

MAKING THE ICAC WORK

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Preface

Within the framework of a seminar entitled "Investigative Powers in the Modern State", I have been invited to present a paper about the Independent Commission Against Corruption, the ICAC, from a critical perspective.

My specific interest is making the ICAC work. Obviously enough, that is at least the responsibility of the ICAC, especially because it is intended to be an agency independent from external direction. Nevertheless that responsibility also falls on the community through co-operating with and giving support to the ICAC.

An equally important part of taking on the responsibility of making the ICAC work is to build a rational, informed environment for reviewing the operations of the ICAC after it has had a fair chance to perform in practice. That may be between three to five years hence. If there has been one lesson taught by the experience of the National Crime Authority (NCA), as this environment was not worked on from the beginning it is now near impossible to make a credible assessment of its impact on major and organised crime, whether there are areas requiring improvement or whether it should be abolished.

In my view the same mistake should not be made with the ICAC. Accordingly, I propose to use this paper to lay out what I think are the key elements in such an environment.¹ Reflecting the order in which they will be discussed, they include:

1. An appreciation of the role of the media in shaping public discourse on the ICAC
2. ICAC and public debate.
3. Identification of the criteria by which to qualitatively evaluate the operations of the ICAC
4. Detailed discussion of the various expectations as to how the ICAC will operate.

¹ Throughout this paper an attempt has been made to record as many relevant quotations, references and details as possible as it is important to maintain a reasonably comprehensive historical record of relevant material. This is especially important here as the high point of debate about the worth of the ICAC is expected to be in a few years hence, when regrettably, memories of what seem important now tend to fade

5. A close look at the discretion vested in the ICAC to determine what it investigates.
6. A look at what specifically the ICAC can be reasonably expected to investigate.
7. A discussion of corruption prevention and the ICAC
8. A discussion of anti-corruption education and the ICAC
9. A discussion of the role of the ICAC's Annual Report.
10. Identification of possible areas for reform once the ICAC has undergone a process of review.

1. THE ICAC AND THE MEDIA

There is no better four letter word to describe ICAC than news. In Australia, it serves to focus on corruption of a kind regularly reported to occur across the world.² Local corruption allegations, old and new, are given an elevated importance because they may be the subject of ICAC investigations. Accordingly, everything about the ICAC has been newsworthy.

The ICAC and corruption, if not the main issues in the election which saw the coalition parties win the NSW election on 18 March 1988, were nevertheless always in the background, exploiting the widespread perception that the Labor Government was corrupt or at least weak in its response to the perceived corruption problem in NSW. In the months leading to the election, the media had plenty of supposedly corruption (or ICAC)-related material to work with such as:

- the announcement of the ICAC policy in mid-January 1988, gaining the front page banner "Libs to smash crime rackets",³

2 Panama, drugs, elections and General Noriega (Editorial "Noriega the noxious must be deposed" *Weekend Australian* 13-14.5.1989 p 22; Editorial "Panama A Poser For United States" *Canberra Times* 13.4.1989 p 8)

Japan and the Recruit Cosmos Scandal (Ries, I. "Ezoe : From Rags To Riches To Ruin" *AFR* 19.12.1988 p 13; Johnson, M. "The Noose Tightens" *Time* 24.4.1989 pp 10-15 (Cover story: "Money + Politics = Scandal"); Ries, I. "Japan: politics and corruption" *AFR* 3.4.1989 pp 1, 13; Ries, I. "How Japan's political chicanery works" *AFR* 4.4.1989 p 1, 13; Ries, I. "Pervading stench of recruit cosmos" *AFR* 5.4.1989 pp 1, 13; Ries, I. "The Opposition is also guilty" *AFR* 6.4.1989 p 13; "Recruit clouds Takeshita's future" *AFR* 7.4.1989 p 50)

Laos and allegation in US State Department study that international drug trafficking is government policy ("US study accuses Laos of drug dealing policy" 31.8.1988 p 9)
 Mexico, Panama, Colombia South East Asia : allegations that international drug trafficking has in recent years been facilitated by corruption at the highest levels of government, sometimes involving assistance from the CIA (eg Mills, J. (1987) *The Underground Empire : Where Crime And Governments Embrace* Sidgwick London pp 549, 550-551, 751-753, 788-789, 1068, 1140-1143, 1159-1164; McCoy, A. (1972) *The Politics of heroin in South East Asia* Harper & Row; McCoy, A. (1980) *Drug Traffic : Narcotics and Organized Crime In Australia* Harper & Row
 USA, USSR, China : various well known allegations such as institutionalised corruption in the one party systems in China and the USSR; Iran/Contra scandal, Watergate, defence procurement corruption in the USA

