



Report of the Special Commission of Inquiry into the New South Wales Crime Commission

With a recommendation under s. 10(3) of the *Special Commissions of Inquiry Act 1983* that the report be made public

David Patten
30 November 2011

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**REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO THE NEW SOUTH WALES
CRIME COMMISSION WITH A RECOMMENDATION UNDER S. 10(3) OF THE SPECIAL
COMMISSIONS OF INQUIRY ACT 1983 THAT THE REPORT BE MADE PUBLIC (PRINT)**
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Special Commission of Inquiry New South Wales Crime Commission

Her Excellency Professor Marie Bashir AC CVO
Governor of NSW
Office of the Governor of NSW
Macquarie Street
SYDNEY NSW 2000

30 November 2011

Your Excellency,

Special Commission of Inquiry into the New South Wales Crime Commission

I was appointed by Letters Patent issued on 31 August 2011 under the *Special Commissions of Inquiry Act 1983* to inquire into and report to Your Excellency on matters relating to the New South Wales Crime Commission.

I now present my report to you containing all relevant material but excluding confidential material. In relation to this report, I make a recommendation pursuant to s. 10(3) of the *Special Commissions of Inquiry Act 1983* that the report be made public.

I have separately provided to you a second report which contains a recommendation that the whole of that report not be made public.

Yours faithfully

David Patten
Commissioner
Special Commission of Inquiry into the New South Wales Crime Commission

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ABBREVIATIONS

ACC	Australian Crime Commission
ACS	Australian Customs and Border Protection Service
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AQIS	Australian Quarantine and Inspection Service
ASIO	Australian Security Intelligence Organisation
ANZPAA	Australia New Zealand Policing Advisory Agency
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAR Act	<i>Criminal Assets Recovery Act 1990</i>
Commission	New South Wales Crime Commission
Commissioner	Commissioner of the New South Wales Crime Commission
COPS	Computerised Operational Policing System
DPP	Director of Public Prosecutions
G3	NSW Crime Commission Human Source Management Team
HR	Human Resources
ICAC	Independent Commission Against Corruption (New South Wales)
ICAC Act	<i>Independent Commission Against Corruption Act 1988</i>
Inquiry	Special Commission of Inquiry into the New South Wales Crime Commission
IARC	Internal Audit and Risk Committee
NCA	National Crime Authority
NSWCC	New South Wales Crime Commission
NSWCC Act	<i>New South Wales Crime Commission Act 1985</i>
NSWPF	New South Wales Police Force
PFA Act	<i>Public Finance and Audit Act 1983</i>
PIC	Police Integrity Commission
PIC Act	<i>Police Integrity Commission Act 1996</i>
Project Rhodium	Police Integrity Commission, <i>Review of the Capacity of the New South Wales Crime Commission to Identify and Manage Serious Misconduct Risks</i> , July 2009
PSC	Professional Standards Command

Special Commission of Inquiry into NSW Crime Commission

PSEM Act *Public Sector Employment and Management Act 2002*

SCU Special Crime Unit

SDCC State Drug Crime Commission

FINDINGS AND RECOMMENDATIONS

1. For the reasons given:
 - (a) I find that the Commission is complying with the NSWCC Act,
 - (b) I also find that it is now complying with the CAR Act but that in the past some of its practices and procedures did not so comply.
2. During the Inquiry no evidence came to my notice (other than evidence already in the public domain) that any members of staff of the Commission or their associates are, or have been, engaged in criminal activity or serious misconduct; thus there has been no need to make any referral of evidence of such conduct to the PIC.
3. The Inquiry is required, under s. 10(1) of the *Special Commissions of Inquiry Act* 1983, to report whether there is or was any evidence or sufficient evidence warranting the prosecution of a specified person for a specified offence. The Inquiry reports that there is or was no evidence warranting the prosecution of a specified person for a specified offence.
4. In general terms I find that the terms of the NSWCC Act and the CAR Act remain appropriate for securing the objectives of the Acts but I make hereafter a number of recommendations in accordance with term three of my Terms of Reference in relation to the structure of the Management Committee, the structure of the Commission, the provision of additional accountability mechanisms and in relation to the Commission's powers and procedures.
5. I find that the powers of the Commission are generally appropriate but I have made recommendations designed to improve its structures and procedures.
6. I find that existing accountability mechanisms for the Commission are inadequate and I make recommendations in respect thereof.

7. I find that the Management Committee of the Commission operates in accordance with the Act, but I make recommendations for changes in its membership.

My specific recommendations are as follows:

- A. The Management Committee
- (a) That the Minister should no longer be a member (paragraph 98).
 - (b) That there be added to the Management Committee an independent part time Chairperson and the permanent head of the Ministry for Police and Emergency Services (paragraphs 102-103).
 - (c) That the Independent Chairperson be a retired or former judge of an Australian court and that he or she be appointed for a relatively short fixed period, such as three years (paragraph 103).
 - (d) That the minutes of the meeting of a Management Committee resolving to refer a matter to the Commission for investigation should state that the Committee has satisfied itself that ordinary police methods of investigation are unlikely to be effective (paragraph 107).
 - (e) That the Management Committee be given the power to obtain independent legal advice at the expense of the Commission (paragraph 111).
- B. Proceedings under the CAR Act
- (a) That there be no change in the responsibilities of the Commission under the CAR Act (paragraph 149).

- (b) That in complicated cases, provision for meeting legal expenses under s. 10B(3)(b) of the CAR Act be made in stages (paragraph 143).
- (c) That the Act be amended to provide that there is to be no settlement or compromise of proceedings under the CAR Act without the approval of the Supreme Court (paragraph 148).
- (c) That the Chief Justice be requested to prescribe by Practice Note, the evidence required to be available to the Court on application for approval of a settlement or compromise (paragraph 149).
- (d) That the Commission put in place protocols or procedures which demonstrate the separation of its investigative powers from its powers under the CAR Act (paragraph 150).

C. Human Sources

That the Commission establish a Committee chaired by the Commissioner or an Assistant Commissioner and comprising the Investigations Manager of G3, the Solicitor to the Commission, the Director of Investigations and an Assistant Commissioner, if an Assistant Commissioner is not the chair of the Committee. The purpose and function of the Committee will be to hold minuted meetings:

- (i) to formally evaluate relationships with all human sources every six months;
- (ii) to make decisions concerning the payment and quantification of rewards to human sources; and
- (iii) to formally review, at least twice a year, any decision to pay regular sustenance payments to a human source.

D. Employment

- (a) That all recruitment and promotion at the Commission should be on merit, following a competitive selection process. If there are any exceptions to the use of a competitive selection process, such exceptions should be approved by the Commissioner, the reasons for the exception documented and the decision reported to an Inspector, if such a position is created (paragraph 177).
- (b) That all new staff, or at least new staff at or above a certain level, should receive Commonwealth security clearance and that the Commission should receive additional funding to obtain such clearances (paragraph 192).
- (c) That all new staff should be required to furnish a full employment history and that such history be verified by the Commission, including by making contact with a person's direct supervisor where possible (paragraph 198).
- (d) That the NSWCC Act and/or Regulations made under that Act should empower the Commissioner to require an officer of the Commission or applicant for a position to:
 - (i) disclose personal particulars and financial information in approved form, verified by statutory declaration;
 - (ii) produce specified documents that would assist in verification of information disclosed;
 - (iii) update personal particulars and financial information in the event of significant change (paragraph 199).
- (e) That the NSWCC Act and/or Regulations made under that Act be amended to include an equivalent provision to cl. 15 of the *ICAC Regulation* (paragraph 200).

- (f) That the NSWCC Act be amended to include provisions that are equivalent to s. 110 of the ICAC Act and cls 10 and 11 of the *ICAC Regulation* (paragraph 209).
- (g) That the Commission formulate a written policy for managing unsatisfactory performance, remedial and disciplinary action. This policy should include provisions in relation to prevention, identification and management of unsatisfactory performance, guidelines as to the choice of remedial and disciplinary action and the documentation to be retained (paragraph 219).

E. Complaint Handling

- (a) That the Commission to the extent it has not done so put in place procedures recommended by the PIC in its Project Rhodium report (paragraph 229).
- (b) That the Commission review its approach to complaints made by legal practitioners during the course of litigation in order to differentiate and pursue those which make an allegation of serious misconduct (paragraph 230).
- (c) That the Commission establish a procedure for dealing with complaints against the Commissioner personally (paragraph 230).

F. Audit

- (a) That the Management Committee issue a direction pursuant to s. 27(2) of the NSWCC Act requiring the provision to it of any report by IARC as well as the Commission's response and that it direct the Commissioner to invite the Chair of IARC to the next Management Committee meeting following such report and response (paragraph 241).

- (b) That the Commission ask the IARC for written advice as to the sufficiency of the resourcing of its internal audit function relative to the risks facing the Commission, such advice and the Commission's response to it to be provided to the Management Committee (paragraph 247).

G. Alterations to the Commission's Structure

- (a) That the provisions for members of the Commission and meetings of the Commission be omitted (paragraph 254).
- (b) That the Commission be constituted by the Commissioner alone (paragraph 254).
- (c) That the Commissioner be appointed for a fixed term or terms not exceeding 10 years in total (paragraph 256).
- (d) That any future parliamentary committee for the Commission have the power to veto any proposed appointment of the Commissioner (paragraph 257).
- (e) That the Commissioner be a retired or former judge of an Australian court or qualified for appointment to a superior court in Australia (paragraph 258).
- (f) That two full time Assistant Commissioners be appointed, one to be a retired or former judge of an Australian Court or qualified for appointment to a superior court in Australia (paragraph 259).
- (g) That the Assistant Commissioners be approved by the Commissioner before being appointed by the Governor, for fixed renewable terms, to perform the roles and responsibilities determined by the Commissioner (paragraph 260).

- (h) That s. 24(6) of the NSWCC Act be amended to provide for Assistant Commissioners to attend Management Committee meetings and participate in discussion, with the Committee's consent (paragraph 261).

H. Oversight and Accountability

- (a) That an Inspector be appointed to the Commission (paragraph 269).
- (b) That the Inspector be a position with a fixed term appointment, not exceeding in total five years (paragraph 269).
- (c) That there be provision for staff of an Inspector, with the proviso that the Inspector should have the right to make use of PIC's facilities if required (paragraph 269).
- (d) That the Inspector be primarily involved in auditing the operations of the Commission to ensure compliance with the law, in assessing the effectiveness and appropriateness of its procedures and in dealing (by reports and recommendations) with complaints of misconduct and conduct amounting to maladministration (paragraph 270).
- (d) That the Inspector have powers similar to those contained in s. 57C of the ICAC Act, and be required to refer instances of criminal activity or serious misconduct to the PIC (paragraph 271).
- (e) That the PIC Act be amended to provide that the PIC not exercise its powers under s. 23(2) and s. 24 (in relation to a preliminary investigation into matters covered by s. 23(2)) without the consent of the Inspector (paragraph 275).

(f) That there be a joint parliamentary committee to have oversight of the Commission and its Inspector, with functions similar to those set out in s. 95 of the PIC Act, with the exception of s. 95(1)(d). In lieu of s. 95(2) of the PIC Act, the Committee should not be authorised to reconsider a decision of the Management Committee, compromises in litigation subject to the approval of a court under the CAR Act and operational decisions or procedures in relation to a particular reference or investigation (paragraph 283).

I. Amendment to the NSWCC Act

(a) That paragraphs (a1) and (b) of the definition of “relevant offence” in s. 3 be replaced with a reference to any offence for which the maximum penalty of imprisonment is a period not less than three years, and that, as a result of its inclusion via this new formulation, paragraph (e) of the definition be removed (paragraph 353).

(b) That s. 3(2A) be repealed (paragraph 353).

(c) That the reference to “may be about to be” in the definition of “relevant criminal activity” in s. 3 be omitted and the words “may in future be” substituted instead (paragraph 362).

(d) That s. 25(2) be amended to provide that the Management Committee must not refer a matter for investigation unless it is satisfied that the investigation of the matter by the Commission is in the public interest; and that the subsection retain the “ordinary police methods” requirement (paragraph 376).

(e) That s. 25(2) (or a new s. 25(2A)) provide that, without limiting the matters that the Management Committee may

take into account in deciding whether investigation of the matter by the Commission is in the public interest, the Management Committee is to take into account the matters currently set out in s. 3(2A) pertaining to the relevant offence involved (paragraph 377).

- (f) That the requirement be inserted that the Management Committee review each reference on an annual basis, within three months of the anniversary of the granting of the reference, or such longer period (not exceeding two years) as the Management Committee thinks appropriate. Upon review, the Management Committee should be required to determine whether to renew or discontinue the reference, using the same criteria as when the reference is granted. A reference should be able to be renewed more than once. The review requirement should apply to a renewed reference (paragraph 380).
- (g) That the word “review” in s. 6(1)(b1) be replaced with “reinvestigate” (paragraph 385).
- (h) That s. 6(1)(d) be amended to refer to providing investigatory, technological or analytical services to such persons or bodies as the Commission thinks fit (paragraph 386).
- (i) That s. 6 be amended to provide that the Commission can engage in taskforces with other government agencies, including non-police agencies, with the approval of the Management Committee (paragraph 388).
- (j) That s. 6(2) be amended to confer authority on the Commission, in its discretion, to furnish evidence of the type referred to in the subsection to the relevant DPP or Attorney

General; and that the Management Committee should approve guidelines for such releases (paragraph 390).

- (k) That s. 7 be amended to provide that the Management Committee can issue guidelines on the dissemination of information and to confirm that taskforce personnel may be provided with information in accordance with agreed guidelines for taskforce operations without this being a dissemination requiring the Management Committee's approval (paragraph 393).
- (l) That s. 17 be amended to make clear that the Commission can require persons to take reasonable steps to generate a document from electronic data that does not exist in hard copy at the time the s. 17 request is made; and to provide that documents or things produced pursuant to that section must be deposited with the Commission (paragraph 396).
- (m) That s. 18B(3)(e) be amended to clarify that the provision applies both to a proceeding for the falsity of evidence given by the witness to the Commission and to a proceeding for the falsity of evidence given by the witness to a court (paragraph 410).
- (n) That s. 29(1) be amended to insert a new paragraph similar to s. 111(1)(b) of the ICAC Act and s. 56(1)(c) of the PIC Act (paragraph 413).
- (o) That s. 29(1)(d) be amended to indicate that it is the person giving the information whose understanding that the information is confidential counts, provided the recipient is told of that understanding (paragraph 414).

- (p) That s. 29(3) be amended to accord with s. 111(3) and (4) of the ICAC Act, with the qualification that the provision equivalent to s. 111(4)(c) should refer to the “Commissioner, Inspector or Management Committee” (paragraph 416).
- (q) I recommend that a provision for the Minister to conduct a regular statutory review, perhaps at five year intervals, be inserted (paragraph 420).

J. Amendments to the CAR Act

- (a) That s. 14 be amended to include within its purview both pending applications for a proceeds assessment order and for an unexplained wealth order (paragraph 429).
- (b) That ss. 31A and 31B be amended to make provision for the making of a restraining order pending resolution of any application to the Court pursuant to those sections and that the definition of “assets forfeiture order” in s. 4 be amended to include orders under ss. 31A and 31B (paragraph 432).

PRELIMINARY

1. The Letters Patent establishing this Inquiry are dated 31 August 2011 and require a report by 30 November 2011. Although they authorise me to consider operational decisions to the extent that they inform proposals for legislative change and to consider whether the powers and procedures of the Commission are appropriate, my time constraints have restricted me to those matters which seem to have the most important and direct bearing upon the Terms of Reference.
2. Two Departmental officers were allocated to assist me namely, Ms Joanna Davidson and Ms Denyse Moxham, an Associate in the District Court. Ms Davidson was seconded from the NSW Crown Solicitor's Office and was quarantined from that organisation for the duration of the Inquiry.
3. Ms Davidson assumed the role of Solicitor Assisting the Inquiry and Ms Moxham its Secretary. I cannot speak too highly of the assistance and dedication to duty which I received from each of these women. Without their very considerable help, this report could not have been written at all, let alone within the time limited.
4. The Inquiry was provided with suitable and adequately equipped offices within the premises of the Department of Justice and Attorney General in Elizabeth Street, Sydney. There we were welcomed by the Legal Services Branch of the Department, whose offices otherwise occupied the premises, and I would particularly like to thank the Director of the Legal Services Branch, Ms Lida Kaban and her executive assistant Ms Gail Mitchell for their assistance. All the work of the Inquiry was carried out in Sydney with the exception of one day, which Ms Davidson and I spent in Canberra where we interviewed Mr Tony Negus, Chair of the ACC Board and Commissioner of the AFP (together with two other AFP officers); Dr Vivienne Thom, Inspector-General of Intelligence and Security; Mr Phillip

Moss, Integrity Commissioner (together with two staff of the ACLEI); and Mr Michael Carmody AO, Chief Executive Officer of the ACS.

5. On 14 and 17 September 2011, advertisements were placed in *The Australian*, *The Daily Telegraph* and *The Sydney Morning Herald* announcing the Terms of Reference for the Inquiry and inviting submissions by 14 October 2011. Appendix 1 contains a copy of the advertisement and a schedule of publication.
6. The Inquiry established a website on 9 September 2011 at <http://www.lawlink.nsw.gov.au/scicc>, which was hosted by the Department of Justice and Attorney General. All significant information concerning the progress of the Inquiry was published on the website, including the Letters Patent, the contact details for the Secretary to the Inquiry, a public notice calling for written submissions and directions for written submissions.
7. Shortly after the commencement of the Inquiry, letters were sent to key agencies and individuals, inviting them to participate in the Inquiry and to provide relevant information.
8. Most of the information produced to the Inquiry was produced voluntarily, pursuant to requests for production issued to the Commission and others. I also spent considerable time at the Commission inspecting files. Except in relation to the production of one document, it was not necessary to exercise any of the powers contained in Pt 3 of the *Special Commissions of Inquiry Act 1983* under which I was appointed.
9. The Inquiry invited submissions from interested parties. The Inquiry made it clear that submissions could be received on either a confidential or a non-confidential basis. The Inquiry received 14 written submissions from persons other than the Commission. The Commission provided two lengthy confidential documents, which it entitled "Discussion Papers". The first, dated 14 October 2011, related to general matters concerning the operation and management of the Commission, and the second, dated 16 November

2011, contained a technical discussion of aspects of the NSWCC Act and the CAR Act. The Inquiry continued to receive submissions until mid-November 2011. Appendix 3 contains a list of submissions received in response to the advertisement, and to my letters.

10. I did not conduct any public hearings (I was not permitted to exercise the powers contained in ss. 22-24 of the *Special Commissions of Inquiry Act* in any public hearing in view of the declaration pursuant to s. 21 of that Act in my Letters Patent). Rather, I held extensive private meetings with persons who seemed likely to be able to assist the Inquiry, including the then Commissioner and Assistant Commissioner of the Commission and members of its staff. I interviewed 58 people in this manner. Appendix 2 contains a list in alphabetical order of persons interviewed by me. I also spoke by telephone to the Hon M D Ireland QC, a former Inspector of the PIC; to Ms Gail Furness SC, reviewer of the Casino, Liquor and Gaming Control Authority and Mr Peter Clark SC, a former Assistant Commissioner of the PIC. A record was made of each of the meetings and, in the case of a lengthy interview with Mr Phillip Bradley, then Commissioner of the Commission, which extended over two days, a full transcript was taken.
11. During the private meetings much information of a sensitive and confidential nature was conveyed to me relating to criminal investigation methods and procedures and the identity of informants. For that reason, I have directed pursuant to s. 8 of the *Special Commissions of Inquiry Act* that there be no publication of the records of those meetings lodged with me.
12. There were several reasons for conducting meetings in private. The first of my Terms of Reference requires consideration of whether the Commission is complying with the NSWCC Act and the CAR Act. The second Term of Reference related to the appropriateness of the terms of the two Acts, including the Commission's powers and procedures. This required an examination of the Commission's methodologies, including in relation to human sources (informers), and a comparison with the methodologies of other agencies. Both the Commission's operations in relation to the

investigation of serious crime and those of other law enforcement agencies are highly sensitive and their staff are bound by secrecy provisions. The preservation of working relationships between the Commission and other agencies, including Commonwealth agencies, is vital. The Inquiry considers that public disclosure of confidential matters concerning law enforcement methodology at the Commission and elsewhere would not be in the public interest and could reasonably be expected to prejudice the relationships between the Commission and other law enforcement agencies. In addition, legal professional privilege attached to legal advice received by the Commission and various documents in its litigation files.

13. Further, there were no real factual disputes to be resolved in the course of the Inquiry. The differences between the Commission and third parties as to the legality of the Commission's activities and the appropriateness of the terms of its principal legislation were differences of perspective. In those circumstances, I consider that the public interest in maintaining confidentiality in relation to law enforcement methodology and preserving working relationships between the Commission and others outweighed the public interest in public hearings.
14. It is appropriate that I express deep-felt gratitude to all the men and women who freely participated in private and sometimes quite lengthy discussions with me. Their respective contributions to this Inquiry were invaluable, even though, for the most part, I have not otherwise been able to give acknowledgment.
15. It is also appropriate that I record the fact that the Commission itself provided the fullest possible cooperation with the Inquiry. I was given unlimited access to its staff, its files, and its records. I express my thanks, particularly to Mr Bradley and his successor, Acting Commissioner Peter Singleton for this cooperation.
16. Section 10(3) of the *Special Commissions of Inquiry Act* authorises me to make such recommendations relating to the publication of the whole or any

part of the report, as I think proper. In part, the report contains material which should not be published for the reason that it discloses confidential information regarding the detection and investigation of crime.

17. For that reason I have prepared two reports. The first contains all relevant material including confidential material and I recommend that the report not be published by the Government.
18. The second report contains a recommendation that the whole of the report be published by the Government. The majority of the second report is identical to the first, with the exception of the inclusion in the first report of a chapter dealing with human sources. Thus, all recommendations, together with chapters dealing with proceedings under the CAR Act, employment, complaint handling, audit, the Commission's structure, oversight and accountability and the appropriateness of the terms of the principal legislation, appear in each report, along with this chapter. The chapter dealing with the Management Committee has been expurgated so as to disclose only those matters which should properly be in the public domain.

CHAPTER 1 – Introduction

- 1 Relevant portions of the Letters Patent establishing the Inquiry are contained in Appendix 4.
- 2 The Commission was originally formed in 1986. It was then called the State Drug Crime Commission and the statute which incorporated it was the *State Drug Crime Commission Act 1985*. Both the Commission and its principal Act commenced on 20 January 1986. They closely followed the establishment of the National Crime Authority in 1984. The Commission's name was changed to the present name by the *State Drug Crime Commission (Amendment) Act 1990*.
- 3 When moving that the bill for what ultimately became the NSWCC Act be read a second time, the then Premier, the Hon. N K Wran QC, said that it was “a key component in the Government's overall strategy to combat the effects of heroin and other illegal drugs”.¹ He explained:

“The establishment of the State Drug Crime Commission is a key component of [the Government's] strategy, because of the central role it will play in law enforcement ...

... The establishment of the State Drug Crime Commission is a further step in the area of investigation and prosecution that is specifically directed at drug trafficking and its relationship with organized crime. The commission will add an entirely new dimension to the investigation of organized crime. It will rely extensively on the use of modern technology and expertise to enable the identification and prosecution of criminal entrepreneurs who are rarely prosecuted using traditional methods of law enforcement.

... Modern organized crime involves at least four types of operatives: the financiers who supply the capital; the members of professions who are prepared to deviate from professional codes of ethics; the criminal entrepreneurs who put the schemes together; and the criminals who execute the schemes. The last group are more easily identified and convicted by police methods. The first three groups use modern methods of communication and sophisticated techniques, and are rarely identified and less often convicted. The State Drug Crime Commission will be concerned with achieving a higher measure of success in the detection and prosecution of organized drug trafficking. The commission will

¹ New South Wales Legislative Assembly, *Hansard*, 2 October 1985, p. 7536.

have the power and expertise to uncover the operations involved in a sophisticated drug network.

...

The concentration of existing police methods is upon individuals and individual offences rather than the links between them. The pressure of other police work is oriented towards obtaining convictions and satisfying complaints and not towards examining patterns of action or association using computer techniques. The State Drug Crime Commission will be provided with computer resources to facilitate such analysis. There are other ways in which the commission will supplement the work of the police. Some people, for instances, will not give information to the police, but will give it to a commission which is independent of the police.

... Two methods have been adopted to focus the commission's investigations towards the most serious offences. First, references will be given to the commission via a management committee. ...

Second, a statutory definition is provided of relevant drug offences. The commission is restricted to investigations of relevant drug activity and relevant drug offences."²

- 4 Initially, the focus of the Commission was drug trafficking but that has been expanded over the years, particularly since 1988 to encompass the investigation of all types of serious crime. In 1990 the Commission was given functions under the CAR Act, originally called the *Drug Trafficking (Civil Proceedings Act) 1990*.
- 5 Although the NSWCC Act has been amended on numerous occasions, it is instructive to note the Second Reading Speech of the then Minister for Police (the Hon. Paul Whelan) on 31 October 1996, part of which is reproduced in Appendix 5. The Minister speaking upon the *NSW Crime Commission Amendment Bill* reviewed the operation of the NSWCC Act during the previous 10 years and outlined the purpose of the proposed amendments.
- 6 I note that by 1996 the privilege against self-incrimination contained in the statute when first enacted had been removed and replaced by a provision whereby, in effect, answers given by a witness being examined by the Commission over objection, cannot be used against the person in other proceedings, except a prosecution, for giving false evidence. This is

² New South Wales Legislative Assembly, *Hansard*, 2 October 1985, pp. 7537-7543.

consistent with the approach taken in the ICAC and PIC legislation. Of course, the value to a criminal investigation of the compulsory questioning of witnesses lies not so much in what the witness says about himself or herself, but in what he or she says about other people who are, or become, suspects.

- 7 The Commission continues to undertake its dual roles under the NSWCC Act and the CAR Act. In doing so, it is entitled to exercise extraordinary powers, perhaps most significantly, the power to compel the attendance of persons for questioning before it, in circumstances where they are deprived of the common law privilege against self-incrimination, and the power to compel the production of documents. Many aspects of its operations are vulnerable, to corrupt and improper practices and to allegations and perceptions of such practices. This is especially so in the contacts its officers have with human sources (or informers) and in its procedures relating to the recovery of assets acquired as a result of criminal conduct.
- 8 Apart from exercising its primary roles under the NSWCC Act and the CAR Act, I should note that the Commission is a Law Enforcement Agency for the purposes of the *Law Enforcement (Controlled Operations) Act 1997*; an Agency for the purposes of the *Telecommunication (Interception and Access) (New South Wales) Act 1987* and members of its staff are Law Enforcement Officers for the purposes of the *Surveillance Devices Act 2007*. Authorised staff of the Commission are able to make an application for a covert search warrant pursuant to the *Law Enforcement (Powers and Responsibilities) Act 2002*. My Terms of Reference do not extend to consideration of the Commission's compliance with those pieces of legislation.
- 9 Nobody in the course of the Inquiry has suggested that the Commission does other than perform a vital and invaluable service to the community in its investigation of major crime and in its confiscation of assets representing the proceeds of criminal activities. It is quite clear that the

perpetrators of many very serious crimes have only been brought to justice as a consequence of its work. By way of example, I quote three paragraphs from an email sent to me by the Senior Crown Prosecutor, Mr Mark Tedeschi QC:

“In my view, without the coercive powers of questioning of the New South Wales Crime Commission, the murder of John Newman would have remained an enduring, unsolved mystery and the mastermind, Phuong Ngo, would never have been brought to justice. The technique used by the Crime Commission with the assistance of the investigating police of interviewing lower-level conspirators and gradually working their way up to the top, proved its real worth in that case. Without the coercive powers which enabled the Commission to call witnesses and to compel them to answer questions under oath, I am sure that there would never have been any trial.

[NOTICE - DECEMBER 2011 - THE DEPARTMENT OF PREMIER AND CABINET HAS REDACTED ONE PARAGRAPH AT THIS SECTION OF THE REPORT AT THE REQUEST OF THE DIRECTOR OF PUBLIC PROSECUTIONS, AS IT REFERS TO A MATTER THAT IS BEFORE THE COURT.]

In my view, the approach which has been taken in the legislation which set up the New South Wales Crime Commission, whereby witnesses can be compelled to appear before the Commission and answer questions on oath, but where those answers cannot be used against them if they take objection, is a fair balance between the interests of the community in solving serious crime and the legitimate rights of a witness not to incriminate themselves.”

- 10 In performing its criminal assets recovery role the Commission has not only confiscated many millions of dollars for the benefit of the State and Commonwealth Treasuries but has caused detriment to the criminal milieu in a way which, anecdotally, has even greater impact than custodial sentences.
- 11 Likewise, in the course of my Inquiry, nobody has suggested that Mr Bradley, who held office as a member of the Commission from July 1989 until early November 2011 and was appointed as Chairman in August 1993 and Commissioner in December 1996, was a man, not only of complete integrity, but a very dedicated, energetic and capable leader. While some aspects of this report may seem to reflect on the Commission,

they must be put in perspective as they by no means eclipse its outstanding record of achievements.

- 12 As indicated the Commission exercises most of its powers under the NSWCC Act and the CAR Act. I make reference to relevant sections of the former in Appendix 6 and to the latter in Appendix 7.
- 13 I make reference to the PIC Act referred to in my Letters Patent in Appendix 8.
- 14 In the course of the Inquiry, particularly in connection with Term of Reference number three, I have thought it appropriate to identify and consider as possible models, statutes, other than those already referred to, which have comparable aims, structures and powers. In that connection I list the ICAC Act; the *Ombudsman Act 1974*; the *Crime and Misconduct Act 2001* (Qld); the *Criminal Proceeds Confiscation Act 2002* (Qld); the *Corruption and Crime Commission Act 2003* (WA); the *Australian Crime Commission Act 2002* (Cth); the *Law Enforcement Integrity Commissioner Act 2006* (Cth); the *Australian Security Intelligence Organisation Act 1979* (Cth); the *Inspector-General of Intelligence and Security Act 1986* (Cth) and the *Proceeds of Crime Act 2002* (Cth). References to each of these statutes are contained in Appendix 9. There is civil forfeiture legislation in other States as well, but no organisations with comparable functions to those of the Commission.

CHAPTER 2 – The recitals in the Letters Patent

15 The recitals in the Letters Patent refer to four specific matters, together with the significant concern in the community as to the “performance, integrity and governance structures” of the Commission. As these recitals inform the Terms of Reference, it is appropriate that I say something about each of the specific matters mentioned.

Project Rhodium

16 Project Rhodium referred to in the recitals had its genesis in a letter dated June 2008 from the then Minister for Police, the Hon. David Campbell, to the then Commissioner of the ICAC, the Hon. Jerrold Cripps QC, requesting a review of the “systems applying within the NSW Crime Commission for the prevention of illegal activity within the Commission, particularly illegal activity arising from relationships between Commission staff and criminal informers”.

17 Following assent on 1 July 2008 to the *Police Integrity Commission Amendment (Crime Commission) Act 2008*, the Minister’s request was referred to the PIC. Thereafter Mr Peter Clark SC (Assistant Commissioner of the PIC) assisted by Mr Taran Ramrakha prepared a draft report dated April 2009.

18 The introduction to the draft report, inter alia, explained the purpose, scope and objectives of the project (which remained largely unchanged in the final report). The final report’s explanation, taken from the Introduction to that document, is reproduced in Appendix 10.

19 The draft report itself was sent by Mr John Pritchard, then Commissioner of the PIC, under cover of a letter dated 9 April 2009 to the Commission, which responded in some detail on 1 June 2009. On 8 July 2009 the PIC sent a copy of the final report to Mr Bradley. The report of some 180 pages (including appendices) concluded with the 13 recommendations for consideration by the Management Committee set forth in Appendix 11.

20 Thereafter, there was correspondence between the two agencies regarding implementation of the recommendations. A letter from the PIC to Mr Bradley dated 28 June 2011 included these paragraphs:

“As you are aware the Commission has an obligation under section 99(2)(c) of the *Police Integrity Commission Act 1996* to report on its evaluation of responses to its findings and recommendations. As previously foreshadowed, it is the intention of the Commission to include an evaluation of the response of the NSWCC to the Commission's recommendations in the forthcoming Annual Report.

The Commission notes that the NSWCC has made some significant progress in updating some of its policies and procedures. The changes that it has made to its search and seizure and complaints handling procedures in large measure meet recommendations 2 to 5 that the Commission made in Project Rhodium. The Commission also notes that the obligations owed by senior NSWCC managers to identify and manage misconduct now also forms part of their management responsibilities in accordance with recommendation 9.

However, while the Commission notes that the NSWCC has made some positive changes to some of its policies and practices, the balance of the NSWCC response seems to reflect a broad rejection of the reforms proposed by the Commission, which may potentially impede the capacity of the NSWCC to identify and manage serious misconduct risks. The Commission notes, for example, that the NSWCC has elected to deviate from standard source handling practices and has not identified any strategies that might alleviate the risks that arise from doing so,

That said, the Commission accepts that the NSWCC may have its own solutions for treating the misconduct risks that the recommendations were designed to treat. However, upon the basis of the advice to date, no such solutions have been communicated to this Commission. The Commission also accepts that it may not be seized of all the changes made by the NSWCC or all of the reasons why the NSWCC has elected not to implement the Commission's recommendations. Those comments apply especially to the response to recommendations 1, 6, 10, 11 and 12.

A report of the Commission's evaluation of the materials provided under cover of your recent letter is attached for your information.

Overleaf, the Commission brings a number of particular matters to your attention for response. The Commission would appreciate a response to each numbered item at your earliest convenience. “

21 Accompanying the letter was a seven page document which indicated the PIC's continuing concern with some matters, human sources (informers); the handling of high risk items such as drugs; search warrants and exhibits; complaint handling and the documentation of misconduct and risk management generally. The document also enquired as to the position in relation to a number of other matters.

22 The letter was also accompanied by a 41 page "Report on the evaluation of the response of the NSW Crime Commission into the recommendations arising from Project Rhodium" dated 28 June 2011.

23 Over the signature of Mr Bradley, the Commission wrote to me on 16 September 2011 in these terms:

"I have previously furnished to you a copy of the PIC's *Rhodium* Report and our response to the draft which preceded it.

In response to the *Rhodium* Report, the Commission recommended to its Management Committee, and the Committee resolved, that the Commission should undertake the work recommended in PIC recommendations 1 to 12. Recommendation 13 was rejected by the Minister.

The Commission completed its work on recommendations 1 to 12 and reported to the Management Committee. One item, relating to confidential information, was excluded because the Commission had not completed its ICT virtualisation project. It is now scheduled for completion in December 2011.

The Management Committee then referred the Commission's review to the Independent Audit and Review Committee. The Chair of the Committee, Peter Whitehead, reported on 26 May 2011. The Management Committee then resolved that the Commission's review and Mr Whitehead's report be referred to the PIC. This was done on 27 May 2011.

The PIC wrote on 28 June attaching a 7 page document and a more detailed 41 page report. Enclosed are copies of the PIC's letter and attachments. Also enclosed is a copy of the Commission's review and Mr Whitehead's report."

24 Subsequently, I was provided with more recent correspondence between the Commissioners of the PIC and the Commission.

- 25 Mr Cripps of the PIC ended a letter dated 15 August 2011 with the paragraph:

“The Commission has written to the Minister of Police asking whether the Minister wishes the Commission to do further work with respect to the review. At the present time it is the view of the Commission that it has discharged the function asked of it.”

- 26 So far as the Commission and the PIC are concerned, the matter of Rhodium seems to have ended with Mr Bradley’s letter to Mr Cripps dated 15 September 2011:

“Re: *Rhodium* Report

I refer to your letter of 15 August 2011. I note that you will not provide further information.

You have written to the Minister as chair of the Management Committee indicating your view that the PIC has discharged its function. The above matters were discussed at the Management Committee Meeting of 30 August. It was noted that further work on this area will be carried out by the Special Commission of Inquiry (*‘the Patten Inquiry’*). We anticipate that the Minister will be writing to you in relation to these matters.

This Commission substantially disagrees with the *Rhodium* Report and many of the propositions contained within the most recent documents. We will address these matters with the Patten Inquiry.

In view of this and the position taken by the Management Committee, there seems to be little to be gained from this Commission continuing to argue with the PIC as to the adequacy of its policies and practices.

I note that it is proposed to publish something about this Commission’s response in the PIC’s annual report. We would prefer that such comment await the outcome of the Patten Inquiry – given the basis of our earlier complaint. If you propose to publish something adverse, we would welcome an opportunity to comment this time.

Finally, it is noted that you have no intention of publishing the documents attached to the letter of 28 June. A similar assurance in relation to the *Rhodium* Report was given by the PIC Commissioner on 12 June 2009. That caused this Commission not to pursue its complaint with the Inspector.”

- 27 The PIC’s *Annual Report 2010-2011*, published on 31 October 2011, records that the PIC consulted with the Minister in August 2011 concerning what future work was required to be done by it in respect of Project

Rhodium. The Commission was advised that this Inquiry had been established and that it “would deal specifically with the issues raised in Project Rhodium, consistent with the recommendations of this Commission.”³

- 28 Despite Mr Bradley’s statements in the letter above quoted, it seems to me that neither my Terms of Reference, nor the short time allotted to me to conduct the Inquiry require, or permit, further investigation of all the matters referred to in Project Rhodium. In particular, it is important to note that Project Rhodium related to the identification and management of misconduct risks. There is some overlap between those matters and questions of compliance with the NSWCC Act and the CAR Act and the appropriateness or otherwise of the Commission’s procedures, but the issues are not identical. In fairness to the Commission it seems to have addressed or taken steps to address many of the Project Rhodium recommendations, but, on the face of it, the PIC report seems to demonstrate the high level of misconduct risk presented by the Commission’s activities and importance of ensuring that agencies of the State, having powers such as those possessed by the Commission, should be subjected to well resourced, independent and comprehensive oversight. Whether adequate oversight is currently provided falls within my Terms of Reference, number three.

Project Caesar

- 29 According to material provided to me, this project by the PIC concerned the examination of “misconduct risks of civil confiscation and the management of those risks by the Commission”. The PIC’s *Annual Report 2010-2011* says this about Project Caesar:

“Project Caesar is also being undertaken by the Commission in light of, and in association with Operation Winjana. Project Caesar is being undertaken by the Commission to:

- obtain a better understanding of the misconduct risks facing the NSWCC in exercising functions under the CAR Act; and

³ Police Integrity Commission, *Annual Report 2010-2011*, p. 46.

- provide recommendations for how those risks may be better managed, as required.

The Commission is using several methods to carry out the project. The methods include carrying out a textual analysis of NSWCC policy and procedural materials and review of relevant open-source literature, legislation and case law. The methods also involve examining materials and information that the Commission has obtained for the purpose of Operation Winjana.

The Commission made some progress in advancing the project in the year. At the end of the year, a draft version of a report had been finalised for internal review. At that stage, however, no decisions had been made as to the disposition of the report.”

30 PIC noted that there were “untreated” opportunities to introduce an improper or corrupt element into negotiated settlements of proceedings brought under the CAR Act. It gave by way of examples:

- (a) agreements that might be reached that would enable a defendant to retain assets that might otherwise be forfeited to the Crown, in return for some promise to render assistance;
- (b) defendants and their legal representatives might claim over-inflated costs and receive funds from restrained assets that are far in excess of amounts required to cover those expenses; and
- (c) settlements might be entered in haste, without necessary due diligence such that the Commission might turn a blind eye to the true asset position of defendants.

31 Project Caesar is still before the PIC and it is, I think, inappropriate for me to say anything about it except that it refers to procedures under the CAR Act which are dealt with in Chapter 5 of this report.

Operation Winjana

32 This operation by the PIC concerns an investigation into the activities of officers of the Commission, Mr Lou Novakovic and others. It involves a personal relationship between Mr Novakovic and a solicitor who had acted for some defendants in proceedings commenced by the Commission under the CAR Act. It also involves the possible abuse by the Commission of its powers under the CAR Act.

33 Following private hearings and a largely unsuccessful attempt by the Commission in the Supreme Court to limit the scope of the investigation (see the decision of Rothman J in *New South Wales Crime Commission v Police Integrity Commission* [2011] NSWSC 443), the PIC decided to hold public inquiries in Operation Winjana and they took place in September and October of this year. Those hearings stand adjourned for submissions by counsel, possible further public hearings, and the preparation of a report. The matter is still before the PIC at the date of this report and there is nothing further that I should say upon the subject.

Mark William Standen

34 As the conviction of Mr Standen upon very serious criminal charges in the Supreme Court on 11 August 2011 was recited in my Letters Patent, it is appropriate that I say something about him. Undoubtedly, his arrest in June 2008 and subsequent conviction were seminal events in the history of the Commission. The Commission acknowledged, in its first Discussion Paper, that his conduct was “[p]erhaps the worst part of the Commission’s history”. On the other hand, the Commission stated that “one of [its] most significant achievements was its investigation of him for eleven months without his realizing it, producing sufficient evidence to lead to his conviction.”

35 Mr Standen was employed by the Commission from 4 March 1996 as an Investigator, at the specific request of Mr Bradley who had known him for many years and regarded him “very highly”. He was appointed pursuant to s. 32 of the NSWCC Act under a contract for an initial term of 12 months and at a commencing salary of \$65,000 per annum, reviewable annually.

36 Prior to this appointment he had served with the Narcotics Bureau (a branch of the ACS) from 1975 to 1979 and thereafter with the AFP. During the time he was a member of the AFP he was seconded to the NCA. On 2 February 1996 he accepted a redundancy payout from the AFP, numerous

other AFP superintendents having taken redundancy around the same time. In connection with his appointment the Commission obtained a letter from the then NSW Police Service stating that inquiries “reveal that there are no matters of an adverse nature recorded against this person”.⁴ The Commission also obtained a letter from AFP stating, “No information is held by the AFP which would indicate that he is unsuitable for employment with [the Commission]”⁵ and a letter from NCA stating, “I advise that no adverse information concerning Mr Standen is contained in NCA holdings. Mr Standen was an AFP Superintendent on secondment to the NCA at the time of his resignation”.⁶

37 Mr Standen’s duties as an Investigator, as described in a schedule to his employment agreement dated 4 March 1996 were as follows:

- “1. Conduct investigations to locate assets gained from suspected illegal activity which are under the control of targets of the Commission.
2. Collate evidence, prepare documentation and briefs with a view to obtaining production orders, Monitoring Orders and Search Warrants.
3. Serve documents issued by or at the instigation of the Commission.
4. Give evidence in proceedings in the Supreme Court and elsewhere in matters in which the Commission is involved.
5. Provide assessments of market values of prohibited substances.
6. Liaise with officers of the Drug Enforcement Agency and officers of other police units, government, legal and financial agencies.
7. Adhere to, and participate in the administration of the Commission’s Anti-Corruption Program.
8. Carry out other work (including criminal investigations) as directed by the Commission.
9. Oversee security staff and general building security.”

38 Mr Standen was promoted to Chief Investigator (later styled Investigation Manager) on 1 October 1996. In August 1997, Mr Bradley sent the following memo to Mr Standen, who was by then earning a salary of \$75,000 per annum, concerning his annual salary review:

⁴ Letter from Det. Supt N G Ireland, Commander, Special Branch to Hannah Uther, 27 February 1996.

⁵ Letter from S Peisley, Director Internal Security and Audit to Chairman of the Commission, 19 March 1996.

“The Commission has reviewed your salary, and has decided to award you a conditional increase from \$75,000 to \$92,000, with the increase to take effect from 1 October 1997.

The increase will be paid on your presenting to Len Giles a monthly performance certificate signed by John Giorgiutti. In order for Mr Giorgiutti to sign the certificate, you will need to satisfy him that you have met all of the following performance measures:

- Informant contact reports have been submitted for each and every contact you have had with informants within one working day of the contact;
- Information reports are submitted within one working day of the information being received;
- You advise security staff and your own staff details of where you are and when you will be back. You also need to let John Giorgiutti know the above, as well as the purpose of the absence.
- As you are aware, several of your team members have voiced their concern about your leadership style, and the difficulty they have in spending time with you when they require guidance. If there is a significant level of complaint, this will be an indication of non-performance.
- You must be contactable at all times.”

39 There was a further promotion to Assistant Director, Investigations, on 1 October 1997. Mr Standen remained in that position until his resignation in 2008 and his salary was increased at regular intervals through that period. Not all of those increases are noted below.

40 When Mr Standen commenced at the Commission his supervisor was Mr John Giorgiutti, the Director of Operations and Solicitor to the Commission, who conducted regular staff appraisals. On 12 January 1998 his appraisal of Mr Standen contained the following:

“I said I had more of a brief against him than I had ever had. I said he had not met his performance criteria for October, November and December and yet he had been paid for it. I said the only reason it has been paid is because of his personal financial predicament. Mr Standen disagreed ...”

⁶ Letter from G E (Tim) Sage, Regional Director to Chairman of the Commission, 22 February 1996.

- 41 On 23 April 1998 Mr Giorgiutti presented a further appraisal with these remarks:

“I continued to supervise Mr Standen until March 1998, when the Commission resolved that he would report directly to the Commissioner.

Attached are a number of documents on which I have made comment. They indicate Mr Standen’s lack of performance.”

- 42 The following day, 24 April 1998, Mr Bradley commented:

“Mark has potential because he has a high level of intelligence, a great depth of experience and obvious ability in a number of areas in which the Commission is involved. These include criminal investigations, financial investigations, and the use of coercive powers.

