his evidence to that of Mr John McGuigan, a prominent Sydney investor and solicitor, who was the subject of a finding of corrupt conduct in ICAC's Operation Jasper Report (see [531] to [538] of the judgment). While I have not relied upon his Honour's views in reaching any conclusion, it is appropriate to mention them.

## **The Investigation**

### **Background:**

7. Operation Jasper concerned, principally, the circumstances surrounding a decision made in 2008 by Ian MacDonald, then Minister for Mineral resources, to grant a coal exploration licence in the Bylong Valley, including determining whether that decision was influenced by his Parliamentary colleague Mr Edward Obeid, who was a member of the Legislative Council and a former Minister in the Carr Government or by other members of the Obeid family. The licence in question was known as the Mount Penny tenement.
8. As part of its investigation, the ICAC conducted a public inquiry over 45 days between 12 November 2012 and 20 May 2013. The first Operation Jasper

Report, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Sr, Moses Obeid and others* was published in July 2013.

9. The facts found by the ICAC in the Operation Jasper report are both lengthy and complex and many are not necessary for understanding of this report. I summarise the relevant ICAC findings in the following paragraphs.
10. The Commission found that Mr Macdonald, as Minister for Mineral resources, had directed that a mining tenement known as Mount Penny be created and that he did so to benefit the Obeids, and not for any legitimate public purpose. The Obeids sought to submit an expression of interest over the Mount Penny and Glendon Brook tenements as part of a joint venture with Monaro Mining EL and their company, Voope Pty Ltd. Monaro made bids for exploration licences for each of the Mount Penny and Glendon Brook tenements. Monaro subsequently sold to Voope all the shares in the subsidiary, which had been intended to apply for the exploration licences. Before the expression of interest process was completed, Mr McDonald reopened it as a favour to Travers Duncan, a wealthy investor. That permitted Cascade Coal, in which Mr Duncan had an interest, to lodge a bid for Mount Penny and Glendon Brook. The other investors in Cascade Coal included a number of people who made complaints concerning Operation Jasper with which I have dealt in previous reports. They are Messrs McGuigan, Poole, and Atkinson. As noted earlier, Mr Atkinson is the complainant in the complaint I am now determining. The Obeids reached an agreement with Cascade Coal to enter into a joint venture, using an Obeid controlled entity, Buffalo Resources Pty Limited. Those negotiating on behalf of Cascade Coal, including Messrs McGuigan, Poole and Atkinson knew, so the ICAC found, that the Obeids were the party with whom they were entering into a joint venture. One aspect of the joint venture involved Buffalo Resources arranging the withdrawal of the Monaro Mining bids with respect to Mount Penny and Glendon Brook tenements. That withdrawal resulted in Cascade Coal's bid being successful.
11. Operation Credo concerned the following allegations:
  - 11.1 Whether, between 2004 and 2012 persons having an interest in Australian Water Holdings Pty Ltd ('AWH') obtained or sought to obtain a financial benefit from adversely affecting official functions of Sydney Water Corporation ('SWC') by inflating charges made

to SWC and deliberately preventing SWC from ascertaining whether the charges in question were justifiable.

11.2 Whether, in 2010, Edward Obeid Snr, Joseph Tripodi and Anthony Kelly (all members of the Legislative Council) misused their positions as members of Parliament to attempt to influence public officials to exercise their official functions with respect to a public/private partnership proposal submitted by AWH to the NSW Government Cabinet Budget Committee.

12. Mr Gardner Brook gave evidence in both Operation Jasper and Operation Credo. I will not attempt to summarise that evidence or those parts of the ICAC reports in respect of those Operations where the ICAC deals with Mr Brook's evidence. Those parts are, in particular, chapters 18, 20, 26 and 27 of the Operation Jasper report and chapter 14 of the Operation Credo report.

13. Broadly speaking, the ICAC formed a favourable view of Mr Brook's credibility. Thus, in the Operation Jasper report, the Commission said this:

13.1 *The Obeids were introduced to Mr Brook by an intermediary, Arlo Selby, who appears to have been in a business relationship or friendship with Moses Obeid, and a similar kind of relationship with Mr Brook. That is the only extent to which the Commission will rely upon Mr Selby's evidence. Mr Selby was an unreliable witness, and although he had many things to say that, on their face, were relevant to the investigation, he was so unreliable that the Commission has taken the view that his evidence should be put to one side.*

*The first meeting between Mr Brook and the Obeid family occurred at about 2.30 pm on 3 July 2008 in a coffee shop in the Sofitel Sydney Wentworth hotel in Sydney. So much is established. There conflict between Mr Brook and Moses Obeid and other of the Obeids on most other issues involving their evidence. Given this divergence, it is necessary to assess the relative credibility of those witnesses. The Commission has already described the evidence of Moses Obeid – he was an unreliable witness, who gave deliberately untruthful evidence during the public inquiry. Similarly, the Commission has arrived at negative views in respect*

*of each of Paul Obeid and Gerard Obeid. The reliability and credibility of Mr Brook's evidence is more difficult to assess.*