3 Grimshaw, P. *DT* 15.1.1988 p 1

- on 9 February 1988 Federal Labor Minister Mick Young resigned over the Harris-Daishowa NSW election funding affair which also involved leading ALP Party Officer, Stephen Loosely;⁴
- on 24 February 1988, placed by the Liberal Party in the *Sydney Morning Herald*, a double page advertisement appeared with the banner headline "It's time to clean up twelve years of stale Labor rule"; it went on to chronicle various Labor corruption allegations;
- from 24 through 29 February 1988 the *Sydney Morning Herald* ran a series of features on corruption in the NSW Police;⁵
- on 3 March 1988, two weeks before polling day, allegations were made by journalist Bob Bottom about links between organised crime figures and Labor identities, the late Justice Lionel Murphy and the late NSW Attorney-General, Paul Landa;⁶
- on 5 March 1988 Journalist Bob Bottom is reported to allege that a deal was struck between then Premier Unsworth and former Premier Wran to refrain from appointing a crime commission in return for the appointment of a particular person as Police Commissioner;⁷
- on 8 March 1988 further corruption allegations were levelled against former NSW Labor Attorney-General, the late Paul Landa.⁸

Press clippings animate the formal and funereal black text of Hansard recording the parliamentary debates in May and June of 1988 which led to the

4 SMH 10.2.1988 pp 1,4. Loosley was subsequently convicted and fined \$200. He has lodged an appeal (Turner, P. "Loosely to appeal against fine" SMH 12.5.1989; "Loosely will appeal over conviction" CT 12.5.1989 p 5; Thieberger, V." Loosley plans appeal against conviction over electoral return" Age 12.5.1989 p 4)

5 For example, Keenan, A. "Commissioner defends his incorruptibles" SMH 24.2.1988 p 7; Keenan, A. SMH 26.2.1988; Keenan, A. "A few bad apples - or a system gone wrong?" SMH 29.2.1988 p 8

6 Bottom, B. "Phone tap links murdered pusher to Murphy, Landa" SMH 3.3.1988 pp 1, 4; Keenan, A. & Coultan, M. "Eustace case : police to act" SMH 4.3.1988 pp 1, 4; Keenan, A. "Minor spat led to bloody gang war" SMH 5.3.1988 p 1; Keenan, A. "No surrender" SMH 5.3.88 pp 64-65; Slee, J. "Tony And Palma, Lionel And Paul" SMH 8.3.1988 p 14; Keenan, A. & Shanahan, D. "Mulock seeks order for fresh inquest on Eustace" SMH 9.3.88 pp 1,7; Keenan, A. "Puzzle over inquest evidence" SMH 10.3.1988 p 2; "Journalist alleges phone taps 'witch-hunt'" SMH 14.3.88 p 2; "Journalist threatens retaliation in row over phone taps" Age 14.3.1988 p 3

7 Coultan, M. "Premiers in deal on crime: Bottom" SMH 5.3.1988 p 3

8 Keenan, A. "Landa had second Stathis no-bill application" SMH 8.3.1988 p 3

enactment of the *Independent Commission Against Corruption Act 1988* (NSW), (the *ICAC Act*). Headlines of the following style are especially evocative:

- "Avery and police union divided over new corruption watchdog"⁹
- "Sharp teeth for new corruption watchdog"¹⁰
- "Crime body's powers feared"¹¹
- "Mauling is much more meaningful in bear pit"¹²
- "Lawyers warn of "gestapo-like" probe"¹³
- "Dowd threatens ICAC plebiscite"¹⁴
- "Judges fall out on ICAC powers"¹⁵
- "Priests vow to defy crime inquiry"¹⁶
- "MP tanks up for big decision"¹⁷
- "Corruption commission plan derailed"¹⁸
- "Shambles over the ICAC Bill"¹⁹
- "Appeal to Pope over confession".²⁰

On the morning of 15 June 1988 the *Daily Telegraph* had the headline "Graft Busters Get Green Light",²¹ confirmed by the *Australian Financial Review* who led with "Corruption Busters Get Green Light".²² The ICAC Bill had been passed the night before by the NSW Legislative Council and now, according to the headline on page one of the *Sydney Morning Herald*, ICAC had the "Go-ahead for anti-graft crackdown".²³

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- 9 Brown, M. SMH 19.4.1988 p 4; also Clark, P. "Police head attacks new 'monster'" SMH 18.4.1988 p 2; Harbutt, K. "Why police hate crime authorities" *Australian* 28.4.1988 p 11
- 10 Grimshaw, P. DT 25.5.1988 p 6
- 11 Grealy, M. *Sun Herald* 29.5.1988
- 12 Garcia, L. SMH 22.6.1988 p 7
- 13 Hogarth, M. *Australian* 7.6.1988 p 4
- 14 Lagan, B. SMH 8.6.1988 p 2
- 15 Lagan, B. SMH 9.6.1988 p 1
- 16 Nicholson, L. DT 9.6.1988 p 7; A spokesman for the Sydney Catholic Archdiocese, Fr Brian Lucas, was reported to be concerned that ICAC had the power to interfere with the confidential relationship between priests and penitents
- 17 Lagan, B. SMH 11.6.1988 p 1
- 18 Nicholson, L. DT 10.6.1988 p 2
- 19 Editorial SMH 13.6.1988 p 8
- 20 Farr, M. DM 14.6.1988 p 2. The Hon Mr Richard Jones MLC reported to promise a personal appeal to the Pope if his proposed amendment to protect the confidential priest/penitent relationship from ICAC is defeated
- 21 Morris, L. DT 15.6.1988 p 4
- 22 Boylen, L. AFR 15.6.1988 p 4
- 23 Lagan, B. SMH 15.6.1988 p 1