Mark falls down in his organisational skills. This is evidenced by the state of his office, his inability to meet deadlines, and the lack of compliance with requirements for documents to be produced including reports to the Ombudsman, effectiveness reports and like matters.

I told Mark that there are limits to what can be paid to an effective investigator, but that an Assistant Director should be regarded as a potential Director, a person who could take over the running of the Commission. I said that if he developed better organisational skills consistent with general modern management principles, he would be Director-material.

I said that when he was employed at the Commission he was told that he had three priority matters to attend to – they were: ‘supervision, supervision, supervision’.

I said that John and I hope that the Commission could one day run without us and that we looked to him and Tim O’Connor as the successors in the management of the Commission. I said that provided there was a good litigation lawyer to work with them, it wouldn’t matter who the Chairman was.”

- 43 In April 1999, Mr Bradley conducted a further staff appraisal of Mr Standen. His report included this comment:

“I said there was a good team spirit in his area and that his staff had a lot of respect for his ability and diligence, as do I. However, there was a continuing communication problem, which was affecting the morale of important staff members. Although this had been addressed in the past and there had been an improvement, it was only temporary.”

44 In August 2000, Mr Giorgiutti's performance appraisal of Mr Standen noted:

"I said I am conscious of the fact that I do not provide Mark with much assistance – that I leave him to his own devices. I indicated that I would involve myself more in his work over the next year.

Mark said he meets with a lot of informers but whilst he writes up contact reports, he does not always have them filed. We agreed that it is an important and dangerous area, and that they must all be written and filed in a timely way. I noted, however, that Mark is very good at managing informer relationships."

45 Notwithstanding further questions raised about Mr Standen's performance in this appraisal and an exchange of emails between Mr Bradley and Mr Standen in September 2000, which reflected criticisms of Mr Standen's performance, from October 2000 his salary was increased. A fresh written agreement was entered into for a term of three years stating, as had previous agreements, that the employment was pursuant to s. 32(2) of the NSWCC Act. That subsection has since been repealed but at the time it provided:

"(2) The Commission may also employ staff. Part 2 of the *Public Sector Management Act 1988* does not apply to or in respect of any such staff."

46 His "Key Accountabilities" as Assistant Director, Investigations were listed in the Position Description annexed to his contract dated 1 November 2000 as including:

1. Direction and management of the Commission through participation in the Commission's Management Team;
2. Direction and management of operations as leader of an investigation team;
3. Relationship management with police assist the Commission;
4. Management of informants;
5. Act as counsel in Commission hearings;
6. Other duties as directed."

47 In a staff appraisal in August 2001, Mr Giorgiutti commented:

"I said in the past I have been unhappy but that I am no longer unhappy with Mark's performance."

48 Mr Bradley commented in reviewing Mr Standen's salary in October 2001:

"Your performance is regarded as having been exceptional over the past twelve months."

49 In August 2002 Mr Giorgiutti produced a handwritten performance appraisal containing the following comments:

"Mark is very intelligent and a very experienced investigator. People like him and he is therefore a valuable team player. When Mark became an Assistant Director, Investigations he displayed poor organisational skills. He improved in that area very slowly over time. Whilst I believe that there is still room for some improvement I think that over the last twelve months he has shown a big improvement in this area. He maybe understands that some of the areas I nag about can be our undoing. ... He certainly 'drives' the investigations of the criminal activities even though our partner agencies probably have a view that they in fact do that."

50 This was followed in 2003 by another handwritten appraisal of Mark Standen by Mr Giorgiutti which contains these comments:

"An improved performance. Maturing. Doing a great job holding a big team together. Especially with NSW + AFP. A team likely to be a failure without him. Value for tax payer dollar. Still some room for improvement in organisational skills but forgiven because of volume and complexity of work. Studies still motoring."

51 No further appraisal of Mr Standen appears in his personnel file produced to me. However, there is reference to a salary increase to \$228,800 per annum in October 2004 and there is a copy of a fresh employment agreement entered into in January 2005 and another agreement entered into in August 2006 pursuant to Ch. 1A of the *Public Sector Employment and Management Act 2002* which provided for a salary of \$237,952 per annum. Thereafter there are only documents relating to a salary review in September 2006 and his resignation effective on 2 June 2008, which was the day of his arrest. Mr Bradley told me that performance appraisals were not compulsory for Mr Standen after 2003 and he elected not to undergo them

- 52 As appears from the records of the trial of Mr Standen, the Crown case was that he was engaged in dishonest behaviour from about 2003. He has not been charged with criminal activity relating to any period before 2006.
- 53 After a trial commencing in March 2011, Mr Standen was convicted on 11 August 2011 of conspiracy to import a commercial quantity of a border controlled precursor, namely pseudoephedrine, contrary to s. 307.11 and s. 11.5 of the *Criminal Code 1995* (Cth), conspiracy to supply not less than the large commercial quantity of a prohibited drug, contrary to ss. 25(2) and 26 of the *Drug Misuse and Trafficking Act 1985* and conspiracy to pervert the course of justice, contrary to s. 43 of the *Crimes Act 1914* (Cth). For reasons which on the Crown case were unconnected to and unknown to Mr Standen, no border controlled precursor drugs were included in the container that was ultimately imported. Mr Standen is yet to be sentenced.
- 54 The Crown case in relation to the conspiracy to import and supply charges was that the conspiracy could be established between Mr Standen and both Bakhos Jalalaty and James Kinch (or between Mr Standen and either of those men) and that it involved divers others. It was not alleged that others were involved in the conspiracy to pervert the course of justice. That conspiracy involved Messrs Standen, Jalalaty and Kinch agreeing that Mr Standen would use his knowledge and position as a senior law enforcement officer and experienced investigator to deflect authorities from discovering and hence producing evidence of and prosecuting the true facts in relation to an offence involving importation of substances in contravention of Commonwealth law.
- 55 The activities of Mr Standen relied on by the Crown in relation to the conspiracy to pervert the course of justice included concealing his dealings with Mr Kinch from his employer, supplying Mr Jalalaty with a cover story in the event the drugs were detected, making inquiries of the ACS, advising and reporting back to Mr Jalalaty about ACS and AQIS

procedures, police methodology and the actions he should and should not take in order to avoid detection. The Crown alleged that a major element of Mr Standen's part in the conspiracy to pervert the course of justice involved taking advantage of his position and knowledge so that a future prosecution could be obstructed, prevented and defeated, including by affecting the evidence and quality of evidence in any case.

56 Extensive evidence was admitted at Mr Standen's trial in the form of telephone intercepts, listening devices and draft emails that were not sent from his Commission email account. Messrs Jalalaty and Standen regularly communicated with Mr Kinch via multiple Hotmail email accounts, using a variety of aliases. The method of communication used involved creating a Hotmail account and sharing the account name and password. After the email account was established, messages were created and saved in the draft folder which could be accessed by other users, until they were typed over.

57 The Crown case was that Mr Kinch in effect co-ordinated the venture. He had a long-standing relationship with a Dutch drug syndicate. Mr Standen formed a relationship with Mr Kinch, who was a registered human source at the Commission. The Crown alleged that this was an improper relationship from 2003 onwards, based on the level of contact between the two men – unexplained by any informer relationship – as well as actions taken by Mr Standen in relation to drugs charges then pending against Mr Kinch. Mr Kinch left Australia in early 2004 but continued to provide information to Mr Standen. According to Mr Game SC's closing address to the jury in Mr Standen's trial, Mr Standen was "irrevocably compromised" and "effectively in the pocket of Mr Kinch"⁷ by December 2005, when Mr Jalalaty received a payment of \$47,500 from Mr Kinch, which was then transferred to Mr Standen. In early 2006, Mr Jalalaty received \$1 million from Mr Kinch. The Crown case on the conspiracy to import charge started on 1 January 2006. That said, it was not necessary for the jury to

⁷ *R v Mark William Standen*, Supreme Court of NSW, No. 200900008922, Transcript, 25 July 2011, p. 4912.

find that the conspiracy commenced in January 2006 or at any particular time.

58 Mr Jalalaty was the person who had face-to-face meetings with Mr Kinch, ultimately meeting Mr Kinch overseas some five times. He also made the arrangements for obtaining the container and shipping its contents to Australia under the guise of his food importation business.

59 Over time, on the Crown case, Mr Standen received at least \$220,000 from Mr Kinch and to a much lesser extent from Mr Jalalaty. The Crown did not set out to prove particular figures, but on the Crown case these payments provided a good idea of the reality of the situation.

60 There was evidence in the trial, including from Mr Giorgiutti and Mr Bradley, to the effect that Mr Standen did not comply with the Commission procedures in relation to both what should and what should not have been done with information, such as reporting of contacts with, and the provision of information to, Mr Kinch. The Crown led evidence that Mr Standen maintained personal files concerning his contacts with Mr Kinch of which he gave some details, but not others, to the Commission. It appears that this non-compliance with Commission policy, even in the most basic respect of reporting contact with informers, continued over a period of some years. Mr Giorgiutti reviewed the Commission's human source file in relation to Mr Kinch and noted that the last contact between Mr Standen and Mr Kinch recorded on that file was 5 December 2005. A further review of Mr Standen's email accounts and notebooks and other Commission documents suggested to Mr Giorgiutti that Mr Kinch had ceased to provide information relating to Commission investigations by August 2006.

61 Mr Standen failed to comply with Commission policy in relation to human sources in other respects apart from failure to report contacts. In his closing address to the jury, Mr Game SC referred to aspects of the Commission's human source policy in place at the relevant time, including amongst other things a requirement that officers not become socially

involved with informers, not meet them in dangerous or compromising circumstances, not make promises or incur liabilities to them, accept responsibility for their ethical management, strictly adhere to instructions of a supervisor, never trade information, not ask for information about a person of interest in a way which might inappropriately disclose the interest and not solicit or accept any gift or token. Mr Game continued:

“Well I’m not going to say all of them were broken but the vast majority of them were broken not because Mr Standen was slack in his dealings with informers but because it was not an informer relationship in substance. It was something completely different. As I said things were tightened up considerably in G3 such that Mr Standen shouldn’t have had any further dealings with Kinch at all.”⁸

62 Between March and May 2007, the Commission established G3. In view of the matters to be considered by the Inquiry concerning the Commission’s human source management procedures, it is convenient to set out by way of example some instructions that Mr Bradley gave in relation to the new arrangements for G3, which were not followed by Mr Standen. On 7 August 2007, Mr Bradley sent an email to Tony Newton, Tim O’Connor, Mark Standen, Piet Baird and John Giorgiutti, in emphatic terms:

“... Instead of more and more people, with other jobs to do, getting across all the info that passes through G3 I want to ensure that a small number of dedicated people get across all the source based material. ... There will eventually be an approved document for this. But everyone understands the fundamentals. We MUST get it right this time. In particular we MUST report ALL contacts and they must go thru the G3 system.

I regard this as the most important initiative and I am concerned that others may not share my view or regard the rules as ‘flexible’. If that continues to happen, as has occurred in the past, I will have to act. I am not trying to terrorise anyone here, but I think you know that I’ve been frustrated on this issue for a long time. The ‘honour in the breach’ approach will not survive in the next instance.”

63 On 6 November 2007, Mr Bradley circulated an email, including to Mr Standen, instructing:

⁸ *R v Mark William Standen*, Supreme Court of NSW, No. 200900008922, Transcript, 26 July 2011, p. 4974.

“The new Informer Management Plan, which was approved by Management Team and G3 people some time ago, is now on the intranet and has been in use for some weeks. The document is not set in concrete and if experience necessitates amendment, that can be done. However any departure from this document will need to be approved by me personally. The management of informants is an area of real vulnerability for the Commission for a number of reasons, which should be obvious to all of you.

If anything goes wrong in the context of informers, then our adherence to the Plan will be closely examined. In the past we have been fortunate that we have not had any major mishaps in relation to informers but our adherence to previous plans, as modified by procedures put in place by me, would not bear close scrutiny.

I have therefore decided to amend our practices as follows in the context of the new Plan:

...

This will mean that there will be no new contact reports other than those generated by Piet. The exception will be telephone contact reports, which should simply report a referral to Piet. I note that we have had recent discussions about this, but I am putting these matters in writing to reinforce my position.”

- 64 As part of the establishment of G3, the Commission went through a process of classifying each of its registered human sources as either active or inactive. The inactive classification applied to persons who were no longer providing information to any Commission human source handler. In a recorded telephone conversation with Ms Marsha Canning of the Commission, who was responsible for the maintenance of the Commission’s Human Source Register, on 26 November 2007, Mr Standen prevaricated in relation to a question as to Mr Kinch’s classification, but ultimately instructed Ms Canning that Mr Kinch was not an active human source and that he should be classified as inactive.
- 65 Mr Standen’s involvement in illegal activity was first discovered as a result of the work of Dutch authorities and the AFP. In June 2006, the AFP commenced an investigation, with the assistance of the National Crime Squad of The Netherlands, into a European syndicate believed to be trafficking in drugs and precursors. The Dutch investigation had ascertained that an Australian law enforcement official had been corrupted and was, via Mr Kinch, assisting the drug trafficking activities. The

investigation indicated that the Dutch syndicate planned to traffic commercial quantities of border controlled precursors into Australia, concealed in foodstuffs and that Mr Standen was the corrupt officer involved.

66 The Commission states in its first Discussion Paper that it is not aware of, nor did the AFP's careful investigations reveal, evidence of any involvement in the conspiracy by any other member or employee of the Commission. To the contrary, the Commission participated in the AFP's successful, covert operation and assisted in gathering evidence against Mr Standen.

67 It is important to note that the Letters Patent, although mentioning Mr Standen's conviction in the recitals, do not authorise me to inquire into the conduct of his duties during the 12 years he worked at the Commission; supervision of him during the course of his employment; the Commission's role in relation to the investigation of his activities; or his possible involvement in any other criminal activity, corruption or misconduct whilst an officer of the Commission. The last of these matters would seem to me to appropriately be the subject of investigation by the PIC. In that regard, the Commission's first Discussion Paper states that "neither Kinch nor Standen has given an accurate account of their relationship from 2004 onwards, and the PIC has not completed whatever investigations it is conducting into it, so nothing definitive can be said at this stage."

68 It is difficult even with the benefit of hindsight to be unduly critical of the appointment and continued employment of Mr Standen in the period up to 2006. It seems now that his record with AFP was not entirely unblemished (as discussed in more detail in Chapter 7 in the context of the Commission's employment arrangements) but, nevertheless, he retained his high rank of superintendent and Mr Bradley told me that at the time he employed Mr Standen he knew nothing which would cause him not to do so. I am not aware of any reason not to accept this statement.

- 69 The personnel records set out above reveal that in his early years with the Commission his performance was monitored and deficiencies were addressed. The records also reveal that, on the face of it, he became a very effective operator warranting the promotions and substantial salary increases that came his way.
- 70 Mr Bradley, however, told me there was a marked deterioration in his work performance, in the period from late 2006 into 2007. The problem did not only relate to poor record keeping but to a lack of diligence generally. One of Mr Bradley's chief concerns was that he was often away from the office, uncontactable by his staff, and with his mobile telephone diverting to voicemail. On some occasions he excused himself by referring to the needs of his wife who, to Mr Bradley's knowledge, was ill.
- 71 In January 2007, Mr Bradley learned that Mr Standen had formed an attachment to a junior employee in the Commission's office and that they had spend some time together in Dubai. He counselled Mr Standen about what he regarded as inappropriate conduct and took steps to arrange alternative employment for the other employee. Mr Bradley attributed the decline in Mr Standen's performance to his liaison with this employee. Even with hindsight, Mr Bradley, according to what he told me, does not believe the change in Mr Standen's attitude towards his work was related to his involvement in criminal activities, or that any crimes occurred until after February 2007, though the evidence which emerged during the trial would appear to contradict that belief.
- 72 However, Mr Bradley said that during 2007, he determined not to renew Mr Standen's contract when it fell due for renewal later in the year. Before this time arrived, in July 2007, he was informed that Mr Standen was under investigation and decided, against contrary advice, not to jeopardise the investigation by dismissing him or refusing to renew his contract.
- 73 It is certainly significant that although the pool of people at the Commission who were told of the investigation in the 11 months between July 2007 and

Mr Standen's arrest on 2 June 2008 widened to include members of the management team and some operatives, word of it did not reach Mr Standen before his arrest. For 11 months, officers of the Commission were aware of and assisted in the AFP's investigation into Mr Standen, while still working closely with him on operational matters. This situation naturally placed considerable stress on Commission officers, some of whom worked long hours including late nights and weekends in pursuit of evidence for the investigation into Mr Standen. Their conduct in this respect should not go unremarked upon.

CHAPTER 3 – The Structure of the Commission

74 In its original constitution the Commission comprised a Chairperson (also a full time member) and two members, one of whom was part time. Of the structure, the then Premier (the Hon. N K Wran QC), in his second reading speech said:

“The Commission will consist of three members: two are to be full-time and one to be part-time. One of the full-time members is to be a senior member of the legal profession. The tenure of the commission is limited to four years. Longer tenure may result in bureaucratic inertia and a failure to emphasize the urgency of the problem. Limited tenure maintains high staff enthusiasm and the commission is most likely to get maximum special assistance from other agencies”.⁹

75 Mr Bradley was a member of the Commission from 17 July 1989 until his retirement. He was designated Acting Chairman and then Chairman during the period 29 May 1993 to 6 December 1996, after which date he was Commissioner. For most of the time until July 2010, he was without an Assistant Commissioner and alone constituted the Commission, a situation which the Act, as amended, permitted. Mr Peter Singleton, a member of the NSW Bar, was appointed Assistant Commissioner on 12 July 2010 and continues in office. He has been appointed on a full time basis since July 2011 and has been Acting Commissioner since Mr Bradley’s retirement in November 2011. The Commission remains a relatively small organisation having a total permanent complement of about 100 staff.

76 The Commissioner has statutory functions including presiding at hearings of the Commission pursuant to s. 13 of the NSWCC Act, issuing summonses pursuant to s. 16 and notices pursuant to ss. 10 and 17. The Commissioner also serves as chief executive officer of the organisation and is the ultimate decision-maker in relation to the conduct of investigations and proceedings under the CAR Act. In his capacity as chief executive officer of the Commission, the Commissioner is responsible for managing the Commission’s resources: something which

Mr Bradley was universally regarded by those to whom I spoke as having done well. In its first Discussion Paper, the Commission explained that the Commissioner must encourage creativity in pursuit of the Commission's functions, whilst ensuring that the Commission and its staff remain within legal and ethical bounds. The Commission recognised that these two responsibilities must be managed together, ensuring that there is as much creativity as properly can be achieved whilst always ensuring achievement of propriety. Assistant Commissioners at present have essentially the same role. Both Commissioners and Assistant Commissioners are members of the Commission. A person may only be appointed Commissioner or Assistant Commissioner if he or she holds "special legal qualifications", defined in s. 3(4) as a person who is or has been a Judge, or is a legal practitioner of at least seven years' standing.

- 77 Over time, the management structure of the Commission (while changing in detail and using different names for the different divisions) has broadly recognised three divisions, with responsibility for the investigation of crime pursuant to references from the Management Committee; the recovery of criminal assets; and the provision of management or support services. That remains its structure today.
- 78 The chain of command headed by the Management Committee currently passes via the Commissioner, respectively through the Director (Criminal Investigations), Director (Operations Support) (who is also the Solicitor to the Commission) and the Director (Financial Investigations). Until the retirement of Mr Bradley, the internal Management Team (which is distinct from the Management Committee) comprised these persons, together with the Assistant Commissioner and the Manager (Operations Support). The Management Team meets on an approximately weekly basis. When those meetings were attended by Mr Bradley and Mr Singleton, they strictly constituted meetings of the Commission, with the other participants being invitees of the Commission. The Management Team meetings are

⁹ New South Wales Legislative Assembly, *Hansard*, 2 October 1985, p. 7542.

minuted (although the recent minutes the Inquiry has seen do not record the diversity of views amongst attendees in any detail). Meetings follow a standard agenda pursuant to which all aspects of the general management of the Commission's affairs are discussed. Mr Bradley told me that he took responsibility for all decisions at the Management Team meetings, and that if he disagreed significantly on an issue, his opinion would prevail, though he suggested this did not happen very often.

- 79 The Director (Criminal Investigations), Mr Tim O'Connor has reporting to him officers engaged in various aspects of criminal investigation, including forensic accountants, intelligence analysts, financial analysts, lawyers, linguists and technical officers. Analysts in the Criminal Investigations Unit are split amongst teams known as G2, G3 and G5. G2 does the investigative work that the Commission undertakes in co-operation with police and others who are not stationed in the Commission's building. G3 is the Human Source Management Team. G5 works with police from the Organised Crime (Targeting) Squad, under the NSWPF State Crime Command, who are stationed in the Commission's building.
- 80 Mr Giorguitti is Director (Operations Support) and also Solicitor to the Commission. Lawyers, financial officers, information, communication and technology experts and other support officers report to him. The Operations Support unit consists of legal, finance, operations support (primarily executive assistants), building and security, records management and information and communications technology teams.
- 81 Mr Jon Spark is Director (Financial Investigations). Those who report to him include forensic accountants, financial analysts and lawyers. The Financial Investigations Unit has its own legal team, currently comprising two solicitors and three paralegals.
- 82 The Commission currently operates under what may be described as a flat management structure. This flat structure is not reflected in its formal organisation charts, but the arrangements under Mr Bradley meant that

management hierarchy was deliberately minimised, so that large numbers of Commission staff in practice reported directly to Mr Bradley on particular matters, or in the case of more junior staff, directly to the respective Directors of Criminal or Financial Investigations, without intermediate reporting layers.

- 83 The flat structure has been in place for some time. In the past, even though Mr Giorgiutti was the sole Director of the Commission (with Assistant Directors “beneath” him), staff including Mark Standen when he was Assistant Director did not in practice report to Mr Bradley through Mr Giorgiutti. In anticipation of the commencement of the *New South Wales Crime Commission Amendment Act 1996*, Mr Bradley convened a meeting attended by the Solicitor to the Commission, Assistant Directors and Investigation Managers on 11 November 1996. Notes of that meeting indicated that Mr Bradley told the attendees that the restructure was a “significant change of direction and relationships” and that the core management group would have to operate on the basis of mutual trust, with decisions taken by the group to be adhered to and supported by all. The notes also record that Mr Bradley “said that he was always accessible to the group and encouraged discussion on management issues if things were going wrong. He said that he often failed to involve or communicate with key personnel about important decisions and he needed to be reminded of this.”
- 84 Many people I interviewed, both inside and outside the Commission, remarked on Mr Bradley’s involvement in an extraordinary number of decisions at the Commission, including very detailed decisions about operational matters. This would appear to be a reflection of the flat management structure, as well as Mr Bradley’s personal management style and superior corporate knowledge, developed over more than 20 years at the Commission.
- 85 Mr Bradley favoured the retention of the flat management structure given the small size of the Commission. He advocated the efficiency of the

arrangement, pointing out that the expense involved in creating extensive chains of command in some other agencies did not provide the public with good value for money. He noted the advantages of having the respective Directors involved in the detail of all operations and suggested that this was feasible in an organisation the size of the Commission. He indicated that he had responded to past suggestions that the Commission should have a layer of strategic development staff to the effect that he was capable of making all necessary strategic decisions for the Commission, if provided with adequate information.

86 Others suggested that the flat management structure was problematic. It was said to generate a significant “key person” dependency for the Commission and to lead to operational decisions being made by the Commissioner without the knowledge or involvement of members of the Management Team. Concern was expressed that it prevented issues being considered and debated amongst the Management Team, and also that it prevented the Commissioner from being able to take a detached perspective on strategic decisions, because he was too “close to the ground”. As the work of the Commission and the complexity of the matters it investigates has increased, it is more and more difficult for any one person, no matter how diligent or approachable to more junior staff, to have a detailed knowledge of all aspects of its operations. This is true of the three Directors in relation to their respective teams as well as the Commissioner.

87 I have addressed the question of changes to the structure of the Commission in Chapter 10.

CHAPTER 4 – The Management Committee

- 88 The constitution and functions of the Management Committee of the Commission are provided for by ss. 24 to 27A respectively of the NSWCC Act (see Appendix 6). The Management Committee has four members: the Minister for Police, the Commissioner of Police, the Chair of the Board of the ACC (who is also the Commissioner of the AFP, pursuant to s. 7B(3) of the *Australian Crime Commission Act 2002* (Cth)) and the Commissioner. Until December 1996, the Management Committee also included the Chairman of the Police Board of NSW. I have interviewed all current and some past members of the Management Committee in the course of the Inquiry.
- 89 The Management Committee's constitution and powers are distinguishable from those of other comparable organisations. The ACC has a Board of some 15 members, with some similar functions to those of the Management Committee in that one of its functions is to "determine, in writing, whether such an operation is a special operation or whether such an investigation is a special investigation" (*Australian Crime Commission Act 2002* (Cth) s. 7C(d)), thus enabling the use of coercive powers. The ACC Board has somewhat broader functions under s. 7C than those of the Management Committee, including determining national criminal intelligence priorities and the priorities of the ACC, providing "strategic direction" to the ACC, authorising intelligence operations or investigations and determining the class of persons to participate in operations or investigations. The ACC Board typically meets four times each year.
- 90 The ACC is also supervised by an Inter-Governmental Committee, which meets twice each year, made up of Ministers representing the Commonwealth and each participating State, which has the function of "monitoring generally" the work of the ACC and the Board and overseeing its strategic direction: *Australian Crime Commission Act 2002* (Cth) ss. 8(1) and 9(1).

- 91 The ACC devotes significant resources to supporting its Board, and persons who have served on both the ACC Board and the Management Committee expressed to the Inquiry their satisfaction with the way in which members of the ACC Board receive papers and briefings well in advance of meetings. The Commission is a much smaller organisation than the ACC and its Management Committee meets much more regularly (on 12 occasions in 2010-2011). Commission staff explained that the Commission lacks the resources to support its Management Committee in the same manner as the ACC Board, but it has recently improved its practices in relation to release of papers to the Management Committee in advance of meetings.
- 92 The Crime and Misconduct Commission in Queensland (“CMC”) has a Crime Reference Committee, whose functions are to refer major crime to the CMC for investigation, to review general referrals every five years and to “coordinate, to the extent the committee considers appropriate, investigations into major crime conducted by the commission in cooperation with a police task force or another entity”: *Crime and Misconduct Act 2001* (Qld) s. 275. Section 278 provides that the Reference Committee has seven members: the chairperson of the CMC and its assistant commissioner, crime (who is the chairperson of the reference committee), the Queensland Commissioner of Police, the Commissioner for Children and Young People and Child Guardian, the CEO of the ACC and two persons appointed by the Governor as community representatives, at least one of whom must have a “demonstrated interest in civil liberties” and one must be female.
- 93 Neither the ICAC nor the PIC have a supervisory body comparable to the Management Committee. The ICAC has an internal committee system to oversee corporate governance, investigations, prosecution brief preparation and corruption prevention projects. ICAC’s key internal committees are the Executive Management Group, the Strategic

Investigation Group, and the Prevention Management Group.¹⁰ The PIC has an internal Executive Group as well as an Operations Advisory Group which provides strategic direction, consisting of PIC Commissioner, Director Operations, Director Prevention and Information and the Commission Solicitor.¹¹

- 94 The Corruption and Crime Commission in Western Australia (which does not itself have the power to investigate serious or organized crime but can grant an application by the Commissioner of Police to do so) also does not have the equivalent of a Management Committee.
- 95 In the United Kingdom, the Serious Organised Crime Agency (“SOCA”), a Non-Departmental Public Body of the Home Office, is constituted by a chairman and such numbers of other members as the Secretary of State may determine (*Serious Organised Crime and Police Act 2005* (UK), Sch. 1(1)) and is led by a board which currently has nine members, the majority of whom are non-executive members. SOCA’s Director General is responsible for everything SOCA does both operationally and administratively.¹²
- 96 In relation to its reference function, the Management Committee has rarely if ever refused a request from the Commission for a reference. Apart from referring matters to the Commission, the Management Committee’s principal functions include “review[ing] and monitor[ing] generally the work of the Commission”. The Commission provides various reports to the Management Committee as part of the papers for Management Committee meetings, in order to enable the Committee to conduct such monitoring.
- 97 It is important to note that the Management Committee under the NSWCC Act does not have the same role as a corporate board of directors in

¹⁰ Independent Commission Against Corruption, *Annual Report 2010-2011*, 2011, ICAC, Sydney, p. 55.

¹¹ Police Integrity Commission, *Annual Report 2010-2011*, 2011, PIC, Sydney, p. 52.

¹² Serious Organised Crime Agency, *How we are run*, <http://www.soca.gov.uk/about-soca/how-we-are-run> (26 November 2011).

relation to control of the Commission's activities, although it does have oversight capacity. Its governance role is more than merely advisory, but the extent to which it has, in recent times, exercised its capacity to issue directions to the Commission is very limited. While the Management Committee is able give the Commission directions and guidelines with respect to the exercise of its functions and its internal management, with which the Commission is obliged to comply pursuant to s. 27(2), the only such directions or guidelines to the Commission currently in place relate to the review the Commission was directed to undertake in respect of its policies and procedures in light of PIC's Project Rhodium recommendations, which review was completed on 31 December 2010. The limited use of the Management Committee's power to give directions is perhaps unsurprising, in view of the other responsibilities of its members and the extent to which it has, in the past, relied exclusively on the Commissioner for information. Moreover, if the responsibilities of the Management Committee were significantly enhanced, the membership I favour for the Committee might be impossible to maintain. It is partly for this reason that the Inquiry's view is that additional oversight mechanisms are desirable.

- 98 As to the constitution of the Management Committee, there is a general consensus amongst all to whom I have spoken on the subject (including the current Minister and his immediate predecessor) that it is inappropriate for the Minister to be a member of the Committee and I will recommend accordingly. There are at least two reasons for this, namely that the Minister might be compromised by unknowingly having met or dealt with a person under investigation and, secondly, to avoid any perception that references by the Management Committee, which are operational law enforcement decisions, are subject to political direction.
- 99 The removal of the Minister from the Management Committee should not diminish the Commissioner's, and indeed the Commission's, accountability to the Minister, insofar as the Commission constitutes an agency within the Minister's portfolio and the Commissioner is its head. It should not be

necessary to insert a provision in the NSWCC Act to give effect to this arrangement.

- 100 Given the nature of the responsibilities of the Commission, I see no reason to recommend that any of the other members of the Management Committee should not continue in office. It is desirable for the Commissioner of Police and the ACC Chair to remain on the Committee. The Commission's ability to work with police and the ACC is enhanced by the involvement of the leaders of those organisations in referring matters to the Commission. Their continuation on the Management Committee is largely uncontroversial.
- 101 The Minister is currently the only person on the Management Committee who does not have a direct law enforcement role, and the only representative of government. Given the sensitivity of the information provided to the Management Committee in connection with the granting of references, it is obviously desirable that any new member of the Management Committee be completely trustworthy. It is also desirable that they not have any recurrent conflicts of interest. Finally, it is desirable that a representative of the State Government more broadly continue to serve on the Committee, given the importance to the State of securing the aims of the NSWCC Act and the CAR Act.
- 102 I recommend the addition to the Management Committee of two new members. I recommend that one should be the permanent head of the Ministry for Police and Emergency Services who, as I understand it, has attended meetings of the Management Committee as an observer for some years. I considered, but rejected, designating the new member as the "nominee of the Minister" as this would perpetuate some of the problems involved in having the Minister on the Committee.
- 103 The second addition to the Management Committee I propose is an independent part time Chairperson (perhaps only two or three days a month), to strengthen the reality and appearance of the Commission being

subjected to greater oversight, particularly in the matter of ensuring that references by the Management Committee conform with the statute and that the Management Committee generally performs its role in accordance with the Act. I recommend that the independent Chairperson should be a retired or former judge of an Australian court and that he or she be appointed for a relatively short fixed period, such as three years. In view of the Management Committee's limited role, the new Chairperson should not have responsibilities beyond those entrusted by the statute to the Management Committee, in other words, his or her position should not be regarded as akin to the Chair of a Board of Directors in a corporation.

- 104 The Management Committee plays an extremely important role in the criminal investigation side of the Commission's activities, in that the special powers it exercises in respect of a criminal investigation depend upon the investigation having been lawfully referred under s. 25 of the NSWCC Act. Thus it is vital that each matter is referred by a written notice, which complies with the section.
- 105 In the course of the Inquiry, I examined the minutes of some meetings of the Management Committee and some notices of reference of matters for investigation. Of those two classes of document, the references are more significant as their contents are prescribed. The consequence of an invalid reference might be to render inadmissible, as evidence in criminal proceedings, the material gathered during the investigation.
- 106 The minutes I have seen regarding new references seem to follow a typical form; "Mr Bradley referred to the reference papers for the proposed new X reference (to investigate A, B & C activities by Y) which were emailed to members on (date). Mr Bradley summarised the contents and recommended referral. The reference proposal was approved by the Committee and the Minister signed the reference papers". Reference notices are typically prepared by lawyers at the Commission. In the past they were sometimes settled by counsel, although since Mr Singleton was

appointed to the Commission I understand that he has usually performed this function.

- 107 As the NSWCC Act does not stipulate that the minutes have any particular content except that they be full and accurate (cl. 5 of Sch. 3), I do not categorise the minutes I have seen as non-compliant, particularly as they incorporate other documents by reference. I would, however, recommend that they state, in accordance with s. 25(2), that the Committee expressed itself as satisfied that “ordinary police methods of investigation into the matter are unlikely to be effective”.
- 108 In my view, it is implicit in s. 25 that a matter being referred must be identified with some particularity. This will usually involve the description of a particular crime, such as a murder, the naming of suspects or the description of a criminal activity by reference to events in a locality or in some other way which takes it outside a merely generic description such as “drug trafficking”. I think this much is required by the use of the words, “the matter” in s. 25(4)(a). Of course, the elements of identification by virtue of s. 25(4)(a) (which was inserted in response to the Court of Appeal’s decision in *Mannah v State Drug Crime Commission* (1988) 13 NSWLR 43) need not be included in, or annexed to the notice of referral and may therefore remain confidential.
- 109 Provided that a reference notice refers to documents which themselves identify a “matter” capable of being referred the notice need only state the general nature of the circumstances or allegations constituting the relevant criminal activity (s. 25(4)(b)), the purposes of the investigation (s. 25(4)(c)) express the Committee’s satisfaction in accordance with s. 25(2) and impose limitations if any under s. 25(3).
- 110 All the notices of reference I have seen, in my opinion, on their face, comply with s. 25(4), although because of paragraph (a) the bar is set quite low. However, a reference notice may stand or fall not on what is on

its face but because of the content or lack of content in any documents to which it refers.

- 111 Because of the importance of the validity of reference notices, the involvement of Commission lawyers in drafting the notices and associated extrinsic material and the difficulties to which I have referred, the Management Committee should have the right to obtain its own legal advice, from lawyers external to the Commission. I note that the Commission's Independent Audit and Risk Committee, discussed in Chapter 9, has this capacity. It seems incongruous that the Management Committee does not, especially in circumstances where many references are requested by the Commission itself and even if they are not, reference material will be drafted at the Commission. I recommend that the Management Committee be given the power to obtain independent legal advice at the expense of the Commission.

CHAPTER 5 – Proceedings under the CAR Act

112 My Terms of Reference include whether the Commission is complying with the CAR Act in the exercise of its functions and whether the terms of the CAR Act remain appropriate for securing the objectives of that Act. The objects of the CAR Act (referred to in Appendix 7) are set out in s. 3 and include the confiscation of property and the recovery of unexplained wealth and the proceeds of illegal activities without requiring a conviction. In the course of the Inquiry I reviewed a number of Commission files relating to current and recently settled proceedings under the CAR Act, and interviewed legal practitioners both within and outside the Commission engaged in confiscation litigation.

113 The CAR Act confers upon the Supreme Court jurisdiction in a number of areas, which, loosely described, are concerned with money and property unlawfully derived. Since it was enacted proceedings under it have resulted in many millions of dollars being forfeited to the Crown. As French CJ explained in *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 345 (“*IFTC*”), there is:

“widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity which may result in the derivation of large profits and the accumulation of significant assets.”

114 In many or most cases the jurisdiction of the Court is first engaged by the Commission making an application for a restraining order under s. 10A (a section inserted following the decision of the High Court in *IFTC*).

115 It is to be noted that the application may be made *ex parte*; that it is to relate to specified interests, a specified class of interests; or all the interests in property of any person; that the Court may require the application to be on notice to interested persons; and that the Court is required to make a restraining order if the elements of s. 10A(5) are satisfied.

- 116 There is no apparent reason why a restraining order simpliciter under s. 10A should not be made with the consent of those affected without the need of the court to exercise a supervisory role. However, different considerations apply to the other proceedings under the statute which usually occur, of which s. 10B(3) is a prime example. This provision, which has given rise to considerable controversy, relates to the provision out of property restrained, of reasonable living expenses and reasonable legal expenses of any person whose property interests are affected by the order. While there are no express limitations in respect of the meeting of reasonable living expenses, the provision for meeting reasonable legal expenses is severely circumscribed by s. 16A.
- 117 A restraining order may be set aside by the Court under s. 10C but otherwise its duration is provided for by s. 10D. When making a restraining order the Court may, and so far as I have been able to glean, commonly does, make a variety of ancillary orders under s. 12, typically including orders for the examination of persons on oath before an officer of the Court and for the filing of a Statement of Affairs.
- 118 For obvious reasons, unless s. 10D(1)(b) applies, the Commission is astute to follow up a restraining order obtained ex parte or to include in an application for such an order, an application which falls within s. 10D(1)(a) or (c), namely an application for an assets forfeiture order, an application for a proceeds assessment order, or an application for an unexplained wealth order.
- 119 Section 22 relates to applications by the Commission for an assets forfeiture order. In relation to such an order there is provision for relief against hardship via an exclusion order. Section 24 enables the Court to order payments out of the proceeds of an asset forfeiture order to certain dependants and ss. 25 and 26 enable the court to exclude property or the value of an interest which has been forfeited or which is the subject of a forfeiture application, if the person establishes to the civil standard that the

interest was not illegally acquired or that a proportion of the value of the interest is not attributable to the proceeds of an illegal activity.

- 120 The detailed provisions of ss. 27, 28, 28A and 28B regulate applications by the Commission to the Court for an order that a person pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived by the person from illegal activities (a proceeds assessment order, pursuant to ss. 27 and 28) and for an order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the unexplained wealth of the person, subject to an overriding discretion to refuse to make, or to reduce the amount of, such an order (an unexplained wealth order, pursuant to ss. 28A and 28B).
- 121 The amounts paid to the Treasurer pursuant to proceeds assessment orders and unexplained wealth orders, and the proceeds of forfeited assets, are paid into the Confiscated Proceeds Account established pursuant to s. 32: see ss. 23(2) and 28C(8).
- 122 Since 1990 the Commission reports \$284,706,485 in realisable confiscation orders made.¹³ The Commission is perceived as being very active in this area of its activities and as generally exceeding the Commonwealth's recoveries under equivalent legislation.¹⁴ Research in 2000 indicated that the Commission had obtained more orders than the Commonwealth and all the other States combined.¹⁵ The Commission's success in this area has led to the CAR Act being advocated by some legal practitioners as a model for other jurisdictions to adopt. The Commission's approach is focused on the achievement of early settlements in CAR Act proceedings. Its Confiscation Manual explains that its objective in such proceedings is to maximize the forfeiture of serious crime derived or illegally acquired property; and/or recover the proceeds of

¹³ New South Wales Crime Commission, *Annual Report 2010/11*, 2011, NSWCC, Sydney, p. 14.

¹⁴ Lorana Bartels, *A review of confiscation schemes in Australia*, Australian Institute of Criminology Technical and Background Paper 36, 2010, Australian Institute of Criminology, Canberra, p. 12.

serious crime related activity at a minimum cost, in the quickest possible time. Section 1 of the Manual explains that the Commission recognises the vital importance of financial investigations in achieving success under the Act, so attempts to conduct financial investigations as efficiently as possible, so that it “is in the best possible position to settle at the earliest possible time.”

- 123 Usually, as I understand it, after obtaining a restraining order, or commencing proceedings for an assets forfeiture order, a proceeds assessment order, or an unexplained wealth order, the Commission will seek to negotiate with other parties affected. In a large proportion of cases it reaches an agreement, which in the past has been reduced to the form of consent orders. Such orders were commonly produced to a Registrar of the Court and signed as a matter of course. Frequently this was done with very little evidence available to the Court and no real attempt on the part of the defendant to provide the evidence which the relevant sections seem to contemplate. In some cases, of course, the admission of relevant facts would be implicit in the consent of the parties.
- 124 This procedure became controversial, although justified, initially, at least, on the basis that it related to civil litigation only and that the making of orders by consent usually achieved a speedy outcome, minimised legal expenses, and avoided wastage of judicial resources.
- 125 Controversy arose from the perception that orders made by consent in relation to assets or proceeds (often of very considerable value) the subject of claims under the CAR Act involved conflicts of interest, which impermissibly blurred the twin functions of the Commission. In other words, the Commission might be investigating criminal activities while, at the same time, seeking to recover from suspects under investigation, money and assets for the benefit of the State Treasury. Persons suspected of criminal conduct, while interested in retaining as much of

¹⁵ R Freiberg and R Fox, “Evaluating the Effectiveness of Australia’s Confiscation Laws”, (2000) 33 *Australian and New Zealand Journal of Criminology* 230, p. 249.

their wealth as possible, are usually also anxious to avoid criminal sanctions. There is thus a danger that a negotiated settlement leading to the making of consent orders will give rise to the perception that the criminal aspects of the matter and the wealth of the suspected criminal have both been used as “bargaining chips” in the negotiations. There are suggestions that criminals have “bought” freedom to continue their criminal activities. Other perceptions include that criminals are given a “green light” to commit other crimes and that any money or property they ultimately retain, whatever its source, has become effectively “laundered” with the authority of the Commission. In that way, CAR Act proceedings are perceived as a “tax” on organised crime.

- 126 It is for this reason that some agencies outside NSW, as a matter of policy, decline to be involved in settlements of confiscation proceedings that could be characterised as “asset splits”. For those agencies, the Commission’s high rate of settlements (98 out of 100 cases in the last financial year) is a matter of concern, on the basis that unnecessary risk attaches to an agency taking on responsibility for making decisions as to how much should be forfeited without a court having assessed the available evidence.
- 127 The Inquiry heard that the process of negotiation of consent orders differs depending on the type of assets involved. Those to whom the Inquiry spoke who have represented defendants in confiscation proceedings were anxious to emphasise that a great deal more work was involved in settlement negotiations than just “plucking figures out of the air”, as appears to be one aspect of public concern in relation to the Commission’s administration of the CAR Act. However, in cases where a defendant has a possessory title to a large amount of cash but does not wish to be examined about it, legal representatives may negotiate a “commercial” settlement with the Commission, though such cases were said to be rare.
- 128 In cases where assets and liabilities other than cash are involved, a defendant’s legal representatives will often engage a forensic accountant

in an attempt to demonstrate, in admissible fashion, that their client's legitimately derived income would meet their expenditure. Such reports may be presented during settlement negotiations. From the Commission's perspective, considerations at settlement draw on the Commission's forensic accountant's analysis of estimated realisable value of interests in property and possible exclusion of assets. The Commission's Confiscation Manual suggests that a settlement sheet be prepared assessing the strength of the parties' positions, with the Commissioner's approval to be obtained prior to any agreement being reached on settlement. The section of the Manual dealing with settlements indicates that "Verbal approval may be obtained initially, but written approval must be obtained as soon as possible".

- 129 One particular criticism that was made to the Inquiry of settlement negotiations in proceedings for a proceeds assessment order related to the provisions of s. 28 of the CAR Act. Under s. 28(4)(a), the Supreme Court is not entitled to take into account expenses or outgoings incurred by the defendant in relation to the illegal activity or activities in making an assessment of illegal activity proceeds. The effect of this provision is to enable the Commission to bring to settlement negotiations a very high estimate of proceeds, which may exceed the defendant's total assets, because costs (for example of acquiring drugs) will not have been deducted.
- 130 It was suggested that this provision should be amended, to enable a more careful calculation of what proceeds a defendant has actually retained, which would have the effect of confining the Commission's discretion in such settlement negotiations and prevent settlements being negotiated on the basis of what a defendant could "afford", having worked back from a figure in excess of his or her total assets. While there is sense in this proposal, it would have the effect of treating costs of illegal activity in the same way as other business costs, a proposition which appears to me to be unattractive as a matter of public policy. Strengthening the level of judicial supervision of settlements in accordance with my

recommendations should assist in addressing this issue, though I accept that settlement negotiations, often protected by legal professional privilege, are difficult to monitor and that it would be difficult to resolve the question without an amendment of the type proposed.