***Broadly speaking, the Commission formed a favourable view of Mr Brook and his evidence; he gave his evidence in a slow and careful way, and in a manner that was designed to be generally honest and accurate. There were numerous instances where Mr Brook gave evidence that was against his own self-interest. Even so, there were times when Mr Brook was hesitant in telling the full story, possibly as a matter of self-preservation.*** (Emphasis added)

*One matter is clear – if there is a conflict between the evidence of Mr Brook and the evidence given by Moses Obeid, Paul Obeid or Gerard Obeid, the Commission generally prefers the evidence of Mr Brook.<sup>2</sup>*

13.2 *The initial meeting was appointed for Saturday, 23 May 2009. On one side, there was Moses Obeid and Gardner Brook; on the other side, there was John McGuigan and James McGuigan. The details of the negotiations at the first meeting do not emerge clearly through the evidence, but it becomes obvious from later conduct that the broad parameters of an agreement must have been discussed at this time. It is probable that the negotiations between the two groups were advanced to the extent that it was recognised that there were two separate components to any potential deal. One lay in property transactions; that is, if a deal was to go forward, then some arrangements would be made so that the three properties – Cherrydale, Donola and Coggan Creek – would be the subject of a sale to a Cascade entity. The other component involved the terms under which any mining venture on the Mount Penny tenement would be taken forward.*

*There is a divergence in this area between the evidence of Mr Brook and the other witnesses. Mr Brook gave evidence that, by the time*

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<sup>2</sup> Operation Jasper Report, Chapter 18 page 82

*he attended the first meeting, there had already been an agreement struck by Moses Obeid to the effect that the Obeids would receive 25% of a mining venture, but the other witnesses have contradicted that, and said this detail was only agreed on at a later date. In this instance the Commission is inclined to doubt the recollection of Mr Brook, and to accept the other evidence. This does not have an important bearing upon the ultimate findings.<sup>3</sup>*

13.3 *As described earlier, there were two parts to the transaction – the property agreement and the mining venture agreement. Mr Brook had a personal interest in the mining venture agreement and would be directly financially affected by the outcome of the negotiations on the mining venture. But, as earlier mentioned, the two transactions were interdependent – there had to be an agreement on both, or there would be no agreement at all.*

*Mr Brook was present on each of the occasions that the terms of the two transactions were negotiated. In respect of the initial negotiations, Mr Brook gave this evidence:*

*...During the mining part who was speaking on your side? Were you speaking alone, or - - -?---No, Moses was speaking.*

*Now was there any, for example, any subterfuge at play? For example was Moses saying the Obeid family are not involved in this part of the transaction? Was he saying anything like that?--  
-No.*

*Was it an open discussion that the Obeids were involved in the mining part?---Well they were in the room.*

*Well they were in the room but they may have been silent, you see? I want to know whether there were words said?---No, it was very, very clear to me that both sides knew each other. It was obvious.*

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<sup>3</sup> Operation Jasper Report, Chapter 26 page 109

*Draft agreements were produced as a result of the negotiations. Mr Brook gave this evidence in respect of the first draft:*

*And then at page 153 is the draft between Cascade and the nominee company, that's the company that actually ended up becoming Buffalo Resources Pty Limited?---That's correct, sir, yes.*

*But this is I think the first draft that we've been able to track down. So could I ask you, is there any doubt whatsoever in your mind that during the negotiations with the people who apparently reflected Cascade Coal, was there any doubt that the Obeids were involved on the other side?---No doubt at all.*

*Mr Brook commented upon the claim of an unawareness of an Obeid involvement:*

*Now, I'm going to tell you something again, not all of them, but some of the people from Cascade have told the Commission they had no idea that the Obeids were behind the 25 per cent interest in Mount Penny.*

*THE COMMISSIONER: Buffalo Resources?*

*MR WATSON: Which at one time was under the name Buffalo Resources ... During the negotiations leading to it, those people from Cascade you met, you've nominated them, is there any doubt in your mind that that was openly discussed and openly on the table?---It's outrageous.*

*You're saying it's outrageously wrong or right?---It's wrong.*

*Wrong?---The Obeids and Cascade at all times were dealing with each other, always.*

*As earlier stated, the Commission was favourably impressed by the honesty and accuracy of Mr Brook's evidence, and specifically accepts this part of his evidence.<sup>4</sup>*

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<sup>4</sup> Operation Jasper Report, Chapter 27, pages 115-116



## **Background – Matters Not Disclosed**

14. During the course of its investigation which culminated in the Operation Jasper Report, the Commission became aware of two matters which might rationally be thought to effect the credibility of Mr Brook. The first showed, on one view, willingness to tell lies to secure a financial benefit, the other that he suffered difficulties of memory as a result of a brain injury.

15. The two matters were:

15.1. The fact that Mr Brook falsely held himself out as having a law degree, as having attended the Booth School of Business at the University of Chicago and as having a particular qualification from the Booth School, an “EMBA”, that is, so I understand, an Executive Master of Business Administration degree.