Of course the media was just warming up. Next step was speculation over who was to head the ICAC That Mr Ian Temby Q.C. won the day²⁴ should not allow us to forget the roll of those who were probably nominated without their knowledge or consent.²⁵

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- 24 "Temby may head crime bust team" DM 3.8.1988 p 15; Greiner reported to scoff at suggestions that Temby to head ICAC "Clear path for war on corruption" DT 4.8.1988 p 4; Coultan, M. "Temby refuses to comment on possible ICAC post" SMH 5.8.1988 p 4; Coultan, M. "Temby on crimebuster list" SMH 8.8.1988 p 1; Tip that Temby has eye on being WA Chief Justice "Temby job hope has gone West" SMH 8.8.1988 p 32; Grimshaw, P. "Search for Chief delays graft hunt" DT 16.8.1988 p 4; Coultan, M. "No rush for corruption inquiry's top job" SMH 16.8.1988 p 2; Frail, R. "Temby likely to head NSW corruption body" Age 6.9.1988 p 18; Jones, B. & Grealy, M. "All Clear for Temby: Carr softens stand on crimebuster" Sun Herald 11.9.1988 p 1; Power, J. "Temby set to fight corruption in NSW" AFR 12.9.1988 p 5; Coultan, M. & Dunn, R. "Temby accepts reins of ICAC"; Coultan, M. & Dunn, R. "The Man who takes on either side"; letter from Temby on his appointment published in full in the paper SMH 14.9.1988 p 9; Campbell, R. "Temby: I hope we get it right" CT 14.9.1988 p 1-2; Power, J. & Boylen, L. "Temby Appointed ICAC chief" AFR 14.9.1988 p 5; Grimshaw, P. & Romei, S. "Temby gets \$6m to fight corruption" DT 14.9.1988 p 2
- 25 The following is my list of 17 but ICAC trivia buffs may have more. The Hon Fred Nile MLC suggested churchmen Sir Alan Walker or Dean Lance Shilton (NSW Legislative Council 8.6.1988 debates p 1711). Media nominees were Justice Douglas McGregor, a retired Federal Court Judge, or Murray Gleeson QC, then a senior silk and now Chief Justice of the NSW Supreme Court (Cooper, J. "QC, Ex-judge on short-list to head ICAC" Australian 28.8.1988 p 1); Brian Sully, a Sydney QC ("Sully tipped for crime-buster job" DM 4.7.1988 p 9) QC's Murray Gleeson, Brian Sully and TJ Studdert (P Clark "Lawyers tight-lipped on corruption job" SMH 11.7.1988 p 3); Judge Thorley of the Judicial Commission and District Court ("Clear path for war on corruption" DT 4.8.1988 p 4); Justice John Nader of the N.T. Supreme Court; Lionel Robberds QC, a member of the NCA; Ian Barker QC; Geoffrey Robertson QC of TV's "Hypotheticals", Queensland QC Lou Wyvill; Ron Castan QC; Alf Goran QC, a retired District Court Judge; Greg James QC; Bill Hosking QC; NSW Crown Advocate Malcolm Grey QC (Clark, P. "Govt hawking ICAC job, says ALP" SMH 22.8.1988 p 7)

Putting aside sporadic stories about different issues such as ICAC staff matters,²⁶ the next flurry of media interest was when the ICAC formally opened for business on 13 March 1989²⁷ (although in fact as Commissioner-designate Mr Temby had already been active in building the ICAC organisation and had commenced some operations in relation to corruption in local councils).²⁸

Naturally the media made news of all the ICAC "firsts" such as:

- the first criticism of the ICAC, even before the ICAC Bill had been introduced into the NSW Parliament;²⁹
- the first important letter ICAC sent, to local councils and other parts of the public sector;³⁰
- the first ICAC hearing;³¹
- the "first swoop" or in the words of the *Sydney Morning Herald* headline "Temby's corruption fighters raid council",³² being the first ICAC investigation, relating to Waverley Municipal Council; the *Daily Telegraph* however reported that according to an official ICAC spokesperson there was no "swoop", no search warrants were executed and ICAC had attended at the request of the Mayor.³³