- 131 Allegations that inappropriate settlements have in fact been negotiated by the Commission have been made in a general way on a number of occasions during the course of the Inquiry. Although, to the extent I have been able to investigate them, they have seemed without foundation, there have been some cases drawn to my attention where allowances for the legal costs of defendants, on their face, appear excessive.
- 132 Moreover, for a period from early 1998 up to 30 June 2008, the Commission made a practice of including in orders made by consent, an order providing for payment of its own costs and expenses based on a percentage (15 per cent) of the value of the assets retained. The 15 per cent figure was determined by reference to the cost of the Commission's confiscation function, including salary costs and equipment, as a percentage of the total projected annual recovery from civil confiscation proceedings. The Commission's view is that this was justified by s. 12 of the CAR Act – which provides for the making of orders ancillary to restraining orders and says (s. 12(1)(a)) that an ancillary order can be made to vary the interests in property to which a restraining order applies – or alternatively by s. 98 of the *Civil Procedure Act 2005*. A common arrangement was for the restraining order to be varied so as to release funds to pay for the Commission's costs, followed by a confiscation order in respect of some or all of the remainder.
- 133 There was no statutory warrant for this practice, which the Commission accepted did not relate to its actual costs in a particular matter, and this practice was possibly unlawful. However, the Commission only adopted the practice after securing the agreement of its Management Committee, the Minister for Police and the Treasury, the Treasurer having given approval to “recover civil litigation costs” in CAR Act proceedings on 2 April

1998. The practice ceased on 1 July 2008 after a new funding arrangement was agreed, whereby the Commission no longer seeks costs in settled matters but the Government increased the Commission's budget by a corresponding amount. In my view the practice did not involve corrupt conduct on the part of any officer of the Commission within the definition of that expression in Part 3 of the ICAC Act (which is an example of misconduct of a Crime Commission officer pursuant to s. 5B of the PIC Act).

134 In *International Finance Trust Company Ltd v New South Wales Crime Commission (No. 2)* [2010] NSWCA 45, the Court of Appeal held in relation to an order made by consent for the purposes of s. 27 of the CAR Act that, faced with a valid application brought under a valid statutory provision, a Deputy Registrar possessed jurisdiction to make the orders consented to without undertaking an independent inquiry into the factual basis of them.

135 However, the question is not whether an order such as one made by consent under s. 27 is valid, or valid until set aside, but whether in accordance with my first Term of Reference, the Commission is complying with the CAR Act. The issue for the purposes of the Inquiry relates to the Commission's compliance with the law, not whether defendants in confiscation proceedings are or have been failing to discharge the burden cast on them by s. 16A(1). As to that issue, in fairness to the Commission, it should be said that, particularly in relation to the provision by consent of costs under s. 10B(3)(b), it took advice in 2000 from Mr Ian Temby QC and in 2010 from the Crown Solicitor. Mr Temby concluded that orders made by consent were valid but warned that, in the absence of evidence stipulated by s. 16A, they might be vulnerable to an application to set them aside. The Crown Solicitor took the view that the Court's jurisdiction to order the payment of a defendant's legal expenses is contingent upon the establishment of the facts set out in s. 16A and that the Court would not have jurisdiction to overcome the requirement in s. 16A(1)(c) had it not been satisfied.

136 An opinion on the subject given on 11 August 2011 by Mr Bret Walker SC to the PIC was tendered at the Operation Winjana public hearing and subsequently provided to me. That opinion in relation to the provision for costs under s. 10B(3)(b) and the impact of s.16A was unequivocal:

“The power granted by subsec 10B(3) is expressly subject to sec 16A, the terms of which unmistakably impose restrictions. Those restrictions are expressed to as to apply whenever the Supreme Court is asked to exercise those powers, and no words provide any footing for the suggestion that they apply only to contested or fully contested proceedings. Nor is there any legal merit in the suggestion that the Court’s ‘inherent’ jurisdiction somehow permits to be done by consent that which the statutory provisions creating the very power hedge about with restrictions. There is no principle and no authority for such a nebulous idea.

...

Each of the other restrictions must be observed by the Supreme Court whenever asked to make such an order: ‘No provision is to be made...’. The Commission, as an agency of the State and with its statutory functions and standing in proceedings under CARA, must assist the Court to do so. It must not mislead the Court as to the availability of the Court’s power to make the order sought.”

137 As it happens, Hall J recently determined the question in *New South Wales Crime Commission v Cook* [2011] NSWSC 1348, delivered on 10 November 2011. His Honour’s conclusion appears at [70] of his reasons:

“I have concluded that, unlike the position with proceeds assessment orders under s.27, an order under s.10B(3)(b) of the Act is not one that can be made by consent of the Commission and another. It requires the Court itself, on a proper basis, to determine that an order under s.16A(1) of the Act meets the exemptions from the legislative requirements.”

138 In my opinion, in terms of the reference question, the Commission was not complying with the CAR Act in any case where it sought from the Court an order by consent, which was not supported by evidence satisfying the requirements of the relevant section. That practice, in relation to s. 10B(3)(b) costs, will have in any event ceased as a consequence of Hall J’s decision. Moreover, in relation to other orders which may be made under the CAR Act, the Chief Justice, on 28 October 2011, issued Practice Note No. SC CL 10, *Supreme Court Common Law Division – Proceeds of Crime and Criminal Assets*, applicable to applications by consent, or

otherwise, for variation or discharge of orders concerning the proceeds of crime or criminal assets. Relevantly, the Practice Note provides that any such order under the CAR Act shall only be made by a judge of the Court.

139 The Commission expects the effects of Hall J's decision to be an increase in its litigation costs and the amounts awarded to defendants for legal expenses, and a reduction in the confiscation returns to the Treasury. That may be the effect of a greater level of judicial scrutiny in relation to s. 10B(3)(b) orders, but if so, it would be a consequence of statutory compliance. I agree with the recent comments of the President of the Victorian Court of Appeal in relation to the role of the courts in confiscation proceedings:

“... the role of the courts should be seen as both necessary and beneficial. The maintenance of judicial oversight over enforcement proceedings, and the power of the court to alleviate unjustifiable hardship, are conducive to public confidence in the legislative schemes”.¹⁶

140 There is an allied problem, namely, the quantification of legal expenses for the purposes of s. 10B(3)(b). There are competing public interests involved in this problem, as the Australian Law Reform Commission recognised in its 1999 review of Commonwealth confiscation legislation:

“The first ... is that the property restrained to ensure availability for mandatory confiscation as the profits of crime ... ought not to be put at risk of dissipation by being available at the discretion of a court for the legal defence of proceedings to which that unlawful activity relates.

The second is that, in the interests of justice, a separate and distinct obligation should be legislatively imposed on the state to ensure that a person deprived by the state of the opportunity to make their own arrangements for their defence by reasons of such restraint of their property should nevertheless be provided with the capacity to offer a proper defence.”¹⁷

¹⁶ The Hon. Chris Maxwell, “The Role of the Courts Under Asset Confiscation Legislation”, [2011] *VicJSchol* 22, p. 10 (address delivered at the OPP Proceeds of Crime Conference, 6 October 2011).

¹⁷ Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, ALRC 87, 1999, ALRC, Canberra, [15.95]-[15.96].

- 141 This issue is now addressed at Commonwealth level by an express prohibition on a court making an order to allow legal costs to be made out of restrained property: *Proceeds of Crime Act 2002* (Cth), s. 24(2)(ca). Instead a person is able to apply to the relevant Legal Aid Commission for assistance, and if legal aid is provided, the Legal Aid Commission may be reimbursed pursuant to s. 293. One view expressed to the Inquiry was that this arrangement places a considerable burden on legal aid authorities. The CAR Act does contain a provision (in s. 16B) for the making of regulations fixing maximum allowable costs for legal services provided in connection with an application for a restraining order or confiscation order or the defending of a criminal charge, but no regulations have been made pursuant to this provision.
- 142 In many cases, it seems to me that an affidavit from the solicitor seeking the provision of legal expenses should suffice as the basis for the Court establishing a reasonable sum. In complicated cases, particularly where a lengthy criminal trial is a possibility, consideration should be given to legal expenses being provided in stages. The Commission suggests that such a “drip” arrangement would result in increased legal expenses and reduced confiscation returns. I acknowledge that this may create practical problems, which perhaps could be solved by the orders of the Court providing for the NSW Trustee and Guardian to pay out of restrained property, costs, beyond an initial sum, against appropriately supported bills of costs. I make a recommendation to this effect.
- 143 One way to avoid the perceptions referred to earlier would be to entrust the administration of the CAR Act to another agency such as the DPP. He already has analogous functions in relation to convicted persons under the *Confiscation of Proceeds of Crime Act 1989*. The DPPs in several other States, including Victoria, have responsibilities under confiscation legislation. At Commonwealth level, the Parliament has now passed the *Crimes Legislation Amendment Bill (No. 2) 2011*, which will have the effect of transferring responsibility for prosecuting civil confiscation actions from the Commonwealth DPP to the AFP. The Law Council of Australia

submitted to the Senate Legal and Constitutional Affairs Committee inquiry into the Bill that there is a conflict of interest in the AFP both investigating and taking proceedings under proceeds of crime legislation. At a public hearing of the Senate Committee, Ms Helen Donovan of the Law Council explained:

“...[I]t certainly is better that there is a separation between the agency which does the investigation and then the agency which comes fresh to the available evidence and the speculation about evidence that might become available and makes an assessment about whether or not it is appropriate to proceed at that time and in which way it is appropriate to proceed. Otherwise there is not the necessary distance and objectivity from the investigation. I think that the AFP itself would acknowledge that. That is why they are suggesting that their internal arrangements will try to build this in...[T]he model that is proposed is an inferior one because it is based on the idea that that there will be Chinese walls within the Criminal Assets Confiscation Taskforce and that the legal team will somehow sit separately and exercise its judgment objectively and independently”.¹⁸

144 The Bar Association, in its submission to the Inquiry, supported the Law Council’s views in expressing concern about the Commission’s CAR Act functions. The Senate Committee ultimately recommended passage of the bill, whilst also recommending that the Commonwealth DPP should be a permanent member of the Criminal Assets Confiscation Taskforce. The Senate Committee’s Report noted concern about the NSW model (rejected by representatives of the Commonwealth Attorney General’s Department on the basis of distinctions between NSW and Commonwealth legislation) as well as “the necessity of a high level of scrutiny and accountability to ensure the integrity of the process”. The Senate Committee stressed the importance of oversight of the AFP by the ACLEI, Senate estimates and internal integrity measures within the AFP for ensuring the Assets Confiscation Taskforce operates appropriately.¹⁹

145 By contrast to the role of the DPP under the *Confiscation of Proceeds of Crime Act*, the role of the Commission under the CAR Act goes far beyond

¹⁸ Australia, Senate Legal and Constitutional Affairs Legislation Committee, Proof Committee *Hansard*, 4 August 2011, p. 8.

¹⁹ Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment Bill (No. 2) 2011*, 2011, Canberra, p. 28.

the confiscation of the assets of convicted persons. In my opinion, it is not an appropriate role for the DPP, which itself has a possible conflict as a prosecuting authority, because the commencement or continuation of confiscation proceedings by a prosecutor while criminal proceedings were on foot could be perceived as a form of collateral pressure. Moreover, the DPP ordinarily does not come into a matter until a relatively late stage, well after, according to current practice, the Commission has usually taken proceedings under the CAR Act. The Commission is not the only similar organisation with confiscation functions: in Queensland the CMC conducts assets confiscation work.

- 146 Of existing agencies, it seems to me, on balance, that the Commission is, in truth, best suited for the role entrusted to it by the CAR Act. Apart from that role, it is an investigator with no responsibility either for the charges preferred against people it investigates, or for prosecuting those charges. Section 24B(1) of the *Crimes (Sentencing Procedure) Act 1999*, inserted in 2010, prevents a court from taking into account, as a mitigating factor in sentencing, the consequences for the offender of any order of a court imposed because of the offence under confiscation or forfeiture legislation.
- 147 The alternative to an existing agency would be the establishment of a new stand alone agency to administer the CAR Act. This solution would likely involve very wasteful duplication of resources. A separate Assets Recovery Agency was established in the UK in 2003 to recover assets pursuant to the *Proceeds of Crime Act 2002* (UK), but was dissolved in 2008 and merged into the Serious and Organised Crime Agency and the National Police Improvement Agency, with the Committee on Public Accounts noting in a 2007 report that by December 2006 the agency had recovered only £23 million as against expenditure of £65 million.²⁰

²⁰ House of Commons, Committee of Public Accounts, Assets Recovery Agency: Fiftieth Report of Session 2006-2007, *Report, together with formal minutes, oral and written evidence*, 2007, London, p. 4.

- 148 In the result, I recommend that there be no change in the responsibilities of the Commission under the CAR Act. I do however, recommend that the Court have a more defined role and that the legislation be strengthened so that except with the approval of the Court, there may not be any compromise or settlement of proceedings under the CAR Act.
- 149 I also recommend that the Chief Justice might be requested to expand Practice Note SC CL 10 referred to above by indicating the evidence required to be available to the court when approval of a compromise or settlement is sought under the various sections of the CAR Act.
- 150 Further I recommend that the Commission put in place protocols or procedures which demonstrate the separation of its investigative role from its role under the CAR Act. The Commission submitted that there is already a significant division between its criminal investigation and confiscation functions, both organisationally and in terms of policy. There will inevitably be some provision of information by the Commission's Criminal Investigation Unit to its Financial Investigations Unit, for example so that forensic accountants within the latter Unit can consider commencement of proceedings. However, the Inquiry is of the view that it is inappropriate, for example, for the Director of Criminal Investigations to be involved in settlement negotiations of confiscation proceedings, a situation which the Inquiry is aware has occurred, albeit rarely, in the last few years. The Commission should have a specific protocol in place dealing with management of the separation of responsibilities between what is properly an investigation decision and what is a litigation decision in relation to proceeds, rather than including general statements in its Confiscation Manual or Human Source Management Policy. This should incorporate protocols for protecting the integrity of any concurrent criminal process from inappropriate derivative use of information obtained in an examination under the CAR Act, taking into account any guidance provided by the Court of Appeal in its judgment in *New South Wales Crime Commission v Lee*, which is listed for hearing on 6 December 2011.

CHAPTER 6 – Human Sources (Informants)

151 This Chapter is not included in the report containing a recommendation that it be published.

CHAPTER 7 – Employment

- 152 The Commission’s employment procedures are another important means by which it may resist corruption. The Commission does not itself have direct employment powers, by virtue of s. 8(2) of the NSWCC Act. However, the Commission may, under s. 32(4) of the NSWCC Act, arrange for the use of the services of any staff or facilities of a government department, administrative office or local or public authority. Pursuant to s. 32(3) and (5), the Commission may also arrange for police officers to perform services for the Commission, and the Commission may engage consultants. The staff of the Commission comprise those persons employed under Ch. 1A of the PSEM Act in the Government Service to enable the Commission to exercise its functions, together with those persons referred to in s. 32(3)-(5).
- 153 The Commission’s practice has been to “induct” officers of other law enforcement agencies involved in joint task forces and operations with the Commission, as well as some senior police and some other persons, as members of the Commission’s staff, without putting them on the Commission’s payroll. The Commission’s first Discussion Paper states that this is done “so that they can have convenient and lawful access to the Commission’s facilities and intelligence holdings (including telecommunications interception material)”.
- 154 In 2008, a draft Cabinet Minute was prepared (the “2008 Draft Minute”) that included a number of recommendations for amendment of the NSWCC Act, which the Inquiry understands were based on a broad consensus between officers of the Commission, the then Ministry for Police and Attorney General’s Department. The 2008 Draft Minute was never signed or endorsed by the previous Government or Minister, so the amendments it suggested were never proposed in the form of a Bill. They included a proposal to amend s. 32 to formalise this “induction” arrangement, in order to:

“make it explicit that the Crime Commission can appoint personnel from other agencies for limited purposes or specific investigations, in respect of which they could receive Crime Commission information, including telecommunications interception product. Staff appointed in this way will remain under the command and control of their ‘home’ agency for the duration of their appointment to the Crime Commission.”

- 155 This “induction” arrangement would not seem to be required by the secrecy provision in s. 29 of the NSWCC Act, given the breadth of that provision, which extends its obligations beyond members of staff of the Commission. The arrangement would affect the records the Commission is required to keep pursuant to s. 5(e) of the *Telecommunications Interception and Access (New South Wales) Act 1987*, insofar as communication of information to other inducted “members of staff” of the Crime Commission would not constitute a communication of which a record would need to be kept. However, s. 5(d) of that Act requires records to be kept of “each use made by the authority of lawfully obtained information” and the Inquiry understands that where any “inducted” member of Commission staff uses such information for the purposes of their “home” agency, records must be kept of both the use and the communication.
- 156 Where staff of other law enforcement agencies are “inducted” but not paid by the Commission, it would certainly seem desirable to clarify by means of legislation that they remain subject to the command and control of their “home” agencies and not the Commission. As noted above, it is not clear to the Inquiry that s. 29 of the NSWCC Act requires the amendment of s. 32, but the Inquiry supports the proposed amendment to the extent that it would clarify the issue of command and control.
- 157 The vast majority of the Commission’s paid staff are employed in a division of the Government Service called the New South Wales Crime Commission Division. This is a Special Employment Division listed in Pt 3 of Sch. 1 to the PSEM Act. The head of the Division is the Commissioner and the Division has no practical existence independent of the Commission. Ninety-nine Commission employees were employed in this

way as at 30 June 2011. The Commission also employs a fluctuating number of people (usually in the order of 30) on a casual basis under Ch. 1A of the PSEM Act as listening post monitors, interpreters and transcription typists.

- 158 The staff employed in the New South Wales Crime Commission Division were formerly employed directly by the Commission, an arrangement that was changed pursuant to the *Public Sector Employment Legislation Amendment Act 2006*, described in the then Deputy Premier, the Hon. John Watkins's Second Reading Speech as a response to the Commonwealth's 'WorkChoices' legislation:

"WorkChoices does not apply to the direct employees of the Government of New South Wales. Therefore, by transferring public sector workers to direct Government employment, we are ensuring the continued application of the State industrial relations system".²¹

- 159 As a result of the 2006 amendments, the employment powers of the Crime Commission were transferred to the Government of the State in the service of the Crown. Staff employed in Special Employment Divisions are not part of the Public Service as defined in the PSEM Act, although they are part of the broader Government Service provided for in Ch. 1A of that Act and are employed under s. 4B of the PSEM Act. There are no restrictions imposed by the PSEM Act on the mode of employment of these staff. The provisions in Ch. 2 of the PSEM Act regarding employment and termination, management of conduct and performance that apply to public servants employed within the Public Service do not apply to them. Instead, remuneration and employment conditions for Commission staff employed in the New South Wales Crime Commission Division are set by and pursuant to individual contracts. Senior officers of the Crime Commission are not employed within the Senior Executive Service under the PSEM Act.

- 160 Special Employment Divisions enable more flexible employment arrangements generally than are possible within the Public Service. For

example, most employees within the New South Wales Crime Commission Division are classified by the Commission as “professional” and do not enjoy entitlements to overtime or ‘flex-time’. They do, however, receive time off in lieu in instances where they are required to work “around the clock” or on weekends. The Police Integrity Commission Division is also a Special Employment Division under the PSEM Act. ICAC staff are employed pursuant to more specific provisions of the ICAC Act.

161 The flexibility offered by a Special Employment Division may be desirable given the irregular nature of hours worked by some Commission staff, particularly those working on criminal investigations. On the other hand, employment of Commission staff under contracts enables them, in theory at least, to be paid more than would otherwise be the case if they were working in the Public Service, subject to the Commission’s budgetary constraints and wage policy applying to the whole of the Government Service.

162 It is not within the Inquiry’s terms of reference to consider levels of staff salaries or particular employment conditions at the Commission. The Commission nevertheless submitted that despite the flexibility offered by the Special Employment Division, most of its staff are underpaid, including by comparison to salaries paid by the PIC, as a result of limitations on the Commission’s budget and the proportion of that budget that can be allocated to salaries. It is true that, as the Commission pointed out, recruitment is the major area in which the Commission competes with the private sector. Senior Commission officers told the Inquiry that a number of the Commission’s monitors, lawyers, forensic accountants and analysts have been recruited by other agencies, including the PIC, for higher rates of pay. The Commission’s Discussion Paper does acknowledge that “there are some, particularly able, employees whom the Commission does remunerate well and better than other agencies”. The Commission keeps information about its staff salaries strictly confidential. It appears that

²¹ New South Wales Legislative Assembly, *Hansard*, 7 March 2006.

salary benchmarking exercises with other comparable agencies at State and Commonwealth level would be beneficial.

- 163 The Commission also employs three members of staff in the Office of the New South Wales Crime Commission, which is a Department of the Public Service listed in Div. 2 of Pt 1 of Sch. 1 to the PSEM Act. Once again, the Office of the New South Wales Crime Commission has the Commissioner as its Department Head and has no practical independence from the Commission. These four officers are public servants of the type commonly employed within the Public Service, although the Inquiry understands that their employment as public servants is a result of historical arrangements, their having been employed at the Commission before the Commission commenced employing staff under individual contracts.
- 164 Mr Bradley was employed pursuant to s. 5 of the NSWCC Act, with his remuneration set by the Statutory and Other Offices Remuneration Tribunal. Acting Commissioner Singleton, when he was Assistant Commissioner, was appointed pursuant to s. 5B of the NSWCC Act, with remuneration set by the Minister.
- 165 At the time of the 2006 amendments to employment arrangements at the Commission, s. 32(7) of the NSWCC Act was inserted, providing a regulation-making power in respect of “the appointment, conditions of employment, discipline, code of conduct and termination of employment of staff of the Commission”. The origins of this provision are obscure. It is not referred to in either the Explanatory Note or the Second Reading Speech for the *Public Sector Employment Legislation Amendment Bill 2006*. It may be that the power was inserted to enable regulations to be made for the Commission to exercise special powers (such as suspension without pay) that are not common law employment powers. In any event, no regulations have been made pursuant to this provision. It would certainly be possible to use this provision to specify employment conditions for Commission staff, if a future review of those conditions considered them to be unsatisfactory or inappropriate.

Recruitment of staff

- 166 The Commission recognises the importance of recruiting talented staff, and places emphasis on ensuring that its recruitment processes avoid the delay that characterises some public sector recruitment. As explained in its first Discussion Paper, the Commission “seeks to expedite the process so that applicants for positions are not discouraged. This is done by applying resources to avoid delay rather than by abandoning proper screening.” Typically, after a cull by senior staff of applications received, three rounds of interviews are conducted, with the numbers of candidates reducing in each round. Both the Commissioner and, while Mr Singleton served in that position, the Assistant Commissioner, as well as at least one Director, interview candidates in the final round.
- 167 The Commission has considered the adoption of psychological testing as part of its recruitment procedures, but has not yet adopted it in any systemic way. Mr Bradley told the Inquiry that he had a degree of enthusiasm for the adoption of psychological testing but did not necessarily have a high level of faith in the results. Psychometric assessment is part of the application process for the NSW Police Force’s recruit education program.²² While the Inquiry accepts there are significant differences in the working environments of police and Crime Commission officers, the broader use of psychological assessment in recruitment, including as a tool in corruption prevention, is an issue warranting the new Commissioner’s consideration and consultation with other State and Commonwealth agencies.
- 168 There is no direct legal requirement that the Commission recruit on merit alone. The PSEM Act’s requirements for merit selection of applicants are found in Ch. 2 of that Act and do not apply to the Commission in respect of employment in the New South Wales Crime Commission Division. As a result of amendments that commenced on 1 November 2011, the PSEM

Act now includes a set of “public sector core values” that apply to the entire public sector, found in s. 3B of that Act. These include “[r]ecruit and promote staff on merit”. The new Public Service Commissioner has the function of “promoting and maintaining” these core values: s. 3C of the PSEM Act. However, the values are not directly enforceable, insofar as s. 3C(3) provides that “Nothing in this Part gives rise to, or can be taken into account in, any civil cause of action”.

169 As a matter of government policy, the Inquiry understands that the Commission is expected to recruit on merit. The *Merit Selection Guide for the NSW Public Sector: Picking the best person for the job* (“Merit Selection Guide”) was most recently updated as part of DPC circular C2008-29, Amendments to Public Sector Employment and Management Act and Regulation. The Merit Selection Guide is not explicit as to its applicability outside the Public Service, as defined in the PSEM Act, although it does refer generally to its use in selecting applicants for “NSW Government jobs” and to “principles of merit selection in the NSW public sector”. The minimum standards it sets out include advertising of vacancies to a competitive field of applicants.²³ The Merit Selection Guide states:

“Competitive selection is used for most vacancies. There are a few exceptions, for example for redeployment of a displaced employee or during major restructuring occurring within the agency.”

170 The Inquiry is aware of instances where job vacancies or opportunities for promotion at the Commission have not been advertised and/or competitive selection was not apparently used. The most prominent example of this is Mark Standen, who was appointed on Mr Bradley’s direct recommendation to the Minister at the time. The largest number of such cases involve the recruitment of casual listening post monitors. These positions are not advertised, but the Inquiry understands that applicants for them are usually recommended by existing monitors, and if the application is considered

²² NSW Police Force, *Admission into the Associate Degree in Policing Practice*, http://www.police.nsw.gov.au/recruitment/application_process (17 November 2011).

²³ Department of Premier and Cabinet, *Merit Selection Guide for the NSW Public Sector: Picking the best person for the job*, 2008, Department of Premier and Cabinet, Sydney, p. 8.

suitable an interview process is then followed. The Commission's staff who were interviewed by the Inquiry were of the view that this system worked well and that problems would be created if these positions were publicly advertised. Mr Bradley accepted that the system was unorthodox and did not conform to Public Service requirements regarding advertising and merit selection (which, as noted above, do not apply to the Commission's Special Employment Division).

171 Another allegation raised with the Inquiry was that some intelligence managers were appointed to their positions (from within the Commission) because of their close relationship with a former employee. The Inquiry understands that some staff were designated as intelligence managers because of the need to have persons so designated so that the Commission had staff in relevant areas able to approve matters under various statutory schemes, and that the remuneration of these staff was not increased at the time of their being designated intelligence managers.

172 The Commission's Staff Handbook states, in relation to methods of recruitment:

"External advertising is often a good [sic] of achieving merit based recruitment and is followed in many cases. There are several advertising methods available. ...

Direct Appointment

Appointments without advertising can be made with the approval of the Commissioner. Where a direct appointment to a position is proposed, a submission outlining the reasons why a direct appointment is to be made (rather than advertising) should be prepared by the Assistant Director, Operations Support."

173 In the time available, and given the Inquiry's terms of reference are limited, with the exception of its review of Mark Standen's personnel records as a result of the recitals in the Letters Patent, the Inquiry has not been able to investigate the facts of particular recruitment or promotion exercises. However, it is worthy of note that Ms Canning, who has since 2009 been responsible for running the Commission's human resources functions, is of the view that a "correct" recruitment process should be followed in every

instance. She informed the Inquiry that if the Commission proposed to hire someone into a position such as Mark Standen's without a proper process, she would voice her objection, put it in writing and argue that there should be a correct recruitment process followed.

- 174 The ICAC issued corruption resistance guidelines in relation to recruitment and selection in 2002. The resulting ICAC publication, *Recruitment and selection, Navigating the best course of action*, observes:

“Recent ICAC surveys show that recruitment is an area of decision-making that needs attention to minimise corruption risks. For example, about one-third of survey respondents considered that it was not corrupt to use one's public sector position to get a friend a job or to appoint a colleague without following proper processes. Unravelling Corruption II: Exploring changes in the public sector perspective 1993 – 1999 (ICAC, 2001).”

- 175 The ICAC indicated its belief that one of the core values applying to recruitment and selection is “[c]ompetition: the pool of potential applicants must be maximised to the extent practicable and appropriate”.²⁴ The ICAC publication “recognises that circumstances, on occasion, may require that competitive processes be bypassed, but this should be the exception not the rule. ... it is important to record the reasons for making a particular decision (such as why competitive processes were not used), and make record [sic] available for scrutiny when required.”²⁵

- 176 Another core value in recruitment and selection is openness, as the ICAC explains:

“Conducting transparent recruitment and selection processes and clearly documenting the process and results sends a strong message to staff and the community about the integrity of an agency. Staff are more likely to act according to the established policies and practices if they can clearly see that the way agency recruitment and selection processes are carried out is above board.

²⁴ ICAC, *Recruitment and selection: Navigating the best course of action*, 2002, ICAC, Sydney, p.

6.

²⁵ Ibid, p. 11.

Keeping good records of recruitment and selection decisions and the reasons for making them also demonstrates the accountability of the decision-makers.”²⁶

- 177 As a matter of policy and consistent with the newly legislated public sector core values, the Inquiry recommends that all recruitment and promotion at the Commission should be on merit, following a competitive selection process. If there are any exceptions to the use of a competitive selection process, this is something which should be approved by the Commissioner, the reasons for the exception documented and the decision reported to an Inspector, if such a position is created.
- 178 In a more general sense, both some senior and more junior officers of the Commission expressed the view that there was not a career path for promotion open to talented employees at the Commission, insofar as there are a small number of senior Director positions and a large number of more junior positions, especially for analysts, with few positions in between through which it is possible to progress. Salary increases (now constrained by Government wages policy) have been the main reward for productive employees. The Commission’s Director of Operations, in particular, is aware that lack of career progression is a problem and told the Inquiry that he is committed to creating more development opportunities for junior staff. The Commission’s Discussion Paper also states that it has “found that, in some cases, under performing staff can be converted into high achieving staff by changing their responsibilities”.
- 179 The absence of a career progression at the Commission may be a product of the Commission’s flat management structure. It could reasonably be expected to have the effect of generating staff attrition, by reducing incentives for the Commission’s most talented and committed junior staff to remain at the Commission in the long term. Whether a structure can be created to enable such progression, and what else can be done to increase and publicise opportunities for staff development are issues to which the new Commissioner may wish to devote attention.

²⁶ Ibid, p. 9.

Vetting and clearance of Commission staff

- 180 Pre-employment screening, or vetting, of Commission staff is obviously of vital importance to securing the integrity of the Commission. The Commission's senior officers recognised the importance of vetting in their interviews with the Inquiry, as did senior officers of Commonwealth agencies. However, the approaches taken to this issue at State and Commonwealth level are quite different.
- 181 At Commonwealth level, there is a unified system of security clearances linked to the classification of information. Since October 2010 the Australian Government Security Vetting Agency ("AGSVA"), located within the Department of Defence, has been the sole authority, apart from a few exempt agencies, for the granting of Commonwealth security clearances. The AGSVA operates on a fee-for-service model and is able to call upon the services of a panel of Commonwealth government-approved vetting companies.
- 182 The Commonwealth security clearance process is an exhaustive and can be an invasive one, involving background checks designed to identify any vulnerable areas in a person's life or history that may expose them to manipulation, blackmail or coercion. Checks may include interviews and the obtaining of statements from others, financial checks and searches of records held by Commonwealth Government agencies.²⁷ At higher levels of clearance, positive vetting is conducted. At the ACC and the AFP, all staff are required to achieve security clearances, including because of the high levels to which those organisations' buildings are cleared. Commonwealth clearances are re-evaluated every five years, with some people at high levels of clearance having their clearance reviewed every twelve months.

²⁷ Attorney-General's Department (Cth), *Security clearance process: frequently asked questions*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Securityvetting_Howdoestheclearanceprocesswork (16 November 2011).

183 By contrast, apart from Working With Children checks, there is no unified system for pre-employment screening in NSW. Nor is there any system for security classification of government information. This means that, with a limited exception in relation to child protection checks, each State agency conducts its own vetting procedures. The Inquiry's discussions with senior officers in the Public Sector Workforce area of the Department of Premier and Cabinet indicated that no need for a central vetting agency has been identified at State level. Mr Bradley expressed the view that a central vetting agency at State level would present "special branch-type" problems in relation to the information that such an agency would possess about staff of other agencies.

184 People being offered employment at the Commission are subjected to security vetting. The Commission conducts its own vetting as well as requesting that checks be done by the AFP. Vetting is conducted in respect of applicants who have been recommended for appointment (such as after an interview process). The Commission's vetting process is described in its Staff Handbook as follows:

"The Assistant Director, Operations Support will provide an Information Sheet relating to completion of the Personal Particulars form, a Personal Particulars form and a General Consent form (Commission proformas) to the preferred applicant for completion, submission and investigation prior to a formal offer being made.

The purpose of conducting security checks is to obtain information upon which an assessment can be made as to whether the employment of the recommended applicant poses a potential or actual risk to the security or integrity of the Commission. Personal Particulars forms are treated in strictest confidence and used only for personal vetting purposes.

The security vetting forms require that the applicant and the applicant's spouse or partner consent to the Commission making relevant inquiries and the applicant affirm by statutory declaration the completeness and accuracy of the information provided.

The Assistant Director, Operations Support checks that the forms of the recommended applicant have been properly completed. The forms are then provided to a senior analyst, who sends proforma letters requesting information to the following agencies: the AFP and the ACC (with the applicant's consent form); and conducts searches of the following databases: Roads and Traffic

Authority, Electoral Roll, NSW Police Criminal Records, ACID, the Department of Corrective Services, the Department of Immigration/Passports Office and the Electronic White Pages.

The analyst prepares a report about the searches conducted. The report is submitted to the Assistant Director, Operations Support as soon as it is completed; it should be able to be done within a matter of a day or two of receipt of the Personal Particulars form. The responses from the AFP and ACC are forwarded to the Assistant Director, Operations Support on receipt. The Commission's request should be followed up by letter if an agency fails to respond in a timely manner.

The reporting analyst comments on the suitability of the applicant, and recommends further checks, if he/she considers it warranted as well as any documentation relevant to any recommendation that the applicant has not obtained the required security clearance. The report must also refer to any further checks conducted and attach relevant documentation. The Personal Particulars form should be returned with the report(s).

The Commissioner must be informed if an analyst reports that the employment of the recommended applicant may pose a security risk to the Commission. The Commission will then decide whether or not the appointment constitutes a security risk. The Commission will consider whether the applicant should be informed and be given the opportunity to respond. The Commission will then take this material into consideration in determining whether to appoint the recommended applicant.

On some occasions, the Commission may wish to make a decision to employ a recommended applicant, before the responses from agencies (AFP and ACC) have been received. In these cases, the formal offer of employment must be conditional upon receipt of satisfactory outstanding responses.

Where a recommended applicant is not appointed on the basis that it is a risk to security, the recruitment file must be noted accordingly by the Assistant Director, Operations Support so that the file contains all relevant information."

185 This policy suggests that the ACC be asked to perform checks as part of the vetting process, but the Commission informed the Inquiry that the ACC has withdrawn its assistance in this respect.

186 The databases described in this policy do not accord exactly with the databases Ms Canning referred to as being checked as part of the vetting process, which include the NSW Police COPS database and land titles databases. Ms Canning also indicated that there are limitations on who

conducts the analysis of potential recruits, in that only intelligence managers conduct security checks for staff, whereas any analyst is able to perform the checks for a casual employee. Mr Bradley informed the Inquiry that, subject to the co-operation of other agencies, the Commission is able to complete its vetting processes in approximately one week. He emphasised that the Commission errs on the side of caution in relation to the results of its vetting processes, so that if a person has a remote connection with, for example, a known drug dealer, the person would not be hired. That seems to the Inquiry to be an entirely necessary approach.

187 A further step in the vetting process described in the Commission's Staff Handbook is the production of original or certified copies of a person's full birth certificate, documents evidencing name changes, marriage or divorce certificates, naturalisation or citizenship certificates, passport or visa(s), armed services discharge certificates, current drivers licences and "certificates of educational, professional, trade, training attainments". This last requirement is consistent with the requirement imposed by Premier's Circular C2004-43, Verification of Professional and/or Academic Qualifications. The Staff Handbook states that these documents may be used in connection with the security vetting procedure and that "[i]t may be necessary to check the authenticity of some documents". The Commission's "Information Sheet Relating to Completion of the Personal Particulars Form" refers to a requirement to produce most of these documents, but does not mention production of passports/visas or armed services documentation. As Ms Canning described the process, potential employees are asked to send through copies of their birth certificate and educational qualifications, and are subsequently asked to bring in the originals to be sighted.

188 The vetting process conducted by the Commission causes problems in relation to co-operation with Commonwealth agencies, because Commission staff, in general, do not have Commonwealth security clearance. Officers of Commonwealth law enforcement agencies as well as Mr Bradley acknowledged this issue. There are some Commonwealth

sites where Commission staff are not able to work, because they do not have the required clearance. International partners working with Commonwealth agencies also demand certain levels of security in relation to their information. The lack of Commonwealth clearance for Commission personnel represents a significant impediment to Commonwealth law enforcement agencies working with the Commission.

189 It would be possible for Commission staff to be vetted by the AGSVA, although this would involve payment to the Commonwealth and would also take considerably longer than the Commission's vetting processes, given the more onerous procedure involved, especially if positive vetting is conducted for some staff. It is obviously desirable that the Commission is able to recruit the best staff available, and to employ them with relative speed, so that they do not take up a competing position in the meantime. However, given the risks involved in the Commission's work, the rigour of the vetting process conducted should be of paramount importance. Despite the skill of the Commission's analysts and intelligence managers preparing vetting reports for the Commissioner, there are risks involved in the Commission conducting such a process internally and involving a number of its staff in the process, because this necessitates potential work colleagues knowing a great deal of information about each others' personal lives. The ICAC conducts its own vetting, but manages this issue by having a security manager who performs the vetting.

190 Some senior officers at the Commission expressed a desire to use the Commonwealth's security clearance processes, if the Commission obtained extra funding to pay for this process. Mr Bradley did not share this view. He told the Inquiry that the Commonwealth process is deficient, because those assessing clearance applications are no more skilled than the Commission's analysts, the Commonwealth has access to the same sorts of databases as the Commission in any case and there have been instances of leaking from the Commonwealth processes, so that people don't approach Commonwealth security clearance with the degree of candour that an interrogator is entitled to expect. Mr Bradley did

acknowledge that there are disadvantages to an internal vetting process. He nevertheless expressed the view that only cost and delay would be added by requiring Commonwealth security clearance for Commission staff.

191 Other Commission officers explained that the Commonwealth security clearance process has a different focus to that of the majority of the Commission's work, in that the Commonwealth process considers intelligence concerning links to terrorism and the potential for foreign government infiltration, whereas the Commission's intelligence holdings focus on organised crime.

192 Requiring Commission staff to obtain (and maintain) Commonwealth security clearance would not preclude the Commission conducting its own internal checks. It would facilitate greater co-operation with Commonwealth law enforcement agencies, which is an essential element of the Commission's work in relation to drugs. It would provide both the Commission and the public with an additional level of assurance as to the rigorous vetting of Commission staff, which is vital given the highly sensitive information with which the Commission deals on an everyday basis. While additional time and money would be required to obtain Commonwealth clearances, one option for avoiding the risk of losing talented applicants to other positions would be to offer employment subject to security clearance and/or to extend probation periods (typically six months) until security clearance is obtained. Accordingly, I recommend that all new staff, or at least new staff at, or above, a certain level should receive Commonwealth security clearance and that the Commission should receive additional funding to obtain such clearances.

Reference checking

193 The vetting process described above is a separate process from the checking of references. According to the Staff Handbook, when a selection committee is considering its recommendations, at least one of its members should contact the nominated referees for both the

recommended applicant and any applicant being considered for an eligibility list. Referees' comments should be included in the selection committee's report. The Handbook states that a separate "service check" is conducted in relation to "NSW public servants only", including ascertainment of whether "services are satisfactory". The Commission's Personal Particulars Form, completed as part of the vetting process, requires full particulars of all current (and other) employment in the last ten years to be disclosed, including the name, address and telephone number of the employer and a person's reason for leaving.

- 194 The ICAC recognises that there is a risk of people who have engaged in corruption or misconduct entering the NSW public sector as a result of poor employment screening. In an August 2010 publication entitled *Recruitment: the background check risk*, the ICAC suggested:

"An agency should seek approval from applicants to contact people who may not have been nominated in the first instance. In particular, the applicant's current or recent supervisor should ideally be contacted. Reviewing officers should explore any reluctance by applicants to volunteer information and take the time to resolve gaps in resumes."²⁸

- 195 Varying views were expressed to the Inquiry as to whether problems in Mr Standen's employment record – specifically evidence to the Stewart Royal Commission concerning an incident involving flushing drugs down a toilet while he was employed at the Federal Narcotics Bureau and the fact he was charged in 1980 with a disciplinary offence in relation to that incident – could or should have been discovered by the Commission at the time he was employed in 1996.
- 196 In 1996, the Personal Particulars Form in use by the Commission required disclosure of employment only in the last five years. The disciplinary charges in relation to Standen flushing drugs down a toilet were laid – and deferred – in 1980, well before the five year pre-employment period in relation to which disclosure was required by the Commission in 1996.

²⁸ ICAC, *Recruitment: the background check risk: Tip sheet for NSW public officials*, 2010, ICAC, Sydney, p. 1.

Standen's Personal Particulars Form, accompanied by a statutory declaration dated 14 February 1996, states that he was employed by the Australian Federal Police between 1979 and 1996, but does not refer to any employment prior to that time (as noted above, this was not required by the terms of the form). He answered "no" to the question "Have you ever been charged with any offence in NSW or elsewhere?".

197 Section 2.1 of the Commission's Code of Conduct, in its current form, states that "Any significant changes in personal details and financial interests of officers or their spouses/partners must be submitted in writing to the Commission". Enforcement of the Code of Conduct is made possible through the provisions for termination in the Commission's standard conditions of employment. I propose to deal with financial disclosures separately below.

198 It is not within the Inquiry's terms of reference to determine what information was available to the Commission concerning Mr Standen in 1996, or the extent to which he failed to comply with disclosure obligations to the Commission. Rather, looking ahead, the question for the Inquiry is whether the Commission's current reference checking procedures are appropriate. Taking into account the ICAC's suggestions and the loss of public confidence potentially resulting from the Commission recruiting staff with backgrounds in law enforcement involving poor disciplinary records, I recommend that the Commission amend its reference checking and/or vetting procedures to require that all previous employment (rather than just employment in the last 10 years) be disclosed by a candidate and verified by the Commission, by means of a process akin to the Commission's current "service check" procedure for NSW public servants, including by making contact with a person's direct supervisor where possible.

199 As an indication of the seriousness with which the Parliament treats integrity and accountability of Commission staff, I recommend that, consistent with the provisions of s. 110 of the ICAC Act and cls 4-9 of the *Independent Commission Against Corruption Regulation 2010* ("ICAC

Regulation”), the NSWCC Act (and, if appropriate, Regulations made under ss. 32(7) or 37 of that Act) be amended to empower the Commissioner to require disclosure by an officer or applicant of personal particulars (and particulars of any associated person) in approved form, verified by statutory declaration; to require updates to a statement of those particulars in the event of significant change and to empower the Commissioner to require an officer or applicant to produce specified documents (including the person’s most recent income tax return and assessment) which would assist in verification of information disclosed.

200 Compliance with the *ICAC Regulation* is a condition of employment at the ICAC, pursuant to cl. 15 of the *ICAC Regulation*. Failure to comply with any requirement of the *ICAC Regulation* is sufficient ground for terminating the officer’s employment or engagement (cl. 15(2)), although there is no failure to comply merely because the person fails to disclose matters of which the person is not aware: cl. 15(4). As a mechanism for strengthening compliance with any new statutory obligations of this kind, I recommend that the NSWCC Act (or, if appropriate, Regulations made under that Act) be amended to include an equivalent provision to cl. 15 of the *ICAC Regulation*.

Financial disclosures

201 At the back of the Personal Particulars Form completed by potential Commission recruits is a Statement of Financial Interests (“Financial Statement”). This Financial Statement is required to be verified by statutory declaration. The form includes an authority for the release of information by any statutory authority, Department of State or Commonwealth or financial institution and a consent from the applicant and the applicant’s spouse, partner or fiancé to the Commission undertaking such inquiries as it may deem necessary for the purposes of assessing suitability for employment. The instructions for completion of the Financial Statement include:

“It is a condition of your employment with the Commission that you complete a financial declaration. This is a measure which assists

the Commission to identify risks and minimise the likelihood of persons being vulnerable to corrupting influences. It is important that the information you provide is honest and candid. Providing false or misleading information may amount to an offence.

...

It is important to note that, if any major change occurs in the information lodged, you should IMMEDIATELY notify the Commission, in writing. You may be required to verify such notification by statutory declaration.

All information provided may be checked by reference to various authorities ... Further particulars may be required arising from answers provided”.

- 202 The Financial Statement requires disclosure of all real estate holdings, shareholdings, other assets exceeding \$10,000 in value, gifts and other benefits exceeding \$2,000 from any one donor (excluding family and close friends) received in the last three years, liabilities exceeding \$2,000, any other private interests (such as partnerships, directorships, trusteeships), sources of income other than Commission employment, recent financial transactions involving amounts over \$10,000, business interests, addictions, gambling in amounts of over \$1,000 per year and currency of tax returns.
- 203 The form of the Financial Statement has changed over time. Since 2007, it has been updated to require disclosure in relation to addictions, gambling and tax returns.
- 204 The Commission’s Staff Handbook contains the following description of the procedure in relation to Financial Statements:

“The Assistant Director, Operations Support reads the statement and determines what, if any, verification action and further inquiries are required. The form itself is placed in a sealed envelope and is filed in a secure location.

All staff members are obliged to notify the Commission in writing if any major change occurs in relation to their financial interests as previously disclosed to the Commission. The staff member can either complete a new ‘Statement of Financial Interests’ form or swear a statutory declaration indicating the nature of the interests which have changed since the original form was submitted. The document should be submitted to the Assistant Director,

Operations Support, who will ensure that it is handed to the Commissioner. The new information is filed securely in a sealed envelope.”