15.2. The fact that Mr Brook’s lawyer had supplied the Commission with a copy of a report prepared by a Singapore psychiatrist and a psychologist concerning Mr Brook. I note the following passages of the report which is dated 3 November 2012:

*He reported he had his ups and downs financially and his work does give him tremendous stress and anxiety. He reported he had a fall after a binge drinking episode in 2010, when he hit the back of his head on the ground, resulting in a frontal lobe contusion. Since the head injury, he reported suffering from retrograde and anterograde amnesia, inability to concentrate and behavioural changes like greated [sic] irritability and disinhibition/impulsivity. We noted from his neuropsychological report and brain scan which confirmed findings of his cognitive impairment.*

15.3. Of more significance are the psychiatrist’s and psychologist’s diagnosis which they explained in the following terms:

*In our opinion his symptoms are consistent with someone suffering from a frontal lobe contusion, and depression. He suffers cognitive impairment in speech and memory. He would*

*need more time to process information presented to him, to recall events that happened in the past as well as formulate appropriate responses when required. He will need to continue on his medication for his depression and to prevent episodic drinking.*

16. For convenience, I will refer to the two items respectively as ‘the CV lie’ and ‘the psychology report’ and together as ‘the non-disclosed information’.

17. The non-disclosed information had come into the possession of the Commission in the following circumstances:

17.1. On the weekend before Mr Brook’s compulsory examination on 12 March 2012, senior counsel assisting, Geoffrey Watson SC, located the false curriculum vitae on the internet. The ICAC has supplied me with an email from Mr Watson to Mr Waldon of the Commission, dated 14 August 2018 in which he says this:

*I had only the weekend to prepare so I did a bit of homework for that [compulsory examination] on the Saturday or Sunday (maybe both). There were a number of issues but the key issue for present purposes is the credit issue. This was mainly based upon Brook making false claims about his background. This included a false CV published by Brook. I found that CV myself. It was not hard to find. I found it following a single google search. All I did was google Gardner Brook. I had no idea if or when or where Brook had used the CV but I remember it had something to do with a business he had in Singapore.... I quickly saw through the CV. Anybody would have done so. The dates did not fit and when I looked at other information on Brook I noticed he had not made similar claims in Lehmann Bros. documents. No-one would hide a degree from the Booth school....*

17.2. Mr Watson raised the CV lie with Mr Brook during the compulsory examination on 12 March 2012 and he admitted making the false statements in question and doing so knowingly.<sup>5</sup>

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<sup>5</sup> ICAC Operation Jasper pp 190-193 of transcript 12 March 2012

17.3. The position in relation to the psychologist's report is a little more complex. My inquiries of the ICAC reveal that it was supplied by Brook's legal representatives on 20 November 2012 to an ICAC investigator. The investigator does not recall reading the psychology report but believes he offered it to a Commission lawyer working on Operation Jasper who did not take it or read it. The investigator then entered it into the Commission's record management system. The precise circumstances of its receipt are described in an email dated 20 November 2012 from the investigator in question to Ms Loder:

*"At around 4.30pm today Lewis Tyndall, accompanied by an instructing solicitor called Emily, attended level 7 for a pre-arranged meeting with myself and Mr Watson.*

*The meeting was requested by Mr Tyndall to discuss his client, Gardner Brook.....*

*Mr Tyndall told me the following:*

*"Tyndall would prefer Brook to give evidence sooner rather than later for a number of reasons, including Brook's mental state. He then handed me a psych report on the understanding that it was not to be made public"*

17.4. In addition, the investigator informed Ms Loder, then Executive Director Investigation Division, of the existence of the psychology report but does not seem to have given her a copy or discussed its contents with her. In addition, the investigator in question indicates that he informed the Commissioner and counsel assisting of the psychology report but did not discuss its content with them. Thus while the Commissioner, Ms Loder and counsel assisting seem to have been informed of the existence of the psychology report they do not seem to have been aware of its contents. Neither Mr Watson nor junior counsel assisting, Mr Nicholas Chen, have any recollection of seeing the psychologist's report. These facts explain why, even if it had been thought that it was otherwise appropriate

to disclose the psychology report to persons affected, that was not done.

18. While the psychology report was not itself disclosed, the information set out in it, including the fact that Mr Brook has suffered a brain injury, was apparently well known to those involved in Operation Jasper and, specifically, to their legal representatives. Thus, at pp 1591 lines 44-47, of the Operation Jasper public inquiry, the following appears:

*Mr Watson: Sorry, maybe I should make it plain, you did have an accident years ago?*

*Mr Brook: I've got frontal lobe contusion damage, yes*

*Mr Watson: Yes. And it interferes with your speech?*

*Mr Brook: It does very much*

And at pp1639 – 1640 the following appears:

*[Mr Barry, counsel for Mr McGuigan]*

*When did you have your acquired brain injury?*

*Mr Brook: In 2010*

*Mr Barry: That was years after these particular events had occurred?*

*Mr Brook: yes*

*Mr Barry: And as a result of that acquired brain injury do you have memory problems?*

*Mr Brook: Sometimes*

*Mr Barry: Do you have memory problems in relation to the transactions that were occurring around about this time, that is the period between 19 May 2009 and say the first week or so of June of 2009?*

*Mr Brook: Yes I do, they were very important*

*Mr Barry: And I take it that when you gave evidence to this Commission at private hearing, certain positive propositions were put to you?*

*Mr Brook: Well, I was to be included as part of the Obeid JV with Cascade.*

*Mr Barry: And the positive propositions that were put to you I want to suggest is what you are relying upon rather than any independent recollection.*

[at this point the Commissioner interjected and rejected the question just quoted.]