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- 26 Lagan, B. "Fancy an ICAC job? Then not even your tattoo is safe" SMH 1.7.1988 p 12; Harbutt, K. "Perform or go, Temby tells staff" *Australian* 14.3.1989 p 6; "ICAC plans to conduct public hearings" CT 14.3.1989 p 3; Roden, A. QC to become part-time Commissioner at ICAC Coultan, M. "ICAC law to be altered" SMH 16.3.1989 p 6; Coultan, M. "ICAC to vet its staff closely" SMH 8.4.1989 p 5; Coultan, M. "Temby puts retired federal policeman in senior position" SMH 10.4.1989 p 11; Coultan, M. "Plan would give Temby right of dismissal" SMH 15.4.1989 p 8; see also NSW Legislative Assembly 11.4.1989 debates : 6205-6212; NSW Legislative Council 18.4.1989 debates : 6548-6558
- 27 "Temby's tough task" CT 6.3.1989 p 3; Harbutt, K. "Temby to take the 'Tough Town' to task" *Australian* 6.3.1989 p 6; Coultan, M. "Temby creates a whistle-blower's paradise" SMH 6.3.1989 p 15; Hall, B. "Corruption informers to 'back' charges" DM 8.3.1989 p 4; ICAC advertises for complaints SMH 6.3.1989 p 6; "Temby sets out tough game plan" *Australian* 14.3.1989 p 1; Harbutt, K. "ICAC Chief plans to keep his finger on the pulse" *Australian* 14.3.1989 p 6; Simper, E. "Loneliness of a long-distance crime fighter" *Australian* 14.3.1989 p 6; McAsey, J. "Temby says ICAC will operate independently" *Age* 14.3.1989 p 18; Goodsir, D. "Temby vows to avoid muckraking" DT 14.3.1989 p 9; "ICAC plans to conduct public hearings" CT 14.3.1989 p 3; Coultan, M. "Greiner lets Temby get on with the job" SMH 14.3.1989 p 4
- 28 SMH editorial "Mr Temby, QC, opens shop" SMH 30.1.1989 p 10
- 29 Dawson, C. "Debate sought on vice watch" *Australian* 19.5.1988 p 15; "Corruption body comes under fire" SMH 19.5.1988 p 8; "Anti-corruption move attacked" *Canberra Times* 19.5.1988 p 11
- 30 Editorial "Mr Temby, QC, opens shop" SMH 30.1.1989 p 10
- 31 "ICAC begins first hearing" CT 18.5.1989 p 4
- 32 Coultan, M. "Temby's corruption fighters raid council" SMH 22.3.1989 p 3
- 33 Coomber, S. "Council first on ICAC list" DT 22.3.1989 p 5

And there have been media foul-ups such as the quadrella of ICAC-related errors in the *Australian* on 16 March 1989.³⁴

2. THE ICAC AND PUBLIC DEBATE

The media has shown a tremendous interest in the ICAC and in turn has provided the main source of information about the ICAC. The above review of the media treatment of the ICAC serves to focus on several important points:

- that level of interest suggests that the newsworthiness of the ICAC is unlikely to flag in the near future;
- almost all media coverage of the ICAC's functions has been on investigation whilst almost none has been on corruption prevention and education;
- the quality and accuracy of the information has fluctuated significantly;
- the most important ICAC-related issues from the media point of view have been either personal (such as who will run the ICAC or who will be investigated) or in terms of the familiar combat between law and order against civil liberties;
- criticism has been largely limited to editorial 'grandstanding' over the case for or against aspects of the legislation.

The effect of these points is that :

- the public discourse on the ICAC, which has already been significantly affected by the media, will continue to be orientated towards personalities both in terms of subject matter such as allegations about corrupt individuals and in terms of the analysis of corruption itself;
- media criticism will by and large be narrowly confined to the familiar dichotomy of law and order versus civil liberties;
- the public discourse on corruption is evolving so that insufficient information will be generated to facilitate constructive criticism of the ICAC;
- these factors together with the likely volume of news relating to ICAC investigations will result in considerable difficulty in raising other concerns in wider public discourse such as:
 - the conditions which make corruption possible and likely;
 - measures dealing with corruption at an institutional and management level such as corruption prevention;

34 The four errors were : (1) an article implied that the Parliamentary Joint Committee on the ICAC was a recent initiative of the Greiner Government when in fact it was required by section 63 of the ICAC Act (Cooper, J. "ICAC gets a second watchdog" *Australian* 16.3.1989 p 8); (2) an editorial stated that the Operations Review Committee (ORC) was also an initiative of the Greiner Government when in fact it was required by section 58 of the ICAC Act; (3) it erroneously implied that the ORC consisted entirely of citizens with headline "Citizens versus crime" when in fact the ORC consists of only four people representing community views out of the eight members (section 60 ICAC Act); (4) it fundamentally misrepresents the functions of the ORC, attributing to it powers "watch over" the ICAC, citizens fighting crime and "the power to refer possible inquiries to the ICAC, halt inquiries and to ensure that decisions whether or not to investigate matters are arrived at fairly and impartially"; this is contrary to the letter and spirit of the ICAC Act which has the independence of the ICAC at its heart and the ORC as merely an advisory body

- measures dealing with public attitudes to corruption such as education; and
- the effectiveness, efficiency and accountability of anti-corruption measures such as the ICAC.
- consequently debate about the ICAC is likely to focus on narrow law enforcement concerns in particular cases.