- 205 In practice, Ms Canning reviews the contents of the Financial Statements completed by new recruits. If a Financial Statement revealed anything that she thought was potentially problematic, she would bring this to the attention of the Commissioner. There is no regular annual update of Financial Statements. Staff are obliged to update their financial disclosure when there is a “major change” in relation to their financial interests, though Mr Bradley acknowledged that some staff would not think to do this in all circumstances where it should be done. Each time a staff member’s contract is renewed (usually every three years for most staff, every five years for more senior staff) Ms Canning sends an email to which the person must respond, either stating there is no change to their financial situation, or updating the disclosure.
- 206 In general, the Commission has not applied its resources to verifying information supplied in Financial Statements. Mr Bradley explained that such verification would be a resource intensive exercise. Ms Canning told the Inquiry that there were only a few instances where information provided in a Financial Statement had caused her sufficient concern to raise it with Commissioner Bradley. In Mr Standen’s case, he had borrowed money from another member of the Commission’s staff, Tony Newton, but this was not disclosed by either man.
- 207 It is no doubt the case, as in any organisation, that the financial positions of Commission employees will vary widely. It is also the case that Commission staff could (and, in Mr Standen’s case, did) fail to disclose interests or liabilities and thus conceal their true financial position. Mr Bradley was of the view that the Financial Statement is a tool that is useful if a person is deceiving the Commission (as proof of the deceit) and that the Commission should probably administer it a bit more tightly. He was also of the view that the Commission’s practices in this area had been

tightened up and that the contract renewal process was the appropriate time to re-administer the Financial Statement form. He did not support a statutory obligation for financial disclosures, on the basis that such disclosures should be required in any business that is properly administered, so that there is no magic in a statutory obligation requiring such disclosure.

208 The staff of both the PIC and the ICAC are required to make declarations of their pecuniary interests. For the ICAC, the obligation is found in s. 110 of the *ICAC Act* and cls 10 and 11 of the *ICAC Regulation*. ICAC staff provide updates to their financial disclosure forms to the Solicitor to the ICAC. There are guidelines for ICAC staff in relation to disclosure. An equivalent provision to s. 110 of the *ICAC Act* is found in s. 138 of the *PIC Act*, although regulations have not been made pursuant to this section.

209 Financial disclosures are not, in themselves, an accountability mechanism. However, their inclusion in statutory form, particularly if accompanied by a provision such as cl. 15 of the *ICAC Regulation* specifying that compliance is a condition of employment, further indicates the seriousness with which the Parliament treats integrity and accountability of Commission staff and ensures that non-compliance can have serious consequences. I therefore recommend that the NSWCC Act be amended to include provisions that are equivalent to s. 110 of the *ICAC Act* and cls 10 and 11 of the *ICAC Regulation*.

Procedures concerning ongoing employment matters

210 The Commission has a number of policies in place in relation to the conduct of its staff. These include its Code of Conduct and Complaints Handling Manual, both of which were revised in 2010 as part of the Commission's review conducted pursuant to resolutions of the Management Committee on 25 March 2010 in response to the PIC's Project Rhodium report. They also include its Staff Handbook, Fraud Control Plan and Occupational Health and Safety Policy.

- 211 In addition to the matters relating to recruitment and disclosures canvassed above, it appears to the Inquiry that the major concern in relation to the Commission's procedures for management of its existing employees relates not to the terms of any of the above policies in particular, but to supervision procedures generally and to discipline procedures for those employees. In an environment such as that of the Commission, involving a high level of misconduct risk in some parts of its operations, as identified for example in the Project Rhodium report, it is important that supervision arrangements be appropriate.
- 212 Two supervision issues at the Commission raised with the Inquiry appear to be attributable to the Commission's flat management structure: some lack of clarity in lines of reporting given Mr Bradley's involvement in the detail of many decisions, and the high level of trust attributed to staff, particularly senior staff, as the Commission's workload has increased and Directors such as Mr O'Connor have become busier and less able to actively supervise particular investigations.
- 213 Mr Bradley explained that the main forms of supervision at the Commission initially involve the allocation of a mentor to new employees. There is then ongoing supervision, which varies in form depending on the team concerned. The staff of the Financial Investigations Unit staff all report to Mr Spark. In relation to criminal investigations (not including the G3 group discussed in Chapter 6), there is direct supervision of those working in criminal investigations by Mr O'Connor, as well as some supervision of analysts by intelligence managers and by the Investigations Managers in G2 and G5. Mr Bradley noted that the Commission has tried to avoid imposing too many active supervision obligations on intelligence managers so as not to distract them from their operational work.
- 214 Analysts in G2 meet with the Commissioner, Assistant Commissioner and Director of Criminal Investigations on a fortnightly basis to discuss their work. G5 analysts meet with the Commissioner, Assistant Commissioner, Director of Criminal Investigations, and senior police working at the Crime

Commission weekly. Mr Bradley indicated that his presence at these meetings with analysts was another manifestation of the Commission's flat management structure, and that the Commission expects its analysts to be self-starters.

215 The Inquiry's recommendation that permanent Assistant Commissioners be appointed (discussed in Chapter 11) is intended to address the Commission's flat management structure. In addition to this, in view of the changes in the Commission's work over time and its increasing involvement in more complex investigations such as unsolved murders, it would seem appropriate for the new Commissioner to consider whether reporting arrangements should be changed or clarified so as to ensure all officers are subject to appropriate supervision and to report on this to the Management Committee.

216 Although it conducts performance reviews, the Commission does not have a discipline policy or a written procedure for the management of unsatisfactory performance by employees. The Commission has dismissed some employees over time, although Mr Bradley told the Inquiry that there was a very low level of breaches of the Commission's requirements amongst its staff. He noted that employees' contracts indicate that they are required to comply with Commission policy and that they may be dismissed for gross misconduct. Employees are informally counselled, by a variety of people including the various Directors, Ms Canning and the Commissioner. Steps that may be taken between informal counselling and dismissal appear to be determined on a case-by-case basis. Section 6.3 of the Commission's Code of Conduct includes the following statement in relation to breaches of the Code of Conduct:

"Breaches of this Code or of any of the principles and guidelines that it describes may lead to the Commission taking disciplinary action. Disciplinary action may include:

- counselling by supervisors, senior management or, in extreme cases, by the Commissioner;
- a record of behaviour being documented and placed on file;
- a salary increase being deferred;

- a further term of employment not being recommended;
- reporting to the PIC;
- suspension;
- termination of contract;
- dismissal and/or
- criminal prosecution.”

217 There is no guidance supplied as to which sanctions may be applied in which circumstances. That is understandable in the context of a Code of Conduct, which is necessarily a general document. However, breaches of the Code of Conduct are not the only issues which may generate a need for disciplinary action.

218 The Inquiry understands that it is difficult for small organisations such as the Commission to develop a full suite of workplace management policies on their own. This is a particularly difficult task for the Commission, given that it has no separate human resources function and that the manager responsible, Ms Canning, has numerous other responsibilities. However, the Inquiry understands that other small agencies within the public sector have adapted such policies from other, larger organisations within their cluster or elsewhere in the sector. Consistency in the approach taken by Commission managers as well as consistent treatment of underperforming employees, and transparent disciplinary procedures, would serve to enhance institutional integrity.

219 I therefore recommend that the Commission formulate a written policy for managing unsatisfactory performance, remedial and disciplinary action, having considered best practice in relation to such policies in use by other organisations within the broader Government Service. This policy should include provisions in relation to prevention and identification of unsatisfactory performance, management of unsatisfactory performance (via a staged process such as informal counselling, formal counselling, remedial action and review, further remedial action or disciplinary action), guidelines as to the choice between remedial and disciplinary action and the documentation to be retained.

CHAPTER 8 – Complaint Handling

- 220 Complaint handling by the Commission was one of the subjects dealt with by the PIC in the Project Rhodium report. The recommendations made by the PIC numbered 4 and 5 are contained in Appendix 11.
- 221 The correspondence referred to in Chapter 2 which occurred earlier this year between the Commission and the PIC reveals that while the PIC accepted that recommendations 4 and 5 had largely been addressed by the Commission, some issues remained outstanding. Those issues, so far as the PIC was concerned, continued to be outstanding when the PIC wrote to the Minister for Police in August this year stating that it was of the view that it has discharged the functions asked of it.
- 222 Upon request, the Commission provided me with its Complaints Report Register, which comprises 35 pages of short references to many miscellaneous complaints which, although not entirely in chronological order, seem to encompass the period between 1996 and the present. Some of the complaints seem minor, for example, a complaint made in relation to lack of courtesy by Commission staff in making a request of bank staff.
- 223 Some of the complaints, on their face, are much more serious, such as a complaint made in 2007 that Mark Standen had provided a false affidavit.
- 224 For the most part the register does little more than record the complaint without indicating the steps taken to address it or the ultimate conclusion, although the Commission's Complaints Handling manual states that it is meant to record, among other things, referral options, investigation options and alternatives, if relevant, investigation findings, management outcomes and complainant satisfaction status. In relation to older complaints, this may be because the Complaints Register includes a back-capture of historical complaints material, the details of which may not be immediately available to Commission staff.

- 225 The short time provided for the Inquiry means I have not had the opportunity to investigate fully the Commission's procedures regarding registration of complaints. However, I did call for production of further documents in respect of some complaints, which were duly furnished. I also raised the subject with Mr Bradley.
- 226 The difficulty is that complaints about the conduct of the Commission and its officers can range from the very trivial to the very serious and for that reason standardisation of procedures is not without complexity. Complaints can be made orally in an open court, informally by telephone to the Commission or more formally by written notice
- 227 In relation to complaints made during the course of litigation by legal practitioners, the Commission seems to have largely adopted the course, both in its Complaints Handling manual and in practice, of leaving it to the presiding judge to resolve such complaints. In my experience, in many or most cases, this is an idle expectation. Complaints that are not an aspect of the matter in dispute between the parties are unlikely to attract judicial resolution. The Commission's Complaints Handling manual states that "[t]he Commission does not usually investigate or take such complaints further". The manual explains that this is because remarks and allegations are often made by legal practitioners "in the heat of the battle" that lack in merit and have no real basis. The PIC was also concerned that this approach to complaints made by legal practitioners in litigation could be being applied as a blanket rule, and suggested in the attachment to its letter dated 28 June 2011 that there may be occasions where complaints made by legal practitioners in the course of litigation ought to be registered and referred to the PIC in accordance with s. 75D of the PIC Act. In my view, serious allegations made in the course of litigation should be recorded, investigated and dealt with appropriately.
- 228 The Commission now has an electronic complaints register which enables tracking to take place. According to the PIC, having reviewed the

Commission's Complaints Handling manual, it remains unclear whether the Commission's procedures now include:

- processes and criteria to determine whether a complaint requires investigation;
- tiered investigation methods that incorporate evidence and outcome based methods;
- the sanctions that might be applied in the event that a complaint is sustained; and
- a mechanism by which both internal and external persons can easily lodge complaints.

229 I agree that the Complaints Handling manual does not address these issues, and the absence of a written policy for disciplinary action (discussed in Chapter 7) compounds the third point. I recommend that to the extent it has not yet done so, the Commission should put in place the above procedures and I also recommend that in the event an Inspector is appointed, this should become an area for concern of the Inspector.

230 Having reviewed the Complaints Handling manual, I likewise recommend that the Commission review its procedures in relation to complaints made by legal practitioners during the course of litigation in order to isolate and treat differently those which make an allegation of serious misconduct by the Commission or one of its officers and those which do not. I also recommend that the Commission establish a procedure for dealing with complaints against the Commissioner personally.

CHAPTER 9 – External and Internal Audits

231 The Inquiry is specifically asked to consider the adequacy of accountability mechanisms for the Commission, as part of its inquiry and report into the adequacy of the terms of the NSWCC Act for securing the objectives of that Act. Audits obviously provide one form of accountability, particularly as regards financial accountability.

External Audit

232 External financial audits of the Commission are conducted by the Auditor-General annually, pursuant to the requirements of the PFA Act and an independent auditor's report is published as part of the Commission's Annual Report. The most recent volume of the Auditor-General's Report covering the Commission was released on 23 November 2011. The Auditor-General indicated that he would reassess his approach to the audit of confiscated assets once this Inquiry and the PIC had reported their findings. The Auditor-General recommended that:

“The Commission should consider how it can improve reporting its performance to its stakeholders. When compared to performance reporting by other jurisdictions, I believe the Commission's reporting against Key Performance Indicators (KPIs) may be improved.”²⁹

233 When the Auditor-General considers it appropriate to do so, he or she is empowered, under s. 38B of the PFA Act, to conduct performance audits “of all or any particular activities of an authority to determine whether the authority is carrying out those activities effectively and doing so economically and efficiently and in compliance with all relevant laws”. Performance audits may, therefore, involve examination and assessment of the use of resources, information systems, performance measures, monitoring systems and legal compliance.

234 The Auditor-General is funded to conduct 12 performance audits each year. No such audit has ever been conducted in relation to the

Commission, which is perhaps unsurprising, given the small size of the Commission and the very large number of public authorities falling within the Auditor-General's responsibilities. The Auditor-General takes into account a variety of matters when deciding whether to conduct a performance audit, focusing on the value delivered by such an audit. While there has been no external performance audit of any aspect of the Commission's activities and the Inquiry would not presume to direct the Auditor-General in his selection of subjects for future performance audits, internal performance audit and risk management mechanisms within the Commission have the potential to strengthen the Commission's accountability mechanisms. This is particularly the case given the outside expertise available to the Commission via its IARC, which was established in 2009 pursuant to Treasury guidelines and replaced the Commission's previous internal audit committee.

Internal Audit

- 235 The Internal Audit and Risk Management Policy for the NSW Public Sector, set out in NSW Treasury Policy & Guidelines Paper TPP09-5 ("Audit Policy") was issued as a direction to Department Heads and Statutory Bodies under NSW Treasury Circular TC09/08. A stated purpose of the corporate governance practices required by the Audit Policy is to promote the integrity of, and accountability for, the allocation and management of public resources. The Audit Policy itself aims to ensure "that department heads and governing boards of statutory bodies establish and maintain organisational arrangements that will provide additional assurance, independent from operational management, on internal audit and risk management."
- 236 Among the core requirements of the Audit Policy are that there be an operationally independent internal audit function, appointment of a Chief Audit Executive and an Audit and Risk Committee with an independent chair and a majority of independent members appointed from a central

²⁹ Audit Office of NSW, *NSW Auditor-General's Report Financial Audit Volume Seven 2011*, 2011, Audit Office of NSW, Sydney, pp. 5, 66.

register of “pre-qualified” individuals. The Audit Policy requires the Audit and Risk Committee to report either to the governing board of a statutory body, in cases where a board is responsible for the governance of the relevant entity, or to the chief executive officer in cases where a statutory body has either an “advisory board” subject to Ministerial control and direction or no governing board. It is important to recognise, when assessing the IARC’s effectiveness as an accountability mechanism, that the Audit Policy specifies that the Audit and Risk Committee does not have any management functions or executive powers.³⁰

237 In accordance with the requirements of the Audit Policy, the Commission’s IARC comprises Mr Peter Whitehead (former NSW Public Trustee, now National Manager Fiduciary at Perpetual) as Chair, Mr Andrew Koureas (Executive Director, Corporate Services of the ICAC) and Mr Singleton. The IARC reports to the Commissioner, rather than to the Management Committee. Consistent with the terms of the Model Audit and Risk Committee Charter which is Annexure C to the Audit Policy, the IARC’s Charter states that “The Committee is directly responsible and accountable to the Commissioner for the exercise of its responsibilities. In carrying out its responsibilities, the Committee must at all times recognise that primary responsibility for management of the [Commission] rests with the Commissioner.”

238 The Commission’s most recent Annual Report reinforces the limited role of the IARC: “The IARC’s role is advisory. The Commissioner has overall accountability and responsibility for the management of the Commission and is therefore under no obligation to accept either in full, or in part, any advice offered by the IARC.”³¹ The IARC has no right or power to report to the Management Committee. The Inquiry understands that the Management Committee has, at times, been provided with memoranda from the IARC’s Chair (the most prominent example being a memo

³⁰ NSW Treasury, *Internal Audit and Risk Management Policy for the NSW Public Sector*, Office of Financial Management Policy & Guidelines Paper TPP09-5, 2009, Treasury, Sydney, [4.2.10], [4.2.11].

following a review of the Commission's draft report to the Management Committee following the Project Rhodium report), but the IARC nonetheless reports to the Management Committee through the Commissioner and the provision of the IARC's reports to the Commissioner would appear to be entirely a discretionary matter. That said, the Commission has agreed to implement all recommendations of the IARC in the most recent reporting period.³²

Reporting arrangements for the Internal Audit and Risk Committee

239 As noted above, the Audit Policy contemplates the Audit and Risk Committee reporting to a governing board, where the relevant statutory body has a board that is responsible for the governance of the entity. The reason the IARC does not report to the Management Committee is that the Commission does not have a "governing board" in the sense that term is used in the Audit Policy: the Commissioner is ultimately responsible for the governance of the Crime Commission. On the other hand, nor is the Management Committee purely an "advisory board" as that term is used in the Audit Policy, insofar as it may give directions and furnish guidelines to the Commission concerning its internal management. Furthermore, the Management Committee itself would not appear to be subject to direction by the Minister, at least in his capacity as a member of that Committee: it is empowered to make decisions by majority vote (Sch. 3 cl. 4 of the NSWCC Act), so it would be possible for the Minister to be outvoted by the other three members of the Committee in his capacity as the presiding member.

240 Given that the Management Committee's functions pursuant to s. 25 of the NSWCC Act include general monitoring of the work of the Commission, and that it is empowered to issue directions and guidelines to the Commission with respect to the internal management of the Commission (s. 27(2)), it is most unfortunate that the Management Committee does not have an automatic mechanism for receipt of the IARC's recommendations.

³¹ NSW Crime Commission, *Annual Report 2010/11*, 2011, NSWCC, Sydney, p. 18.

³² *Ibid*, p. 19.

This would provide the Management Committee with an important additional source of information to the information the Commission chooses to supply, and would enable the Management Committee to draw more fully on the outside expertise of the IARC's members.

- 241 The Audit Policy enables provisions additional to those set out in the Model Audit and Risk Committee Charter to be included in the IARC's charter, provided they do not conflict with the model Charter.³³ It would not seem to be inconsistent with the model to provide in the IARC's charter that its reports and recommendations to the Commissioner are to be supplied to the Management Committee. Furthermore, I recommend that the Management Committee issue a direction pursuant to s. 27(2) requiring the provision to the Management Committee of any report or recommendation of the IARC as well as the Commission's response; and directing the Commissioner to invite the chair of the IARC to attend the next Management Committee meeting following the completion of any report or recommendation.

The Commission's Internal Audit Capacity

- 242 The IARC met on four occasions in the last financial year. Its work is not limited to scrutiny of financial matters. Its risk management remit encompasses consideration of such matters as key person risk, operational and reputational risks and fraud control. The outside expertise of the members of the IARC suggest that its recommendations in each of these areas could be of significant utility in strengthening internal control and compliance frameworks at the Commission. However, the IARC is constrained by the fact that it does not play an independent investigatory role. It does not itself conduct audits. Although the IARC's Charter includes an authorisation from the Commissioner to the IARC to "[o]btain any information it needs from any employee and/or external party (subject to their legal obligation to protect information)", in practice, much of the IARC's work is reactive and consists in reviewing material provided to it in

³³ NSW Treasury, *Internal Audit and Risk Management Policy for the NSW Public Sector*, Office of Financial Management Policy & Guidelines Paper TPP09-5, 2009, Treasury, Sydney, [4.1.2].

the form of attachments to reports of internal audits. For example, the IARC's members would not themselves obtain access to and inspect particular Commission files. While this is understandable, it obviously means that the Commission's internal audit capacity represents an important constraint on the IARC's work. I note in this respect that the Auditor-General's most recent report in relation to the Commission recommends that "The Commission's internal audit section should consider increasing the proportion of time it spends on operational and performance audits as part of its annual internal audit program."³⁴

243 The Commission currently staffs its internal audit function internally, deploying staff previously allocated to other accounting work who have taken on internal audit as a result of the new Treasury requirements set out in the Audit Policy. The Commission has not employed dedicated internal audit professionals or created a risk management team to perform internal audit roles.

244 The Commission's Internal Audit Charter refers neutrally to the "Internal Audit function" and makes reference to circumstances where internal audit services are performed by an external third party provider. In apparent recognition of the fact that statutory bodies vary in the size and complexity of their activities and the risk profile of their operations, the Audit Policy does not require the internal audit function to be delivered "in-house" by statutory bodies themselves, but permits an outsourced service delivery model. The Audit Policy provides that the "department head or governing board of the statutory body must ensure that the Internal Audit function has a budget, and access to sufficient professional staff resources with the necessary skills and experience, that are sufficient relative to the risks facing the department or statutory body."³⁵ This means that, at the Commission, the Commissioner determines the budget and level of resourcing for the internal audit function. While the Audit Policy requires

³⁴ Audit Office of NSW, *NSW Auditor-General's Report Financial Audit Volume Seven 2011*, 2011, Audit Office of NSW, Sydney, pp. 5, 66.

the IARC to draw the Commissioner's attention to any view it forms that "the level of resourcing for the Internal Audit function is insufficient relative to the risks facing the department or statutory body",³⁶ the Commissioner would make the ultimate decision as to which service delivery model is adopted. The Commission is currently considering whether to outsource some or all of its internal audit function.

245 The IARC's agenda and work plan is determined based on internal audit information supplied to it by the Commission. To date, while the IARC has attempted to focus on high risk areas of the Commission's operations, such as the use of safes and risks identified by the PIC, the absence of a comprehensive risk assessment of the Commission's operations has constrained the IARC's capacity to focus on high risk areas of the Commission's operations in a proper and methodical fashion. The IARC is awaiting a risk assessment currently being conducted by Internal Audit Bureau Services (IAB, a State government trading enterprise), which will enable it to make recommendations as to an appropriate cyclic audit plan. The risk assessment is recorded in the Commission's most recent Annual Report as having been commenced by IAB in June 2011. It appears that the cost to the Commission of commissioning such a risk assessment from a third party provider delayed its commencement.

246 There would probably be additional costs involved in the professionalisation of the Commission's internal audit functions, whether by recruitment of new staff with qualifications in audit or risk management or contracting this function to an external provider, such as the IAB. The Inquiry recognises that the Commission is operating from a low base in this area, having not previously employed dedicated risk management or internal audit staff. However, given the high-risk environment in which the Commission operates, regular, rigorous internal audit of compliance with law and policy across all areas of the Commission's operations would

³⁵ NSW Treasury, *Internal Audit and Risk Management Policy for the NSW Public Sector*, Office of Financial Management Policy & Guidelines Paper TPP09-5, 2009, Treasury, Sydney, [1.6.1].

³⁶ *Ibid*, [1.6.2].

appear to me to be an essential contributor to strengthening the Commission's accountability. The role of the IARC, as well as oversight of the Commission by external agencies (whether by the PIC, the Auditor-General or other, new oversight mechanisms) does and will inevitably involve supplying those bodies with information of comfort. It would seem appropriate for the Commission to have personnel (whether employed or third-party contractors) dedicated to the task of producing such information. The deployment of such personnel and the institution of a cyclic internal audit plan may, over time, relieve some of the burden on senior staff such as the Assistant Commissioner (now Acting Commissioner) and Director of Operations Support/Solicitor to the Commission, who are currently principally responsible for responding to ad hoc requests such as those received from the PIC.

- 247 Accordingly, when a new Commissioner is appointed and the IARC has had the opportunity to consider the risk assessment, I recommend that the Commission ask the IARC to provide written advice in relation to whether the level of resourcing for the internal audit function is sufficient relative to the risks facing the Commission and to indicate the level and type of resourcing that would be desirable. This advice, and the Commission's response to it, should also be provided to the Management Committee in order to facilitate the discharge of its monitoring responsibilities pursuant to s. 25 of the NSWCC Act.

Internal Audit and a future Inspector

- 248 If my recommendation that the position of Inspector of the Commission be created is adopted, it would be desirable for the Inspector to develop a working relationship with the IARC, in order to avoid duplication of resources. The Inspector's proposed capacity to report to Parliament may also enable him to bring to attention any concerns he may have regarding the Commission's response to the IARC's recommendations. I do not think that duplication of effort between the Inspector and the IARC is likely. Both the ICAC and the PIC have Internal Audit and Risk Committees as well as Inspectors and no concerns in relation to overlap of functions within

those two organisations have been raised with the Inquiry. The Inspector will contribute a different set of qualifications and experience to that of the IARC's members. I also envisage the Inspector's role as much more proactive than that of the IARC, which as noted above effectively restricts its work to review of material supplied by the Commission.

- 249 To facilitate the working relationship between the Inspector and the IARC, it may be that the Inspector could be a permanent invitee to the IARC's quarterly meetings. The IARC's present Charter provides that the Commissioner authorises the Committee to request the attendance of any employee, including the Commissioner, at committee meetings and to discuss any matter with "other external parties (subject to confidentiality considerations)". The Inspector would not be an employee of the Commission, but would perhaps constitute an "external party" within the terms of the Charter. Nevertheless, to clarify the Inspector's standing invitee status, it may be appropriate to amend the IARC Charter.

CHAPTER 10 – Alterations to the Commission’s Structure

- 250 My Terms of Reference seem to me wide enough to encompass the making of recommendations regarding the structure of the Commission itself, in that they raise a question as to whether the Commission is complying with the NSWCC Act and the CAR Act, whether those Acts remain appropriate for securing the objectives of the Acts; and whether the powers and procedures of the Commission are appropriate.
- 251 Appendix 9 makes reference to other State and Commonwealth agencies, which have comparable roles and powers to those of the Commission. There are similarities and dissimilarities in the elements of their structures. It is apparent from the very existence of the differing structures, not to mention my discussions with persons having relevant knowledge and experience and my reading during the course of the Inquiry, that no particular structure for such agencies has achieved general acceptance as “ideal”. To a large degree, structure depends on an organisation’s size and the particular functions and powers it exercises, as well as the extent to which the structure needs to meet the needs of other persons and entities who inter-relate with, or are dependent upon, it.
- 252 Schedule 2 to the NSWCC Act provides that a quorum for a meeting of the Commission is two. However, only one member’s appointment is required by the Act: other members (Assistant Commissioners) are provided for but not required. While Mr Bradley was the sole member of the Commission, which has been the case for most of the time since 1996, the provisions of Sch. 2 to the NSWCC Act relating to meetings of members of the Commission were otiose and the Commission could not meet to conduct business. Instead, it has operated on the basis of delegations from the Commission to the Commissioner (made at times when there was an Assistant Commissioner appointed, so that the Commission was able to meet). Although in light of s. 5(3)(b) of the NSWCC Act, inability to hold a meeting would not, in my opinion, constitute a failure to comply with the Act, the tension between s. 5(3)(b) and Sch. 2 does not seem to me to be

appropriate and I recommend that it not continue. Either the Commissioner should be regarded as constituting the Commission, in which case Sch. 2 may be deleted, or the Act should require the appointment of at least one “member” in addition to the Commissioner.

- 253 While I accept that there are arguments in favour of a multi-member Commission model – insofar as it enables a direct check on the Commission’s power, at least if there are more than two members – I favour the first of these alternatives. In the first place, it seems to have operated reasonably satisfactorily for many years under Mr Bradley. More significantly, it has been the model adopted in NSW under more modern legislation for agencies such as the ICAC and the PIC, which have similar powers to those of the Commission, even though different functions. Furthermore, there is a Management Committee exercising a degree of general oversight. Neither of the two most comparable Commonwealth agencies, the ACC and the ASIO, incorporate the notion that there will be members who have formal meetings, although the former is subject to a Board.
- 254 My recommendation therefore is that the Commission be constituted by the Commissioner alone. The provisions for members of the Commission and meetings of the Commission should be omitted.
- 255 As to the term of the Commissioner, again there is no unanimity of view. All the models I have considered now provide for fixed terms of varying lengths. Some terms are renewable indefinitely, some not at all. At least one provides for a single renewal. The argument that a Commissioner or any CEO can be “too long in office” is countered, “Why terminate the employment of someone who by all measures is extremely successful and still has a lot to offer?” There is force in both of those contentions.
- 256 Neither the ICAC Commissioner nor the PIC Commissioner may hold office for terms exceeding in total five years. Having been persuaded that the Commissioner should alone constitute the Commission, it seems to me

that I should, despite the contrary argument, stipulate a maximum term of office. This will obviate the risk of bad practices and procedures becoming entrenched under a CEO who has been too long in office, no matter how successful he or she has otherwise been, and will ensure that periodically there is opportunity for a fresh look at all the Commission's procedures and practices. But I think a total term of five years is too short, based on my perception that the role of the Commissioner, particularly in relation to the Commission's functions concerning organised crime, is of a much more ongoing nature than that of either the ICAC or the PIC Commissioner, with greater demands for continuity. I propose to recommend a fixed term or terms to a maximum of 10 years, which I note is now the maximum term of the DPP.

257 The appointment of the Commissioner should be made by the Governor on the advice of the Executive Council. As I propose to recommend oversight by a parliamentary committee, that committee should be given the power to veto any proposed appointment in similar terms to those contained in s. 5A of the ICAC Act.

258 I have given considerable thought to the necessary qualifications of the Commissioner. There was a view expressed to me that as CEO of a substantial organisation with a range of functions and powers, he or she most needs administrative skills of a high order and, furthermore, that there is advantage in separating the office of Commissioner from those, for instance, who are engaged in conducting the compulsory questioning of witnesses. This is effectively the model adopted by the ACC via its CEO and Examiners. I found both these arguments attractive but, in the end, I have rejected them. The Commission is not large enough, in my view, to afford a Commissioner, unqualified to undertake one of its most important functions, namely presiding at the examination of witnesses. There is also, I think, the valid reason that an agency with powers anathema to the common law should be led by a man or woman well versed by background and training in the common law and predisposed to maintaining it. Accordingly, I recommend that the Commissioner be either a former or

retired judge or a person qualified for appointment to a superior court in Australia. I should add that although it has occurred in the past in relation to members of the Commission, in my view a serving judge should not be regarded as a suitable appointment. There are practical reasons for this, but more importantly, in my view, it has the tendency to infringe the principle of separation of executive and judicial powers.

259 Although, as indicated earlier, I do not recommend that Assistant Commissioners be “members” of the Commission in future, I do propose to recommend the appointment of Assistant Commissioners. In my view, a slightly more hierarchical management structure than now operating is desirable in the hope that the, perhaps more formal, structure so created, will aid the establishment of a culture which values compliance with systems and protocols as highly as the achievement of results. As it seems to me problems in the past have largely stemmed from departures from such culture. I recommend the appointment of two full-time Assistant Commissioners be required, one of whom should be a retired, or former judge, or qualified for appointment to a superior court in Australia and so able to preside at Commission hearings. The qualifications of the second Assistant Commissioner, I would leave open: contemplating, for instance, someone with an accounting, financial, policing or scientific background. Although, in my view, it should be regarded as a matter for the Commissioner and not for legislation, it would be convenient if one Assistant Commissioner was given particular responsibility for investigative activities and the other for CAR Act proceedings.

260 I recommend that an Assistant Commissioner be approved by the Commissioner before being appointed by the Governor. He or she should be appointed for fixed renewable terms, perhaps as long as seven years. Assistant Commissioners should have the roles and responsibilities determined by the Commissioner. The remuneration of the Assistant Commissioners should be a matter for the Statutory and Other Officers Remuneration Tribunal, consistent with the existing provision of cl. 5 of Sch. 1 of the NSWCC Act.

261 As a means of providing the Management Committee with the benefit of the Assistant Commissioners' input, s. 24(6) of the NSWCC Act should be amended to provide for Assistant Commissioners to attend Management Committee meetings and participate in discussion with the Committee's consent.

CHAPTER 11 – Oversight and Accountability

- 262 One of my Terms of Reference directly raises the question of the accountability of the Commission. It would, of course, be wrong to say that there is presently no oversight. The Commission has a Management Committee; it is subject to the jurisdiction of the PIC; it is required to make an annual report for tabling in Parliament by the Minister; it has budgetary restraints imposed upon it; it has a semi independent internal audit committee; it is subject to the *Government Information (Public Access) Act 2009* (albeit not in respect of its investigative and reporting functions, which are excluded pursuant to s. 43 and Sch. 2 of that Act); it is subject to the PFA Act and its records in relation to telecommunications interception, surveillance devices and controlled operations are inspected by the Ombudsman. Nonetheless, my Terms of Reference require me to consider whether the existing accountability mechanisms are adequate.
- 263 The work of the Commission is quite complex. Not only does it provide a wide range of law enforcement functions, which involve the exercise of extraordinary powers unknown in this country until comparatively recently, but in many, or most, of its investigative roles, it needs to act in conjunction with, or support, other agencies, both State and Federal, including the NSWPF, the AFP, the ACC, the ACS, Austrac, ASIO, Corrective Services NSW, the DPP(NSW) and DPP(Cth), the Casino, Liquor and Gaming Control Authority; the Australian Taxation Office, and the Ombudsman.
- 264 The Management Committee has a limited role and the PIC is concerned primarily with corruption and misconduct. None of the other oversight bodies mentioned above has, in my opinion, the necessary capacity or power to provide oversight of all aspects of the Commission's functions.
- 265 The conviction of Mr Standen, the matters raised in the Project Rhodium report, some aspects of the evidence which emerged during the public hearings in Operation Winjana (even though no report has yet been made upon such evidence), information which I have gained in the discussions

referred to earlier and the various submission made to the Inquiry persuade me that existing accountability mechanisms have indeed proved to be inadequate for such a complex and powerful agency as the Commission.

- 266 Although not quite unanimous I have experienced overwhelming support for the appointment of an Inspector to the Commission. The advantage of an Inspector is seen as a person who in “real time” has the power to audit every facet of the Commission’s operations, to have immediate access to all the Commission’s records and staff, to be able to spend time at the Commission’s offices and to be an independent person with whom concerns and complaints about the Commission can be raised. Ideally, a strong culture of agency self-reporting to an Inspector will develop, as appears to be the case, for example, with many of the Commonwealth agencies reporting to the Inspector-General of Intelligence and Security.
- 267 Nonetheless, I recognise that an Inspector to an agency has not always operated satisfactorily and in some instances has been regarded as a failure. The recent disagreement between the PIC and its Inspector concerning the publication of reports is an example of this.³⁷ The Inquiry is also aware of difficulties in relation to the role of the inspectors in comparable organisations to the Commission in Queensland and Western Australia. In Western Australia, a dispute between the Parliamentary Inspector of the CCC and the Commissioner of the CCC as to whether the Inspector could critically review opinions reached by the CCC that certain individuals had engaged in misconduct and table directly with Parliament a report containing his critical review led, at its height, to the Commissioner commencing two sets of proceedings in the Supreme Court of Western Australia against the Inspector, seeking injunctions preventing the tabling of the report and declarations that the Inspector’s actions were unlawful.³⁸

³⁷ See New South Wales Legislative Assembly, *Hansard*, 11 October 2011, p. 5936 and the documents tabled on that occasion.

³⁸ *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex Parte Corruption and Crime Commission*, Supreme Court proceedings CIV 2776 of 2008 (commenced on 18 December 2008 and discontinued on 23 December 2008, in which a judgment dismissing the application for

- 268 A similar dispute occurred in Queensland in 2000 between the then-Criminal Justice Commission (now merged into the CMC) and the Parliamentary Criminal Justice Commissioner.³⁹ Although statutory oversight mechanisms obviously should not be designed around particular individuals, much depends on the personalities of the Inspector and the CEO of the agency he or she inspects. Each must recognise and respect the boundaries of their responsibilities. Obviously, an Inspector who seeks to override a CEO in operational matters exceeds his or her role unless a serious breach of established protocols and procedures is involved. Other problems have arisen when Inspectors have been required to seek assistance from other investigative bodies due to the insufficiency of their own resources, which has the potential to disrupt the work of those other bodies and absorb their own limited resources.
- 269 In the result, I have decided to recommend the appointment of an Inspector to the Commission. I suggest that this be a position with a fixed term appointment not exceeding in total five years. Although it might naturally be thought that the position would be filled by a senior lawyer, I am not persuaded that this is necessarily so, and I would leave the qualifications of an Inspector open. There should be provision for staff of the Inspector, along the lines of s. 57E of the ICAC Act, but with the proviso that the Inspector should have the right to make use of PIC's facilities if required.
- 270 The question immediately arises as to the relationship which should exist between the Inspector and the PIC; the latter being a much larger and better resourced agency than an Inspector is likely to be. Moreover, in NSW, at least, there is not currently a similar relationship between Government agencies as I envisage between the Inspector and the PIC.

an interlocutory injunction was delivered by Martin CJ: [2008] WASC 305) and *Corruption and Crime v Malcolm James McCusker AO QC, The Parliamentary Inspector of the Corruption and Crime Commission of Western Australia*, Supreme Court proceedings CIV 2832 of 2008 (commenced on 29 December 2008 and discontinued on 6 February 2009).

The two need to complement each other, in a manner that will match accountability mechanisms to risk. At least some areas of the Commission's operations present similar, serious, misconduct risks to those presented by the NSWPF's operations, such that there is a logic to the PIC retaining jurisdiction over the Commission. I recognise that division of oversight responsibilities is undesirable if this leads to weakened oversight arrangements overall, as a result of fragmented resource allocation. What I recommend for the role of the Inspector is that he or she be primarily involved in auditing the operations of the Commission to ensure compliance with the law, in assessing the effectiveness and appropriateness of its procedures and in dealing (by reports and recommendations) with complaints of misconduct and conduct amounting to maladministration (compare s. 57B of the ICAC Act; and bearing in mind that the PIC is required, as far as practicable, to turn its attention principally to serious misconduct: PIC Act s. 13B(2)).

271 The Inspector should be required to refer instances of criminal activity or serious misconduct to the PIC. The Inspector should have powers similar to those contained in s. 57C of the ICAC Act, which include a power to refer matters relating to the Commission to other public authorities for action.

272 It was suggested to me that an Inspector should be constituted as the "gateway" to the PIC, in the sense that the PIC would not be entitled to exercise powers in relation to the Commission except by reference from the Inspector. Messrs Bradley and Singleton favoured this approach. At least in part, the Commission's concerns conveyed to the Inquiry in relation to existing PIC oversight related to the expense involved in responding to PIC inquiries; as well as the disproportion involved in subjecting the Commission to scrutiny by an organisation with more, or approximately the same, resources as the Commission. The Commission's first Discussion Paper included an estimate that responding

³⁹ See *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8; *Re Criminal Justice Commission* [2000] 1 Qd R 581.

to the PIC was (at least as at 14 October 2011), absorbing over 15 per cent of its entire resources.⁴⁰ State Budget Estimates for 2011-2012 forecast the expenditure by the Commission of \$1.3 million on “integrity and accountability activities”, as compared to \$12.3 million to investigate serious crime and \$5.3 million for financial investigations.⁴¹

273 The Commission also pointed to the fact that PIC’s principal functions under s. 13 of the PIC Act relate to the approximately 16,000 member NSWPF, with its functions relating to the much smaller Commission described as “other” functions (s. 13B), though the Inquiry notes that the recently published *Review by the Minister of the PIC Act* recommends amendment of the PIC Act to accord equal priority to the PIC’s oversight of the Commission, NSWPF officers and NSWPF administrative staff.⁴² The Commission’s submission to that statutory review echoed its submissions to this Inquiry in terms of the diversion of resources involved in oversight by the PIC. It submitted to the Review that the Commission:

“with its limited staff and limited budget cannot cope with the demands and distractions that the PIC impose upon it. The simple exercise for the PIC of preparing and serving a notice to produce can create hours or more work for several people at this Commission. This Commission’s fight against organized crime is being significantly weakened by the conduct of the PIC.”⁴³

274 A further argument raised with the Inquiry is that the Commission at times has a role to play in PIC investigations, and that it is difficult for the two organisations to work together if PIC also has oversight of the Commission.

275 I do not regard the Inspector serving as a “gateway” to the PIC as an appropriate course to follow, particularly given the PIC’s size and accumulated experience, as well as its superior capacity to detect

⁴⁰ This estimate was said to comprise mostly proportions of salaries of the people who work on responding to PIC requests, together with an allocation of the Commission’s administrative and other corporate services such as rent.

⁴¹ New South Wales Government, *Budget Papers 2011-2012*, 2011, Sydney, p. 2-88.

⁴² *Review by the Minister of the Police Integrity Commission Act 1996*, November 2011, Outcome 5, p. 14.

⁴³ New South Wales Crime Commission, Supplementary Submission to Review, 10 March 2011.

misconduct on the part of Commission officers, for example by long-term intelligence gathering and via its use of telecommunications interception powers, which the Inspector would not possess. I do not propose that the Inspector be inserted as another “layer” of oversight; rather, as noted above, I intend the Inspector’s role to complement that of the PIC. However, the PIC does have powers under ss. 23(2) and 24 of the PIC Act to embark upon investigations (or preliminary investigations) even though no particular Crime Commission officer has been implicated and no misconduct of such an officer is suspected. Such an exercise of power may conflict with the exercise of powers by the Inspector. I recommend that the PIC Act be amended to provide that the PIC not exercise its powers under s. 23(2) and s. 24 (in relation to a preliminary investigation into matters covered by s. 23(2)) without the consent of the Inspector.

276 The PIC submitted to the *Review by the Minister of the PIC Act*, tabled on 10 November 2011, that it should have an audit function in relation to the Commission. As the PIC pointed out in its submission to that review, an auditing function can be distinguished from a prevention function, in that auditing allows identification of issues including governance and control frameworks across the Commission’s operations, before there is a need for major remedial action.⁴⁴ That Review recommended that the Parliamentary Joint Committee on the Office of the Ombudsman and the PIC be asked to make recommendations concerning an audit function for the PIC in relation to the Commission.⁴⁵ If the Inspector plays the proactive monitoring and reviewing role that I envisage, it should not be necessary to expand the PIC’s functions in relation to the Commission in this way.

277 Effective oversight of the Commission by external agencies such as the PIC and an Inspector will necessarily involve those bodies requiring the Commission to provide them with information of comfort. There is

⁴⁴ Police Integrity Commission, *Submission on Second Review of the Police Integrity Commission Act 1996*, 31 August 2010, [2.29].

inevitably a resource burden involved in responding to such requirements for the production of information. It is only in recent years, since the extension of the PIC's jurisdiction to cover the Commission, that it has had to respond to such requirements and doing so has inevitably diverted its senior personnel from their other functions. It would be reasonable to expect that, in the absence of additional funding, this will have some impact on the Commission's outputs in other areas of its operations, at least until a more mature integrity framework has developed internally at the Commission and its record-keeping in some areas is improved. It is important to emphasise that the public interest is served by ensuring the utmost integrity of the Commission's operations as well as by maximising the effectiveness of its criminal and financial investigation functions.

⁴⁵ NSW Government, *Review by the Minister of the Police Integrity Commission Act 1996*, 2011, NSW Government, Sydney, Outcome 11, p. 28.

CHAPTER 12 – Oversight by Parliamentary Committee

278 The ICAC, its Inspector, the PIC and its Inspector are subject to oversight by Parliamentary Joint Committees. In the case of the ICAC and its Inspector the committee is called the Committee on the Independent Commission against Corruption and in the case of the PIC and its Inspector, the Committee on the Office of the Ombudsman and the Police Integrity Commission.

279 Although the confidential nature of much of the work the Commission performs does not lend itself to parliamentary scrutiny of its operational activities, its activities in general terms do. In my opinion, particularly because of the nature of the extraordinary powers the Commission is entitled to exercise, both in the investigation of crime and in its function of recovering the proceeds of crime, some direct oversight by Parliament is particularly desirable. While there is some existing oversight via the Legislative Council Estimates process, in my view this should be supplemented by a dedicated committee whose members will have the capacity to develop some familiarity with the Commission's affairs over time.

280 There was near-unanimous support for some form of direct parliamentary oversight of the Commission by those to whom I spoke. One notable exception was the Member for Maroubra, the Hon. Michael Daley MP, who was the Minister for Police between December 2009 and March 2011. Mr Daley's submission noted that he believed the Commission should remain an exception to the principle (which he supported) of parliamentary oversight of public bodies. His reasons for this were first, that the Commission is subject to the PIC's oversight, which he suggested should continue; second, that a Commission representative appears before the Legislative Council's Estimates hearings to be examined each year; and third, that there is significant utility to the Commission and its activities remaining covert. Mr Daley submitted that parliamentary oversight may erode the Commission's covert nature and would not add anything useful

to the supervision of the Commission. Mr Bradley accepted that parliamentary oversight of the Commission would create a perception of greater transparency, but suggested that many State parliamentary committees were used to embarrass Ministers by examining public servants, and that many members of such committees did not bring a lot of expertise to their roles. In a letter to me dated 14 November 2011, Mr Singleton stated his belief that public confidence in, and appropriate knowledge of, the Commission could be enhanced through a parliamentary committee process.

281 A parliamentary committee charged, amongst other things, with examining the Commission's Annual Report, would enable parliamentary consideration of the Commission's description of patterns or trends in the nature and scope of drug trafficking and organised and other Crime that have come to the Commission's attention in the course of the past year, together with any recommendations for law reform. Such a description, and recommendations for law reform if any, are required to be included in the Commission's annual report, pursuant to s. 31(2)(b) and (c) of the NSWCC Act. The Commission does include the requisite description in its Annual Report, although the length and detail included in the relevant section has fluctuated over time. In recent years there has been something of a downward trend: this section occupied approximately seven pages in the Commission's Annual Report for 2001-2002 and four pages in its 2002-2003 Report, but only just over one page in its 2009-2010 and 2010-2011 Annual Reports. The Ombudsman's submission to the Inquiry similarly noted a significant lessening in detail in the operational information provided when comparing the Commission's 1993-1994 Annual Report with its 2009-2010 Annual Report.

282 Another reason I favour the extension of parliamentary committee oversight of the Commission is that such a committee would provide a body, independent of Government, to whom the Inspector whose appointment I have recommended could report. Both the ICAC and PIC Inspectors report in this manner.