*Mr Barry: What I'm putting to you is that because of your acquired brain injury and the problems that it causes your recollection, that what you have engaged in is in part is reconstruction. That's what I am putting to you?*

*Mr Brook: I deny that*

19. It can be seen here while the psychology report had not been disclosed, there was no secret about the factual information it contained, such as the brain injury and consequent memory loss.
20. For completeness, I note that Mr Brook was also cross examined about his memory loss during the Operation Credo public inquiry in April 2014. Specifically, it was put to him by Moses Obeid's legal representative that Mr Brook had told Moses Obeid that he had hit his head and suffered memory loss.<sup>6</sup>

### **Reasons for non-disclosure**

21. The reasons why the psychology report was not disclosed are set out in [17.3] and [17.4] above. While they had been informed of its existence, the Commissioner and counsel assisting were not aware of its contents, except in very general terms.
22. Turning to the CV lie and the reason why it was not disclosed, the first thing to be noted is that it was not secret information, nor a matter known only to ICAC (and Brook) but could have been located by anyone with access to a computer and the internet. It is surprising that this did not occur, particularly as it is obvious that Brook's credibility and reliability were in issue in both Operation Jasper and Credo. The passages I have quoted from the transcripts concerning Brook's memory loss show that. It may be that some of the parties aware of the matter chose to not raise it for tactical reasons but I have no way of determining that.
23. On the material available to me there appears to be two reasons why the material put to Mr Brook concerning the CV lie was not disclosed during the compulsory examination. The first is best expressed by Mr Watson in his email dated 14 August 2018 to Mr Waldon to which I refer above:

*Your real question is as to why the transcript was not revealed during the ICAC public hearing. As you know, the [compulsory examination] process*

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<sup>6</sup> Operation Jasper Report, pp 1113-1114

*is highly confidential. That does not prevent parts of CE [sic] transcript being revealed, and that is done sometimes. But this was a special case – we were trying to protect Brook from further interference by the Obeids, .....I think there is some suggestion that the CE evidence which goes only to credibility of one person as “exculpatory” of another person. Brooks CE evidence did not go to the Mount Penny transaction or Brook’s relationship with the Obeids. It was about some false claims about his education and experience. And if you read his evidence he quickly admitted his falsehoods – which really took the sting out of any credibility issue.*

I should record my disagreement with Mr Watson’s last proposition concerning Mr Brook’s admission of his deception taking the sting out of the credibility issue. That said, I accept the remainder.

24. The second reason is more general. During the course of Operation Jasper, counsel for Mr Macdonald applied on several occasions for an order that all compulsory examination transcripts held by the Commission be supplied. Had such an application been successful, the transcript of the compulsory examination when Mr Watson raised the CV lie with Mr Brook would have been disclosed. Commissioner Ipp refused that application and gave his reasons on 11 February 2013. They are set out in Appendix 5 to the Operation Jasper Report in the following terms:

*COMMISSIONER: On more than one occasion during this public inquiry, Mr Hale has applied for orders requiring the Commission to provide his client, Mr Macdonald, with copies of the compulsory examination transcripts that contain exculpatory material relating to Mr Macdonald or, if I have understood correctly, copies of all compulsory examination transcripts. I think it desirable to state now in full my reasons for refusing those applications.*

*These reasons will apply to any future such applications unless any new grounds are advanced.*

*In these inquisitorial proceedings it is the Commission’s obligation to afford all persons who might be affected by its findings procedural fairness. I do not regard that obligation as requiring the Commission to provide Mr Hale*

*with the transcripts he has sought. As background to Mr Hale's applications I point out that the Commission has held 92 [sic] compulsory examinations, some involving several hours of questioning. These examinations have been undertaken over a period of approximately 20 months.*

*Some witnesses have, over time, participated in more than one compulsory examination. The Commission has also interviewed in excess of 60 potential witnesses and many witnesses have participated in more than one interview.*

*Virtually all of those interviews have been recorded. In addition, the Commission has obtained 12 witness statements.*

*The material obtained in this way extends to many thousands of pages. I give these particulars to indicate the scale of the evidentiary material obtained by the Commission and the practical difficulties that would thereby arise if the Commission were to accede to Mr Hale's applications and like applications which other persons no doubt would be induced to make should Mr Hale's application be granted.*

*There is the additional consequence that with a very large number of counsel involved in this inquiry the disclosure Mr Hale seeks will probably cause the inquiry to extend immeasurably in length. The delay in itself is an important factor to be taken into account as given the seriousness of the allegations in this inquiry it is in the public interest that the Commission report its findings to Parliament as soon as possible.*

*Furthermore, the delay would cause large amounts of unnecessary costs to be incurred and inconvenience suffered. This would occur in circumstances in which the Commission has decided that the material sought is unnecessary and irrelevant as it would not advance the inquiry in any respect.*