With that preamble I turn to discuss the appropriate structure and qualities of ICAC-related constructive criticism.

Constructive criticism

Although bodies like the ICAC have been created or promised around Australia,³⁵ there is no justification for complacency about organised crime and corruption and the state response to them. As two media commentators independently argued, rightly I think, in early July 1988, public criticism should continue.³⁶ Constructive criticism in relation to the ICAC should at this stage be:

1. specific rather than general;
2. focused on the ICAC in operation rather than the merits of the ICAC legislation;
3. focused on effectiveness, efficiency and accountability rather than a debate in terms of law and order against civil liberties.

Specificity

Specificity is desirable on a number of grounds. It is practically unhelpful and irrelevant to debate a thing like ICAC in general theoretical, political or moral

35 See Appendix A

36 Simons, M. "After Fitzgerald, who will keep stirring the can of worms?" *Age* 5.7.1988 p 16; Bacon, W. "It is important for public criticisms to continue" *AFR* 5.7.1988 p 12

terms as to do so ignores the complex, specific issues which arise when considering the ICAC in operation in its legal, political, historical and social context.³⁷

Moreover Mr Ian Temby QC stated in a letter issued on 13 September 1988, upon the announcement of the decision to appoint him the ICAC Commissioner, that "We cannot hope to be free of criticism, but it is my hope and expectation that any criticism will be specific and not generalised."³⁸

ICAC in operation

Although it is possible to focus on numerous aspects of the ICAC, it is of the utmost importance to structure discussion so as to concentrate on matters of practical relevance. I presently see this as accomplished by breaking up the issues into three stages.

The first stage commenced with the public announcement of the ICAC policy, some months before the election of the Greiner Government on 18 March 1988. It ended with the enactment of the legislation on 14 June 1988.³⁹ At this stage it is desirable that all the concerns about the policy and the draft legislation be recorded and vigorously debated.⁴⁰ The familiar arguments about the balance between law and order against civil liberties are most appropriately played out at this time, in the context of the draft legislation.⁴¹

The second stage covers the early years of operation of the new agency which began after enactment of the *ICAC Act* and runs for perhaps three to five years. Whatever perceived faults may exist in the *ICAC Act*, it must be recognised that the

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- 37 On the desirability of specificity in law and policy debates see : Brown, D. (1987) "The politics of reform" in Zdenkowski, G. Ronalds, C. & Richardson, M., eds, **The Criminal Injustice System Vol 2** (1987) pp 254-281; Hogg, R. "Taking crime seriously : Left realism and Australian criminology" in Findlay, M. & Hogg, R., eds, **Understanding Crime And Criminal Justice** (1988) pp 24-51 at 41, 47
- 38 SMH 14.9.1988 p 9
- 39 Cooper, J. "Search is on for corruption body chief" **Australian** 15.6.1988 pp 1,2; Morris, L. "Graft busters get green light" **DT** 15.6.1988 p 4; Lagan, B. "Go-ahead for anti-graft crackdown" **SMH** 15.6.1988 p 1; Boylen, L. "Corruption busters get green light" **AFR** 15.6.1988 p 4; Frail, R. "Greiner wins vote for anti-graft commission" **Age** 15.6.1988 p 5; Lahanar, N. "Privilege For priests in graft bill" **DM** 15.6.1988 p 4
- 40 In my own case I made a number of comments about the ICAC policy and legislation: Bersten, M. "Organised crime: strategies and future directions" (1988) paper presented at the 1988 ANZAAS Congress, Sydney University, 18 May 1988; Bersten, M. (1988a) "Crimefighters : Time for a rethink" **Australian Society** (July 1988) pp 39-41; Bersten, M. & Hogg, R. (1988) "NSW anti-corruption commission: has it been worth the wait?" **13 Legal Services Bulletin** 146-149 at 149; Dawson, C. "Debate sought on vice watch" **Australian** 19.5.1988 p 15; "Corruption body comes under fire" **SMH** 19.5.1988 p 8; "Anti-corruption move attacked" **Canberra Times** 19.5.1988 p 11); Hansard 8.6.1988 p 1716; Bersten, M. (1989) "The NSW Independent Commission Against Corruption : A Critique" (forthcoming in **Criminology Australia**)
- 41 This supposed dichotomy has been criticised by various writers and I do not want to be taken to endorse it as the appropriate lens through which to characterize all criminal justice debates: see Hogg, R. "Perspectives on the criminal justice system" in Findlay, M., Egger, S. & Sutton, J. **Issues In Criminal Justice Administration** (1983) pp 2-19; McBarnet, D. **Conviction : Law, The State And The Construction Of Justice** (1983); Uni NSW Criminal Law Teachers "Reforming the criminal process in NSW" **8 Legal Services Bulletin** (1983) pp 175-178 at 176

NSW Parliament enacted legislation for which the Greiner Government had a mandate. The decision of the Parliament should be respected for a while by forbearing on criticism of the legislation except for matters of the greatest urgency or which if left untended would hinder the operation of the ICAC. The ICAC should be given a fair chance to be tested in practice.