283 I therefore recommend that the Parliament be requested to form a Joint Committee in relation to the Commission and its Inspector. I consider it important that there should be no perception of parliamentary interference with the investigative conduct of either the Commission or the Inspector. The Committee should have similar functions to those set out in s. 95 of the PIC Act, with the exception of s. 95(1)(d). In lieu of the particular matters set out in s. 95(2)(a), (b) and (c) of the PIC Act, the lack of authority should relate to reconsideration of decisions of the Management Committee or Inspector, reconsideration of compromises in litigation subject to the approval of the Court under the CAR Act and operational decisions or procedures in relation to a particular reference or investigation.

CHAPTER 13 – Submissions received

284 Not many formal submissions were received but in fairness to those who took time and trouble it is appropriate I make some reference to them, addressing first those submissions made on behalf of organisations. I have dealt in the next chapter with those who have made particular complaints.

NSW Bar Association

285 The submission, over the hand of the Association's President, Mr Bernard Coles QC, referred to a view amongst members of the legal profession that the Commission suffers from an incomplete adherence to internal protocols as exemplified by the proceedings involving Mr Standen. It was submitted that there should be greater external oversight to restore public confidence. The submission referred to questions concerning the Commission's administration of the CAR Act and the possibility that, in relation to obtaining orders by consent, it was not complying with the law. It noted the potential for abuse of the currently relatively informal process of settlement negotiations at the Commission. It suggested that the asset recovery function does not always fit comfortably with the criminal investigation function and submitted that consideration should be given to the establishment of structural boundaries, either by "Chinese walls", separate departments, or an entirely separate body, to deal with asset recoveries.

286 The Bar Association recommended the creation of the office of Inspector General to oversee the Commission and the provision of parliamentary oversight. It submitted that the Commissioner, Assistant Commissioners and senior investigative staff be appointed on fixed term contracts, to guard against the perception that many of the problems at the Commission "stem from the lack of critical internal assessment of personnel as a result of comfortable familiarity built over many years". Finally, the Bar Association supported the continuation of oversight by the PIC.

287 Most of the submissions made by the Bar Association have been, in one way or another, incorporated into my recommendations.

Law Society of NSW

288 The submission, over the hand of the Society's President, Mr Stuart Westgarth, made reference to the extensive powers exercised by the Commission and its virtually unlimited secrecy provisions and pointed to the potential for serious misconduct. The submission sought greater oversight of the Commission by an Inspector General and a parliamentary committee. I am making recommendations which meet both these proposals.

NSW Ombudsman

289 The submission by the Ombudsman, Mr Bruce Barbour, drew attention to the lessening of detail in the Commission's Annual Reports in relation to its criminal investigative work over time, specifically referring to the 2009-2010 report compared to the 1993-1994 report and to the lack of any detail as to how complaints to the Commission are recorded and managed. The Ombudsman also queried whether the Commission is accurately reporting the amount of assets which potentially could be seized under the CAR Act.

290 The submission referred to the absence from the 2003-2004 annual report of reference to what was said to be a loss of \$300,000 in the investigation of money laundering and also to the "watershed moment" when Mr Standen was arrested in 2008, resulting in focused public discussion about "concerns" people held about the Commission.

291 The 2008 legislation, which brought the Commission within the jurisdiction of the PIC was referred to and the submission commended the Commonwealth model under which ACLEI oversees the ACC and the AFP. The Ombudsman noted that it is difficult to measure the effectiveness of the Commission. He suggested that it may be too early to evaluate the success or otherwise of PIC's oversight of the Commission.

The Ombudsman submitted that, due to the secret nature of the Commission's operations, the body providing oversight should be able to look beyond complaints and investigations, and be empowered to audit the functions and general procedures of the Commission on a regular basis. He advocated the subjection of the Commission to oversight by a parliamentary joint committee.

292 I believe that the recommendations made in this report should, if fully implemented, overcome most, if not all, of Mr Barbour's concerns.

Casino, Liquor & Gaming Control Authority

293 The submission, over the hand of the Authority's Chairperson, Mr Chris Sidoti, indicated that the Authority has contact with the Commission in relation to the statutory requirement that it ensures its management and the operation of the Casino remains free from criminal influence or exploitation. Representatives of the Authority also attend regular meetings hosted by the Commission on money laundering. The Authority seems to regard all its contacts with the Commission as satisfactory and had no particular submissions to make in response to the Terms of Reference.

Mr Peter Breen

294 Mr Breen, a lawyer and former member of Parliament, who has long taken an interest in the Commission, made a lengthy and detailed submission. He referred to Commission officers as being regarded as "cowboys". He referred to a perception that the Commission fails to give prospective witnesses the benefit of independent legal advice and he said that "from a defense lawyer's point of view, there is a consensus" that Crime Commission witnesses cannot be trusted to give truthful evidence in circumstances where they have been compromised in some way, especially in relation to protecting assets that might be seized as the proceeds of crime, if they do not cooperate with investigators. He claimed, in effect, that sometime potential witnesses are provided with lawyers "friendly" to the Commission, thereby compromising their independence. He asserted that it was naïve to think that the civil and criminal roles

performed by the Commission could be properly sequestered from each other and that it was self-evident that “horse trading” would take place whereby the two roles were improperly blended.

295 Although it would be impossible for me to investigate all the matters raised by Mr Breen given their general nature, it might well be that at least some of them are perceived to be true. The evidence of someone who has been obliged to provide information to the Commission could be undermined by that circumstance, but this would be a matter for the trier of the facts. Nothing which came to me during the Inquiry suggested that any witness has given evidence to the Commission, false or otherwise, as part of a deal to preserve his assets. In relation to the provision of lawyers, I was informed by Mr Bradley that usually witnesses are encouraged to have legal representation and that panels of suitable solicitors are provided from time to time by the Law Society on request. I called for documents in relation to the provision of lawyers. It appears that the Commission’s approach is to ask the Law Society’s Solicitor Referral Scheme to provide the witness with a suitable list of choices.

296 A person giving evidence at a Commission hearing may be represented by a legal practitioner: s. 13(4). Section 15(1) of the NSWCC Act provides that a witness who is appearing or about to appear before the Commission may make an application to the Attorney General for the provision of legal or financial assistance, as may a person who proposes to make, or has made, an application to the Supreme Court under s. 19(2). The test for the provision of such assistance is set out in s. 15(3). In appropriate cases where a witness cannot afford a lawyer, or has difficulty affording an existing legal representative, the Commission seeks to facilitate an application for assistance under s. 15 via communication with the Legal Services Branch of the Department of Attorney General and Justice, and I have reviewed a sample of such correspondence. I also inspected transcripts of the forms of opening used by Mr Bradley and Mr Singleton in commencing a hearing of the Commission and note that Mr Singleton’s formulation specifically advises the witness that, ordinarily, he would be

given the opportunity to ask his lawyer for assistance or advice at any time.

- 297 It was suggested by Mr Breen and some others in the course of the Inquiry that the services of the Legal Representation Office within the Department of Attorney General and Justice, which was established in 1994 to provide advice and representation in relation to the Wood Royal Commission and currently provides assistance to persons subject to the coercive powers of PIC or ICAC, should be made available to witnesses appearing at Commission hearings. Mr Bradley was not in favour of this suggestion. It does not appear to me that existing arrangements to facilitate representation are inadequate, though I agree it would be inappropriate for the Commission to be referring witnesses to particular lawyers.
- 298 Whilst I accept that many sections of the CAR Act leave scope for negotiation, in many cases that could be legitimate. Illegitimacy would only arise if and when there was a blurring between the Commission's criminal investigation and assets confiscation functions. I hope that the recommendations I make will avoid this.
- 299 I respectfully disagree with Mr Breen's contention that the Commission should not have powers in relation to crimes not involving illegal drugs. Although a high proportion of crime investigated by the Commission has some connection with illegal substances, it has been made clear during the Inquiry that in relation to other very serious criminal activity, murders for instance, it has performed extremely important investigative functions not otherwise available to the police. There is, in my opinion, no reason to restrict a continuing role in this regard.
- 300 I also disagree with the proposition that the power to confiscate assets should not be exercised until criminal proceedings are finalised. There are, of course, well-recognised dangers in relation to confiscation proceedings which are referred to in this report, but, in my opinion, with proper safeguards in place, there is no reason not to confiscate assets

before the completion of criminal proceedings. In saying this, I am aware that in a matter to be heard in the Court of Appeal on 6 December 2011 (*New South Wales Crime Commission v Lee*), it will be argued that the Commission should be prevented from seeking orders for the examination of person before an officer of the Court under the CAR Act while they await trial on related matters.

301 Mr Breen referred to two identifiable cases, which I have investigated and refer to in the following chapter.

Mr Peter Clark SC

302 Mr Clark has been earlier mentioned as the principal author of the Project Rhodium report. He referred to the perception of an entrenched culture in the Commission that the end justifies the means. He said there was some evidence of this, creating “an almost flippant attitude to protocol and risk management”. He asserted that the hands-on role of the Commissioner was “an inhibitor to the true functions of the head of a law enforcement agency”, and he argued for a better management structure, including a more in-depth role for the Chairman of the Management Committee. He did not favour an Inspector-General model, saying “it is a very difficult role to undertake and few can do it well. They are either seen as rubber stamps for the organization or alternatively a hindrance to the daily functions of the agency”. He favoured strengthening the Commission’s internal audit program and appointing independent persons to the IARC.

303 As to the role of the Commission under the CAR Act, Mr Clark submitted:

“This dual role creates a multitude of difficulties in a small agency with limited management structure. For example the NSWCC relies heavily on informers. Whilst the reward of these persons and any confiscation proceedings were said to be kept separate, they were continuing strains which produced outcomes that had the appearance of ‘all-in deals’. Rewards were used to pay confiscation liabilities. The amount owing to the Crown was on one occasion amortized and subsequently satisfied by the informant by way of reward.

Such a situation is quite unsatisfactory. It can lead to arrangements where if the information provided by the person is

found to be correct, items of property which otherwise might be confiscated can be retained by the informant or relatives of the informants. It is tantamount to buying evidence. It compromises the interests of the Crown and the notion that those who profit by criminal activity should not be able to enjoy the proceeds.”

- 304 In Mr Clark’s submission the two functions should be undertaken by different agencies. His concerns were, of course, similar to those of others I have referred to. I was particularly disturbed by his statement that confiscated assets, on one occasion, were amortized to satisfy rewards and raised the question with Mr Bradley who conceded that amortization had occurred in a case where it was convenient for this to happen. He assured me that the reward was separately assessed in accordance with established protocols and happened to coincide with the value of an asset under restraint. I have no reason to doubt this explanation but did not have the time to investigate it further.
- 305 I recommend, however, that such a situation should never be permitted to recur. It was certainly one where a perception of the improper blurring of the two principal functions of the Commission could readily arise.
- 306 Although I have stopped short of recommending that the two functions should be carried out by separate standalone agencies, the recommendations I make should provide sufficient oversight and transparency to ensure that the perceived dangers do not arise.
- 307 Dr Michael Kennedy, who heads the Bachelor of Policing Programme at the University of Western Sydney made submissions in relation to events involving the Commission of which he had personal knowledge. However, they occurred a long time ago (of the order of 20 years) and I decided that they did not fall within my Terms of Reference.

CHAPTER 14 – Particular Complaints

- 308 It is apparent from what I have said that whilst I have encountered much praise for the work of the Commission, there has also been not inconsiderable criticism. The criticism has focused not on the achievements of the Commission, which are undoubted, but on its processes and procedures exemplified by Mr Clark's phrase, "the end justifies the means". The extreme danger presented by this culture is demonstrated in the Standen case. In my opinion, an "end justifies the means" approach should never be tolerated in a public agency, let alone one with the extraordinary powers possessed by the Commission. Without proper oversight and transparency such measures, highly desirable in themselves as an all-out assault on crime, can be bought at too high a price. Having said that, I should add that while a few of the matters which I have considered during the course of the Inquiry reflect badly on the Commission (Mr Standen being a case in point), mostly those which may be perceived to reflect adversely, in truth, do not do so.
- 309 A good example of the latter is a case referred to me by Mr Breen whose attention, not unreasonably, was attracted to an article in *The Sun Herald* published on 13 November 2005 under the headline "The drug baron who paid \$5m then walked out of jail".⁴⁶ The report concerned the sentencing in the District Court of Mr Ian Robert Munn.
- 310 Mr Munn had been sentenced on 6 May 2005 to imprisonment for a term of three years with a non-parole period of 12 months to date from the date of his arrest and entering custody on 12 November 2004. His offences were cultivation of 1,591 cannabis plants and supply of 30 kilograms of cannabis leaf. The judge took into account one offence of having \$600 in his possession attributed to the supply of illegal drugs.

⁴⁶ Alex Mitchell, "The drug baron who paid \$5m then walked out of jail", *The Sun Herald*, 13 November 2005, p. 11.

311 The judge, in his remarks on sentence, unexceptionally took into account pleas of guilty, previous good character, and cooperation with authorities as mitigating factors. As aggravating factors, again unexceptionally, he took into account the large number of plants under cultivation and the large quantity of cannabis leaf involved in the supply charge. Controversially, his Honour also took into account as a mitigating factor the circumstance that assets of the offender had been confiscated by the Commission. In effect, his Honour regarded this as an extra-curial punishment which, on well-established principles, he was entitled to take into account. To the extent he did this he was probably acting contrary to the decision of the Court of Criminal Appeal in *R v Chan* [1999] NSWCCA 103, a case which was obviously not brought to his attention. The matter was subsequently put beyond any doubt by the *Crimes (Sentencing Procedure) Amendment Act 2010*, which inserted into the *Crimes (Sentencing Procedure) Act 1999* s. 24B:

“Confiscation of assets and forfeiture of proceeds of crime to be disregarded in sentencing

- (1) In sentencing an offender, the court must not take into account, as a mitigating factor in sentencing, the consequences for the offender of any order of a court imposed because of the offence under confiscation or forfeiture legislation.
- (2) In this section:
confiscation or forfeiture legislation means the following:
 - (a) the *Confiscation of Proceeds of Crime Act 1989*,
 - (b) the *Criminal Assets Recovery Act 1990*,
 - (c) the *Proceeds of Crime Act 2002* of the Commonwealth,
 - (d) any other law prescribed by the regulations for the purposes of this definition.”

312 Perusal of the Commission file in respect of Mr Munn reveals that the value of assets confiscated was approximately \$500,000; not \$5 million as the newspaper report claimed.

313 Importantly, for the purposes of this Inquiry, nothing in the circumstances of Mr Munn’s case reveals any untoward behaviour by the Commission. He was charged, prosecuted and sentenced in the usual way, the judge

giving detailed reasons for the sentence he imposed. There is no suggestion that the charges faced by Mr Munn were reduced as a result of the assets forfeiture, nor that the Commission played any role whatever in the submission to the sentencing judge that the forfeiture of assets was to be regarded as a mitigating factor. The Crown did not appeal against the sentence.

314 Mr Breen also raised the case of what he referred to as “four brothers” who became witnesses for the Commission in a number of unrelated crimes involving gangs of persons of Lebanese extraction.

315 According to Mr Breen’s submission, the brothers were “no-billed on kidnapping and ransom charges as well as the drugs charges”. They also secured the exclusion of a number of valuable properties set to be confiscated by the Commission as the proceeds of crime.

316 This matter was identifiable and I asked the Commission to produce papers related to it. What was produced was a letter to Mr N R Cowdery QC, then the DPP, dated 28 May 2004 and a report from an officer of the Commission, Mr Robert Davis, to Mr Bradley dated 11 September 2007 to which was attached draft Consent orders in respect of proceedings under the CAR Act.

317 The persons referred to as the “Brother H” were Ahmad Hannouf, Rabbi Hannouf, Haissam Hannouf and Wahib Hannouf. As appears from the documents referred to:

- (a) The Hannouf brothers were arrested in January 2004 and charged with a number of serious offences which included kidnapping, manufacturing of prohibited drugs and armed robbery.
- (b) Collectively the Hannouf brothers subsequently provided the police with 49 statements relating to the following crimes:

“The murder of Ahmed FAHDA on 30 October 2003 at a Punchbowl petrol station;
A shooting at Rogues niteclub on 30 June 2002;

A shooting at a Lebanese restaurant on 11 May 2003;
The history of the RAZZAK and DARWICHE family dispute which has resulted in numerous shootings including the murder of Ali ABDULRAZZAK on 29 August 2003;
Manufacture and supply of firearms by an ex-military male known as 'Gus';
The criminal activities of Fadi EL-JAMAL;
The shooting of Ali SKAF by Ahmed DIB in 2002;
The shooting of Rabbi DIAB in Roberts Park, Punchbowl;
HANNOUF's involvement in the purchase of a pill press machine;
Stolen Commonwealth Bank cheques;
The criminal activities of Tony HADDAD;
Serious assault on Ali NOIR;
Shooting of Wahib HANNOUF by Bassam DARWICHE;
Drug supply of associates including 'Asian James' and 'John' from Wollongong;
The importation of firearms by Ali METLEG;
HASHLAN importing firearms and tobacco."⁴⁷

- (c) The statements led to a number of arrests.
- (d) In return for an agreement to give evidence in a number of cases, the Hannouf brothers were granted immunity from prosecution, given new identities and relocated.
- (e) At the time of their arrest the Hannouf brothers were estimated to have assets of about \$2,000,000.
- (f) Realization of their assets (pursuant to confiscation action taken by the Commission) between June and September 2004 produced the net sum of \$601,565.59.
- (g) The remaining asset, a property at Bankstown was sold in August 2007 and a net sum of \$1,180,948.55 was deposited with the Public Trustee.
- (h) Consent Orders agreed to by the Commission were made by a Deputy Registrar on 3 September 2007.
- (i) The consent orders seem to reflect the following paragraphs in Mr Davis's report to Mr Bradley:

"After consideration of the circumstances of the matter, the Commission agreed to settle the matter by way of an assets forfeiture order in respect of \$500,000 of the funds held by the Public Trustee, subject to \$200,000 being paid to the Commission for its costs and \$11,000 being paid to

⁴⁷ Letter from P Bradley to NR Cowdery dated 28 May 2004.

Andrews on behalf of the legal expenses of the Hannoufs. This provided a net amount to the Crown of \$489,000.

Due to the fact that the Hannouf brothers had contracted to purchase the service station and needed all of the proceeds from the sale of the Bankstown property to complete the purchase, the Commission agreed that the Public Trustee could advance \$489,000 to the Hannouf brothers, subject to second mortgage security for a fixed term of three years, interest free.

If the Commission sought to litigate the matter, the final realization may not result in a greater amount than that negotiated. To prove all the different offences against each brother would require significant costs in preparation and running a trial. In all likelihood, the Court would probably agree to fund the Hannouf brothers' defences; therefore hundreds of thousands of dollars could be spent from the estate of \$1.18 million. Any final orders may prove to be hollow, as the balance of funds left may not satisfy any orders made.

Confirmation of the settlement is sought. A copy of the Consent Orders is attached.”

- 318 In respect of the indemnity against criminal prosecution, the Commission seems to have done no more than provide the DPP in May 2004 with relevant information. That aspect of the matter cannot reflect on the Commission as the decision maker was the Attorney General relying on a submission from the DPP.
- 319 There is a published Interagency Protocol for Indemnities and Undertakings approved by the Attorney General (“Interagency Protocol”).⁴⁸ The Interagency Protocol records that the Commission has agreed to submit its applications to the Attorney General through the DPP. Any request, recommendation or advice from the DPP is briefed to the Crown Advocate to advise the Attorney General. The Interagency Protocol is meant to ensure that the DPP is able to alert the Attorney-General in the event of any disagreement between agencies in relation to the terms of an indemnity and the Crown Advocate’s involvement means that even if, contrary to the Protocol, the Commission were to approach the Attorney

⁴⁸ *Criminal Practice and Procedure NSW*, Vol. 3, 28 PRACTICE NOTES AND GUIDELINES, Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW), Appendix C – Forms of Immunities [28-25,220] (25 November 2011).

directly in relation to an indemnity, the matter should be referred to the DPP for consideration.

320 The settlement of the CAR Act proceedings three years later is in a different category. Consistent with what I have said earlier, the Commission had no entitlement to deduct its own costs and expenses from restrained property and the Court in the absence of appropriate evidence should not have made orders by consent. To that extent the involvement of the Commission, in light particularly of recent authority, was wrong and should not recur. However, the compromise itself does not appear to be unreasonable, certainly not corrupt, and there does not appear to have been any blurring of the Commission's two functions.

321 Another matter drawn to my attention emerged in the Hansard of a meeting of the Senate Legal and Constitutional Affairs Committee on 22 February 2011. In the course of an exchange with the Commissioner of the AFP, Mr Negus, Senator William Heffernan was recorded as saying:

"You have my full sympathy in the important role that you play in knowing who to trust, but if you are dealing with an agency that actively negotiates with criminals to share the proceeds of crime – in recent investigation which was on the front page of some of the papers someone in the New South Wales Crime Commission allegedly let a major crime family, which I named earlier and will not name again, know that there was a bug in the house and they were heard discussing it on the bug before they found the bug – wouldn't this raise concerns for the risk of both blackmail entrapment and the exchange of information that should not be exchanged with the criminals, and wouldn't that put your agency at risk?

...

It certainly is not in return for protection from criminal proceedings as it is with the New South Wales Crime Commission. You do it after the capture and there they are. By the way, with all these drive-by shootings and shooting people in the leg and the knee et cetera, it is almost Al Capone times in parts of Sydney. There was a recent case in NSW where the criminal family involved was part of the same criminal families that are negotiating with the New South Wales Crime Commission to avoid prosecution in return for half the proceeds: 'Whoops, we've caught that. Give us half of that \$10 million. You're let off on that crime'. Now the family goes off and commits a couple more; they get away with it; then they get caught again: 'Oops, we'll negotiate and take half that money'.

Where does that lead to? What about young policemen in the New South Wales Crime Commission? I have spoken to people in the New South Wales Crime Commission who are concerned about the integrity because of the temptation surrounding these negotiations. Where does that leave the Australian government and the Australian police and the nation in highly sensitive security and terrorist type exchanges of information, where you know there are negotiations by a major crime authority with criminals for money, part of which is used to fund the criminal agency? Isn't the risk of temptation increased exponentially for entrapment, blackmail et cetera in those sorts of proceedings?"⁴⁹

- 322 I invited Senator Heffernan to provide me with any documents or other material held in relation to the matters he raised and have received no reply. It seems likely that the Senator was doing no more than reflect what he had been told or had been reported in the media, symptomatic again of the perception even by a person holding high office, that the Commission was behaving in a way not appropriate for a statutory agency exercising wide and important powers. In any event, I hope that the recommendations made in this report could significantly reduce, if not eliminate, any basis for the views obviously held by the Senator.
- 323 Under cover of a letter from Frank Nolan & Associates, solicitors, I received a 12 page document from a Mr Warren Austin Richards, presently on remand in custody, in respect of alleged drug offences. The document was accompanied by a folder containing copies of court documents in a number of proceedings involving Mr Richards as a party or as a witness.
- 324 In substance, Mr Richards complains that the Commission wrongly disclosed to Sydney Thomas Finnie and Graham Kent Fowler information held by the Commission in relation to Mr Richards's property and financial affairs. This information permitted Mr Finnie and/or Mr Fowler to perpetrate frauds upon Mr Richards as a result of which he suffered loss. According to Mr Richards, the improper disclosure occurred in, or about, early 2003.

- 325 Mr Richards's document does not name any officer of the Commission alleged to be guilty of improper conduct, but it is plain that he contends that such conduct must be inferred from all the circumstances.
- 326 The material sent to me certainly contains evidence suggesting that serious frauds were perpetrated upon Mr Richards by Mr Finnie and Mr Fowler. However, it is obviously very difficult to investigate the complaint after the lapse of nearly nine years. The matter was indeed placed in the hands of the police in 2007 and the material sent to me includes a letter from Detective Senior Constable Hall to Mr Richards's solicitor, Mr Frank Nolan, stating that police had decided to terminate the investigation. What the police were actually investigating is not entirely clear but it does not seem that it encompassed the conduct of the Commission or any of its officers.
- 327 I note that earlier this year, proceedings instituted by the Commission under the CAR Act against Mr Richards and one John Mills Graham were finalised by the making of Consent Orders in the Supreme Court. I also note that upon receipt of Mr Richards's documents, I called upon the Commission to provide relevant information in its possession. Although a considerable number of documents were produced to me, none of them provided any support for Mr Richards's claim.
- 328 In the circumstances, while Mr Richards may, or may not, have a genuine grievance, I feel unable to take the matter further. I believe that the material sent to me does not, within the Terms of Reference, provide evidence that members of the staff of the Commission or their associates have been involved in criminal activity or serious misconduct.
- 329 David Sarikaya complained, in a detailed submission, that the Commission had established systemic procedures which amounted to an abuse of the

⁴⁹ Australia, Senate, Legal and Constitutional Affairs Committee, *Hansard*, 22 February 2011, L&C 172-173.

CAR Act and had colluded with members of the NSWPF to maliciously prosecute or persecute him. His principal complaint appeared to be in relation to what he claimed were offences under ss. 317-319 of the *Crimes Act 1900* committed by members of the NSWPF in relation to what he claimed were five sets of 83 charges brought against him. The conduct of the NSWPF falls outside my Terms of Reference.

- 330 The abuse of the CAR Act alleged related to two applications made by the Commission for a proceeds assessment order against Mr Sarikaya. An inspection of the Commission's files in the matter reveals that a restraining order was first entered in December 2009, following which Mr Sarikaya sought review pursuant to s. 10C of the CAR Act. On 27 April 2010 the Commission filed a Notice of Motion seeking a new restraining order. On 5 July 2010, Davies J set aside the first restraining order and made a further restraining order. On 20 October 2010, Mr Sarikaya applied by Notice of Motion for orders pursuant to s. 10C that this second restraining order be set aside.
- 331 Consent orders resolving the litigation between the Commission and Mr Sarikaya were entered on 31 January 2011, pursuant to which the second restraining order was set aside, Mr Sarikaya's Notice of Motion and the Commission's application for a proceeds assessment order were dismissed. The Court noted that in consideration for the orders, Mr Sarikaya released the Crown and the Commission from any claim of damages in consequence of making the first restraining order, the second restraining order or otherwise. Both parties were to pay their own costs.
- 332 Mr Sarikaya's complaint in relation to the Commission's conduct amounted to an allegation that, in applying for the restraining orders and associated orders, it had relied on false, misleading and deceptive information provided by the NSWPF. The Commission's records indicate that several sets of charges were laid against Mr Sarikaya. The first set of relevant charges, laid by police on 25 September 2009, were all withdrawn on 29 March 2010. Further charges laid on 4 February 2010 were dismissed in

the Local Court on 26 August 2010. These were the charges that were relevant to the second restraining order. Additional charges laid on 2 November 2009 were withdrawn on 6 April 2010 and charges laid on 15 April 2010 were withdrawn or dismissed on 19 January 2011. The Commission subsequently consented to orders which had the effect of releasing Mr Sarikaya's assets from any form of restraint.

333 The Commission's records do not suggest any improper conduct on the part of Commission staff in Mr Sarikaya's case in initially relying on information supplied by the NSWPF when applying for the restraining orders. The matter was referred to the Commission by the Police Assets Confiscation Unit to investigate for potential confiscation action only a short time before proceedings for a restraining order were commenced in 2009. An application for a restraining order must often be made quickly, and must be supported by an affidavit deposing to a relevant suspicion and the Court must be satisfied that the grounds for suspicion are reasonable: CAR Act s. 10A.

334 Any deficiencies in the police case against a defendant in CAR Act proceedings will not necessarily amount to a deficiency in the Commission's case, providing (in the case of an application for a restraining order) that the authorised officer's suspicion is reasonably held. The affidavit of Jon Spark supporting the application for the first restraining order in Mr Sarikaya's case deposed to certain suspicions and annexed a police facts sheet in support. The Court of Appeal has held that the mere fact that a police officer charges a person with an offence is not a basis for a reasonable suspicion of serious criminal activity, but is simply evidence that some other person had such a suspicion or belief: *NSW Crime Commission v Vu* [2009] NSWCA 349 at [39]. However, the Court also held in *Vu* (at [49]-[51]) that an affidavit was capable of disclosing reasonable grounds for suspicion where it is based on information from an identified police officer who was involved in the investigation, who had access to all the relevant information, and who accepted responsibility for

the basic facts upon which the suspicion was based. That appears to have been the case here.

335 On the other hand, there certainly appear to have been problems with the police case against Mr Sarikaya, leading to the laying and withdrawal of various sets of charges. Police conduct in this matter cannot be attributed to the Commission – which can of course proceed with confiscation proceedings even though a person has not been convicted – although it may be that the Commission should have moved more quickly to settle the matter once the charges relevant to its second application for a proceeds assessment order were dismissed in August 2010. A proceeds assessment order cannot be made unless the Court finds it to be more probable than not that the defendant was, within the previous six years, engaged in a serious crime related activity involving an offence punishable by imprisonment for five years or more: CAR Act, s. 27(2). Once the relevant charges were dismissed, the Commission's role was to assess the prospects of satisfying this standard. This it did, and it ultimately consented to orders dismissing its application for the proceeds assessment order. The procedure followed does not appear to me to have involved abuse of the CAR Act.

336 One further issue arising from the Inquiry's inspection of the files in this matter warrants comment. Those files indicate that the Financial Investigation Team Settlement Sheet in the Sarikaya matter, containing the responsible forensic accountant's recommendation as to settlement, was not signed by the forensic accountant until 2 February 2011 (and not by Mr Spark until 8 February 2011), although consent orders were entered on 31 January 2011. The Settlement Sheet records that instructions in relation to the settlement were sought and received from Mr Bradley on 21 January 2011. It appears that the forensic accountant's analysis, recommendation and record of those instructions was prepared after the settlement. It is obviously desirable that the Assistant Director, Financial Investigations and the Commissioner be fully briefed when providing

instructions in relation to the compromise of CAR Act proceedings, and that contemporaneous records of instructions be kept

CHAPTER 15 – Other amendments to the NSWCC Act and CAR Act

337 My Terms of Reference require me to report on whether the NSWCC Act and the CAR Act remain appropriate for securing their objectives. In general terms, I am satisfied that they do.

338 However, in other sections of this report I have made several recommendations which, in my opinion, will achieve structural and management improvement and will provide greater accountability and oversight. I propose to deal in this chapter with the appropriateness of other sections of the NSWCC Act and the CAR Act, raised with me during the course of the Inquiry, for securing the objects of those Acts.

The appropriateness of the terms of the NSWCC Act for securing the objectives of that Act

339 The Inquiry has not been asked to consider the appropriateness of the objects of the NSWCC Act, which are set out in s. 3A of that Act. Principally, the object of the Act is to reduce the incidence of illegal drug trafficking and secondarily, to reduce the incidence of organised and other crime.

340 Section 3A has remained unchanged since its insertion in 1988. It reflects the genesis of the Commission as the State Drug Crime Commission and the seriousness of the harmful consequences of illegal drug trafficking for society, together with the involvement of organised crime in drug trafficking. Drug trafficking continues to be a significant, though not the only, focus of organised crime. The Australian Crime Commission's most recent annual report on Organised Crime in Australia states that most organised criminal activities in Australia are "focussed on illicit drug markets, although organised crime groups also engage in a wide variety of

associated criminal activity including tax evasion, money laundering, fraud, identity crime and high tech crime.”⁵⁰

341 The objects of the NSWCC Act are reflected in ss. 6(5) and 25(6), requiring that both the Commission and the Management Committee, in exercising their principal functions, “give high priority to matters relating to illegal drug trafficking, as far as practicable.” If the objects of the Act were to be amended in future, it would be appropriate to consider repealing these subsections.

Matters that may be referred

342 At the heart of the Commission’s criminal investigatory work is the work that it does pursuant to references from the Management Committee. References are granted pursuant to s. 25(1)(a) of the NSWCC Act and s. 6(1)(a) provides that it is a principal function of the Commission to investigate “matters relating to a relevant criminal activity referred to the Commission by the Management Committee for investigation”. The question of which matters can and should be referred is therefore pivotal to the question of whether the terms of the NSWCC Act are appropriate for securing the objects of the Act by reducing the incidence of the type of crime referred to in those objects.

343 The statutory definitions and tests involved in what may be referred are somewhat vague. As the Commission points out in its first Discussion Paper:

“What the Management Committee must refer, and the Commission must investigate, are ‘matters related to relevant criminal activities.’ The definition of the ‘relevant criminal activity’ – ‘any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, or may be about to be, committed’ – is not an *activity*: it is certain *circumstances* and *allegations*. Thus, in short, references and investigations thereunder are into matters related to circumstances or allegations.” [emphasis in original]

⁵⁰ Australian Crime Commission, *Organised Crime in Australia 2011*, 2011, ACC, Canberra, p. 3.

“Relevant offence”

344 The definition of “relevant offence” in s. 3 has been amended several times, most substantially in 1988 and in 1996. Originally, it was only relevant drug activity, informed by the definition of “relevant drug offence”, that could be referred. The *State Drug Crime Commission (Further Amendment) Act 1988* first introduced definitions of “relevant criminal activity” and “relevant offence”. “Relevant offence” was then defined as:

- “(a) a serious drug offence that involves substantial planning and organisation; or
- (b) an offence—
 - (i) that involves 2 or more offenders and substantial planning and organisation; and
 - (ii) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and
 - (iii) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind; and
 - (iv) that involves theft, fraud, tax evasion, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery or corruption of, or by, an officer of the State, bankruptcy and company violations, harbouring of criminals, or that involves matters of the same general nature as one or more of the foregoing,
- but—
- (c) does not include an offence the time for the commencement of a prosecution for which has expired; and
- (d) does not include an offence for which there is no penalty of imprisonment; and
- (e) does not include an offence for which the maximum penalty of imprisonment is a period of less than 3 years;”

345 The 1996 amendments aimed to simplify the definition of “relevant offence”. The then-Minister for Police explained the problems with the existing definition as follows in his Second Reading Speech:

“The Act currently defines ‘relevant offence’ in a complex manner. It imposes a number of thresholds including a requirement that the offence involves ‘substantial planning and organisation’ and that it involves ‘the use of sophisticated methods and techniques’. These are terms of imprecise meaning and a number of persons subject to investigation have attempted technical challenges to the authority of the commission on the basis that the criminal activity under investigation was not sufficiently sophisticated. Such challenges have invariably been unsuccessful yet have had the

effect of significantly delaying, and therefore impeding, the work of the commission. In such cases the time gained by these delaying tactics is capable of being used to move assets and prejudice the investigation in other ways.

...

The overall effect of these changes will be to reduce the scope for technical challenges to the commission's investigations whilst still ensuring that the management committee reserves the special powers and resources of the commission for the most serious types of offending where ordinary police methods are unlikely to be effective."⁵¹

346 Accordingly, the *New South Wales Crime Commission Amendment Act 1996* deleted the words "that involves substantial planning and organisation" from paragraph (a) of the definition of "relevant offence". The 1996 amendments substituted paragraphs (a1) and (b) of the definition in their current form and inserted the current s. 3(2A) in relation to offences involving fraud.

347 The current definition of "relevant offence" has been unchanged since 1996. It includes three paragraphs. Paragraph (a) creates a category – serious drug offences – that is dependent only on the type of offence committed. The next two paragraphs create categories dependent on the opinion of the Management Committee (paragraphs (a1), where the relevant opinion is as to seriousness of the offence, including by consideration of the matters listed in s. 3(2A); and (b), where the relevant opinion is as to the public interest and the necessity of use of the Commission's functions). There is no longer a judgment involved as to whether a crime is "organised", except to the extent that the degree of organisation is relevant to the assessment of seriousness for the purposes of paragraph (a1) of the definition. There is an exclusion for offences attracting low penalties or where the time to prosecute has expired.

348 It does not appear that the definition of "relevant offence" has caused particular difficulty in relation to securing the objects of the NSWCC Act. However, there have been proposals to amend it since 1996, supported by the Commission. The 2008 Draft Minute, which as noted above was never

signed or endorsed by the previous Government or Minister, contained such a proposal.

- 349 The 2008 Draft Minute suggested that the definition of “relevant offence” be amended to refer simply to “any offence where the maximum penalty of imprisonment for the offence is a period not less than three years”. The Commission now supports such a change, submitting – in its second Discussion Paper – that a statutory definition referable to an opinion formed on a case-by-case basis is unsatisfactory. The Management Committee’s opinion should not relate to whether offences should be classified as “relevant”, but rather to whether matters should be referred to the Commission. The Commission submitted that “there is a case” for thinking that the specific inclusion of fraud, but not other serious and sometimes organised crimes, in paragraph (a1) of the definition of “relevant offence” is anomalous.
- 350 The Second Reading Speech for the Bill corresponding to the *New South Wales Crime Commission Amendment Act 1996* suggests that fraud was included in order to “send a clear signal to those who would embark on serious fraudulent activity”, because of the impact on the community of serious, organised fraud.⁵² It is not clear that the introduction of paragraph (a1) of the definition of “relevant offence” in relation to fraud has had the effect of reducing the incidence of serious fraud, or that the Commission’s focus has shifted significantly as a result of the inclusion of this paragraph.
- 351 As the Commission recognises in its second Discussion Paper, the question of changing the definition of “relevant offence” is to some extent related to the question of whether the objects of the Act should retain a special emphasis on drug trafficking, which as noted above is outside the Inquiry’s terms of reference. Whether or not paragraph (a) of the definition of “relevant offence” is retained, the Inquiry is of the view it would be appropriate to consolidate those matters on which the Management

⁵¹ New South Wales Legislative Assembly, *Hansard*, 31 October 1996, pp. 5700-5701.

⁵² *Ibid.*

Committee is required to form an opinion into s. 25 and to remove them from the realm of statutory definition. It would be possible to reformulate the definition of “relevant offence” to list particular types of offences. This is the approach taken to the “seriousness” aspect of the definition of “serious and organised crime” in s. 4 of the *Australian Crime Commission Act 2002* (Cth): see paragraph (d) of that definition. The ICAC Act also defines “corrupt conduct” in part by reference to a list of matters in s. 8(2). However, the Inquiry’s view is that it is desirable for any revised definition of “relevant offence” to be sufficiently flexible as to capture offences that the Parliament may, in future, decide are sufficiently serious as to warrant significant penalties, with the Management Committee’s opinion as to whether such offences justify a reference to the Commission to be formed separately.

352 The definition of “relevant offence” currently includes the criterion of seriousness in two of its three categories. It is certainly appropriate that only serious crimes be referred to the Commission. The Inquiry believes that a distinction may be drawn between serious crime and organised crime, albeit that there may be occasion for the Management Committee to refer both types of crime to the Commission. There is room for diversity of opinion as to whether a particular crime is “serious”. One measure of seriousness is provided by Parliament, by imposition of maximum penalties for offences. It is appropriate for that measure of seriousness to be carried across into the definition of “relevant offence”. The requirement that offences carry a maximum penalty of at least three years’ imprisonment has been a consistent aspect of the definition of “relevant offence” in the NSWCC Act and draws on the Parliament’s assessment of seriousness.

353 I therefore recommend that paragraphs (a1) and (b) of the definition of “relevant offence” be replaced with a reference to any offence for which the maximum penalty of imprisonment is a period not less than three years, and that, as a result of its inclusion via this new formulation,

paragraph (e) of the definition be removed. I also recommend that s. 3(2A) be repealed.

354 For the avoidance of doubt, it may be sensible for this new formulation of the definition of “relevant offence” to also include a reference to offences for which a penalty at large or life imprisonment can be imposed, in order to avoid any ambiguity concerning the inclusion of offences at common law or attracting life imprisonment.

355 This new formulation of the definition may render paragraph (a) of the definition of “relevant offence” superfluous, insofar as those matters which would be covered by the definition of “serious drug offence” would also be covered by this paragraph of the definition. If the objects of the Act are amended in future to remove the special emphasis on drug trafficking, consideration should be given to removing the concept of “serious drug offence”.

“Relevant criminal activity”

356 “Relevant criminal activity” is defined in s. 3 of the NSWCC Act by reference to circumstances implying, or allegations, that a relevant offence “may have been, or may be being, or may be about to be” committed. The temporal limitation “about to be” is imprecise. Further, given that what may be referred is matters “relating to” relevant criminal activity, the Commission is not in any case restricted to investigating only the “relevant criminal activity”.

357 The 2008 Draft Minute proposed amending the definition of “relevant criminal activity” to read:

“any circumstances implying or any allegations that a relevant offence may have been, may at the time of consideration by the Management Committee be, or may be committed in the next twelve months.”

358 The Inquiry agrees that the “about to be committed” element of the definition of “relevant criminal activity” is unsatisfactory. It could limit the

Commission's capacity to secure the objects of the NSWCC Act, if for example a question arose as to the validity of the Commission's investigation of a crime occurring many months after the related matter had been referred. It is important for the Management Committee to be able to refer, and for the Commission to be able to investigate and disrupt, organised criminal enterprises at their planning or preparatory stages, which may in some sophisticated enterprises occur more than twelve months in advance of the commission of a relevant offence.

359 The Inquiry is of the view that it should be enough for a relevant offence to be foreseeable in order for it to fall within the definition of "relevant criminal activity", without the Commission having to establish whether the timing of its planned execution satisfies the term "about to be" or "may be committed in the next 12 months": a task which would no doubt be difficult or impossible in some cases.

360 The *Australian Crime Commission Act 2002* (Cth) defines "relevant criminal activity" as "any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed ...". I favour the adoption of the formulation "may in future be committed" in the definition, as in the Commonwealth Act. Although introducing a timeframe of 12 months into the definition of "relevant criminal activity", as proposed in the 2008 Draft Minute, would prevent the definition from being open-ended, it is a somewhat arbitrary period and its introduction could cause difficulties in satisfying the Management Committee about the precise timing of an anticipated offence.

361 The policy consideration underlying the proposed inclusion of the 12 month period could better be achieved by limiting the duration of references to a period of 12 months, as discussed below. In that way, foreseeable serious criminal conduct that will not crystallise for more than a year but which is capable of being investigated before then may be referred, but the Management Committee will be required to revisit the question of whether the reference is appropriate after 12 months.

362 Accordingly, I recommend that the reference to “may be about to be” in the definition of “relevant criminal activity” in s. 3 be omitted and the words “may in future be” substituted instead.

The reference power

363 By s. 25(1)(a) of the NSWCC Act, the Management Committee is empowered to refer “matters relating to relevant criminal activities” to the Commission. The formula is a wide one, insofar as relevant criminal activities are defined by reference to circumstances or allegations that relevant offences may be occurring, as discussed above. The breadth of the references granted by the Management Committee to the Commission has varied over time. The Commission’s current practice in drafting references for the consideration of the Management Committee is clearly more rigorous than was formerly the case, and references generally narrower.

364 Section 25(1)(a) has not been substantially amended since its introduction as part of the *State Drug Crime Commission Act* in 1985. However, there is a significant policy question in relation to whether particular topics of concern in relation to serious or organised crime – such as, to take some hypothetical examples, “heroin distribution” or “extortion” in general are, or should be, able to be referred. This is not only a question of whether the terms of the NSWCC Act remain appropriate for securing its objects of reducing the incidence of illegal drug trafficking, organised and other crime, because there is reason to think that the Commission has had considerable success over the years in achieving those objects under the current terms of the legislation. There is also a question of whether, if broader topics of concern could be referred to the Commission, the objects of the Act would be more effectively secured. That is necessarily a speculative question, but I have not seen material sufficient to persuade me that this would inevitably be the case.

365 The 2008 Draft Minute suggested the introduction of the concept of a “serious crime concern” which could be referred to the Commission. “Serious crime concern” would be defined in s. 3 as:

“any circumstances implying, or any allegations, that relevant offences of a particular type or class are being, and are likely to continue to be, committed in an organised, systemic or sustained way so as:

to have, or be likely to have, a significant impact on the community, or

to involve, or be likely to involve, substantial proceeds (within the meaning of proceeds in the Criminal Assets Recovery Act 1990) of criminal activity, or

to make it, in the opinion of the Management Committee, in the public interest that the Commission investigates them.”

366 An amendment to s. 25 would then have inserted, as an additional function of the Management Committee, referring matters relating to serious crime concerns for investigation. The Commission now supports this proposal, which it says would strengthen the fight against organised crime by making it clear that such serious crime concerns may be referred by the Management Committee as well as to more closely define and control broad references.

367 The current reference power in s. 25 does, in the Inquiry’s view, require some identification of some particular offence or offences, or pending offence or offences, before a “matter” relating to a “relevant criminal activity” will be identified and can be referred. If the offence or its nature cannot be identified or described, it will not be possible for circumstances to imply its commission, or for allegations to be made about it. Of course, it may not be possible in any case fully to specify the particulars of the offence or the identity of the offenders at the point at which the matter is referred, but a relevant offence (or offences) must be identified in some way. This means that the Management Committee is able to refer the planning of as-yet unknown criminal offences by a known group of people (particularly in light of s. 3(2), which extends the definition of “relevant offence”). The Management Committee may also refer an unsolved

murder, or the anticipated supply of identified drugs detected as part of a shipment, although those involved are not yet known.

368 As discussed in Chapter 4, I do not think that the Management Committee is able to refer a broad topic or type of offending without a relevant offence (or offences) first having been specifically identified as the subject of allegations that such an offence may have been, may be, or may be about to be committed (or circumstances implying the same). The Management Committee is then able to refer matters relating to such “relevant criminal activities”. The term “relating to” in s. 25(1)(a) is itself broad, but not to my mind so broad as to encompass within a reference every instance of a particular type of offending: there must be some connection between the matter and the “relevant criminal activities” the subject of the reference. If the Commission becomes aware of circumstances or allegations concerning an unrelated matter, it should seek a new reference from the Management Committee.