*I appreciate that arguably these practical difficulties alone should not stand in the way of procedural fairness properly assessed. But in my view the practical difficulties are not without relevance in deciding what procedural fairness requires in this case.*

*The Commission has in any event decided that irrespective of these practical difficulties there are other compelling grounds that alone cause it to*

*conclude that Mr Hale's applications should be dismissed. These are as follows:*

*(a) Before evidence was led in this public inquiry, the Commission carefully assessed all the evidence it had so far obtained, including all the compulsory examination transcripts, interviews and statements to which I have referred. Having considered all this material, the Commission determined which of the potential witnesses from whom that material had been obtained could give relevant evidence at the public inquiry. That assessment has continued throughout the course of the inquiry. The Commission has determined to call all those witnesses so identified irrespective of whether a witness's testimony supports the allegation that contention that corrupt conduct has been committed or whether that testimony is exculpatory of any person. By the end of the evidence in this inquiry all such witnesses will have been called.*

*That is the Commission's intention, and there is no reason to think that that intention will not be fulfilled. The Commission considers that through the leading of the evidence of these witnesses and the relevant questioning of them by others will lead to the discovery of the truth. Compare *Australian Securities and Investments Commission v Hellicar* (2012) HCA 17, at [241] *et seq per Heydon, J.**

*(b) In the majority of instances the compulsory examination constitutes the first occasion when officers of the Commission are in a position to explore with potential witnesses the evidence they may be able to give. Thus, on such occasions, the Commission officers generally ask open-ended and wide-ranging questions. In this way, much irrelevant material is adduced. Before these witnesses are called to testify, Counsel Assisting the Commission and Commission officers sift through the material to identify evidence that is relevant. At the public inquiry, Counsel Assisting, having considered the compulsory*



*examination testimony and the other preliminary evidence obtained, endeavours to adduce only those parts of such material as are relevant. It would be contrary to the public interest to disclose publicly, material that is irrelevant.*

- (c) Counsel Assisting gave a full and detailed opening address and, throughout the questioning of witnesses, has been at pains to make clear what allegations are being made, if any, against the persons concerned.*
- (d) I am satisfied that in this way all persons who have, who may be affected by any findings the Commission makes, have or will have been fairly apprised of the allegations against them. I do not understand it to be contended otherwise by anyone.*
- (e) I have invited any person who wishes to have testimony called to proceed in accordance with directions I have made in that regard.*
- (f) All persons who wish to reply to the allegations that have been made against them have been and will be given a full and fair opportunity of answering relevant evidence that might be adverse to them.*
- (g) As has elsewhere been noted, disclosure of the compulsory examination transcripts could compromise the investigation and inquiry or cause the investigation and inquiry to be less effective than it otherwise would have been. For the Commission to disclose its hand prematurely, “will not only alert suspects to the progress of the Commission, but may well close off other sources of inquiry”. These words were spoken in *National Companies & Securities Commission v News Corporation Ltd (1984) 156 CLR 296* by Mason, Wilson and Dawson JJ at 323 – 4; see also Gibbs CJ at 316. Premature disclosure may allow corrupt witnesses to tailor their evidence dishonestly. Secrecy and silence are often effective means and indeed sometimes the only means of enabling the truth to be discovered.*

- (h) *Evidence given at compulsory examinations is virtually always given subject to a suppression order in terms of s 112 of the Independent Commission Against Corruption Act 1988. Such a suppression order renders the evidence so given in effect secret. The Commission generally reserves the right to vary that order if it considers that the public interest requires it to do so. Such a suppression order is often an important factor in persuading witnesses to tell the truth. If an order for disclosure as sought by Mr Hale is made, otherwise than for the reason that it is in the public interest to do so, the benefits to the Commission and the state in holding the compulsory examination, and making the suppression orders, could to a material extent be lost. Moreover the disclosure of certain evidence contained in the transcripts, interviews and statements could lead to serious harm to witnesses and, indeed, to others mentioned by such witnesses. The Commission is of the view that it is not in the public interest to disclose the compulsory examination transcripts as Mr Hale seeks. The same applies to the interviews and statements the Commission has obtained.*
- (i) *The approach that the Commission has adopted is in accord with three first instance decisions of the Supreme Court of New South Wales, namely *Aristodemou v Temby* and the *Independent Commission Against Corruption* (unreported) NSWSC 14 December 1989, per Grove J; *Donaldson v Wood* (unreported) NSWSC 12 September 1995, per Hunt CJ at CL (upholding a decision of Wood J, who was then acting as a Royal Commissioner); *Morgan v Independent Commission Against Corruption* (unreported) NSWSC 31 October 1995, per Sperling J. See also *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214 per Wood J. The judges who delivered these judgments were, with respect to their Honours, deeply experienced in the law relating to investigatory bodies such as the ICAC as well as the criminal law. The principles embodied in their decisions have led to a practice being adopted by this*

*Commission that has remained unchallenged for at least 17 years.*

*The practical considerations applicable to this inquiry, to which I earlier referred when opening my remarks on this issue, reinforce the conclusion to which the Commission has come.*