Criticising the *Act* at this stage is also irrelevant to party politics given that the Leader of the Opposition, Bob Carr, has clearly taken a 'wait and see' attitude to the ICAC.⁴² It is noteworthy in that regard that Mr Temby has stated "It is of course fair to say, as Mr Carr has done, that the ICAC must be judged by its results."⁴³ And whilst Mr Carr has reservations over the appointment of Mr Temby as Commissioner, it is apparently not his intention to "blackball" him.⁴⁴

Moreover the Greiner Government appears resolved to resist amendment of the ICAC legislation for quite some time. Indicative of the mood in government was an unwillingness to accept proposals which it perceived as involving fundamental change. Before finally passed through the Parliament, the Greiner Government went so far as to threaten a referendum on the ICAC Bill.⁴⁵ This stance was endorsed in a *Sydney Morning Herald* editorial which supported the refusal of the Greiner Government to further amend the ICAC Bill and warned Labor Opposition Leader, Bob Carr, that he ran the certain risk of being perceived as obstructionist if he pressed too hard for further amendments.⁴⁶ Further Mr Greiner is recorded as having believed that the *ICAC Act* was not tough enough.⁴⁷

The task in the second stage is two-part. First, it is to collect and analyse the data as to the operations of the ICAC so as to have a proper information base for the

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- 42 On 11.9.1988 Carr is reported to have said "Some in the Labor Party are very critical of Mr Temby. But fundamentally it is a matter of how the ICAC handles itself. If it is used politically then it will not have public credibility and support. It stands or falls on its performance." (Jones, B. & Grealy, M. "All clear for Temby : Carr softens stand on crimebuster" *Sun Herald* 11.9.1988 p 1)
- On 13.9.1988 Carr is reported to have said "If he (Temby) retains his independence and makes it clear he is there to do the job the legislation requires, he will have the support of everyone." (Power, J. & Boylen, L. "Temby appointed ICAC chief" *AFR* 14.9.1988 p 5)
- See also: Moore, M. "Carr's crash course in survival may save Labor" *SMH* 26.5.1988 p 28; Grimshaw, P. & Romei, S. "Temby gets \$6m to fight corruption" *DT* 14.9.1988 p 2; Power, J. & Boylen, L. "Temby appointed ICAC chief" *AFR* 14.9.1988 p 5; Coultan, M. "Greiner lets Temby get on with the job" *SMH* 14.3.1989 p 4; Moore, M. "Carr's political crafting" *SMH* 8.4.1989 p 81
- 43 *SMH* 14.9.1988 p 9
- 44 Jones, B. & Grealy, M. "All clear for Temby: Carr softens stand on crimebuster" *Sun Herald* 11.9.1988 p 1; Power, J. "Temby set to fight corruption In NSW" *AFR* 12.9.1988 p 5; Power, J. & Boylen, L. "Temby appointed ICAC chief" *AFR* 14.9.1988 p 5; Coultan, M. & Dunn, R. "Temby accepts reins of ICAC" *SMH* 14.9.1988 p 9; Editorial "Mr Temby and the ICAC" 14.9.1988 p 18
- 45 Lagan, B. "Dowd threatens ICAC plebiscite" *SMH* 8.6.1988 p 2; "Council delays anger Greiner" *DT* 8.6.1988 p 17; Jamieson, A. & Hogarth, M. "Dowd refuses to budge over anti-crime bill" *Australian* 14.6.1988 p 2
- 46 "Shambles over the ICAC Bill" *SMH* 13.6.1988 p 8
- 47 Cooper, J. "Crime body 'Not tough enough'" *Australian* 16.6.1988 p 2

third stage of the debate. Second, it is to maintain open and constructive debate over the ICAC not only to keep alive the concerns over the ICAC in the first stage until the third, but also to articulate community concerns over the ICAC and corruption in NSW generally.

The third stage is one of review after the ICAC has had a reasonable chance to prove itself in practice. At this stage it is desirable that all the criticism of the legislation be reconsidered in the light of the experience of the agency in practice.

The second stage is now underway. This paper is a contribution to it and to the third.

Effectiveness, efficiency and accountability

A corollary of the focus on the operations and results produced by the ICAC is analysis and evaluation with reference to specified criteria. Elsewhere I have argued⁴⁸ (and hence will not re-argue now) for the need to examine state efforts against organised crime in terms of effectiveness, efficiency and accountability. The impact of the ICAC upon civil liberties is also important although I think that is better treated as an accountability problem given that:

- ICAC's special powers, which may impact adversely on civil liberties, are said by the Greiner Government to be justified in the special kind of cases the ICAC will investigate;
- Given that they are at the core of ICAC's identity it is impractical to attack these powers without attacking the ICAC as a whole;
- The civil liberty arguments are weakened if ICAC uses the impugned powers effectively; and
- In such circumstances the more practical way to protect civil liberties is:
 - first, through reinforcing the view that abuse of these special powers is intolerable and
 - second, that proper systems of accountability are required so as to ensure that these special powers are held in check and only used when genuinely appropriate.