369 My view on the reference power is reinforced by the fact that the coercive powers of the Commission (such as the power to compel attendance and answers to questions) trespass to a significant extent upon common law liberties, as recognised by the Court of Appeal in the early days of the Commission’s existence in *Mannah v State Drug Crime Commission* (1988) 13 NSWLR 43. As a matter of statutory interpretation, where constructional choices are open, legislation will be construed so as not to encroach upon fundamental common law rights and freedoms: see for example *Evans v State of New South Wales* (2008) 168 FCR 576 at 593.

370 The Inquiry is not persuaded that it is necessary for the Management Committee to be empowered to refer, and for the Commission to be empowered to investigate, broad topic-based references. It has not been suggested by those I have spoken to outside the Commission that the Management Committee should have a power to refer broader matters to the Commission. Over time, such a power would be likely to undermine the effectiveness of the oversight offered by the Management Committee

in relation to the Commission's criminal investigatory functions, in that there could well be fewer references into broader topics. Such a broad power to refer could also make it difficult for the Management Committee to apply the requirements of s. 25(2) concerning the effectiveness of ordinary police methods, discussed below.

371 That is not to say that the Commission cannot investigate criminal problems as opposed to individual offences. It already can and in future it should do so, acting pursuant to references complying with the terms of the NSWCC Act, to the extent other offences constituting such problems are matters related to relevant criminal activities. In circumstances where there are various similar yet otherwise unrelated matters, multiple references can be sought and granted.

372 A further question in relation to the reference power concerns the requirements of s. 25(2), which provides that a matter may only be referred if the Management Committee is satisfied that "ordinary police methods of investigation into the matter are unlikely to be effective". The 2008 Draft Minute proposed replacing s. 25(2) with a requirement that the Management Committee be satisfied that "the Commission's functions may be necessary to fully investigate", that the investigation by the Commission is in the public interest and that the matter is "sufficiently serious or prevalent to warrant its investigation by the Commission."

373 The argument for the removal of the test concerning the ineffectiveness of "ordinary police methods" is premised on the increasing similarity between the Commission's methods and those of the police, so that, with the exception of the Commission's coercive powers, there is no longer much meaning to the test. The Commission has pointed out that s. 25(2) does not require the Management Committee to consider the benefits of the Commission's involvement; rather, it requires attention to what the police are unlikely to be able to achieve.

- 374 The Inquiry is of the view that the requirement that the Management Committee be satisfied that ordinary police methods are unlikely to be effective remains a valuable limitation, ensuring that the Commission is not able to duplicate regular police work and that its extraordinary coercive powers are exercised only in circumstances where existing police powers are unlikely to yield a result. It is precisely because the main difference between the powers of the police and those of the Commission is the Commission's coercive powers that the requirement in s. 25(2) is appropriate. A very similar requirement is found in s. 7C(3) of the *Australian Crime Commission Act 2002*.
- 375 Substituting s. 25(2) with a different test that required the Management Committee to consider the benefits, or possible need, for the Commission's involvement would not provide the same type of safeguard as the existing "ordinary police methods" requirement. This is because there could be benefits to the Commission's involvement in the investigation of many crimes: the Commission has clever staff, dedicated investigatory resources and extraordinary powers. Simply because a majority of the Management Committee perceives the utility of the Commission's involvement does not mean there would be an established need for the Commission to be involved in order to investigate the matter. If a test turning on a perceived need for the Commission's involvement were substituted for s. 25(2), the question of whose understanding of the need should count may also arise.
- 376 The Inquiry therefore favours the retention of the "ordinary police methods" requirement. Consistent with my recommendation in relation to simplifying the definition of "relevant offence", s. 25 is the appropriate place to set out the matters on which the Management Committee is required to form an opinion before referring a matter to the Commission. In view of what I have said about Parliament's assessment of seriousness above, I do not think it is necessary to require the Management Committee to form a separate opinion about seriousness before referring a matter. In order to better secure the object of the Act concerning the reduction of organised

crime, it would be appropriate to require the Committee to turn its mind to the connection between a matter under consideration for referral and organised crime, which could be done by means of a public interest test. In accordance with part of the proposal in the 2008 Draft Minute, I recommend that s. 25(2) be amended to provide that the Management Committee must not refer a matter for investigation unless it is satisfied that the investigation of the matter by the Commission is in the public interest; and that the subsection retain the “ordinary police methods” requirement.

377 In order to provide further guidance for the Management Committee in forming a view as to the public interest and to indicate that the Committee is to consider the ‘organisation’ criterion within the public interest test, I recommend that s. 25(2) (or a new s. 25(2A)) provide that, without limiting the matters that the Management Committee may take into account in deciding whether investigation of the matter by the Commission is in the public interest, the Management Committee is to take into account the following matters – currently set out in s. 3(2A) – pertaining to the relevant offence involved, namely:

- “(a) the number of persons that may be involved in the offence, and
- (b) the degree of planning and organisation likely to be involved in the offence, and
- (c) the person or persons likely to be responsible for planning and organising the offence, and
- (d) the likely involvement of those persons in similar offences, and
- (e) the financial or other benefits likely to be derived from those or other persons from the relevant criminal activity.”

It may also be appropriate to add to this list the prevalence of the relevant offence or type of offence involved and its impact on, or consequences for, the community.

Duration of references

378 It has not been the practice of the Management Committee to impose time limits on references. Instead, it has been the practice of the Commission to treat some references (generally relating to drug trafficking and gangs)

as “stale” after approximately a year, and to seek a new reference in instances where it considers further investigations are warranted. The 2008 Draft Minute proposed insertion of a specific review provision into s. 25, whereby the Management Committee would be required to review each reference on an annual basis, within three months of the anniversary of the granting of the reference, or such longer period (not exceeding two years) as the Management Committee thought appropriate. Such a review was intended to ensure that the problem the subject of the reference still existed, further investigation was likely to have an impact, that the public interest would be served by continuing the investigation and a that a determination would be made to either continue or discontinue the reference.

379 The Inquiry supports this proposal, which would assist in securing the objects of the NSWCC Act by ensuring that references remain likely to be of utility and would also strengthen the Management Committee’s oversight of references. It is appropriate to require the Management Committee not merely to “review” each reference but to decide whether or not to continue a reference, applying the same criteria applicable when the Management Committee first grants a reference.

380 I therefore recommend insertion of a requirement in the NSWCC Act that the Management Committee review each reference on an annual basis, within three months of the anniversary of the granting of the reference, or such longer period (not exceeding two years) as the Management Committee thinks appropriate. Upon review, the Management Committee should be required to determine whether to renew or discontinue the reference, using the same criteria as when the reference is granted. A reference should be able to be renewed more than once. The review requirements should apply to a renewed reference.

Functions of the Commission outside of investigations pursuant to references

Commission-initiated investigations

- 381 The Commission, in its second Discussion Paper, suggested that its capacity to pursue the objects of the Act would be significantly enhanced if it could commence an investigation on its own initiative. The purpose of this proposal is said to be to enable the Commission to react quickly to intelligence received to the effect that a crime is about to be committed, rather than just disseminating information to the police.
- 382 A similar proposal was made in the 2008 Draft Minute, although the purpose was somewhat different: such investigations were to be called “preliminary investigations” and modelled on s. 24 of the PIC Act. Preliminary investigations were to be limited to 90 days unless extended by the Management Committee. The purpose of the proposed amendment was to enable the Commission to obtain material sufficient to enable it to apply for a reference pursuant to s. 26 of the NSWCC Act, including by obtaining telecommunications interception warrants during a preliminary investigation.
- 383 The Commission currently favours a power to self-initiate (as opposed to a power to conduct preliminary investigations), with safeguards imposed by requirements that a decision to commence an investigation be recorded in writing, that the Management Committee be notified within a specified short period and that the Management Committee be empowered to terminate such an investigation. It should be emphasised that the Commission accepts that to make its coercive powers available in a self-initiated investigation would put upon essentially the same footing as the ICAC and PIC, and that there is a fine public policy question for the Parliament involved in whether those powers should be available.
- 384 I believe it to be fundamental that all investigative work conducted by the Commission using its coercive powers, or its powers to intercept telecommunications, is done pursuant to a valid pre-existing reference. If there is a case for the power to self-initiate an investigation, or to make a preliminary investigation before a formal reference, I do not believe it has

been made out. To the contrary, there seems to be ample provision in Sch. 3 for a reference to be obtained as a matter of urgency without a formal in-person meeting of the Management Committee. Neither the Commission nor anyone else has suggested that it has had difficulty in successfully applying for references using s. 26 to date. Further, s. 6(1B) indicates that the Commission's powers of inquiry into matters connected with or arising out of the exercise of its functions are not to be read down as a result of the remainder of s. 6, whether or not those matters are the subject of a reference. Accordingly, I do not support the Commission being given the additional powers suggested either by the name of Commission-initiated investigation or preliminary investigations. There must, in my view, always be the need to first obtain a reference from the Management Committee.

Reviewing police inquiries

385 The Commission was given the function of reviewing a police inquiry "into matters relating to any criminal activity (being an inquiry referred for review to the Commission by the Management Committee)" (s. 6(1)(b1)) in 1988. There have been only a few such matters referred to the Commission, including most notably the police investigation into Leigh Leigh's murder. The 2008 Draft Minute recommended that, in light of the functions of the PIC and the fact that the purpose of this provision is not for the Commission to evaluate the thoroughness of a police investigation, the term "review" should be replaced with "reinvestigate". This appears appropriate, in order to clarify the functions of the Commission in view of the objects of the NSWCC Act. Accordingly, I recommend that the word "review" in s. 6(1)(b1) be replaced with "reinvestigate".

Dissemination of expertise

386 Section 6(1)(d) provides that it is a principal function of the Commission to "disseminate investigatory, technological and analytical expertise to such persons or bodies as the Commission thinks fit". The Commission has suggested that the reference to dissemination of expertise is awkward and that it would be more appropriate to refer to provision of services. Such an

amendment would clarify that the Commission is able to assist other persons or bodies (such as police) via the use of its specialised technology, rather than merely educating such persons or bodies in the use of Commission technology. I have no difficulty in supporting this proposal. I therefore recommend that s. 6(1)(d) be amended to refer to providing investigatory, technological or analytical services to such persons or bodies as the Commission thinks fit.

Participating in taskforces with non-police agencies

387 There is provision in s. 27A for the Management Committee to make arrangements for the establishment of joint taskforces with NSW police, but no other recognition of the Commission's regular engagement in joint work with many other State and Commonwealth agencies. The 2008 Draft Minute proposed to amend s. 6 to make it explicit that the Commission can engage in taskforces with other agencies, including non-police agencies, with the approval of the Management Committee.

388 I support this proposal and so recommend that s. 6 be amended to provide that the Commission can engage in taskforces with other government agencies, including non-police agencies, with the approval of the Management Committee.

Furnishing evidence to the DPP or Attorney General

389 Section 6(2) imposes a duty on the Commission to furnish to prosecuting authorities any evidence that would be admissible in a prosecution for an indictable offence (other than evidence of a relevant offence that is furnished to the DPP pursuant to the Commission's function in s. 6(1)(b)). The literal construction of this provision may produce an absurd – or at least onerous and unworkable – result, requiring the Commission to communicate fragments of evidence it obtains that would be admissible in the event of a prosecution, no matter whether there is any other evidence supporting such a prosecution or whether that prosecution is in prospect.

390 The 2008 Draft Minute proposed removal of the mandatory requirement in s. 6(2), in order to make such releases a matter of the Commissioner's discretion, as to which the Management Committee would develop guidelines. I support this proposal, which would remove ambiguity and enable the Commission to release information at appropriate times, such as once an investigation is completed or sufficient evidence to support a prosecution is obtained. I therefore recommend that s. 6(2) be amended to confer authority on the Commission, in its discretion, to furnish evidence of the type referred to in the subsection to the relevant DPP or Attorney General; and that the Management Committee should approve guidelines for such releases.

Liaison with other bodies

391 Section 7 deals with liaison with other bodies, which is a vital aspect of the Commission's functions. The 2008 Draft Minute recommended that s. 7 be amended in order to clarify that the Management Committee can issue guidelines on the dissemination of information (with the Management Committee to be notified of disseminations after the event), and also to confirm that taskforce personnel may be provided with information without this being a formal dissemination requiring the Management Committee's separate approval. This would clarify s. 7 and the supervisory role of the Management Committee and make better provision for sharing of information within taskforces in which the Commission participates. Provisions for sharing of information within taskforces could be included in guidelines for taskforce operations issued by the Management Committee.

392 The Commission has suggested that s. 7 be further amended to permit dissemination in cases of urgency to such persons or bodies as the Commission thinks fit, provided that such dissemination would not contravene any resolution or guideline of the Management Committee. It appears to the Inquiry that the Management Committee could make guidelines dealing with urgent disseminations in a general way, ensuring that such urgent disseminations are later reported by the Commission.

393 Accordingly, I recommend that s. 7 be amended to provide that the Management Committee can issue guidelines on the dissemination of information (with the Management Committee to be notified of disseminations after the event), and also to confirm that taskforce personnel may be provided with information in accordance with agreed guidelines for taskforce operations without this being a dissemination requiring the Management Committee's approval.

Powers of the Commission

Obtaining documents and things

394 Section 17 confers power on the Commission to obtain documents and things. The 2008 Draft Minute recommended that s. 17 be amended to make clear that the Commission can require persons to take reasonable steps to generate a document from electronic data that does not exist in hard copy at the time the s. 17 request is made. A similar amendment was made to the CAR Act by way of the *Criminal Assets Recovery Amendment Act 2005*.

395 The 2008 Draft Minute also recommended that the section be amended to provide that documents or things produced pursuant to that section must be deposited with the Commission, not merely produced for inspection. This would assist the Commission with forensic analysis of original documents where required. While s. 17A of the Act is clear that if a person objects to production, then the person must deposit the document or thing with the Commission, this requirement does not seem to apply in the absence of an objection. The Commission continues to support both suggestions.

396 Both of these proposals appear likely to clarify the Act in a manner that would enhance the Commission's ability to secure the objects of the NSWCC Act, without substantially expanding the Commission's powers. I therefore recommend that s. 17 be amended to make clear that the Commission can require persons to take reasonable steps to generate a document from electronic data that does not exist in hard copy at the time

the s. 17 request is made; and to provide that documents or things produced pursuant to that section must be deposited with the Commission.

Failure to attend and answer questions

397 Section 18 provides that, when a person is summonsed to appear at a hearing before the Commission, the person shall not fail to attend, be sworn or affirmed, answer a question or produce a document or thing without reasonable excuse (or except as provided by ss. 18A or 18B concerning religious confessions and privilege). “Reasonable excuse” is not defined in the NSWCC Act (nor is it defined in similar provisions creating offences for failure to attend or answer bodies with comparable powers, in s. 86 of the ICAC Act and s. 106 of the PIC Act). The 2008 Draft Minute proposed that s. 18 be amended to insert the words “to the satisfaction of the Commissioner” after “reasonable excuse”.

398 The Commission suggests that the “reasonable excuse” provision, as presently drafted, enables its hearings to be frustrated by delay, because it is unclear how authoritative is a ruling of the Commissioner rejecting such a claim. It submits that the section should refer to an excuse that is reasonable and sufficient to the Commissioner or other person presiding at the hearing and that the Commission should be permitted to take account of all the circumstances of the investigation in question and to balance all relevant factors. This, it submitted, would mean that upon judicial review of a ruling by the presiding member of the Commission that an excuse was not reasonable, whether under s. 19 or otherwise, it would be clear that traditional administrative law grounds applied, and that the Court was not empowered to decide for itself, afresh, whether or not there was a reasonable excuse.

399 The nature of the “reasonable excuse” provision in s. 18 and the review conducted by the Court pursuant to s. 19 of the NSWCC Act was considered by the Court of Appeal in *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423; see also *Z v N (No. 2)* [2005] NSWCA 316 (a

decision from which special leave to appeal to the High Court was refused). In *Ganin*, which was decided prior to the amendments which repealed subsections (4)-(15) of s. 18 and inserted ss. 18A and 18B, witnesses relied on the “reasonable excuse” provisions to refuse to answer questions. President Kirby (Meagher JA and O’Keefe AJA agreeing) made the following observations in relation to the construction of the term “without reasonable excuse” in s. 18(2) (at 436):

“There is no apparent reason to read down exemptions for ‘reasonable excuse’ in s 18(2) of the Act. On the contrary, there is every reason to give the words used their ordinary construction. They simply ask whether the refusal to answer the question was ‘without reasonable excuse’. As Ireland J rightly pointed out, the question is not whether the excuse stated or subjectively conceived was reasonable. It is whether, at the relevant time of refusal to answer the question as required, there was, or was not, a reasonable excuse. In accordance with orthodox canons of construction these words would not be given a narrow meaning. ... They appear in an enactment which, as has been said, amounts to a drastic derogation from the ordinary liberties of citizens. They appear in a subsection which, giving ample meaning to the words ‘without reasonable excuse’, will be defensive of fundamental rights recognised both by the common law and by international law: see *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 (at 420E) per Kirby P and per Clarke JA (at 433).

Of course the ‘reasonable excuse’ must be one relevant to the refusal or failure to answer a question. It is in that context that the phrase appears in s 18(2).”

400 The Court of Appeal declined to adopt a narrow construction of the phrase “reasonable excuse”. President Kirby observed (at 439) that it is “undesirable that different *formulae* should be substituted for that which parliament has enacted”. Nevertheless, his Honour thought it appropriate for the decision-maker to put aside imaginary, insubstantial or very remote fears on the part of a witness in assessing an excuse. He accepted a submission by the Commission that the Court should not decide for itself whether there was a reasonable excuse in the circumstances when reviewing a decision pursuant to s. 19 (at 439), noting the Commission should make the primary decision on the question:

“For the Commission it was put that, if the Court came to this conclusion, it should not substitute its own opinion for that of the

decision-maker. The proceedings in the Court being by way of review, and not a merits appeal, the Court should identify the error and return the matter to the Commission for its decision. For a number of reasons, I think that is the correct course to take. It accords the proper relationship between the Commission and the Court.

...

As well, the Commission, as a body constituted to perform investigatory functions, is likely to have more knowledge of the reasonableness or otherwise of the appellants' now submitted excuses than this Court could muster from its own experience. Where parliament establishes a specialised body, such as the Commission, it is appropriate for this Court to accord great weight to the decision of the Commission, given the knowledge and experience available to it: see *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 184. This is not to forfeit the court's duty to perform the review contemplated by parliament in s 19(2) of the Act. The powers of the Commission are so drastic and exceptional that it is unsurprising that parliament should have provided for such review. But it is to insist that, at least in the first instance, this specialised body should be afforded the opportunity of making the primary decisions."

401 In *Z v NSW Crime Commission (No. 2)* [2005] NSWSC 1388, Johnson J (leave to appeal from whose decision was refused by the Court of Appeal: [2005] NSWCA 316) dealt with an argument that the principles of public interest immunity and fear of reprisals constituted a reasonable excuse. Johnson J concluded that there was no such excuse in the circumstances. After extracting some passages from *Ganin*, he observed (at [34]-[35]):

"Section 19(4) enables the Supreme Court '*in its discretion*', to make an order affirming or setting aside the decision of the Commission. The statutory reference to the Court exercising a discretion in this respect tends to support the view that the function being carried out by the Court is not a narrow one. Likewise, the observation of Kirby P in *Ganin*, above, that the Court may consider whether the person had a '*reasonable excuse*' at the time when the person appeared before the Commission, whether that head of '*reasonable excuse*' was advanced at that time or not.

In the event, I do not consider that it is necessary to explore this question further to determine the present application." [emphasis in original]

402 The effect of the amendment to s. 18 proposed in the 2008 Draft Minute and advocated by the Commission would appear to confine the Supreme Court's discretion pursuant to s. 19(4) (where an application to the

Supreme Court under s. 19 is available), and possibly also pursuant to s. 18AC, in cases where a warrant has been issued for the arrest of a witness pursuant to s. 18AA. The Inquiry is not persuaded that there is a need to confine the Court's oversight of the decisions of the Commissioner (or other person presiding at a Commission hearing) in this way in order to secure the objects of the NSWCC Act, in view of the strength of the Commission's coercive powers and the approach the Court of Appeal has taken to the nature of review of the Commission's decisions concerning "reasonable excuse".

Commission investigators

- 403 The 2008 Draft Minute proposed the insertion of a provision enabling the appointment of Crime Commission investigators, similar to s. 123 of the PIC Act, to enable the Commission to appoint suitably qualified persons as "investigators", with the same powers as constables of police, and make clear that investigators are subject to the command and control of the Commissioner. The 2008 Draft Minute suggested that the numbers of such persons would be limited, that only persons with suitable previous employment experience in law enforcement would be eligible for appointment, that they would be subject to stringent vetting before appointment (how or by whom was not explained) and that their appointment would be subject to the approval of the Management Committee.
- 404 This proposal would replace existing arrangements whereby a few Commission staff, who are engaged, for example, in conducting searches and seizures, are appointed as Special Constables under the *Police (Special Provisions) Act 1901* and in that capacity are subject to the supervision of the Commissioner of Police. The proposed amendment, which the Commission continues to support, would place those staff solely under the Commissioner's command and would remove any blurring of command responsibility in circumstances where the relevant Commission staff are conducting Commission business.

405 The arrangements for PIC investigators in s. 122 and 123 of the PIC Act must be read in the context of the restrictions on PIC employing, or engaging, police officers or former police officers (see s. 10(5) of the PIC Act), and against the related concerns that would presumably arise from placing PIC staff investigating police conduct under the supervision of the Commissioner of Police. The same concerns do not apply to the Commission.

406 The Commission's policy concerning search warrants, entitled "Search Warrants Exhibit Handling Procedures", updated in November 2010 following the Project Rhodium report, specifies under the heading "Execution of Search Warrants" that:

"All search warrants obtained by the Commission, or involving members of staff of the Commission are executed under the control of a member of the NSW Police Force, or respective law enforcement agency nominated by the Assistant Director, Investigations or Financial Investigations.

...

The NSW Police have command of the search warrant and are responsible for the safety and security of all personnel present. All Commission staff will follow the direction of the case officer with respect to safety and security whilst engaged in the search."

407 The Project Rhodium report recommended (Recommendation 2) that the Commission include within its search and seizure procedures clear statements as to the responsibilities of Commission staff in searches and the capacity in which they participate in searches. This was in view of the concern expressed by the PIC in the Rhodium report that clear guidance needed to be provided to Commission officers, so that lines of command did not become blurred in the context of searches. The PIC's June 2011 report evaluating the Commission's response to the Project Rhodium recommendations referred to the above passage as "critical" and stated that the Commission had implemented Recommendation 2 of the Rhodium report.

408 Implementation of a provision for Commission investigators would address the concern regarding blurring of command responsibility for Commission

staff as between the Commissioner and the Commissioner of Police. However, such “blurring” has now been addressed via clarification of the Commission’s own procedures. The creation of Commission investigators with the same powers as police constables would also appear to require changes to aspects of the Commission’s procedures that were deliberately altered in order to clarify the capacity in which Commission staff participate in searches and thereby to address misconduct risks identified by the PIC. Such changes may raise new misconduct risks in the event that Commission investigators, who it seems would not be subject to the direction of relevant police, attend searches with police.

- 409 I am not aware of material suggesting that the revised Commission procedures for searches and seizures are inappropriate. Nor am I persuaded that a new provision for Commission investigators would improve the Commission’s ability to secure the objects of the NSWCC Act. If there is a case for this amendment, it would need to be made out more fully to Government in future, by reference to how any misconduct risks arising would be managed.

Use of evidence given to the Commission

- 410 Section 18B(2), in combination with s. 18B(3)(b), provides that an answer given, or document produced, over objection is not admissible against the person who answered the question or produced the document. Section 18B(3)(e) provides an exception to this position, whereby an answer given or document produced, even over objection, may be used in evidence against the witness “in a proceeding for falsity of evidence given by the witness”. The 2008 Draft Minute proposed amending s. 18B(3)(e) to make clear that the provision applies both to false evidence given to the Commission and in judicial proceedings. This would facilitate charges of perjury or making a false statement on oath (pursuant to ss. 327-339 of the *Crimes Act 1900*) in relation to evidence given by a witness in court that directly contradicts earlier testimony given to the Commission. The Inquiry has no difficulty in supporting this proposal. Accordingly, I recommend that s. 18B(3)(e) be amended to clarify that the provision applies both to a

proceeding for the falsity of evidence given by the witness to the Commission and to a proceeding for the falsity of evidence given by the witness to a court.

- 411 The 2008 Draft Minute proposed, and the Commission supports, amendments to s. 331 of the *Crimes Act 1900*, the ICAC Act and the PIC Act, to provide for comparisons of evidence on oath between those bodies. The Commission has also proposed that its transcripts should be admissible as evidence in a committal hearing (except against the person who gave the evidence). Those proposals fall outside of my Terms of Reference.

Secrecy

- 412 The Commission has submitted that its broadly worded secrecy provision, s. 29, should be amended, in order to:
- (a) clarify that the section applies to the Commission (or at least to its counsel);
 - (b) clarify in s. 29(1)(d) that it is the person who gives the information pursuant to that paragraph whose understanding matters (provided the recipient is told or the circumstances otherwise imply);
 - (c) alter the words “or otherwise in connection with the exercise of the person’s functions under this Act” in s. 29(2) to read “or otherwise for the purposes of the exercise of the person’s functions under this Act or with the approval of the Commission”; and
 - (d) bring s. 29(3) of the NSWCC Act into line with s. 111(3) and (4) of the ICAC Act and s. 56(3) and (4) of the PIC Act.
- 413 As to the Commission’s first proposed amendment, as the remainder of s. 29 refers to natural persons and the Commission’s main concern appears to be that s. 29(1) does not cover counsel, through whom the Commission would ordinarily act, I recommend that s. 29(1) be amended to insert a new paragraph similar to s. 111(1)(b) of the ICAC Act and s. 56(1)(c) of the PIC Act. Those paragraphs extend the coverage of the respective secrecy provisions to include a person who is or was an

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

- 414 I have no difficulty with the second of the Commission's proposed amendments listed above, which I think is intended by the ordinary meaning of the words of s. 29(1)(d) in any case. However, I think the Commission's understanding in relation to the confidentiality of information it gives to others should be made explicit at the time the information is given. I recommend that s. 29(1)(d) be amended to indicate that it is the person giving the information whose understanding that the information is confidential counts, provided the recipient is told of that understanding.
- 415 The third amendment proposed by the Commission in the list above would render the Commission's secrecy provision stricter than that of either the ICAC or the PIC, both of whose provisions use the language "or otherwise in connection with the exercise of the person's functions under this Act": ICAC Act s. 111(2); PIC Act s. 56(2). While I accept that the words "in connection with" are broad and that there are a multitude of examples that could involve a connection with the exercise of a person's functions under the NSWCC Act, the same is true in relation to the exercise of functions under the ICAC and PIC Acts. Whether these will fall within the exception to the secrecy provision is best dealt with on a case by case basis. I am not persuaded that the language of s. 29(2) is inappropriate or insufficient for the Commission's purposes such as to justify the proposed change.
- 416 The fourth amendment proposed by the Commission concerns s. 29(3). Neither the ICAC Act nor the PIC Act contains an exception for proceedings to which the relevant Commission is a party. On the other hand, both of those Acts do permit the respective Commissioners and Inspectors to direct that information be divulged, if the Commissioner or Inspector certifies that this is necessary in the public interest. The question is whether this type of provision, if inserted into the NSWCC Act,

would be a sufficient substitute for the existing exception in s. 29(3) relating to proceedings to which the Commission or a member is a party. It seems to me that prejudicing a procedurally fair hearing of proceedings to which the Commission is a party would be a powerful public interest consideration in favour of the Commissioner providing a certification of the type required, but that there may be circumstances where the Commissioner, perhaps regarding the proceedings as a deliberate or vexatious attempt to evade the secrecy provision, would refuse to provide the required certification. In order to avoid that circumstance, I recommend that s. 29(3) be amended to accord with s. 111(3) and (4) of the ICAC Act, with the qualification that the provision equivalent to s. 111(4)(c) should refer to the “Commissioner, Inspector or Management Committee”.

- 417 It has been suggested to the Inquiry (not by the Commission) that s. 29 should be amended to provide for an exception in instances of disciplinary proceedings involving police who have worked at the Commission, so that police are not able to rely on s. 29 as a basis for avoiding disciplinary proceedings or impeding an investigation. Mr Bradley thought that an amendment of this type was unnecessary, because if police internal affairs staff told him that a person was relying on s. 29 as an excuse in a police investigation, he would authorise disclosure of information. The Commissioner’s power to make such an authorisation is not found in s. 29, and such a dissemination could potentially require approval by the Management Committee under s. 7.
- 418 As noted above, both the ICAC Act (s. 111(4)(c)) and the PIC Act (s. 56(4)(c)) contain an exception permitting disclosure in accordance with a direction of those Commissions’ Commissioner or Inspector, if the respective Commissioner or Inspector certifies that it is necessary to do so in the public interest. My recommendation in relation to s. 29(3) above would provide for a similar exception to be included in s. 29, which would permit disclosure in accordance with a direction of the Commissioner in the context of police disciplinary proceedings.

Statutory review

419 The PIC Act contains a requirement that the Minister “review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives” (s. 146(1)), after five years of the assent to the Act and once again after five years have passed from the date of assent to 2005 amending legislation. The second of those statutory reviews, dated November 2011, has recently been tabled. By contrast, although the NSWCC Act has been amended from time to time, there is no provision for a statutory review of its terms, and in consequence no such comprehensive review has been regularly performed.

420 Given the importance of ensuring that the terms of the NSWCC Act continue to be appropriate for securing the important objects of the Act, I recommend that a provision for the Minister to conduct a regular statutory review, perhaps at five year intervals, be inserted into the NSWCC Act.

Other amendments to Sch. 1 to the NSWCC Act

421 Clause 2 of Sch. 1 to the NSWCC Act differentiates between the appointment of an Acting Commissioner or Assistant Commissioner by the Governor in the event of a long illness or absence, and the appointment of a person to act in such a role by the Minister, if there is no appointment subsisting under the provisions for the Governor to appoint a person to act in the positions, and if the Minister has reason to believe that the duration of the illness or absence will not exceed four weeks.

422 Neither the ICAC nor the PIC statutes differentiate between short and long illnesses or absences in relation to acting appointments: both simply provide that the Governor may appoint a person to act as Commissioner or Assistant Commissioner. Nevertheless, it may be convenient for the Minister to be able to make short-term acting appointments to the positions of Commissioner or Assistant Commissioner of the Commission. If the existing differentiation between long term acting appointments made by

the Governor and short term appointments made by the Commissioner is retained, the ambiguity in cls 2(4) and 2(5) as to whether the Minister may remove a person from an acting position to which they were appointed by the Governor, and whether the Minister may determine the remuneration of a person appointed by the Governor, should be resolved.

- 423 In common with the ICAC legislation, the Commissioner and Assistant Commissioner (if an Assistant Commissioner is appointed to a full-time office) is required to hold that office on a full-time basis, except to the extent permitted by the Governor (Sch 1, cl. 3(3)). In the past, former Commissioner Bradley from time to time took up roles with the Commonwealth (such as in relation to the establishment of the Australian Crime Commission) and other voluntary and ex-officio functions. The 2008 Draft Minute suggested that the arrangement in cl. 3 was workable but relatively cumbersome, and that the NSWCC Act should be amended so that the Commissioner could take on other roles, subject to the Minister's agreement. The Commission supports this change, on the basis that it would enable the Government to call on the Commissioner to assist in matters of public policy which may be outside the functions of the Commission and Commissioner, without the need for the Governor's approval to be obtained.
- 424 The Inquiry remains of the view that the office of Commissioner should be a full-time office. A change to cl. 3 does not seem to the Inquiry to be necessary to secure the objects of the NSWCC Act. However, the Inquiry accepts that there may occasionally be a role for the Commissioner to play in relation to matters outside the functions of the Commission, and that the Commissioner's involvement in such matters (such as, for example, Commonwealth committees) may equip him or her with a broader experience of matters of public administration that could enhance his or her contribution to the Commission.
- 425 Clause 8(4) of Sch. 1 provides for a book to be kept regarding disclosures of pecuniary interests of the Commissioner or Assistant Commissioner

(only) in matters being considered or about to be considered by the Commission, where such interests appear to raise a conflict of interest, to be available for inspection by the public upon payment of a fee. The provisions regarding public disclosure of pecuniary interests in conflict with the proper performance of duties by Commissioners and Assistant Commissioners are not replicated in either the ICAC or PIC legislation, both of which provide that the regulations may make provision for “the compilation and maintenance of registers of pecuniary interests or other matters by officers of the Commission and the inspection and publication of any such register” (ICAC Act s. 110(c); PIC Act s. 138(c)). Neither the *ICAC Regulation* nor the *PIC Regulation* make provision for the inspection or publication of any such register.

- 426 The requirement that such a register containing particulars of disclosures made to the Management Committee be published has the potential to prejudice Commission operations by revealing ongoing or planned operations. It would therefore be appropriate to amend cl. 8(4) of Sch. 1, either to align it with the terms of s. 110(c) of the ICAC Act or to enable the Management Committee to approve the non-publication of particulars disclosed to it, the publication of which would prejudice the exercise of the Commission’s functions.

The appropriateness of the terms of the CAR Act for securing the objectives of that Act

- 427 I have earlier in Chapter 5 made recommendations in relation to the CAR Act which seek to overcome most of the problems previously identified relating to its operation.

- 428 The Commission in its second Discussion Paper mentioned some other anomalies in the CAR Act, the remedying of which may assist in securing the objectives of that Act. The first concerns s. 14(1) (reproduced in Appendix 7). It was submitted that there is no reason to limit the Supreme Court’s power to order a sale to the case where an application for an assets forfeiture is pending. Often, so it was submitted, what is pending in

respect of restrained property is a proceeds assessment order and if that property is subject to waste or substantial loss, it is in nobody's interest that the Court should be unable to order its sale.

429 As the Commission points out, there may well be a valid distinction between an asset which is actually the subject of a forfeiture application and an asset which is merely, in effect, security for a proceeds assessment order. However, the matter is, in any event, within the discretion of the Court and I support the amendment of s. 14 to include within its purview both pending applications for a proceeds assessment order and for an unexplained wealth order.

430 Sections 31A and 31B deal with the situation where a defendant to proceedings under the CAR Act for a proceeds assessment order or an unexplained wealth order has misrepresented his or her assets or failed to disclose assets to the Commission when under an obligation to do so.

431 In such a case, the Commission may apply to the Court under the sections for appropriate orders, but pending the hearing of such an application there is no power for the Court to make a restraining order. The Commission submits that this is an anomaly which should be cured, as is the failure of s. 31D to allow for the examination of persons before an officer of the Court, in relation to applications under s. 31A and s. 31B. This last-mentioned problem arises because the power given by s. 31D applies to "confiscation orders" as defined in s. 4, which definition does not include applications made under either s. 31A or s. 31B.

432 I agree with the Commission's submissions that these are all anomalies which should be overcome by appropriate amendments to the Act. Those amendments would seem to require merely provision for the making of a restraining order pending the resolution of an application in ss. 31A and 31B and an amendment to the definition of "assets forfeiture order" in s. 4.

433 The Commission's submissions in its second Discussion Paper in relation to the CAR Act also addressed the impact of the decision of Hall J in *New South Wales Crime Commission v Cook* [2011] NSWSC 1348. That decision in my view stated the proper interpretation of the statute as it has always been and nothing has come to me during the Inquiry which suggests that the Act should be amended to overcome the decision. To the contrary, as appears in Chapter 5, I have recommended, in the interests of transparency, maintaining or increasing, rather than reducing, the impact of the decision in *Cook*.

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Appendix 1 Advertisement and Schedule of Publication



Special Commission of Inquiry New South Wales Crime Commission

Mr David Patten has been appointed as Special Commissioner to inquire into and report on the following matters relating to the New South Wales Crime Commission:

1. Whether the New South Wales Crime Commission is complying with the *New South Wales Crime Commission Act 1988* and the *Criminal Assets Recovery Act 1990* in the exercise of its functions.

In this matter, the Commission:

- a. may examine particular operational decisions of the New South Wales Crime Commission to the extent that these decisions inform proposals for legislative change; and
 - b. shall refer any evidence that members of staff of the New South Wales Crime Commission or their associates, are or have been, involved in criminal activity or serious misconduct to the Police Integrity Commission.
2. Whether the terms of *New South Wales Crimes Commission Act 1988* and the *Criminal Assets Recovery Act 1990* remain appropriate for securing the objectives of the Acts.
 3. As part of the inquiry and report in matter (2), above, specifically consider:
 - a. whether the powers and procedures of the New South Wales Crime Commission are appropriate;
 - b. the adequacy of accountability mechanisms for the New South Wales Crime Commission including, but not limited to, the mechanisms under the *Police Integrity Commission Act 1996* and whether alternative or additional accountability mechanisms should be adopted;
 - c. the New South Wales Crime Commission's Management Committee structure and whether alternative or additional governing body mechanisms should be adopted.

The Commissioner is due to provide a final report on or before 30 November 2011.

In order to ensure that all relevant information is obtained, the Commissioner has been given special powers under sections 22, 23 and 24 of the *Special Commissions of Inquiry Act 1983* (NSW), on the condition that the appearance of any witness procured under sections 22, 23 or 24 occurs *in camera*.

Interested individuals or organisations are invited to make submissions to the Inquiry. Submissions to the Inquiry should be in writing and lodged with the Inquiry by 4pm on 14 October 2011.

Submissions must comply with the Directions for Written Submissions which can be obtained by contacting Denyse Moxham, Secretary of the Inquiry at email address scicc@justice.nsw.gov.au

Individuals or organisations who are interested in providing assistance to the Inquiry are invited to contact Joanna Davidson, Solicitor Assisting the Inquiry, in writing at the address below in order to inform the Inquiry of their interest, and the extent of assistance which they can provide. Any person who has information and material which is relevant to the Inquiry is invited to provide it directly to Denyse Moxham, Secretary of the Inquiry, at the address specified below.

Any person wishing to contact the Inquiry may do so at the address below.

Special Commission of Inquiry
New South Wales Crime Commission
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60-70 Elizabeth Street
SYDNEY NSW 2000
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Schedule of Publication

The Australian

Wednesday 14 September 2011

Saturday 17 September 2011

The Daily Telegraph

Wednesday 14 September 2011

Saturday 17 September 2011

The Sydney Morning Herald

Wednesday 14 September 2011

Saturday 17 September 2011

Appendix 2 Names of Persons Interviewed

Achterstraat, Peter	NSW Auditor-General
Babb SC, Lloyd	Director of Public Prosecutions
Baird, Piet	Investigations Manager, the Commission
Bailey, Mike	Advisor to the Hon M Daley MP
Barbour, Bruce	NSW Ombudsman
Battilana, Mary-Louise	Ministry for Police and Emergency Services
Bradley, Phillip	Commissioner, the Commission
Breen, Peter	Solicitor
Boulten QC, Phillip	Barrister
Canning, Marsha	Manager Operations Support, the Commission
Carmody AO, Michael	Chief Executive Officer, ACS
Cooper QC, Harvey	Inspector, ICAC
Cripps, QC, the Hon. Jerrold	Acting Commissioner, PIC
Daley MP, the Hon. Michael	Member for Maroubra
Dhanji SC, Hament	Barrister
Delaney, Rob	Attorney-General's Department (Cth)
Game SC, Tim	Barrister
Giorgiutti, John	Director of Operations, Solicitor to the Commission
Gallacher MP, the Hon. Michael	Minister for Police and Emergency Services
Gray, Warren	ACC
Hastings QC, Peter	Barrister
Hamilton, Therese	Deputy Commissioner, ICAC
Hinchelwood, Julie	Analyst, the Commission
Hudson, David APM	Assistant Commissioner, NSWPF
Ipp AO QC, the. Hon David	Commissioner, ICAC
Isherwood, Mark	Attorney General's Department (Cth)
Jones, Greg	Barrister
Kaldas APM, Nick	Deputy Commissioner, NSWPF
Kheir, Jack	Auditor-General's Office
Lawler APM, John	Chief Executive Officer, ACC
Moss QC, the Hon. Peter	PIC Inspector
Moss, Phillip	Integrity Commissioner, ACLEI

Special Commission of Inquiry into NSW Crime Commission

McClellan, the Hon. Peter	Chief Judge at Common Law; Supreme Court of NSW
McGrath, Tom	Former Investigator, PIC
McIlwain, Peter	Director, Performance and Development Public Sector Workforce, Department of Premier and Cabinet
Negus APM, Tony	Chair of ACC Board and Commissioner of AFP
Nicod, Tony	Manager, Legal, Public Sector Workforce, Department of Premier and Cabinet
O'Connor, Tim	Director, Criminal Investigations, the Commission
O'Connor, Andrew	Policy Director, Ministry for Police and Emergency Services
O'Neil, Michael	ACLEI
Plotecki, Mick	Superintendent NSWPF, State Crime Command
Sage, Tim	ACC Examiner
Scipione APM, Andrew	NSW Police Commissioner
Scutella, Brad	Chief of Staff to Minister for Police and Emergency Services
Sellars, Nick	Director Strategic Support, ACLEI
Spark, John	Director, Financial Investigations, the Commission
Singleton, Peter	Assistant Commissioner, the Commission
Stewart, David	AFP
Temby QC, Ian	Barrister
Thom, Vivienne	Inspector General of Intelligence & Security
Tree AM, Les	Director General Ministry of Police Department
Waldon, Roy	Solicitor to the ICAC
Wallace, Deborah	Superintendent and Member of ANZPAA Human Sources Working Party
Whitehead, Peter	Chairman, IARC
Wood AO QC, the Hon. James	Chairperson, NSW Law Reform Commission
Zuccato APM, Kevin	Assistant Commissioner, AFP

Appendix 3 Schedule of Submissions

Babb SC, Lloyd	DPP, NSW
Barbour, Bruce	NSW Ombudsman
Breen, Peter	Solicitor
Cowdery AM QC, Nicholas	Former DPP, NSW
Clarke SC, Peter H	Former Assistant Commissioner, PIC
Coles QC, Bernard	on behalf of NSW Bar Association
Daley MP, The Hon. Michael	Member for Maroubra
Kennedy, Dr Michael	University of Western Sydney
NSWCC	
Norton, Denis	
Richards, Warren Austin	
Sidoti, Chris	Casino, Liquor & Gaming Control Authority
Sarikaya, David	
Tedeschi QC, Mark	Senior Crown Prosecutor
Westgarth, Mr Stuart	on behalf of the Law Society of NSW

Appendix 4 Relevant Portions of the Letters Patent

The Letters Patent establishing the Special Commission of Inquiry recite:

“WHEREAS the Police Integrity Commission of New South Wales has undertaken or is undertaking certain reviews and inquiries into the practices and operations of the New South Wales Crime Commission, namely:

1. Project Rhodium, concerning the capacity of the New South Wales Crime Commission to identify and manage serious misconduct risks;
2. Project Caesar, concerning misconduct risks within the New South Wales Crime Commission in the area of assets confiscation; and
3. Operation Winjana, concerning:
 - a. whether certain members of staff of the New South Wales Crime Commission or their associates are, or have been, involved in criminal activity or serious misconduct; and
 - b. the practices and procedures of the New South Wales Crime Commission in the conduct of actions under the Criminal Assets Recovery Act 1990; and

WHEREAS a former assistant director of the New South Wales Crime Commission, Mark William Standen, was on 11 August 2011 found guilty by a jury of the Supreme Court of New South Wales of conspiring to import drugs, taking part in the supply of drugs and conspiring to pervert the course of justice; and

WHEREAS significant concern exists in the New South Wales community in relation to the performance, integrity and governance structures of the New South Wales Crime Commission.

By these Our Letters Patent, made and issued under the authority of the *Special Commissions of Inquiry Act 1983*, ... We hereby ... authorise you as Commissioner to inquire and report to Our Governor on the following matters relating to the New South Wales Crime Commission:

1. Whether the New South Wales Crime Commission is complying with the *New South Wales Crime Commission Act 1988* and the *Criminal Assets Recovery Act 1990* in the exercise of its functions.

In this matter, the Commission:

- a. may examine particular operational decisions of the New South Wales Crime Commission to the extent that these decisions inform proposals for legislative change; and
- b. shall refer any evidence that members of staff of the New South Wales Crime Commission or their associates, are or have been, involved in criminal

activity or serious misconduct to the Police Integrity Commission.

2. Whether the terms of *New South Wales Crimes Commission Act 1988* and the *Criminal Assets Recovery Act 1990* remain appropriate for securing the objectives of the Acts.
3. As part of the inquiry and report in matter (2), above, specifically consider:
 - a. whether the powers and procedures of the New South Wales Crime Commission are appropriate;
 - b. the adequacy of accountability mechanisms for the New South Wales Crime Commission, including, but not limited to, the mechanisms under the Police Integrity Commission Act 1996 and whether alternative or additional accountability mechanisms should be adopted;
 - c. the New South Wales Crime Commission's Management Committee structure and whether alternative or additional governing body mechanisms should be adopted.

AND hereby establish a Special Commission of Inquiry for that purpose.

AND OUR further will and pleasure is that you do, as expeditiously as possible, but in any case on or before 30 November 2011 deliver your report covering all the matters hereto specified.