*For these reasons, the transcripts of the compulsory examinations will not be produced as Mr Hale requires.*

### **The Current Procedures of the Commission**

25. Things have changed since Operation Jasper. The *ICAC Amendment Act 2016* No. 65 inserted section 31B of the Act. That section provides:

#### ***31B Procedural guidelines relating to public inquiries***

*(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.*

26. The Commission has adopted such guidelines. I have attached a copy to this Report for ease of reference. Of present relevance is clause 4.3 which is in the following terms:

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

- (a) the witness has made an inconsistent statement or previously given inconsistent evidence,*
- (b) the witness has been subject to an adverse finding as to credibility,*
- (c) the witness suffers, or has suffered, from any physical or mental condition that may affect the reliability of the person's evidence,*
- (d) a concession or benefit has been offered or provided to the witness to secure that person's evidence, or*
- (e) the witness has been convicted of any criminal offence or is, or has been, the subject of disciplinary proceedings relevant to the conduct of the investigation,*

*Counsel Assisting will disclose that information to the affected person at an appropriate time.*

27. Thus, in accordance with the present ICAC practice, both the CV lie and psychologist's report would probably now be disclosed if they were discovered in the course of a current enquiry.

#### **How this Investigation came about**

28. The existence of the non-disclosed information became apparent and, ultimately, public as a result of disclosures made during the course of the various criminal prosecutions arising out of Operation Jasper.

29. Subsequently there was an amount of newspaper publicity and criticism of the non-disclosure, as well as reference in Parliament. As noted earlier, the Chief Commissioner raised the matter during his evidence before the Parliamentary Committee of the ICAC on 1 June 2018.

30. As a result of these matters and because of the obvious public interest, I had under consideration the possibility of commencing an investigation of my own initiative under section 57B(2) of the ICAC Act. At that point I received the complaint from Mr Atkinson referred to above. It is set out in his letter dated 27th June 2018 and asserted as the basis of his complaint that ICAC employees "deliberately hid and withheld crucial evidence" adverse to the credit of Brook. In his email of 20 September 2018, Mr Atkinson conveniently summarises the basis of his complaint as follows:

- 1) *Gardner Brook was identified by the Commission as integral to the machinations of the Obeids.*
- 2) *The Commission made generally positive findings of credit with respect to Mr Brook and his testimony.*
- 3) *I respectfully adopt your observation that the evidence of Brook "was highly significant and certainly influenced the findings made by ICAC."*
- 4) *In particular, the Commission explicitly relied in the evidence of Mr Brook to support the critical findings of fact that:*
  - (a) *Cascade received confidential information concerning the Expression of Interest process for the allocation of the Mount Penny exploration license.*
  - (b) *Cascade was aware that the Obeids stood behind the entity with whom Cascade entered a joint venture for the mining of Mount Penny.*
- 5) *Those finding were the foundation for the Commission's recommendation that the Mount Penny and Glendon Brook exploration licences be expunged.*
- 6) *That recommendation was the catalyst and the foundation for the NSW parliament enacting legislation to expunge the Mount Penny and Glendon Brook exploration licences, causing a loss to Cascade of approximately \$500 million.*

- 7) *But for those critical findings, it is difficult to conceive how such expropriation could have been recommended or enacted, in circumstances where there was no finding (or even suggestion) that Cascade had any inkling of the corrupt dealings relating to the creation of the Mount Penny tenement, or that the determination of the “Expression of Interest Evaluation Committee” to allocate the Mount Penny exploration license to Cascade was itself tainted in any way.*
- 8) *ICAC had in its possession evidentiary material, which was seriously adverse to Mr Brook’s credit and therefore exculpatory of any person against whom adverse findings were made in reliance on Mr Brook’s evidence (“Adverse Credit Evidence”). that material included:*
- (a) the Winslow Clinic Report dated 3 November 2012, relating to Gardner Brook’s serious mental instability, cognitive impairment, amnesia issues and vulnerability to suggestibility;*
  - (b) transcripts of private examinations of Gardner Brook on 12 March 2012, in which Mr Brook admitted that he was a fraudster and a liar, in that he falsely represented that he was a lawyer and held degrees he did not have;*

*Had it been disclosed, the Adverse Credit Evidence would have obviously been the subject of rigorous cross-examination and submission relating to Mr Brook’s credit and the weight that should be placed on his testimony. As I noted in my letter of 27 June 2018, there is also some evidence to support the inference that the Commission secretly granted Mr Brook immunity from adverse findings in the ICAC inquiry. If that were the case, the Adverse Credit Evidence (and the unfairness of not disclosing it) would be even more grave.*

- 9) *Notwithstanding Commissioner Ipp’s own stated policy to “reveal any material that in their view is reasonably exculpatory”,*

*Commissioner Ipp and other Commission officers elected not to disclose the Adverse Credit Evidence during the ICAC inquiry.*

*10) I do not seek to speculate on the imponderable question on which you asked my specific response: namely, whether ICAC could or would have made those critical findings but for Mr Brook's evidence. I don't know. Nobody could. What was in the Commissioner's mind in formulating any particular finding only he can know. That said, I respectfully submit that the answer to that question is irrelevant to whether the failure by the ICAC Employees to disclose the exculpatory evidentiary material constituted "maladministration".*