AND pursuant to s. 21 of the *Special Commissions of Inquiry Act 1983* it is hereby declared that sections 22, 23 and 24 shall apply to and in respect of the Special Commission the subject of these our Letters Patent, on the condition that the appearance of any witness procured under sections 22, 23 or 24 occurs in *camera*."

Appendix 5 Extract from Second Reading Speech for the *New South Wales Crime Commission Amendment Bill 1996* by the Hon. Paul Whelan, Minister for Police, Legislative Assembly, 31 October 1996

“The Crime Commission was first established in 1985 as the State Drug Crime Commission, by the Wran Labor Government as a part of that Government’s attack on the illegal drug trade. The Act was amended in 1988 to enable the commission to investigate organised crime more generally and to review police inquiries into criminal activity. In 1990, the Act was again amended and the commission was renamed the New South Wales Crime Commission to better reflect its general role in crime fighting. Whilst these previous amendments went some way to enhancing the operational effectiveness of the commission, some difficulties remain with the underlying legislation.

When first enacted the Act drew on what were, at the time, the best legislative models available for this type of crime fighting organisation. In the intervening period of more than 10 years alternative legislative models have been developed. These include the Police Integrity Commission Act and the Independent Commission Against Corruption Act. In addition, the implications of a number of court decisions have resulted in a need to update the Crime Commission Act to ensure that the organisation operates as effectively as possible.

Before outlining specific aspect of the bill let me acknowledge that concern has been expressed about the potential effect on civil liberties that organisations such as the commission may have. I have taken note of those concerns and have been very conscious whilst preparing this bill of the need to balance traditionally enjoyed civil liberties against the need for an effective fight against organised crime. The effectiveness of organisations such as the Crime Commission, the Independent Commission Against Corruption and the Police Royal Commission stems in no small part from the powers they are able to use above and beyond conventional investigative methods.

This State has seen fit to equip the ICAC and the Police Integrity Commission with coercive powers to be used to investigate corrupt public servants and corrupt police. There is in my view an even more compelling case to enable such powers to be used, subject to stringent safeguards and limitations, against the bosses of major organised crime. In seeking to protect civil liberties we must be careful that we are not simply protecting the capacity of major criminals to take liberties with the rest of the community. The government firmly believes that this bill will enable the effective fight against organised crime to be stepped up without unduly compromising the civil liberties of law-abiding citizens. The bill will enable the Crime Commission to continue as an effective and efficient crime fighting organisation.

I will now turn to the substantive provisions of the bill. When originally established the commission consisted of a number of

members. The Act currently requires that there shall be a minimum of two, one of whom shall be the chairperson. In fact the commission has operated with just two members for some years now, one of whom has been a part-time member. The commission does not need to have two members all the time. The bill therefore alters the structure of the commission so that it shall consist of a full-time commissioner. If the work of the commission at any time makes it necessary, assistant commissioners may be appointed on either a full-time or part-time basis for a specified period. This is more efficient and cost effective than having to ensure that two members are appointed at all time. This change brings the management structure of the commission more closely into line with the structure of the Independent Commission Against Corruption and the Police Integrity Commission.”

...

The Bill will amend the provisions of the Act applying to summonses issued by the commission. At present a member of the commission has the power to summons persons to attend at a hearing and the power to require a person to produce documents or things to the commission in relation to an investigation. Whilst the commission will generally give persons a reasonable period in which to respond to the notice or summons, there are in some cases exceptional circumstances where it is necessary that the commission be able to require that the person respond in a very short time. The bill will enable a member of the commission to require immediate response to a notice or summons where this is necessary to prevent destruction or concealment of evidence, the escape of an offender, the commission of an offence, or serious prejudice to the conduct of an investigation.

In addition there are situations where a lawyer will seek to act for more than one witness without being aware that a potential conflict of interest will arise. This bill significantly alters the way in which claims of privilege against self-incrimination are dealt with in commission hearings. The Crime Commission Act was substantially based on the National Crime Authority Act which was, at the time the commission was established, the best model available for an agency with special powers. Since then alternative models have been developed in New South Wales. In particular, the Independent Commission Against Commission [sic] Act and the Police Integrity Commission Act have used a significantly different and simpler approach for dealing with claims of privilege raised by witnesses in hearings or by person require to produce documents.

These newer models are substantially adopted by the bill. They will significantly simplify the Act and its administration whilst continuing to provide for the practical effect of the privilege against self-incrimination to be maintained. Legal professional privilege will, of course, be retained. The Act currently requires that a person appearing as a witness before the Commission shall not, without reasonable excuse, refuse to answer a question or produce a document. It also provides that it shall be a reasonable excuse if the answer or document tends to incriminate the person.

However, this shall not be a reasonable excuse if the person has received an undertaking from the relevant Attorney General that any answer given or document produced shall not be used in a prosecution of that person.

There are a number of difficulties with this approach. The first is that if a person claims in the commission that an answer or document might tend to incriminate and the commission requires the answer or document to progress its inquiry it will need to bring a halt to proceedings. An undertaking is then sought from the relevant Attorney General – bearing in mind that Commonwealth or interstate offences may be potentially involved. This is a cumbersome and time-consuming process. In addition, a 1993 decision of the Court of Appeal held that the issue when a person refused to answer a question was not whether a witness asserted a reasonable excuse but whether in fact he or she had one, even if he or she was not able to express it at the time. The implication of this is that a person could refuse to answer a question, refuse to state a reason for the refusal and only reveal a reason if and when prosecuted for an offence under the Act. Clearly this has the potential to cause significant difficulty for the conduct of hearings.

The primary reason for including provisions of this type is to uphold the common law privilege which prevents a person being required to involuntarily provide evidence which may be later used in a prosecution against the person. The revised scheme included in the bill is drawn from the provisions of the Independent Commission Against Corruption [sic] Act and the Police Integrity Commission Act. It provides a superior and far more efficient model for dealing with claims of privilege against self-incrimination without removing the practical effect of the privilege. Under these provisions a person shall have a clearer obligation to answer questions and produce documents. However, if a person objects to so doing on the basis that it may tend to self-incrimination then the information provided or document produced will not be able to be subsequently used against the person in a prosecution.”

Appendix 6 New South Wales Crime Commission Act 1985

The NSWCC Act was formerly called the *State Drug Crime Commission Act*. Section 3A states the principal object of the Act is “to reduce the incidence of illegal drug trafficking” and the secondary object “to reduce the incidence of organised and other crime”. I should observe that since its enactment in 1985 the NSWCC Act has been amended on many occasions. My references, unless otherwise indicated, are to the statute in its present form.

The Commission is constituted as a statutory corporation to consist of one or more members, namely a Commissioner and “if any Assistant Commissioners are appointed” the Assistant Commissioners. A person is not eligible for appointment as Commissioner or Assistant Commissioner unless he or she holds “special legal qualifications” (cl. 1, Sch. 1) defined as a person who is or has been a judge or is a legal practitioner of at least seven years standing: s. 3(4). The Commissioner or an Assistant Commissioner holds office “for such term as may be specified in the instrument of appointment” but is eligible for re-appointment: cl. 4, Sch. 1.

Despite the lack of any requirement to appoint an Assistant Commissioner, Sch. 2 to the NSWCC Act relates to meetings of the Commission, which the Commissioner may convene at any time. The quorum for any such meeting is the Commissioner and at least one other member.

Supplementary to s. 3A are ss. 6 and 7 which provide:

“6 Principal functions of the Commission

- (1) The principal functions of the Commission are:
- (a) to investigate matters relating to a relevant criminal activity referred to the Commission by the Management Committee for investigation,
 - (b) to assemble evidence that would be admissible in the prosecution of a person for a relevant offence arising out of any such matters and to furnish any such evidence to the Director of Public Prosecutions,

- (b1) to review a police inquiry into matters relating to any criminal activity (being an inquiry referred for review to the Commission by the Management Committee) and to furnish its findings to the Committee together with any recommendation as to action the Commission considers should be taken in relation to those findings,
 - (c) to furnish in accordance with this Act reports relating to illegal drug trafficking and organised and other crime, which include, where appropriate, recommendations for changes in the laws of the State, and
 - (d) to disseminate investigatory, technological and analytical expertise to such persons or bodies as the Commission thinks fit.
- (1A) The Commission may exercise a function conferred or imposed on it by the *Criminal Assets Recovery Act 1990*, may carry out investigations in aid of the exercise of those functions and may, for the purposes of that Act, make such use as it thinks fit of any information obtained by it in the execution of this Act.
- (1B) Nothing in this section precludes the Commission from inquiring into matters connected with, or arising out of, the exercise of its functions under this or any other Act or law, whether or not those matters are the subject of a reference to the Commission by the Management Committee.
- (2) If the Commission obtains any evidence, being evidence that would be admissible in the prosecution of a person for an indictable offence (other than evidence of a relevant offence which is furnished to the Director of Public Prosecutions) against a law of New South Wales, of the Commonwealth, of a Territory or of another State, the Commission shall furnish that evidence:
 - (a) in the case of an offence against a law of the Commonwealth, of a Territory or of another State-to the Attorney General, or
 - (b) in the case of an offence against a law of New South Wales-to the Director of Public Prosecutions,together with any recommendation as to action the Commission considers should be taken in relation to that evidence.
- (3) If the Commission obtains any information relating to the exercise of the functions of a Government Department, Administrative Office or local or public authority, the Commission may, if it considers it desirable to do so:

- (a) furnish that information or a report on that information to the relevant Minister, and
 - (b) make to that Minister such recommendations (if any) relating to the exercise of the functions of the Department, Office or authority, as the Commission considers appropriate.
- (3A) If the Commission obtains any information relating to the conduct of an officer of a Government Department, Administrative Office or local or public authority, in his or her capacity as such, the Commission may, if it considers it desirable to do so:
 - (a) furnish that information or a report on that information to the principal officer of the Department, Office or authority or (if the officer is the principal officer of the Department, Office or authority) to the relevant Minister, and
 - (b) make to the principal officer or Minister such recommendations (if any) relating to the conduct of the officer as the Commission considers appropriate.
- (3B) In subsection (3A):
officer includes:
 - (a) in relation to a Government Department, Administrative Office or local or public authority:
 - (i) an employee or agent of the Department, Office or authority, or
 - (ii) a person between whom and the Department, Office or authority there is, or has been, an agreement or arrangement under which the person is providing, or has provided, services to the Department, Office or authority, and
 - (b) in relation to a local or public authority-a member of the authority.

principal officer, in relation to a Government Department, Administrative Office or local or public authority, has the same meaning as it has in section 10.
- (5) In exercising its principal functions, the Commission shall give high priority to matters relating to illegal drug trafficking, as far as practicable.

7 Liaison with other bodies

The Commission may, with the approval of the Management Committee:

- (a) disseminate intelligence and information to such persons or bodies as the Commission thinks appropriate, and

- (b) co-operate and consult with such persons or bodies as the Management Committee thinks appropriate. “

The constitution and functions of the Management Committee are prescribed by sections 24 to 27A of the NSWCC Act:

“24 The Management Committee

- (1) There is constituted by this Act a New South Wales Crime Commission Management Committee consisting of 4 members of whom:
 - (a) one shall be the Minister for Police, and
 - (b) one shall be the Commissioner of Police, and
 - (c) one shall be the Chair of the Board of the Australian Crime Commission, and
 - (d) one shall be the Commissioner, or any person acting in any such office.
- (2) The Management Committee shall have and may exercise the functions conferred or imposed on it by or under this or any other Act.
- (3) A member of the Management Committee or, if the member fails to do so, the Minister may appoint a person to attend, in the place of the member, a meeting of the Committee at which the member is not present and a person so appointed shall, when attending a meeting of the Committee in the place of a member, be deemed to be the member.
- (4) If for any reason there is a vacancy in the office of a member of the Management Committee, the Governor may appoint a person to act in that office.
- (5) While a person is acting as a member of the Management Committee the person has and may exercise all the functions of the member.
- (6) A member of the Commission who is not otherwise entitled to be present at a meeting of the Management Committee may, with the consent of the members of the Committee present at the meeting, be present at the meeting and participate in the discussion of matters arising at the meeting.
- (7) Schedule 3 has effect with respect to the procedure of the Management Committee.

25 Functions of the Management Committee

- (1) The principal functions of the Management Committee are:

- (a) to refer (by a written notice) matters relating to relevant criminal activities to the Commission for investigation, and
 - (a1) to refer (by a written notice) to the Commission, for review, police inquiries into matters relating to any criminal activities, and
 - (a2) to arrange (in accordance with section 27A) for police task forces to assist the Commission to carry out investigations into matters relating to relevant criminal activities, and
 - (b) to review and monitor generally the work of the Commission, and
 - (c) to give approvals for the purposes of section 7.
- (2) The Management Committee is not to refer a matter to the Commission for investigation unless it is satisfied that ordinary police methods of investigation into the matter are unlikely to be effective.
- (3) The Management Committee may, by the terms of a reference, impose limitations:
 - (a) on the carrying out of an investigation by the Commission into any matter relating to a relevant criminal activity referred to the Commission for investigation, and
 - (b) on the carrying out of a review of a police inquiry referred to the Commission for review.
- (4) The notice referring a matter relating to a relevant criminal activity to the Commission for investigation:
 - (a) may describe the matter (wholly or partly) by reference to information given at a meeting of the Management Committee or other extrinsic material, whether or not the information or material is included in or annexed to the notice, and
 - (b) must describe the general nature of the circumstances or allegations constituting the relevant criminal activity, and
 - (c) must set out the general purpose of the investigation.
- (5) If information or other extrinsic material referred to in a notice is not included in or annexed to the notice, it does not form part of the notice for the purposes of section 16 (2) (relating to the matter to accompany a summons to a witness).
- (6) In exercising its principal functions, the Management Committee shall give high priority to matters relating to illegal drug trafficking, as far as practicable.

26 Commission may request reference

- (1) The Commission may, if it considers it appropriate to do so, request the Management Committee to refer to the Commission:
 - (a) for investigation a matter relating to relevant criminal activity, and
 - (b) for review, a police inquiry into a matter relating to any criminal activity.
- (2) A request by the Commission under subsection (1) shall be in writing and may be accompanied by such written submissions as the Commission thinks fit.

27 Directions and guidelines to Commission

- (1) The Management Committee may give directions and furnish guidelines to the Commission with respect to the exercise of its functions and the Commission shall comply with any such directions or guidelines.
- (2) The Management Committee may give directions and furnish guidelines to the Commission with respect to the internal management of the Commission and the Commission shall comply with any such directions or guidelines.

27A Police task forces to assist Commission

- (1) The Management Committee may make arrangements with the Commission of Police for a police task force to assist the Commission to carry out an investigation into matters relating to a relevant criminal activity.
- (2) In assisting the Commission to carry out such an investigation, the police task force is (subject to subsection (3)) under the control and direction of the Commissioner of Police.
- (3) The Management Committee may give directions and furnish guidelines to the Commission and the Commissioner of Police for the purpose of co-ordinating such an investigation, and the Commission and the Commissioner shall comply with any such directions and guidelines. “

A quorum for meetings of the Management Committee is three and the Minister for Police if present is to preside: Sch. 3.

In order to fulfil its statutory responsibilities the Commission is given wide powers which include:

- The power to require information and production of documents from agencies of the State (s. 10).
- The power to apply for search warrants and to seize property and retain certain property found during any search (ss. 11 and 12).
- The power to hold hearings for the purposes of an investigation (s. 13).
- The power to summon persons to appear at a hearing including the power in particular circumstances to require the immediate attendance of a person (s. 16).
- The power to require a person to produce documents whether in conjunction with a hearing or otherwise (s. 17).
- The power to take evidence on oath or affirmation at a hearing (s. 16).
- The power to issue warrants for the arrest of witnesses who fail to appear when required by summons to attend a hearing (s. 18AA).
- The power to require witnesses to answer questions at a hearing and to produce documents, except in limited circumstances which do not include that the answer or production may incriminate or tend to incriminate the witness (answers and documents given or produced after objection with some exceptions may not be admitted into evidence against the witness in criminal or civil proceedings) (ss. 18, 18A, 18B).
- The power to require a legal practitioner who claims legal professional privilege in relation to a communication with a person to furnish the name and address of the person (s. 18B).

Unsurprisingly the NSWCC Act contains a secrecy provision, s. 29:

“29 Secrecy

- (1) This section applies to:
 - (a) a member of the Commission, and
 - (b) a member of the staff of the Commission, and
 - (c) a member of a police task force assisting the Commission in accordance with an arrangement under section 27A, and
 - (d) a person to whom information is given either by the Commission or by a person referred to in paragraph (a), (b) or (c) on the understanding that the information is confidential.

- (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act, and either while the person is or after the person ceases to be a person to whom this section applies:
- (a) makes a record of any information, or
 - (b) divulges or communicates to any person any information,
being information acquired by the person by reason of, or in the course of, the exercise of functions under this Act, is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units or imprisonment for a period not exceeding one year, or both.
- (3) A person to whom this section applies shall not be required to produce in any court any document that has come into the person's custody or control in the course of, or by reason of, the exercise of functions under this Act, or to divulge or communicate to a court a matter or thing that has come to the person's notice in the exercise of functions under this Act, except where the Commission, or a member in the member's official capacity, is a party to the relevant proceedings or it is necessary to do so:
- (a) for the purpose of carrying into effect the provisions of this Act, or
 - (b) for the purposes of a prosecution instituted as a result of an investigation conducted by the Commission in the exercise of its functions.
- (4) In this section:
court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.
produce includes permit access to."

Section 30 requires the Commission to keep the Management Committee informed of the general conduct of its operations and to provide any information specifically requested. It is also required to furnish an annual report to the Management Committee for transmission to the Minister containing the matters itemised in s. 31.

Section 32 deals with the staff of the Crime Commission:

“32 Staff

- (1) The staff of the Commission comprises:
- (a) the staff who are employed under Chapter 1A of the *Public Sector Employment and Management Act*

- 2002 in the Government Service to enable the Commission to exercise its functions, and
- (b) the persons referred to in subsections (3), (4) and (5).
- (2) Repealed
- (3) The Commission may engage persons as consultants to the Commission or to perform services for it.
- (4) The Commission may arrange for the use of the services of any staff or facilities of a government department, an administrative office or a local or public authority.
- (5) The Commission may arrange for one or more police officers or for one or more members of the Police Force of the Commonwealth, or of a Territory or another State, to be made available (by way of secondment or otherwise) to perform services for the Commission.
- (6) While performing services for the Commission, a police officer retains rank, seniority and remuneration as a police officer and may continue to act as a constable. However, this subsection does not prevent the payment of additional remuneration to police officers in accordance with arrangements under subsection (5).
- (7) The regulations may make provision for or with respect to the appointment, conditions of employment, discipline, code of conduct and termination of employment of staff of the Commission (except in so far as, in the case of the staff who are employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*, provision is made for those matters by or under that Act)."

Appendix 7 Criminal Assets Recovery Act 1990

The CAR Act describes its principal objects in s. 3:

“3 Principal objects

The principal objects of this Act are:

- (a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and
 - (a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and
- (b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and
 - (b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and
- (c) to enable law enforcement authorities effectively to identify and recover property.“

Section 5 of the CAR Act stipulates that proceedings under the Act are civil and not criminal. Sections 6-9A define “serious crime related activity”; “interest in property”; “effective control of interest in property”; “serious crime derived property”; “illegally acquired property”; and “fraudulently acquired property”.

The operative provisions of the CAR Act commence with s. 10, defining a “restraining order”:

“10 Nature of ‘restraining order’

A ‘restraining order’ is an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order

applies except in such manner or in such circumstances (if any) as are specified in the order. “

In s. 10A, the Commission, referred to in the CAR Act as “the Commission”, is given power to apply for restraining orders:

“10A Proceedings for restraining orders

- (1) Application for order
The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of specified interests, a specified class of interests, or all the interests, in property of any person (including interests acquired after the making of the order).
- (2) The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of specified interests, or a specified class of interests, in property that are held in a false name.
- (3) The Commission may only apply for a restraining order that relates to interests in property derived from external serious crime related activity if the person who has the interests is domiciled in New South Wales or the property is situated in New South Wales.
- (4) Notice to affected person of application
Despite the application for a restraining order being made ex parte, the Supreme Court may, if it thinks fit, require the Commission to give notice of the application to a person who the Court has reason to believe has a sufficient interest in the application. A person who is required to be notified is entitled to appear and adduce evidence at the hearing of the application.
- (5) Determination of applications
The Supreme Court must make a restraining order if the application for the order is supported by an affidavit of an authorised officer stating that:
 - (a) in the case of an application in respect of an interest referred to in subsection (1)-the authorised officer suspects that:
 - (i) the person whose interest is the subject of the application has engaged in a serious crime related activity or serious crime related activities, or
 - (ii) the person whose interest is the subject of the application has acquired serious crime derived property because of any such activity of the

person or of another person,
or
(iii) the interest is serious crime
derived property,
and stating the grounds on which
that suspicion is based, and

...

- (c) in the case of an application in respect of an interest referred to in subsection (2)-the authorised officer suspects that the interest is fraudulently acquired property that is illegally acquired property and stating the grounds on which that suspicion is based, and the Court considers that, having regard to the matters contained in any such affidavit and any evidence adduced under subsection (4), there are reasonable grounds for any such suspicion.
- (6) The Supreme Court may grant an application under this section for a restraining order for interests in property derived from external serious crime related activity only if the application is supported by an affidavit of an authorised officer stating that the officer has made due enquiry and is satisfied that no action has been taken under a law of the Commonwealth or any place outside this State (including outside Australia) against any interests in property of the person concerned that are the subject of the application as a result of the external serious crime related activity.
- (7) **Undertakings by State as to costs or damages**
The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to the Court such undertakings as the Court considers appropriate as to the payment of damages or costs, or both, in relation to the making and operation of the order.
- (8) For the purposes of an application for a restraining order, the Commission may, on behalf of the State, give to the Supreme Court such undertakings as to the payment of damages or costs, or both, as the Court requires.
- (9) **Urgent applications by telephone or other means of communication**
An authorised officer may, on behalf of the Commission, apply for a restraining order by telephone, radio, facsimile, email or other means of communication if the application is supported by a statement of the officer that:
- (a) the order is required urgently as there is a risk that funds in a specified financial institution (being an interest in property in respect of which the order is sought) may be withdrawn or transferred to a place outside

- (c) there is an application for such a proceeds assessment order or unexplained wealth order pending before the Supreme Court, or
 - (d) it is the subject of an order of the Supreme Court under section 20.
- (2) A restraining ceases to be in force if it is set aside under section 10C.”

Further powers are given to the Supreme Court in relation to restraining orders by several sections, including as relevant to the Inquiry:

“12 Supreme Court may make further orders

- (1) The Supreme Court may, when it makes a restraining order or at any later time, make any ancillary orders (whether or not affecting a person whose interests in property are subject to the restraining order) that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:
- (a) an order varying the interests in property to which the restraining order relates,
 - (b) an order for the examination on oath of:
 - (i) the owner of an interest in property that is subject to the restraining order, or
 - (ii) another person,before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest,
...
 - (c1) an order directing a person who is or was the owner of an interest in property that is subject to the restraining order or, if the owner is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission or NSW Trustee and Guardian, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the owner has or had an interest as the Court thinks proper,
 - (d) if the restraining order requires the NSW Trustee and Guardian to take control of an interest in property:
 - (i) an order regulating the manner in which the NSW Trustee and

- (ii) Guardian may exercise functions under the restraining order, or an order determining any question relating to the interest, including any question affecting the liabilities of the owner of the interest or the functions of the NSW Trustee and Guardian, or ...

14 Supreme Court may order sale

- (1) If an application is made for an assets forfeiture order and a restraining order is in force, the Supreme Court may, when the application is made or at a later time, make an order directing the NSW Trustee and Guardian to sell an interest in property that is subject to the application for the assets forfeiture order if:
 - (a) the property is subject to waste or substantial loss of value, or
 - (b) in the opinion of the NSW Trustee and Guardian, the cost of controlling the interest would exceed the value of the interest if the assets forfeiture order were made.
- (2) Notice of an application for an order under this section must be given to the owner of the interest in property to which the application relates.
- (3) The proceeds of the sale under subsection (1) of an interest in property are subject to the restraining order to which the interest was subject.”

Sections 16A and 16B impose restrictions upon the operation of s. 10B(3) in relation to the provision of reasonable legal expenses out of property subject to a restraining order. They provide:

“16A Restrictions on payment of legal expenses from restrained property

- (1) The following restrictions apply to a restraining order making provision for the payment of any legal expenses of a person:
 - (a) no provision is to be made except to the extent (if any) that the Supreme Court is satisfied that the person cannot meet the expenses concerned out of the person’s unrestrained property,
 - (b) no provision is to be made in relation to any particular interest in property if the Supreme Court is satisfied that the interest is illegally acquired property,

- (c) no provision is to be made unless a Statement of Affairs disclosing all the person's interests in property and liabilities and verified on oath by the person has been filed with the Supreme Court,
 - (d) no provision is to be made unless the Supreme Court is satisfied that the person has taken all reasonable steps to bring all of the person's interests in property within the jurisdiction of the Court,
 - (e) any such provision must specify the particular interest in property out of which the expenses concerned may be met.
- (2) A person's *unrestrained property* is any interest in property of the person:
- (a) that is not subject to a restraining order under this Act, or
 - (b) that the Supreme Court is satisfied is not within the Court's jurisdiction (whether or not it is subject to a restraining order under this Act), or
 - (c) that the Supreme Court is satisfied would not be available to satisfy a proceeds assessment order or unexplained wealth order against the person (assuming such an order were to be made against the person).

16B Maximum legal expenses that can be met from restrained property

- (1) Despite provision in a restraining order for the meeting of legal expenses out of any property to which the order applies, a legal expense is not to be met out of that property to the extent that the amount payable for any legal service concerned exceeds any maximum allowable cost for the service that is fixed under this section.
- (2) For the purposes of this Act, the regulations may fix maximum allowable costs for legal services provided in connection with an application for a restraining order or confiscation order or the defending of a criminal charge.
- (3) Regulations under this section can fix costs by applying, adopting or incorporating, with or without modification, the provisions of any Act or any instrument made under an Act (for example, regulations under the *Legal Profession Act 2004*) or of any other publication, whether of the same or a different kind, as in force on a particular day or as in force for the time being.

- (4) This section operates only to limit the amount of the legal expenses that are authorised to be met out of property that is subject to a restraining order and does not limit or otherwise affect any entitlement of an Australian legal practitioner to be paid or to recover for a legal service any amount that exceeds any applicable maximum.”

Although no regulation has been prescribed for the purposes of s. 16B, there is provision in s. 17 for the Supreme Court to order that costs be taxed.

Sections 22 and following of the CAR Act deal with the making of Assets Forfeiture Orders. Relevantly s. 22 provides:

“22 Making of assets forfeiture order

- (1) The Commission may apply to the Supreme Court for an order forfeiting to, and vesting in, the Crown specified interests, a specified class of interests or all the interests, in property of a person (an *assets forfeiture order*).
- (1A) The application must specify that the interest in property is an interest in property of any one or more of the following kinds:
 - (a) an interest in property of a person suspected by an authorised officer, at the time of the application, of having engaged in a serious crime related activity or serious crime related activities,
 - (b) an interest in property suspected by an authorised officer, at the time of the application, of being serious crime derived property because of a serious crime related activity or serious crime related activities of a person,
 - (c) an interest in property held in a false name that is suspected by an authorised officer, at the time of the application, to be fraudulently acquired property that is illegally acquired property.
- (1B) An assets forfeiture order may be made whether or not an application for a restraining order relating to the interests in property the subject of the application for the assets forfeiture order has been made or granted.
- (2) The Supreme Court must make an assets forfeiture order in respect of an interest in property referred to in subsection (1A)(a) or (b) if the Court finds it to be more probable than not that the person whose suspected serious crime related activity, or serious crime related activities,

formed the basis of the application for the assets forfeiture order was, at any time not more than 6 years before the making of the application, engaged in:

- (a) a serious crime related activity involving an indictable quantity, or
 - (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.
- (2A) The Supreme Court must make an assets forfeiture order if the Court finds it more probable than not that interests in property subject to an application are fraudulently acquired property that is also illegally acquired property.”

Section 23 deals with the effect of an Assets Forfeiture Order:

“23 Effect of assets forfeiture order

- (1) On an assets forfeiture order taking effect in relation to an interest in property:
 - (a) the interest is forfeited to the Crown and vests in the NSW Trustee and Guardian on behalf of the Crown, and
 - (b) if the person forfeiting the interest was in possession, or was entitled to possession, of the property, the NSW Trustee and Guardian may take possession of the property on behalf of the Crown.
- (2) An interest forfeited under subsection (1) is to be disposed of by the NSW Trustee and Guardian in accordance with the directions of the Treasurer and the proceeds are to be paid to the Treasurer and credited to the Proceeds Account.
- (3) The Treasurer may delegate the power to give directions for the purposes of subsection (2).
- (4) The Supreme Court may, when it makes an assets forfeiture order or at any later time, make any ancillary orders that the Court considers appropriate. For example, the Court may make ancillary orders for and with respect to facilitating the transfer to the Crown of interests in property forfeited to the Crown under such an order.”

Sections 24, 25 and 26 give the Supreme Court power to provide relief against hardship to dependants and to exclude certain property or the values of certain property from restraining orders and assets forfeiture orders. The sections provide:

“24 Relief from hardship—spouses and dependants

- (1) If the Supreme Court is satisfied that an assets forfeiture order will operate to cause hardship to any dependant of the person who will forfeit an interest in property under the order, the Court:
 - (a) may order that the dependant is entitled to be paid a specified amount out of the proceeds of sale of the interest, being an amount that the Court thinks is necessary to prevent hardship to the dependant, and
 - (b) may make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who is under 18 years of age.
- (2) The Court is not to make an order under this section in favour of the dependant of a person whose serious crime related activity or illegal activity formed the basis for the assets forfeiture order concerned unless the Court is satisfied that the dependant had no knowledge of any serious crime related activities or illegal activities of the person.
- (3) Subsection (2) does not apply if the dependant concerned is under 18 years of age
- (4) In this section:
the *dependant*, in relation to a person, means:
 - (a) a spouse or a de facto partner of the person, or
 - (b) a child of the person, or a member of the household of the person, dependent for support on the person.

25 Exclusion of property from restraining order and assets forfeiture order

- (1) If an assets forfeiture order:
 - (a) has been applied for but not made—a person whose interest in property might be subject to the order if made, or
 - (b) has been made—a person whose interest in property was forfeited by the order,may apply to the Supreme Court for an order (in this section called an "exclusion order") excluding the interest from the operation of the assets forfeiture order or any relevant restraining order.
- (2) The Supreme Court must not make the exclusion order applied for unless it is proved that it is more probable than not that:

- (a) in the case of an order relating to fraudulently acquired property-the interest in property to which the application relates is not fraudulently acquired property or is not illegally acquired property, or
 - (b) in any other case-the interest in property to which the application relates is not illegally acquired property.
- (3) An exclusion order must declare the nature and extent of the interest in property to which it relates and:
 - (a) if the interest has been forfeited to the Crown, but not disposed of-must require the Crown to vest the interest in the claimant, or
 - (b) if the interest has been disposed of-must require payment by the Crown to the claimant of an amount declared by the Supreme Court to be the value, as at the date of the order, of the former interest of the claimant.
- (4) After an assets forfeiture order has been made, an application for an exclusion order may not be made by a person:
 - (a) if the person was given notice of the proceedings that led to the relevant restraining order or assets forfeiture order-unless it is made within 6 months after the assets forfeiture order took effect and leave to apply has been granted by the Supreme Court, or
 - (b) in any other case-unless it is made within 6 months after the assets forfeiture order took effect or the Supreme Court has granted leave to apply after that time.
- (5) Notice of an application for an exclusion order is to be given to the Commission and any other person required by the regulations to be given notice and a person entitled to be given notice may appear, and adduce evidence, at the hearing of the application.
- (6) The applicant for an exclusion order must give the Commission notice of the grounds on which the exclusion order is sought.
- (7) If the Commission proposes to contest an application for an exclusion order, it must give the applicant notice of the grounds on which the application is to be contested. In such a case, the Commission is not required to give the applicant notice of those grounds, and the application must not be heard, until the Commission has had a reasonable opportunity to conduct an examination of the applicant under section 12 or 31D.
- (8) An application may be made by a person under this section whether or not the person has also made an application

under section 10C and whether or not any such application is successful.

26 Exclusion of the value of innocent interests from assets forfeiture order

- (1) If it is proved that it is more probable than not that a specified proportion of the value of an interest in property that has been forfeited under an assets forfeiture order is not attributable to the proceeds of an illegal activity, the Supreme Court may:
 - (a) make a declaration to that effect, and
 - (b) order that the person who has forfeited the interest is entitled to be paid the proportion of the proceeds of sale of the interest that is specified in the declaration.
- (1A) If it is proved that it is more probable than not that a specified proportion of the value of an interest in property that has been forfeited under an assets forfeiture order on the ground that it was fraudulently acquired property was not fraudulently acquired property or is not attributable to the proceeds of an illegal activity, the Supreme Court may:
 - (a) make a declaration to that effect, and
 - (b) order that the person who has forfeited the interest is entitled to be paid the proportion of the proceeds of sale of the interest that is specified in the declaration.
- (2) A declaration that an interest in property is not attributable to the proceeds of an illegal activity is to be made on the basis of the extent to which the interest in property concerned was not, when it first became illegally acquired property, acquired using the proceeds of an illegal activity.
- (3) The Supreme Court may make a declaration and order under this section in relation to an interest in property on the application of the person whose interest it was when forfeited under an assets forfeiture order.
- (4) After an assets forfeiture order has been made, an application for an order under this section may not be made by a person:
 - (a) if the person was given notice of the proceedings that led to the assets forfeiture order-unless it is made within 6 months after the assets forfeiture order took effect and leave to apply has been granted by the Supreme Court, or
 - (b) in any other case-unless it is made within 6 months after the assets forfeiture order took effect or the Supreme Court has granted leave to apply after that time.
- (5) Notice of an application for an order under this section is to be given to the Commission and any other person required

by the regulations to be given notice and a person entitled to be given notice may appear, and adduce evidence, at the hearing of the application.

- (6) The applicant for an order under this section must give the Commission notice of the grounds on which the order is sought.
- (7) If the Commission proposes to contest an application for an order under this section it must give the applicant notice of the grounds on which the application is to be contested.”

Division 2 of Pt 3 of the CAR Act contains provisions for the making by the Supreme Court of a Proceeds Assessment Order and an Unexplained Wealth Order. The relevant sections are:

“26A Application for proceeds assessment or unexplained wealth order

- (1) The Commission may apply to the Supreme Court under section 27 for a proceeds assessment order or under section 28A for an unexplained wealth order (or for both).
- (2) If the Commission applies for both orders against a person, the Supreme Court cannot make both orders, but is to make the order that requires payment of the greater amount.
- (3) If the Commission applies for only one of the orders, it may before the application is determined extend the application so that it includes an application for the other order.

27 Making of proceeds assessment order

- (1) The Commission may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived by the person from an illegal activity, or illegal activities, of the person or another person that took place not more than 6 years before the making of the application for the order, whether or not any such activity is an activity on which the application is based as required by subsection (2) or (2A).
- (2) The Supreme Court must make a proceeds assessment order if the Court finds it to be more probable than not that the person against whom the order is sought was, at any time not more than 6 years before the making of the application for the order, engaged in:
 - (a) a serious crime related activity involving an indictable quantity, or
 - (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.

- (2A) The Supreme Court must make a proceeds assessment order against a person (other than an individual who is under the age of 18 years) if the Court finds it more probable than not that:
- (a) the person derived proceeds from an illegal activity or illegal activities of another person, and
 - (b) the person knew or ought reasonably to have known that the proceeds were derived from an illegal activity or illegal activities of another person, and
 - (c) the other person was, at any time not more than 6 years before the making of the application for the order, engaged in:
 - (i) a serious crime related activity involving an indictable quantity, or
 - (ii) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.
- (3) A finding of the Court for the purposes of subsection (2) or (2A) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:
- (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
 - (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity.
- (4) The references in subsections (1) and (2) to a period of 6 years include a reference to a period that began before the commencement of this section.
- (4A) The reference in subsection (2A) to a period of 6 years includes a reference to a period that began before the commencement of that subsection.

28 Assessment for proceeds assessment order—illegal activity proceeds

- (1) For the purpose of making an assessment for a proceeds assessment order under section 27 in relation to the proceeds derived by a person (in this section called "the defendant") from an illegal activity, or illegal activities, of the person or another person the Supreme Court is to have regard to the following matters:
- (a) the money, or the value of any interest in property other than money, directly or indirectly acquired by:
 - (i) the defendant, or
 - (ii) another person at the request, or by the direction, of the defendant,

- because of the illegal activity or activities,
 - (b) the value of any service, benefit or advantage provided for:
 - (i) the defendant, or
 - (ii) another person at the request, or by the direction, of the defendant, because of the illegal activity or activities,
 - (c) the market value, at the time of the illegal activity or of each illegal activity, of a plant or drug similar, or substantially similar, to any involved in the illegal activity or each illegal activity, and the amount that was, or the range of amounts that were, ordinarily paid for an act similar, or substantially similar, to the illegal activity or each illegal activity,
 - (d) the value of the defendant's property before and after the illegal activity or each illegal activity,
 - (e) the defendant's income and expenditure before and after the illegal activity or activities.
- (2) If evidence is given at the hearing of an application for a proceeds assessment order that the value of the defendant's property after an illegal activity or illegal activities of the defendant exceeded the value of the defendant's property before the activity or activities, the Supreme Court is to treat the excess as proceeds derived by the defendant from the activity or activities, except to the extent (if any) that the Supreme Court is satisfied the excess was due to causes unrelated to an illegal activity or activities.
- (3) If evidence is given at the hearing of an application for a proceeds assessment order of the amount of the defendant's expenditure during the period of 6 years before the making of the application for the order, the Supreme Court is to treat any such amount as proceeds derived by the defendant from an illegal activity or activities, except to the extent (if any) that the Supreme Court is satisfied the expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities.
- (3A) The Supreme Court is not to take expenditure into account under subsection (3) to the extent that the Court is satisfied that it resulted in the acquisition of property the value of which is taken into account under subsection (2).
- (4) In making an assessment as provided by this section, none of the following amounts are to be subtracted:
 - (a) expenses or outgoings incurred by the defendant in relation to the illegal activity or activities,

Note: For example, in the case of an illegal activity involving the sale of drugs, in determining the value of the proceeds derived by the defendant

from the sale of drugs there is to be no reduction on account of any expenditure by the defendant in acquiring the drugs.

- (b) the value of any proceeds derived as agent for or otherwise on behalf of some other person (whether or not any of the proceeds are received by that other person).

Note: For example, where the defendant is paid money for drugs in the course of a “controlled buy” but was acting merely as an agent or messenger for some other person (and gives the money to the other person), in calculating the proceeds derived by the defendant the amount given to the other person is not to be subtracted and the full amount is considered to have been derived by the defendant.

- (5) This section applies to, and in relation to:
 - (a) property that comes into the possession, or under the effective control, of a person either within or outside New South Wales, and
 - (b) proceeds acquired either within or outside New South Wales in relation to an illegal activity.

28A Making of unexplained wealth order

- (1) The Commission may apply to the Supreme Court for an unexplained wealth order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the unexplained wealth of the person
- (2) The Supreme Court must make an unexplained wealth order if the Court finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order:
 - (a) engaged in a serious crime related activity or serious crime related activities, or
 - (b) acquired serious crime derived property from any serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).
- (3) A finding under this section need not be based on a reasonable suspicion as to the commission of a particular offence and can be based on a reasonable suspicion that some offence or other constituting a serious crime related activity was committed.
- (4) The Supreme Court may refuse to make an unexplained wealth order, or may reduce the amount that would otherwise be payable as assessed under section 28B, if it thinks it is in the public interest to do so.
- (5) Engagement in a serious crime related activity or the acquisition of serious crime derived property referred to in subsection (2) extends to engagement in an activity or the

acquisition of property before the commencement of this section.

**28B Assessment for unexplained wealth order—
unexplained wealth**

- (1) This section applies for the purpose of making an assessment for an unexplained wealth order of the unexplained wealth of a person against whom the order is made.
- (2) The *unexplained wealth* of a person is the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity.
- (3) The burden of proof in proceedings against a person for an unexplained wealth order is on the person to prove that the person's current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.
- (4) The *current or previous wealth* of a person is the amount that is the sum of the values of the following:
 - (a) all interests in property of the person,
 - (b) all interests in property that are subject to the effective control of the person,
 - (c) all interests in property that the person has, at any time, expended, consumed or otherwise disposed of (by gift, sale or any other means),
 - (d) any service, advantage or benefit provided at any time for the person or, at the person's request or direction, to another person, whether acquired, disposed of or provided before or after the commencement of this section and whether within or outside New South Wales.
- (5) In assessing the unexplained wealth of a person, the Supreme Court is not required to consider any current or previous wealth of which the Commission has not provided evidence.
- (6) The value of any thing included as current or previous wealth is:
 - (a) in the case of wealth that has been expended, consumed or otherwise disposed of—the greater of:
 - (i) the value at the time the wealth was acquired, and
 - (ii) the value immediately before the wealth was expended, consumed or otherwise disposed of, or
 - (b) in any other case—the greater of:
 - (i) the value at the time the wealth was acquired, and

- (ii) the value at the time the application for the unexplained wealth order was made.”

For the purpose of exercising its responsibilities under the CAR Act, the Commission is given wide powers, including the power to seek an order for the examination of persons on oath before an officer of the Court.

Appendix 8 Police Integrity Commission Act 1996

The PIC Act constitutes the PIC and provides for the appointment of a Commissioner. The principal objects of the Act when enacted, as stated in s. 3 were:

“3 Principal objects of Act

The principal objects of this Act are:

- (a) to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct, and
- (b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct, and
- (c) to protect the public interest by preventing and dealing with police misconduct, and
- (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.”

As is apparent from the terms of the section, originally the statute did not include officers of the Crime Commission within its principal objects. That was changed by amendment in 2008 when provisions were introduced which specifically brought within the PIC’s jurisdiction the Crime Commissioner, any Assistant Commissioner, and any member of NSWCC staff. Although s. 3 itself was not amended, s. 5B now provides:

“5B Misconduct of Crime Commission Officers

(1) Definition

For the purposes of this Act, *misconduct* of a [Crime Commission officer](#) means any [misconduct](#) (by way of action or inaction or alleged action or inaction) of a [5B Misconduct of a Crime Commission officer](#):

- (a) whether or not it also involves participants who are not [Crime Commission officers](#), and
- (b) whether or not it occurs while the [Crime Commission officer](#) is officially on duty, and
- (c) whether or not it occurred before the commencement of this subsection, and
- (d) whether or not it occurred outside the State or outside Australia.

(2) Examples

[Misconduct](#) of a [Crime Commission officer](#) can involve (but is not limited to) any of the following:

- (a) the **commission** of a **criminal offence** by a **Crime Commission officer**,
 - (b) any **misconduct**, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law,
 - (c) **corrupt conduct** within the meaning of the *Independent Commission Against Corruption Act 1988* involving a **Crime Commission officer**.
- (3) **Former Crime Commission officers**
Conduct may be dealt with, or continue to be dealt with, under this Act even though any **Crime Commission officer** involved has ceased to be a **Crime Commission officer**. Accordingly, references in this Act to a **Crime Commission officer** extend, where appropriate, to include a **former Crime Commission officer**.”

Part 3 of the Act dealing with the functions of the PIC provides in ss. 13 and 13A for its role in respect of police and certain administrative officers. Section 13B and s. 13C relate to the Crime Commission:

“13B Other functions of PIC in relation to Crime Commission officers

- (1) Other **functions** of the PIC include the following:
 - (a) to prevent **misconduct** of **Crime Commission officers**,
 - (b) to detect or **investigate**, or oversee other agencies in the detection or **investigation** of, **misconduct** of **Crime Commission officers**.
- (2) The PIC is, as far as practicable, required to turn its attention principally to serious **misconduct** of **Crime Commission officers**.
- (3) The reference in this section to *overseeing* other agencies in the detection or **investigation** of **misconduct** of **Crime Commission officers** is a reference to the provision by the PIC of guidance that relies on a system of guidelines prepared by it and progress reports and final reports furnished to it rather than the provision of detailed guidance in the planning and execution of such detection and **investigation**.
- (4) In **overseeing** other agencies for the purposes of this section, the PIC does not have a power of control or direction, and any such oversight is to be achieved by agreement. However, it is the duty of **Crime Commission officers** to co-operate with the PIC in the **exercise** of its oversight **functions**.

- (5) However, nothing in subsection (2), (3) or (4):
 - (a) affects the capacity of the PIC to **exercise** any of the **functions** as referred to in subsection (1), or
 - (b) provides a ground for any appeal or other legal or administrative challenge to the **exercise** by the PIC of any of those **functions**.

13C Special allocation of PIC's functions in relation to Crime Commission officers

The **PIC Commissioner** may allocate responsibility for the **exercise** of the **functions** of the PIC in relation to **Crime Commission officers** to an **Assistant Commissioner** and to such members of the staff of the PIC as are designated by the **PIC Commissioner** for the purposes of this section.”

Although a perusal of the PIC Act seems to make clear that its primary focus is upon the police (a situation which may change if the recommendations of the November 2011 *Review by the Minister of the Police Integrity Commission Act 1996* are implemented), there are other references to the Commission including:

“15 Other functions regarding evidence and information collected

- (1) Other **functions** of the **Commission** include the following:
 - (a) to assemble evidence that may be admissible in the prosecution of a person for a **criminal offence** against the law of the State and to furnish any such evidence to the Director of Public Prosecutions,
 - b) to assemble evidence that may be used in:
 - (i) the **investigation** of a **police complaint**, **Crime Commission officer complaint** or **administrative officer complaint**, or
 - (ii) deciding whether to take action under section 173 or 181D of the **Police Act 1990** ,and to furnish any such evidence to the Minister, the **Commissioner** of Police or other appropriate authority in the State,

...