*11) I note that "maladministration" is defined in the ICAC Act to include "inaction of a serious nature" which is "unreasonable" or "unjust". As you observe, Brook's evidence was "highly significant and certainly influenced" ICAC's findings. And those findings had gravely prejudicial consequences for Cascade (and related parties) as outlined in the Third report. Further, Commissioner Ipp himself acknowledged that "of course, Counsel Assisting and the Commission must act fairly, and reveal any material that in their view is reasonably exculpatory". In those circumstances, I submit that the failure to disclose the Adverse Credit Evidence was a clear case of "maladministration" under s57B(1) of the ICAC Act: ie, inaction of a "serious nature" which was unreasonable and "unjust" to the persons against whom adverse findings were made in reliance on Mr Brook's evidence.*

*12) I respectfully suggest that there is no basis for construing the scope of "maladministration" (with which you are authorised to deal) as being confined to conduct which you determine altered the substantive outcome or findings of the Inquiry. Such a construction risks conflating the review of the probity of ICAC's process (which the Inspector is charged to undertake under s57B of the ICAC Act), with a review of ICAC's ultimate findings (which is outside the jurisdiction of the Inspector). In this regard, I note the statement you made in your Special Report dated 18 August 2018 where you*

*stipulated that: "Parliament has not granted the Inspector any power to engage in a merits review of Commission decisions..."*

*13) I also note that you are authorised (under a separate head of power) to "deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission": section 57(1)(b). That head of power is not qualified by the requirement that the relevant conduct be of a "serious nature". I submit that the denial of natural justice constituted by the failure to disclose the Adverse Credit Evidence also constitutes a "impropriety" and "misconduct" under section 57(1)(b).*

31. As a consequence, I decided to proceed with an "own initiative" investigation as well as with dealing with Mr Atkinson's complaint. I sought and obtained information from the Commission (upon which I have relied upon in stating the background above) and further information from Mr Atkinson himself.

### **Consideration**

32. My role is to determine whether the matters stated in section 57B (1)(b) and (c) of the ICAC Act have been established, that is, whether failure to disclose the CV lie and the psychologist's report amount to "abuse of power, impropriety [or] other forms of misconduct" (s57B(1)(b)) or "maladministration" s57B(1)(c)) on the part of the Commission. In relation to this, counsel assisting is not an officer of the Commission within the meaning of section 3 of the Act and, as a consequence, I have no power to deal with complaints to the extent they involve the conduct of counsel assisting.
33. I will also express my views concerning the significance of the non-disclosure of information in Operation Jasper as well as my views concerning the ICAC's current disclosure guidelines when contrasted with the position in 2012-2013 at the time of Operation Jasper.
34. In my view, the suggestion that the Commission or any officer of it has been guilty of misconduct should be rejected. As to the CV lie, first, such material was not "exculpatory" as I understand that concept, that is, it did not tend to establish that any person against whom the Commission was considering



making an adverse finding whether of corrupt conduct, or otherwise, had not engaged in the wrongdoing in question. Rather, it raised a credibility issue, that is, it showed that Mr Brook had told a lie on an admittedly serious occasion which might indicate that he might tell further lies on other occasions. But it does not of itself establish that any evidence he actually gave was untrue. Rather, it was one factor amongst many which a tribunal, such as the Commission, might take into account in assessing whether his evidence was accurate or not.

35. Secondly, while the content of Mr Watson's examination was not disclosed, the information on which it was based was not secret. As stated it was not held exclusively by the Commission but was publicly available in the sense I have described above. It was available to anyone with a computer and internet access and the wit to use them as Mr Watson had done.
36. For these reasons I do not consider the ICAC had any obligation to disclose the CV lie under the practices that applied at the time of Operation Jasper and, therefore, do not consider that the failure to do so amounted to misconduct.
37. Moreover, this matter seems to have been the responsibility of counsel assisting, and as stated, I have no power to make determinations as to his conduct.
38. As to the psychology report, I do not consider the Commission's failure to disclose that document constituted misconduct. First it does not appear that its contents came to the attention of any person with executive authority and, specifically, not the Commissioner or counsel assisting. For that reason (amongst a number of others) this non-disclosure does not seem to me to involve misconduct.
39. Secondly, the document's significance in the scheme of things, especially at the conclusion of the evidence in Operation Jasper seems to me to be minimal for the following reasons:
  - 39.1. The fact that Mr Brook had suffered a brain injury and had memory issues were known to the persons under investigation and the subject of cross examination. I find it difficult to see what difference a report by a psychiatrist and psychologist saying, in effect, the same thing, would have added.
  - 39.2. The report itself had been provided on behalf of Mr Brook himself and was marked "Confidential". It is difficult for me to

reach any firm conclusion now, after 6 years when relevant Commission staff have moved on or are no longer available to answer enquiries, why the psychology report was disclosed by Brook's lawyer to the Commission. One obvious possibility is that it was part of an attempt to dissuade the Commission from calling him as a witness (which itself might cause a reasonable person to view it with some scepticism). But it seems to me that, if the document was supplied for a limited purpose and on a confidential basis, it may in fact have been improper for the Commission to disclose it.

39.3. The utility of the report was minimal. While the rules of evidence do not apply to the Commission (see s17 of the ICAC Act), it is worth considering the position if they did. The psychologist's report would have been inadmissible in any proceeding in which there were issues analogous to those in the ICAC public enquiry. There are a number of reasons, the most obvious of which is that it goes only to a collateral issue (credit of a witness) and comprises inadmissible opinions. So the only use which could be made of it, if disclosed, would be to deploy the information which it contained. But that information was known independently to counsel appearing and was deployed in any event, as the passages of cross-examination quoted above show. The report itself added little, if anything, to what was already known.

### **Significance of Brook's evidence**

40. I propose to deal with this issue because Mr Atkinson in his complaint suggests Brook's evidence had crucial significance to the findings ultimately made by the Commission, a position also expressed in some of the media articles concerning Gardner Brook. I disagree. It seems to me that the findings made by the Commission in Operation Jasper were supported by other probative evidence.

41. The Commission has argued in its submission to me that Brook's evidence had only limited relevance to the findings eventually made in the Operation Jasper

report. To deal with this issue it is necessary to understand what the Commission found and the basis for those findings. The ultimate finding was that there were two corrupt agreements between Mr Macdonald and members of the Obeid family including Edward Obeid Senior. The Commission expressed their findings in Operation Jasper in the following terms:

*The Commission is satisfied that there was an agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.*

*The Commission is also satisfied that there was an agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown to provide Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.*

*These two agreements are essential elements of the corrupt conduct findings made below with respect to Mr Macdonald, Edward Obeid Sr and Moses Obeid.*

42. The basis of these conclusions was a series of factual findings set out in the body of the Operation Jasper report which the Commission summarises on pp 143-145 of the Report which, so the Commission found, led to an inference that the corrupt agreements referred to had come into existence. There were, on my count 32 such findings. The ICAC position is that Gardner Brook's evidence was relevant to only four of those 32 findings and that in each of those, the finding was supported by other evidence independent of Gardner Brook.
43. Space prevents me from analysing all four of those findings. I will select one, the finding that Mr Macdonald had provided confidential information to Moses Obeid or other members of the Obeid family including a confidential Department of Primary Industries map dated 30 May 2008, which appears on p144 of the Operation Jasper report.

44. Brook identified that map as one he had been shown during a meeting on 3 July 2008.<sup>7</sup> The Commission found based on Brook's evidence that members of the Obeid family had a copy of the map of the Mount Penny Area. The Commission further found that Macdonald, in breach of his ministerial duty had given a map to Moses Obeid.
45. But Brook's evidence only went to the fact that the Obeids had a copy of the map, not who provided it or how that had been done. There was, in fact, no doubt that the Obeids did have a copy of the map – it had been found in their business premises in Drummoyne on 23 November 2011 when ICAC officers executed a search warrant there.<sup>8</sup>
46. Thus, the matter stated at p83 and p144 of the Report, possession of the 30 May 2008 DPI map, was established independently of Brook's evidence of having been shown it. That independent basis seems to be the sole basis for the conclusions expressed at pp 52-53 of the Report.
47. This analysis also demonstrates an underlying fallacy in the approach of those who criticise the Commission's reliance on Brook and his evidence. It is a truism of trial practice, and relevantly applies to any fact-finding exercise including that by the Commission, that the evidence must be considered as a whole. Juries are regularly instructed to that effect and that for example, doubts that the jury might have about one piece of evidence may be resolved by another. That is also a truism of human experience. Here, the fact that it was established that the Obeids had the 30 May 2008 map, made it more likely that Brook's evidence that one of the Obeids showed it to him was true and thereby enhanced Brook's credibility.
48. I accept the Commission's submission in this respect, in response of each of the four findings. That submission is set out in tabular form and I will attach it to this report.

### **The Present Position**

49. I will for the convenience of the reader attach a copy of the Commission's current s31B Guidelines. They seem to me to express a fair balance between the

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<sup>7</sup> Operation Jasper Report, p83

<sup>8</sup> Operation Jasper Report, p52

functions referred to in paragraph 1.3 thereof, that is, efficient conduct of a public inquiry, effective pursuit of the Commission's functions on the one hand and procedural fairness on the other as well as considerations of public interest and breaches of public trust.

50. Certainly, that position is preferable and clearly more in accord with considerations of procedural fairness than the position exemplified by the refusal to disclose the content of the compulsory examination reflected in Appendix 5 of Operation Jasper which I have quoted above. While it could not conceivably amount to misconduct, I find the blanket refusal to hand over the materials in question concerning and not likely to lead affected persons to believe they had been dealt with fairly. That said that approach would not be adopted now in view of the section 31B guidelines.

### **Conclusion**

51. In my view, the assertion that the ICAC engaged in misconduct by failing to disclose the CV lie or the psychologist's report should be rejected.
52. Pursuant to section 78(1)(a) of the ICAC Act I recommend that this report be made public forthwith.

Bruce R McClintock SC

**Inspector ICAC**

**November 2018**