16 Provisions regarding assessments, opinions and recommendations

- (1) The Commission may:
 - (a) make assessments and form opinions, on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has

management or oversight under this Act, as to whether police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer:

- has or may have occurred, or
- is or may be occurring, or
- is or may be about to occur, or
- is likely to occur, and

...

- (c) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations

...

- (3) An opinion that a person has engaged, is engaging or is about to engage:

- (a) in [police misconduct](#), [misconduct](#) of a [Crime Commission officer](#) or [corrupt conduct](#) of an [administrative officer](#) (whether or not specified conduct), or
- (b) in specified conduct (being conduct that constitutes or involves or could constitute or involve [police misconduct](#), [misconduct](#) of a [Crime Commission officer](#) or [corrupt conduct](#) of an [administrative officer](#)),

is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit a [criminal offence](#) or [disciplinary offence](#).

19 Application of Criminal Assets Recovery Act 1990

- (1) The [Criminal Assets Recovery Act 1990](#) applies to the Police Integrity [Commission](#) in the same way as it applies to the New South Wales Crime [Commission](#).
- (2) Accordingly, references in that Act to the Crime [Commission](#) are taken to include references to the Police Integrity [Commission](#), so that [functions](#) exercisable by the Crime [Commission](#) may be [exercised](#) by either body.
- (3) The Police Integrity [Commission](#) may [exercise](#) a [function](#) under that Act only:
 - (a) after the [PIC Commissioner](#) has consulted with the Crime [Commission](#), or
 - (b) in conformity with an arrangement referred to in section 84 of this Act, and must consider whether any such [function](#) should instead be [exercised](#) by the Crime [Commission](#).
- (3A) Subsection (3) does not apply if the [exercise](#) of the [function](#) by the PIC under that Act relates to an [investigation](#) by the PIC concerning [misconduct](#) of a [Crime Commission officer](#).

- (4) It is intended that the Police Integrity Commission will exercise a function under that Act only in connection with matters arising during or out of its own investigations. However, this subsection does not provide any grounds for an appeal against or any other challenge to the exercise by the Commission of any such function.

...

23 Investigations generally

- (1) The Commission may conduct an investigation:
- (a) on its own initiative, or
 - (b) on a police complaint made or referred to it or on a police complaint of which it becomes aware, or
 - (c) on an administrative officer complaint made to it, or
 - (c1) on a Crime Commission officer complaint made to it, or
 - (d) on a report made to it.
- (2) The Commission may conduct an investigation even though no particular police officer, administrative officer, Crime Commission officer or other person has been implicated and even though no police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer is suspected.
- (3) The Commission may, in considering whether or not to conduct, continue or discontinue an investigation, have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion):
- (a) the subject-matter of the investigation is trivial, or
 - (b) the conduct or matter concerned occurred at too remote a time to justify investigation, or
 - (c) if the investigation was initiated as a result of a police complaint, Crime Commission officer complaint or administrative officer complaint-the complaint was frivolous, vexatious or not in good faith.

...

75C Complaints about possible misconduct of Crime Commission officers

- (1) Any person may make a complaint to the PIC about a matter that involves or may involve misconduct of a Crime Commission officer.
- (2) The PIC may investigate any such complaint or decide that the complaint need not be investigated.
- (3) The PIC may discontinue an investigation of any such complaint.

...

75D Duty to notify PIC of possible misconduct of Crime Commission officers

- (1) This section applies to the following officers:
 - (a) the Crime Commissioner,
 - (b) the Commissioner of Police,
 - (c) the principal officer of a public authority,
 - (d) an officer who constitutes a public authority.
- (2) An officer to whom this section applies is under a duty to report to the PIC any matter that the officer suspects on reasonable grounds involves or may involve misconduct of a Crime Commission officer.
- (3) The PIC may issue guidelines as to what matters need or need not be reported.
- (4) This section has effect despite any duty of secrecy or other restriction on disclosure.
- ...

77 Referral of matter

- (1) The Commission may, before or after investigating a matter (whether or not the investigation is completed), refer the matter for investigation or action:
 - (a) to a police authority, or
 - (b) if the matter relates to a Crime Commission officer- to the Crime Commission.
- (2) The Commission may, when referring a matter, recommend what action should be taken by a police authority or the Crime Commission and the time within which it should be taken.
- (3) The Commission may communicate to a police authority or the Crime Commission information that the Commission has obtained during the investigation of conduct connected with the matter.
- (4) The Commission must not refer a matter to a police authority except after appropriate consultation with a police authority and after taking into consideration the views of the police authority with whom it has consulted.
- (4A) The PIC must not refer a matter to the Crime Commission except after appropriate consultation with the Crime Commissioner and after taking into consideration the views of the Crime Commissioner.
- (5) If the Commission communicates information to a person or body under this section on the understanding that the information is confidential, the person or body is subject to the secrecy provisions of section 56 in relation to the information.

78 Report to Commission

- (1) The PIC may, when referring a matter under this Division, require the police [authority](#) or the Crime [Commission](#) (as the case requires) to submit to the PIC a report or reports in relation to the matter and the action taken by the police [authority](#) or the Crime [Commission](#).
- (2) A report must be of such a nature as the [Commission](#) directs
- (3) A report must be submitted to the [Commission](#) within such time as the [Commission](#) directs.

...

79A Referrals to Crime Commission—further action by PIC

- (1) If the PIC is not satisfied that the Crime [Commission](#) has duly and properly taken action in connection with a matter referred to it under this Division, the PIC must inform [the Crime Commissioner](#) of the grounds of the PIC's dissatisfaction and must give [the Crime Commissioner](#) an opportunity to comment within a specified time.
- (2) If, after considering any comments received from [the Crime Commissioner](#) within the specified time, the PIC is still not satisfied, the PIC may submit a report to the Minister for Police setting out the recommendation concerned and the grounds of dissatisfaction, together with any comments from [the Crime Commissioner](#) and the PIC.
- (3) If, after considering any comments received from the Minister for Police within 21 days after the report was submitted to that Minister under subsection (2), the PIC is still of the opinion that the recommendation should be adopted, the PIC may make a report as referred to in section 100.

80 Responsibility of police [authority](#) or the Crime [Commission](#)

It is the duty of a police [authority](#) or the Crime [Commission](#) to comply with any requirement or direction of the [Commission](#) under this Division.”

In carrying out its statutory responsibilities, PIC may establish task forces; cooperate with other agencies, require information, hold public and private hearings, summon witnesses, issue search warrants, seize documents and things, seek the issue of warrants under the *Surveillance Devices Act* etc.

There is provision in Pt 6 of the PIC Act for the appointment by the Governor of an Inspector of the PIC:

“89 Principal functions of Inspector

- (1) The principal functions of the Inspector are:
 - (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
 - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
 - (c) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.
- (2) The functions of the Inspector may be exercised on the Inspector’s own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Committee or any other agency.
- (3) The Inspector is not subject to the Commission in any respect.

...

90 Powers of Inspector

- (1) The Inspector:
 - (a) may investigate any aspect of the Commission’s operations or any conduct of officers of the Commission, and
 - (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
 - (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission’s operations or any conduct of officers of the Commission, and
 - (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission’s operations or any conduct of officers of the Commission, and
 - (e) may investigate and assess complaints about the Commission or officers of the Commission, and

- (f) may refer matters relating to the [Commission](#) or officers of the [Commission](#) to other agencies for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the [Commission](#).”

The Inspector is also given the power to hold inquiries and to arrange for the use of the staff and facilities of the Commission and of other government agencies.

The PIC and its Inspector are brought within the oversight of the Parliamentary Joint Committee called the Committee on the Office of the Ombudsman and the Police Integrity Commission, constituted under the *Ombudsman Act 1974*. This oversight is achieved by s. 95 of the PIC Act:

“95 [Functions](#)

- (1) The [Joint Committee](#) has the following [functions](#) under this Act:
 - (a) to monitor and review the [exercise](#) by the [Commission](#) and the [Inspector](#) of their [functions](#),
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the [Commission](#) or the [Inspector](#) or connected with the [exercise](#) of their [functions](#) to which, in the opinion of the [Joint Committee](#), the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the [Commission](#) and of the [Inspector](#) and report to both Houses of Parliament on any matter appearing, or arising out of, any such report,
 - (d) to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the [Joint Committee](#) thinks desirable to the [functions](#), structures and procedures of the [Commission](#) and the [Inspector](#),
 - (e) to inquire into any question in connection with its [functions](#) which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the [Joint Committee](#):
 - (a) to [investigate](#) a matter relating to particular conduct, or

- (b) to reconsider a decision to [investigate](#), not to [investigate](#) or to discontinue [investigation](#) of a particular complaint, a particular matter or particular conduct, or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the [Commission](#) in relation to a particular [investigation](#) or a particular complaint.
- (3) The provisions of Part 4A of the [Ombudsman Act 1974](#) apply in relation to the [Joint Committee's functions](#) under this Act in the same way as they apply in relation to the [Joint Committee's functions](#) under that Act."

Appendix 9 Comparable Statutes

The Independent Commission Against Corruption (ICAC) was established under the ICAC Act in 1988. The principal objects of the Act are stated in s. 2A, which was inserted in 2005:

“2A Principal objects of Act

The principal objects of this Act are:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
 - (i) to [investigate](#), expose and prevent corruption involving or affecting public authorities and [public officials](#), and
 - (ii) to educate public authorities, [public officials](#) and members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the [Commission](#) special powers to inquire into allegations of corruption.”

The ICAC Act provides for the appointment by the Governor of a Commissioner and Assistant Commissioners. The Commissioner and an Assistant Commissioner are required to be qualified for appointment as a judge of a superior court in Australia or to be a former judge of any Court in Australia. The Commissioner is prohibited from holding office for more than five years and an Assistant Commissioner for more than seven years.

Under s. 10, any person may make a complaint to the Commissioner about a matter that concerns, or may concern, corrupt conduct. The Commissioner may investigate or decide not to investigate any such conduct. By s. 11, certain public officials are required to report suspicions of corrupt conduct to the Commission.

The ICAC is given wide and general powers to investigate complaints and allegations made to it and to fulfil its other roles under s. 13, which include the provision of advice to public authorities as to ways corrupt conduct may be eliminated, the review of relevant statutes and procedures; and the dissemination of information to the public regarding corrupt conduct.

In connection with its principal functions, the ICAC may arrange for the establishment of task forces, seek the establishment of joint task forces with the Commonwealth or other states and work in cooperation with other agencies. For the purposes of its investigative powers under Div. 2, the ICAC may obtain information by service of notices on public officials, require the production of documents, enter public premises, conduct compulsory examinations and public inquiries, issue or procure the issue of search warrants and require the attendance of witnesses.

There is no privilege against self-incrimination in respect of answers to questions or production of documents, but no answer given or document produced is admissible in evidence against a person who has objected to giving the answer or producing the document except in proceedings an offence under the ICAC Act: s. 26. A legal practitioner may claim legal professional privilege unless the privilege is waived by a person having authority to do so.

In 2005, Part 5A was introduced into the ICAC Act providing for the appointment by the Governor of an Inspector of the ICAC. The principal functions of the Inspector, who may not serve for more than five years, are:

“57B Principal functions of Inspector

- (1) The principal functions of the **Inspector** are:
 - (a) to audit the operations of the **Commission** for the purpose of monitoring compliance with the law of the State, and
 - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the **Commission** or officers of the **Commission**, and
 - (c) to deal with (by reports and recommendations) **conduct** amounting to maladministration (including, without limitation, delay in the **conduct** of **investigations** and unreasonable invasions of privacy) by the **Commission** or officers of the **Commission**, and
 - (d) to assess the effectiveness and appropriateness of the procedures of the **Commission** relating to the legality or propriety of its activities.”

Section 57B goes on to provide:

- “(2) The functions of the **Inspector** may be exercised on the **Inspector’s** own initiative, at the request of the Minister, in response to a complaint made to the **Inspector** or in response to a reference by the **Joint Committee** or any **public authority** or **public official**.
- (3) The **Inspector** is not subject to the **Commission** in any respect.
- (4) For the purposes of this section, **conduct** is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
 - (a) contrary to law, or
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or
 - (c) based wholly or partly on improper motives.”

The powers of the Inspector are contained in s. 57C:

“57C Powers of **Inspector**

The **Inspector**:

- (a) may **investigate** any aspect of the **Commission’s** operations or any **conduct** of officers of the **Commission**, and
- (b) is entitled to full access to the records of the **Commission** and to take or have copies made of any of them, and
- (c) may require officers of the **Commission** to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the **Commission’s** operations or any **conduct** of officers of the **Commission**, and
- (d) may require officers of the **Commission** to attend before the **Inspector** to answer questions or produce documents or other things relating to the **Commission’s** operations or any **conduct** of officers of the **Commission**, and
- (e) may **investigate** and assess complaints about the **Commission** or officers of the **Commission**, and
- (f) may refer matters relating to the **Commission** or officers of the **Commission** to other public authorities or **public officials** for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the **Commission**.”

As with the Inspector of the PIC, the Inspector is also given the power to hold inquiries and to arrange for the use of the staff and facilities of the Commission and of other government agencies: s. 57E.

In relation to the ICAC there is also a Parliamentary Joint Committee which is established pursuant to s. 63 and derives power from s. 64 of the ICAC Act:

“63 Constitution of Joint Committee

As soon as practicable after the commencement of this Part and the commencement of the first session of each Parliament, a **joint committee** of members of Parliament, to be known as the Committee on the Independent **Commission** Against Corruption, shall be appointed.

64 Functions

- (1) The functions of the **Joint Committee** are as follows:
 - (a) to monitor and to review the exercise by the **Commission** and the **Inspector** of the **Commission’s** and **Inspector’s** functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the **Commission** or the **Inspector** or connected with the exercise of its functions to which, in the opinion of the **Joint Committee**, the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the **Commission** and of the **Inspector** and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
 - (d) to examine trends and changes in **corrupt conduct**, and practices and methods relating to **corrupt conduct**, and report to both Houses of Parliament any change which the **Joint Committee** thinks desirable to the functions, structures and procedures of the **Commission** and the **Inspector**,
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the **Joint Committee**:
 - (a) to **investigate** a matter relating to particular **conduct**, or
 - (b) to reconsider a decision to **investigate**, not to **investigate** or to discontinue **investigation** of a particular complaint, or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the **Commission** in relation to a particular **investigation** or complaint.”

The Parliamentary Joint Committee has the right to veto the proposed appointment of both the Commissioner and the Inspector: s. 64A.

The *Ombudsman Act 1974* creates the office of Ombudsman, an appointment which may be made by the Governor for a renewable term not exceeding seven years: s. 6.

Under s. 12, any person, including a public authority, may complain to the Ombudsman about the conduct of a public authority (as widely defined) and the Ombudsman may make the conduct the subject of an investigation.

In conducting investigations the Ombudsman has broad powers, including the power to hold inquiries, but the powers fall short of those given to the Commission. For instance, a witness in an inquiry conducted by the Ombudsman has the same privilege he or she would have in a court of law: s. 21.

Following an investigation, the Ombudsman's role and powers are regulated by a number of sections of the Act, including:

“26 Report of investigation

- (1) Where, in an **investigation** under this Act, the Ombudsman finds that the **conduct** the subject of the **investigation**, or any part of the **conduct**, is of any one or more of the following kinds:
 - (a) contrary to law,
 - (b) unreasonable, unjust, oppressive or improperly discriminatory,
 - (c) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory,
 - (d) based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration,
 - (e) based wholly or partly on a mistake of law or fact,
 - (f) **conduct** for which reasons should be given but are not given,
 - (g) otherwise wrong,the Ombudsman is to make a report accordingly, giving his or her reasons.
- (2) In a report under this section, the Ombudsman may recommend:
 - (a) that the **conduct** be considered or reconsidered by the **public authority** whose **conduct** it is, or by any **person** in a position to supervise or direct the **public authority** in relation to the **conduct**, or to review,

- rectify, mitigate or change the **conduct** or its consequences,
 - (b) that action be taken to rectify, mitigate or change the **conduct** or its consequences,
 - (c) that reasons be given for the **conduct**,
 - (d) that any law or practice relating to the **conduct** be changed,
 - (d1) that compensation be paid to any **person**, or
 - (e) that any other step be taken.
- (3) The Ombudsman shall give a report under this section:
- (a) to the **responsible Minister**,
 - (b) to the **head** of the **public authority** whose **conduct** is the subject of the report, and
 - (c) where the **public authority** is employed under the *Public Sector Management Act 1988* , to the Premier's **Department**.
- (4) The Ombudsman may give a copy of a report under this section:
- (a) where the **investigation** arises out of a **complaint** to the Ombudsman, to the complainant,
 - (b) to the **public authority** to whose **conduct** the report relates.
- (5) The **person** to whom a report is given under subsection (3) (b) may, and on request by the Ombudsman shall, notify the Ombudsman of any action taken or proposed in consequence of a report under this section."

The *Crime and Misconduct Act 2001* (Qld) has as its main purpose "to combat and reduce the incidence of major crime" and "to continuously improve the integrity of, and to reduce the incidence of misconduct in the public sector": s. 4(1), as well as to facilitate the Crime and Misconduct Commission ("CMC")'s involvement in the investigation of any "confiscation related activity". Section 5 states the means by which the objectives are to be achieved:

- "(1) The Act's purposes are to be achieved primarily by establishing a permanent commission to be called the Crime and Misconduct Commission.
- (2) The commission is to have investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate major crime.
- (3) Also, the commission is to help units of public administration to deal effectively, and appropriately, with misconduct by increasing their capacity to do so while

retaining power to itself investigate cases of misconduct, particularly more serious cases of misconduct.

- (4) Further, the commission has particular powers for investigations into confiscation related activities for supporting its role under the Confiscation Act. “

Matters are referred to the CMC by a Reference Committee which includes two CMC officers, the Commissioner of Police, two community representatives and, for certain items of business, the Chief Executive of the Australian Crime Commission: s. 278.

There is a monitoring and reviewing role conferred on the Parliamentary Crime and Misconduct Committee of the Legislative Assembly. The statute also creates the office of Parliamentary Crime and Misconduct Commissioner in Pt 4 of Ch. 6 and confers on such Commissioner broadly the powers conferred by the ICAC Act upon the ICAC Inspector, including the right to conduct hearings.

As to the performance by the CMC of its functions, s.35 provides:

“35 How commission performs its misconduct functions

- (1) Without limiting how the commission may perform its misconduct functions, it performs its misconduct functions by doing 1 or more of the following—
 - (a) expeditiously assessing complaints about, or information or matters (also *complaints*) involving misconduct made or notified to it;
 - (b) referring complaints about misconduct within a unit of public administration to a relevant public official to be dealt with by the public official;
 - (c) performing its monitoring role for police misconduct as provided for under section 47(1);
 - (d) performing its monitoring role for official misconduct as provided for under section 48(1);
 - (e) dealing with complaints about official misconduct, by itself or in cooperation with a unit of public administration;
 - (f) investigating and otherwise dealing with, on its own initiative, the incidence, or particular cases, of misconduct throughout the State;
 - (g) assuming responsibility for, and completing, an investigation, by itself or in cooperation with a unit of public administration, if the commission

- considers that action to be appropriate having regard to the principles set out in section 34;
- (h) when conducting or monitoring investigations, gathering evidence for or ensuring evidence is gathered for—
 - (i) the prosecution of persons for offences; or
 - (ii) disciplinary proceedings against persons.
- (2) In performing its misconduct functions in a way mentioned in subsection (1), the commission should, whenever possible, liaise with a relevant public official.”

The CMC is given similar powers in relation to the questioning of witnesses and the production of documents as are given both to the Commission and the ICAC.

The constitution of the CMC differs from any NSW agency in that it is comprised of a full time commissioner (who may not hold office for more than five years in total) who is the Chairperson and four part time commissioners who are “community representatives”: s. 223. The commissioner must have served on or be qualified for appointment to a superior court in Australia. Part time commissioners must be qualified in accordance with s. 225 and s. 230. Before nominating a person as a commissioner, the Minister must consult, as provided in s. 228, namely, with the Parliamentary Committee or political party leaders if there is no Parliamentary Committee at the relevant time, and in the case of part-time commissioners, with the Chairperson.

The *Criminal Proceeds Confiscation Act 2002* (Qld) (CPC Act) is, as its name suggests, in many ways similar to the CAR Act. However, there are important differences in that it provides for two separate schemes, one where a person has been charged and convicted, which is administered by the DPP, and the other administered by CMC which does not depend on a charge or conviction. In effect, it combines in one statute both the CAR Act and the *Confiscation of Proceeds of Crime Act 1989*, which relates to cases where there has been a conviction in this State.

As with the CAR Act, in cases where there has been no conviction, there are procedures for obtaining restraining orders, orders for sale of restrained property; examination orders, forfeiture orders, proceeds assessment orders, etc. There

are also provisions for exclusion orders and orders for relief against hardship in Div. 2 of Pt 4 of Ch. 2. All proceedings are to be taken in the name State of Queensland and in all proceedings the DPP (Qld) is the solicitor on the record. In general, where there has been no conviction, proceedings are to be instituted by the CMC and, where there has been a conviction, by the DPP.

Although s. 34 permits the court to allow for payment out of restrained property, reasonable living and business expenses, and “a stated debt incurred in good faith”, there is a prohibition against allowing payment of legal expenses in relation to the proceedings or criminal proceedings (s. 34(4)) except where the payment is made to Legal Aid: s. 38(1)(f).

In cases where there has been a conviction and the DPP is the moving party, again in the name of the State, there are analogous procedures to those specified for cases where there has been no conviction, those proceedings being dealt with under Ch. 3.

The Act makes specific provision for consent orders in s. 256A:

“256A Consent orders

- (1) Subject to subsection (2), the court may make an order in a proceeding under chapter 2 or chapter 3 with the consent of—
 - (a) the applicant in the proceeding; and
 - (b) everyone whom the court has reason to believe has an interest in the property that is the subject of the proceeding.
- (2) The court may make an order under subsection (1) if—
 - (a) a person mentioned in subsection (1)(b) withholds consent but the court considers it appropriate to make the order; or
 - (b) the consent of a person mentioned in subsection (1)(b) could not be obtained but the court considers it appropriate to make the order.
- (3) The order may be made without consideration of the matters the court would otherwise consider in the proceeding.
- (2) This section does not apply to an order made on sentence for a criminal offence. “

The *Corruption and Crime Commission Act 2003* (WA) establishes the Corruption and Crime Commission (“CCC”). It provides for the appointment of a Commissioner who must have served as a judge of a superior court or be qualified for appointment to such a court: s. 10. The Commissioner holds office for a term of five years and pursuant to Sch. 2, “is eligible for re-appointment once”. The Act states in ss. 7A and 7B its purposes and the means by which they are to be achieved:

“7A. Act’s purposes

The main purposes of this Act are—

- (a) to combat and reduce the incidence of organised crime; and
- (b) to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.

7B . How Act’s purposes are to be achieved

- (1) The Act’s purposes are to be achieved primarily by establishing a permanent commission to be called the Corruption and Crime Commission.
- (2) The Commission is to be able to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organised crime.
- (3) The Commission is to help public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct.”

In Pt 4 of the Act, the CCC is given particular powers in respect of organised crime, which include the power to summon witnesses for examination by a representative of the Commissioner of Police, the power, on reasonable grounds for suspicion, to stop and search persons and conveyances in which they have been, the power to seize property, the power to carry out controlled operations.

In relation to the examination of witnesses, legal professional privilege is preserved and there is a restriction on the use of answers which a witness is required to give similar to those in the statutes in relation to the PIC and the ICAC considered above.

The Act provides in Pt 13 for the appointment of a “Parliamentary Inspector of the CCC”. The Inspector is designated as an officer of parliament “responsible for assisting the Standing Committee in the performance of its functions”: s. 188.

The functions of the Parliamentary Inspector are stated to be:

“195 . Functions

- (1) The Parliamentary Inspector has the following functions —
 - (aa) to audit the operation of the Act;
 - (a) to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;
 - (b) to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;
 - (cc) to audit any operation carried out pursuant to the powers conferred or made available by this Act;
 - (c) to assess the effectiveness and appropriateness of the Commission’s procedures;
 - (d) to make recommendations to the Commission, independent agencies and appropriate authorities;
 - (e) to report and make recommendations to either House of Parliament and the Standing Committee;
 - (f) to perform any other function given to the Parliamentary Inspector under this or another Act.
- (2) The functions of the Parliamentary Inspector may be performed —
 - (a) on the Parliamentary Inspector’s own initiative;
 - (b) at the request of the Minister;
 - (c) in response to a matter reported to the Parliamentary Inspector; or
 - (d) in response to a reference by either House of Parliament, the Standing Committee or the Commission.
- (3) The Parliamentary Inspector may declare himself or herself unable to act in respect of a particular matter by reason of an actual or potential conflict of interest.
- (4) The Commission is not to exercise any of its powers in relation to the Parliamentary Inspector.”

For the purpose of discharging his or her role, the Parliamentary Inspector is given wide powers of access to the officers and records of the Commission and the right to consult and cooperate with other agencies and authorities: ss. 196 and 197.

General oversight of both the Commission and the Parliamentary Inspector is given to a Joint Standing Committee of the Western Australian Parliament.

The *Australian Crime Commission Act 2002* (Cth) established the ACC. The functions of the ACC as set forth in s. 7A are:

“Functions of the ACC

The ACC has the following functions:

- (a) to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information and intelligence;
- (b) to undertake, when authorised by the [Board](#), [intelligence operations](#);
- (c) to investigate, when authorised by the [Board](#), matters relating to [federally relevant criminal activity](#);
- (d) to provide reports to the [Board](#) on the outcomes of those operations or investigations;
- (e) to provide strategic criminal intelligence assessments, and any other criminal information and intelligence, to the [Board](#);
- (f) to provide advice to the [Board](#) on national criminal intelligence priorities;
- (g) such other functions as are conferred on the ACC by other provisions of this Act or by any other Act.”

The ACC has a numerically large Board established pursuant to s. 7B, chaired by the Commissioner of the AFP and in addition comprising:

- “(2)(b) the Secretary of the Department;
- (c) the Chief Executive Officer of Customs;
- (d) the Chairperson of the Australian Securities and Investments Commission;
- (e) the Director-General of Security holding office under the *Australian Security Intelligence Organisation Act 1979*;
- (f) the Commissioner or head (however described) of the police force of each [State](#) and of the Northern [Territory](#);
- (g) the Chief Police Officer of the Australian Capital [Territory](#);
- (h) the CEO;
- (i) the Commissioner of Taxation.”

The ACC Board, which has a quorum of seven has these functions (s. 7C):

- “(a) to determine national criminal intelligence priorities;
- (b) to provide strategic direction to the ACC and to determine the priorities of the ACC;
- (c) to authorise, in writing, the ACC to undertake **intelligence operations** or to investigate matters relating to **federally relevant criminal activity**;
- (d) to determine, in writing, whether such an operation is a special operation or whether such an investigation is a special investigation;
- (e) to determine, in writing, the class or classes of persons to participate in such an operation or investigation;
- (f) to establish task forces;
- (g) to disseminate to law enforcement agencies or foreign law enforcement agencies, or to any other agency or body of the Commonwealth, a **State** or a **Territory** prescribed by the regulations, strategic criminal intelligence assessments provided to the **Board** by the ACC;
- (h) to report to the Inter-Governmental Committee on the ACC's performance;
- (i) such other functions as are conferred on the **Board** by other provisions of this Act.”

Sections 8 and 9 of the Act establish an Inter-Governmental Committee to monitor generally the work of the ACC. Section 17 requires the ACC to cooperate with law enforcement agencies and enables it to co-ordinate its activities with those of overseas authorities.

The Chief Executive Officer of the ACC is appointed by the Governor General for a term which must not exceed five years: s. 37. Prior to appointment, the Minister must invite the Board to make a nomination and must consult the Inter-Governmental Committee. No particular qualification is stipulated for Chief Executive Officer.

The Act however, creates the office of Examiner, an appointment by the Governor General, the qualification for which is enrollment as a legal practitioner for at least five years: s. 46B. An Examiner is to hold office for a renewable term which must not exceed five years: s. 46B. There are full time and part time Examiners.

Several sections of the Act mandate the role of an Examiner, including the role of conducting examinations for the purpose of a special ACC operation/investigation. In respect of such examinations an Examiner may

summon witnesses and require the production of documents. There is no privilege against self-incrimination but if objection is taken the document or evidence cannot be used against the witness taking the objection in criminal proceedings: s. 30.

The *Law Enforcement Integrity Commissioner Act 2006* (Cth) creates an “Integrity Commissioner”, primarily to investigate and report upon corruption in Commonwealth law enforcement agencies (which include the AFP and the ACC) by a person who is or has been a staff member and collect, correlate, analyse and disseminate information and intelligence in relation to corruption generally, or the integrity of staff members, of Commonwealth law enforcement agencies and other Commonwealth agencies that have law enforcement functions: s. 15.

The Commissioner is given broad powers for obtaining information from witnesses and the production of documents, and generally for carrying out the Commissioner’s investigative role, the powers including the right to hold a hearing in public or private. At the request of the Minister, the Commissioner may conduct public inquiries into corruption issues or corruption generally in law enforcement agencies: s. 71.

Persons required to give information to the Commissioner or provide documents are not excused from doing so on the ground of self-incrimination (s. 80) but if objection is taken, the information given or the document produced cannot be used in criminal proceedings against the person except in limited circumstances.

The *Law Enforcement Integrity Commissioner Act* provides in s. 195 for the establishment of the ACLEI which comprises the Integrity Commissioner and Assistant Commissioner and the staff of ACLEI. Its role is to assist the Commissioner: s. 196.

The Integrity Commissioner is required to give the Minister, for presentation to the Parliament, an annual report including specified information set forth in s. 201 of the Act.

The *Australian Intelligence Organisation Act 1979* (Cth) continued in existence the Australian Security Intelligence Organisation (“ASIO”) under the control of the Director-General who is subject to the direction of the Minister (s. 8), except in particular respects where the Director-General has formed an opinion. The Director-General holds office for a period not exceeding seven years but is eligible for re-appointment: s. 9.

The primary role of ASIO is the collection, correlation, and evaluation of intelligence relevant to security and to provide advice accordingly to relevant persons and authorities: s. 17.

Wide powers are conferred upon ASIO for the exercise of its functions. These powers include, under warrant from the Minister, the use of listening devices and tracking devices and the right to inspect postal articles and delivery service articles. In relation to terrorism offences, Div. 3 of Pt 3 confers the power to seek a warrant for the questioning of a person. Such a questioning warrant may be enforced by detaining the person to be questioned. The questioning is carried out by a prescribed authority namely, a person who has been or is a judge or a person enrolled as a legal practitioner for at least five years.

Oversight of ASIO (and of certain other Commonwealth instrumentalities and agencies) is provided by the Inspector-General of Intelligence and Security established under the *Inspector-General of Intelligence and Security Act 1986* (Cth).

The functions of the Inspector General in relation to ASIO are as set forth in s. 8(1):

“Intelligence agency inquiry functions of Inspector-General

- (1) Subject to this section, the functions of the [Inspector-General](#) in relation to [ASIO](#) are:
 - (a) at the request of the [responsible Minister](#), of the [Inspector-General](#)'s own motion or in response to a complaint made to the [Inspector-General](#), to inquire into any matter that relates to:

- (i) the compliance by ASIO with the laws of the Commonwealth and of the States and Territories; or
 - (ii) the compliance by ASIO with directions or guidelines given to ASIO by the responsible Minister; or
 - (iii) the propriety of particular activities of ASIO; or
 - (iv) the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO; or
 - (v) an act or practice of ASIO that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*, being an act or practice referred to the Inspector-General by the Australian Human Rights Commission; and
- (b) at the request of the responsible Minister or of the Inspector-General's own motion, to inquire into the procedures of ASIO relating to redress of grievances of employees of ASIO; and
- (c) at the request of the responsible Minister, to inquire into the action (if any) that should be taken to protect the rights of a person who is an Australian citizen or a permanent resident in a case where:
- (i) ASIO has furnished a report to a Commonwealth agency (within the meaning of Part IV of the *Australian Security Intelligence Organisation Act 1979*) that may result in the taking of action that is adverse to the interests of the person; and
 - (ii) the report could not be reviewed by the Security Appeals Division of the Administrative Appeals Tribunal;
- and, in particular, to inquire into whether the person should be informed of the report and given an opportunity to make submissions in relation to the report; and
- (d) where the responsible Minister has given a direction to ASIO on the question whether:
- (i) the collection of intelligence concerning a particular individual is, or is not, justified by reason of its relevance to security; or
 - (ii) the communication of intelligence concerning a particular individual would be for a purpose relevant to security;

to inquire into whether that collection is justified on that ground or whether that communication would be for that purpose, as the case may be.”

The Inspector-General is not required to have legal qualifications but the Act does contemplate that the appointment may be of a serving judge of a State or the Northern Territory: s. 6. The Inspector General holds office for such term as is specified in the instrument of appointment, which may not exceed five years and is not eligible to be appointed more than twice: s. 26.

The *Proceeds of Crime Act 2002* (Cth) has its principal objects (s. 5):

“The principal objects of this Act are:

- (a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and
- (b) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (ba) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
- (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and
- (g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the self-governing Territories to be enforced in the other Territories. “

In relation to assets acquired as the result of criminal activity, the Act has similar provisions to the CAR Act. It is presently administered by the Commonwealth

DPP (though this will soon change with the passage of the *Crimes Legislation Amendment Bill (No. 2) 2011*) and has application to the property of persons whether or not they have been convicted of an offence.

Powers of information gathering are conferred for the purposes of the Act, including the power of a Court to require persons to be examined before an approved Examiner, on oath or affirmation and for the DPP to give an examination notice for the examination of the person. There is privilege against self-incrimination and legal professional privilege: s. 197.

Appendix 10 Project Rhodium – Purpose, scope and objectives

“Purpose

- 1.2 The purpose of the Review was to assess the capacity of the NSWCC to identify and manage serious misconduct risks; and, if appropriate, to make recommendations as to how the NSWCC may improve that capacity. The purpose was conceived as a broad-based health-check.
- 1.3 In undertaking the Review it was not the intention of the PIC to consider specific instances of misconduct or focus on a single risk area. It was determined that any areas noted as presenting specific misconduct risks during the life of the project would be noted for more detailed consideration by the PIC in the future.

Scope

- 1.4. Consistent with the broad purpose, the scope of the Review was confined in several ways:
- The project did not examine the conduct of any individual NSWCC officer;
 - It did not examine the capacity of the NSWCC to identify and manage risks other than misconduct risks, such as financial risks, which might be captured by a standard financial audit;
 - As far as practicable, it was limited to examining high-end or serious misconduct risk issues such as illegal activity and not issues such as poor officer performance;
 - it examined only the stated and documented practices of the NSWCC with respect to its misconduct prevention capacity; and
 - It did not seek to audit those practices on the ground.
- 1.5 In other ways, the scope of the Review was broad:
- The project examined the capacity of the NSWCC to identify and manage misconduct risks across several areas;
 - It examined the capacity of the NSWCC to identify and manage misconduct risks in respect of all 'staff (as defined by section 32 of the NSWCC Act) as well as staff working at the NSWCC under the auspices of joint task forces (as defined by section 27A of the NSWCC Act); and
 - It examined larger issues such as organisational culture insofar as these issues can be seen to affect the management of misconduct risks. To do so effectively it

was necessary to understand the environment in which the NSWCC operates.

- 1.6 The review was not an investigation and as such the PIC was not bound by the rules of evidence. The PIC sought to obtain an understanding of how the NSWCC managed misconduct risk and in so doing relied on the relevant documentation furnished by the NSWCC as well as the views of those persons who dealt with such issues on a day-to-day basis.
- 1.7 Consistent with the above, the PIC contends that the management of misconduct risks demands more than the publication of guidelines and directions on any particular sphere of activity. It is in the course of the work of the staff of an agency where the risks of misconduct can become manifest and it is the attitude and intuitive reaction of management and staff that determines how the agency ultimately manages those risks.

...

OBJECTIVES

- 1.11 In carrying out Project Rhodium, the PIC had three primary objectives. These were to:
- Identify and assess the strategies that the NSWCC had in place to identify and manage serious misconduct risks;
 - Identify strengths and opportunities for improvement in how the NSWCC identified and managed serious misconduct risks and make recommendations, if required; and
 - Report to Minister of Police as Chair of the NSWCC Management Committee about the capacity of the NSWCC to identify and manage serious misconduct risks."

Appendix 11 Project Rhodium – Recommendations for Consideration by NSWCC Management Committee

“Informant handling

1. The PIC recommends that the NSWCC implement some immediate changes to its informer management policy. These changes should enshrine procedures for:
 - the ongoing evaluation and assessment of the relationship with informants and the intelligence provided, to be undertaken by supervisors independent of the case officer;
 - determining whether or not relationships with informants should be terminated; and
 - the manner, timing payment and evaluation of rewards or advancement of other financial benefits.

It is the present intention of the PIC to conduct an audit of the informant management practices of the NSWCC following the current investigation the PIC is conducting which is focused on individual relationships. It is hoped that the audit will be better informed by this investigation. It is anticipated that this audit will further examine the efficacy of informer management processes at the NSWCC and that additional recommendation will be made on the topic.

Search and seizures

2. The PIC recommends that the NSWCC update and promulgate its search and seizure procedures and include within the new procedures clear statements as to:
 - the responsibilities of NSWCC and NSWPF staff in searches;
 - the capacity in which NSWCC staff participate in searches;
 - the items which may or may not be seized by NSWCC staff and the procedures by which they are to be seized; and
 - the procedures that are to be used when members of different agencies participate in searches.
3. The PIC recommends that the NSWCC implement improvements in how it handles high-risk items and promulgate such improvements to staff. Such improvements should include:
 - the establishment of secured exhibit facilities within the premises of the NSWCC. Such facilities should include a secured room for undertaking forensic examinations and 24 hour CCTV monitoring; and
 - written procedures relating to all types of high-risk items that may come into the control of the NSWCC including drugs, firearms as well as items of value.

Complaint handling

4. The PIC recommends that the NSWCC reform its complaint management practices and develop policies and procedure that incorporate the following features:
 - a clear definition of a complaint which includes internal complaints;
 - complaint categories that clearly identify the issues raised in complaints;
 - record keeping that allows the agency to monitor the progress of a complaint and use the aggregated data to identify complaint trends;
 - objective processes and criteria to determine whether a complaint requires investigation;
 - tiered investigation methods that incorporate evidence and outcome based methods;
 - referral procedures to determine whether the handling of the complaint by the NSWCC poses any conflicts of interest;
 - the sanctions that might be applied in the event that a complaint is sustained; and
 - a mechanism by which both internal and external persons can easily lodge complaints.

5. To enable the oversight function of the PIC in respect to how the NSWCC handles complaints, the PIC recommends that the NSWCC develops a complaints reporting and tracking system. This system may take the form of a template, which can be used for each complaint to record:
 - the name of the complainant;
 - the complaint narrative as received;
 - the date of receipt;
 - the complaint issues identified by the NSWCC;
 - the date on which the complaint was first assessed and the outcome of that assessment;
 - the dates on which the complaint was subsequently discussed and the outcome of those meetings;
 - conflict of interest considerations;
 - referral options;
 - investigation options and alternatives;
 - if relevant, investigation findings;
 - management outcomes;
 - complainant satisfaction ;and
 - finalisation.

Internal Audit Committee

6. The PIC recommends that the NSWCC further develop the role of the Internal Audit Committee (IAC). This role should be bolstered to ensure that it plays a key role in driving misconduct risk management at the NSWCC. In particular, the PIC recommends that the IAC:
 - be required to conduct an annual agency wide risk assessment to identify areas of misconduct risk;

- maintains a list of systems and polices that may be audited and ensures [sic] that these systems and polices are regularly audited;
- be required to document all of its work;
- make direct reports to the NSWCC management committee; and
- undertake an annual self assessment of the work it does and make a record of this available to the NSWCC Management Committee.

Confidential Information

7. The PIC recommends that the NSWCC examines how it handles confidential information. Subject to the view of the NSWCC Management Committee, the PIC considers that such an examination could be undertaken by the Internal Audit Committee and that it should, amongst other things, consider the following:

- the types of information handled by the NSWCC and whether this information is formally classified;
- the databases maintained by the NSWCC and the types of information they store;
- the restrictions on use and access that apply to each of the databases;
- the number of officers that have access to each of the databases;
- the mechanisms that are in place to audit access and the frequency of their use;
- whether there are any facilities to discover who may have accessed or printed any particular file;
- the types of information that may migrate from one database to another or one system to another, such as TI material, and the security arrangements that are in place to manage this;
- the types of paper files maintained by the NSWCC and the security protocols governing storage, access and use as well as monitoring; and
- the existence and adequacy of any training in handling confidential information, which the NSWCC provides to its employees as well as to task force officers who access computer facilities at the NSWCC.

The IAC should also undertake a wide-ranging audit of those information systems that are currently auditable as well as a review of the NSWCC information security policy in light of the audit findings.

Risk Management

8. The PIC recommends that the NSWCC updates its risk management policy and specifically develops a risk management plan, which will enable it to methodically identify and manage misconduct risks. The policy and planning process should, amongst other things:

- be in accord with the Australian and New Zealand Risk Management Standard;
 - take into consideration the types of officers at the NSWCC and the duties they perform; and
 - for each group of officers, identify the misconduct risks they face because of the work they do.
9. The PIC recommends that the obligation owed by senior managers to identify and respond to risks in their areas of responsibility expressly include misconduct risks, and that their performance in doing so be considered during annual performance appraisals.

Reports to the NSWCC Management Committee

10. The PIC recommends that the NSWCC update the types of content it provides in its annual reports to include the following information:
- in the case of outputs claimed such as arrests and seizures, the nature and extent of the contribution or involvement of the NSWCC as distinct from the NSWPF and other agencies;
 - a detailed description of the charges laid against defendants, prosecutorial outcomes, and information which may assist in making a qualitative assessment of the disruption that such action has caused to criminal syndicates and individuals; and
 - a full range of statistics in respect of actions under the CAR Act, including: details of the number of settlements negotiated, the realisable settlement amounts that were sought and granted, the settlement amounts that were in fact collected from defendants, the amounts claimed and recovered by the NSWCC as professional costs, and the amounts that were deposited with the Public Trustee and Treasury.
11. The PIC recommends that an annual confidential report is also made to the NSWCC Management Committee including:
- statistics for the full range of financial benefits provided to informants, including: reward payments, weekly expenditure allowances, sustenance payments, witness protection payments, and the value of any consideration given in respect of confiscation matters they may be facing; and
 - information on the number and nature of complaints received that involved NSWCC officers, including information on: complaint issues, complaint investigations, the number of matters referred to the PIC, complaint outcomes and the impact, if any, on processes and systems.
- 11.16 Apart from the changes outlined above, the PIC believes that both short and long-term structural change may be needed to improve the capacity of the NSWCC to manage misconduct risks as discussed above.

Task force arrangements

- 11.17 The PIC has identified one main misconduct risk associated with task force arrangements. This risk arises out of the dichotomy discussed in the report concerning NSWPF officers who, in reality, work for and owe responsibility to two distinct agencies.
- 11.18 The PIC notes that changes have been made to task force arrangements and that some of these may remedy the issues identified in the Review. However, the PIC considers that additional measures are required to adequately manage the risk identified by the Review.
12. As part of the review process, the PIC recommends that the NSWCC Management Committee ensures that the dual obligations owned by task force officers as members of the NSWPF and NSWCC are clearly explained to them and that the potential for conflict between these roles is clarified.

Long term review of the NSWCC

- 11.19 As noted above, there are aspects of the management structure of the NSWCC that may necessitate a structural review of the agency.
- 11.20 In addition, the PIC notes that NSWCC has been in operation since 1986 without any substantive review having been undertaken of its structure, functions or other aspects of its work since that time. The value of such a review is that it can provide an assurance to all stakeholders that the agency remains relevant and that the merits of any change are discussed and debated.
- 11.21 The PIC considers that a review of the NSWCC and NSWCC Act is required to determine: whether the policy objectives of the NSWCC Act remain valid and whether the terms of the NSWCC Act remain appropriate for securing those objectives; and whether the structure, functions and powers of the NSWCC remain valid in the current context.
13. It is recommended that an external review of the NSWCC be conducted. This should commence within six months of the date of this report and be concluded within 18 months of that date. The review should consider whether the policy objectives leading to the establishment of the NSWCC remain valid and whether the terms of the NSWCC Act remain appropriate. The PIC further recommends that the review consider, inter alia:
- the desirability of fixing the term of the Commissioner of the NSWCC to five years;
 - the need for additional external accountability mechanisms such as a parliamentary oversight committee;
 - whether the NSWCC should revert to multimember commissionership with a presiding Chair;

- whether there needs to be a separation of the criminal investigatory function on the one hand and the pursuit of the proceeds of crime action on the other; and
- whether the NSWCC should retain the functions of investigating criminal activity and exercising functions under the CAR Act;
- the need to effect internal structural change to ensure that managerial responsibilities are appropriately delegated at the top levels of the agency; and
- whether the functions or powers of the NSWCC should be retained by the NSWCC or be given to some other agency such as the NSWPF.”