48 Bersten, M. (1988b) "Democracy and strategy: Policy development in the field of organised crime and corruption" paper presented at the Fourth Annual Conference of the Australian and New Zealand Society of Criminology, University of Sydney, 24 August 1988

3. CRITERIA FOR EVALUATING THE ICAC IN OPERATION

The fundamental strategic basis for evaluating the operations of the ICAC is to interrogate its actions against first the ICAC legislation and second the promises made for it by the Greiner Government. In other words the achievements of the ICAC should be cross-examined against its political and legal charter.

Criteria for evaluation

The criteria⁴⁹ to evaluate the ICAC are in part specified in the parliamentary debates over the ICAC legislation by principally Premier Greiner, but also others such as the Leader of the Government in the Legislative Council, Hon. Mr Ted Pickering MLC. Comments by the Premier outside the Parliament should be disregarded for the purpose of constructive evaluation of the ICAC.⁵⁰ In the absence of strong evidence to the contrary, the parliamentary statements must also be regarded as the bona fide expressions of the policy of the Government and the majority of members of the Parliament. This entails that for the purpose of evaluation tentative perceptions that the Greiner Government is not as serious about corruption as it makes out should also be put to one side.⁵¹

The justification for the focus on parliamentary statements is that they reflect the intention of the Parliament and the majority of NSW voters because they come from the leaders of the government in both Houses of Parliament speaking for legislation for which the Greiner Government had an electoral mandate.⁵² Moreover, from a legal standpoint, in interpreting a statute in NSW such as the ICAC legislation, the *Interpretation Act* 1987 (NSW) requires that:

49 Although "corruption" is a key term in evaluating the ICAC, the definition found in sections 7-9 of the ICAC Act is the relevant Act as the exercise is essentially evaluating the agency based on that statute. Though important in other contexts, other definitions of corruption are not relevant to the present exercise. Examples of such definitions are : Heidenheimer, A.J. (1970) "Definitions, Concepts and Criteria" reprinted in Gardiner, J.A. & Olson, D.J., eds, *Theft Of The City* (1974) pp 16-23 and Douglas, J.D. & Johnson, J.M., eds, *Official Deviance* (1977) pp 19-26; Brooks, R.C. (1910) "The Nature of Political Corruption" in Douglas J.D. & Johnson J.M. (1977) *ibid*, 13-19; Clarke, M., ed, *Corruption* (1983) pp ix - xix; Turk, A.T. *Political Criminality* (1982)

50 For example, in January 1988 Mr Greiner, then Leader of the Opposition, is reported to have said "We must go the whole hog and clean up the State's act once and for all." (Grimshaw, P. "Libs to smash crime rackets" DT 15.1.1988 p 1)

In August 1988, two months after the enactment of the ICAC Act he was reported to have said "I think you will find that the Fitzgerald Inquiry is a sideshow compared to what ICAC will have to deal with (in NSW). ("Inquiry to be the main event" CT 12.8.1988 p 3)

51 See Appendix B

52 Premier Greiner said his Government had a mandate for ICAC on a number of occasions eg NSW Legislative Assembly 26.5.1988 debates p 673 (Second Reading speech on the ICAC Bill). This was accepted by the Labor Leader of the Opposition, Bob Carr with the qualification that the ICAC Bill exceeded the mandate in a number of respects: NSW Legislative Assembly 31.5.1988 debates pp 822, 832 (Second Reading debate on the ICAC Bill)

- An interpretation that promotes the purpose or object of the *Act* should be preferred to one that does not (section 33); and
- Material extrinsic to the legislation, such as records of parliamentary debates relating to the *Act*, may be used to aid in its interpretation (section 34).

The merits of these criteria against some other options suggested in public debate will be discussed at length.

The purposes and functions of the ICAC

In the second reading speech for the first ICAC Bill⁵³ the Premier made the following statements (which I number for later reference):

1. ...this initiative is a component of the Government's program to restore the integrity of public administration and public institutions in this State.⁵⁴
2. The Commission will not be set up to pillory our political opponents or to engage in political witch hunts.⁵⁵
3. ...the independent Commission will not be a crime commission. Its charter is not to investigate crime generally. The Commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector...the focus of the Commission is public corruption and...the Commission is to co-operate with law enforcement agencies in pursuing corruption.⁵⁶
4. ...the independent Commission is not a purely investigatory body. The Commission also has a clear charter to play a constructive role in developing sound management practices and making public officials more aware of what it means to hold an office of public trust and more aware of the detrimental effects of corrupt practices. Indeed in the long term I would expect its primary role to become more and more one of advising departments and authorities on strategies, practices and procedures to enhance administrative integrity. In preventing corruption in the long term, the educative and consultancy functions of the Commission will be far more important than its investigatory functions.⁵⁷

In the Legislative Council, Mr Pickering made the following statement which also deserves mention:

53 There were two bills, the first not being proceeded with. A second ICAC Bill, very similar to the first, was introduced on 3.6.1988 in the Legislative Assembly (see NSW Legislative Assembly 3.6.1988 debates p 1548). ICAC Bill (No.2) was ultimately passed on 14 June 1988 by the Legislative Council after a complex process of making and undoing amendments: NSW Legislative Council debates 7.6.1988: 1588-1590; 8.6.1988: 1678-1716, 1732-1746; 9.6.1988: 1821-1849; 14.6.1988: 1852-1866, 1882-1906

54 NSW Legislative Assembly debates 26.5.1988 p 673; also Ministerial Statement by Premier Greiner 13.9.1988 p 1172; Journalist Evan Whitton has stated "...Nicholas Greiner need not fear being seen as the timid new Premier: his standing commission, freedom of information legislation and reform of the libel laws must be the greatest advance against corruption, and for parliamentary democracy, in the history of the Westminster system." (SMH *(The Guide)* 16.5.1988 p 2)

55 NSW Legislative Assembly debates 26.5.1988 p 674

56 *Ibid*

57 *Ibid*

5. ...we must not become too obsessed with the Mr Bigs of organised crime. Whilst it is extremely important that such people be brought before the Commission and ultimately prosecuted for their crimes, one of the primary purposes of the Commission will be to deter persons who would otherwise engage in corrupt conduct.⁵⁸

It must also be noted that Mr Pickering endorsed the investigative and preventative functions of the ICAC.⁵⁹

Criteria for ICAC success

The criteria for evaluating the success of the ICAC is qualitative in terms of the extent to which it meets its objects and purposes after the ICAC has had a reasonable chance to perform in practice. As the Premier said:

...it would...be crass and naive to measure the success of the Independent Commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this State.⁶⁰

Many others have had their say on this issue, including ICAC Commissioner Ian Temby who was reported to have "warned journalists that if they expected blood spattered on the floors and walls they would be disappointed." The report recorded Mr Temby as saying "We can't measure our success by headlines".⁶¹

Having emphasised on a number of occasions⁶² that the real test is how the ICAC operates in practice, the Leader of the Opposition, Mr Bob Carr, is recorded to have said

...even accepting the Government's intentions, the proposed body is flawed. It is not equipped to locate and eliminate institutionalized corruption as opposed to pursuing a corrupt individual or a 'rotten apple'.⁶³

He went on to say

...flaws in the philosophy and structure of this proposed body will prevent it doing what it should do, and that is expose and eliminate institutionalized corruption in public bodies and among public officials. In this sense the most stringent acid test that can be directed against the effectiveness of this proposed legislation after it has been in operation for a year or more is how it can point to a reduced opportunity for that measure of institutionalised corruption.⁶⁴

It is noteworthy that none of these suggestions involve a survey of the attitudes of the NSW public as to whether the ICAC is a 'success'. Such an approach is not completely unprecedented as the NSW Police are apparently conducting a two-year market survey of public perceptions of the police, commenced in 1988 at a cost of \$300,000.⁶⁵ However it would be of limited value as the issues are too

58 NSW Legislative Council 1.6.1988 debates p 965

59 NSW Legislative Council 1.6.1988 debates p 964-965

60 NSW Legislative Assembly 26.5.1988 debates p 673

61 Coulton, M. "Temby creates a whistle-blower's paradise" SMH 6.3.1989 p 15

62 Ibid, footnote 42

63 NSW Legislative Assembly 31.5.1988 debates p 822; also 831

64 NSW Legislative Assembly 31.5.1988 debates p 832

65 Levett, C. NSW Police to seek customer's verdict SMH 6.5.1988 p 5

complicated and the methodology too difficult for a reliable and meaningful outcome. Moreover such an approach only tests 'perceptions' and 'opinions' rather than analysing the evidence against the specified criteria for evaluation.

The proper approach, synthesised from the preceding discussion, is therefore a qualitative evaluation qualified by the constraint that the analysis be of the *ICAC Act* and the ICAC operation in 3-5 years. The principal criterion of success is one of effectiveness and efficiency, namely the extent of public confidence in NSW public institutions. Equally important is the inter-related criterion of failure such as the failure to meet its goals or abuse of its powers.

These are not matters to be measured in terms of 'feelings' or unexplained 'opinions' or 'attitudes' as might be derived from an opinion poll but should be based upon a qualitative analysis of the evidence as to:

- 1 the impact of the ICAC on the level of corrupt conduct;
- 2 the impact of the ICAC on the conditions which make corruption likely and possible; and
- 3 the nature and extent of the abuse of ICAC powers.

This in turn can be broken down into specific elements, such as the impact upon

- particular parts of the public sector (for example, law enforcement agencies, local government);
- systems for corruption detection within the public sector; and
- systems for accountability as to key decisions in the public sector where a benefit of some sort can be corruptly conferred.

In terms of the ICAC Act itself, the adequacy of ICAC using its various powers to perform its various functions can be analysed with respect to effectiveness, efficiency and accountability. From this admittedly detailed process would be derived at least a specific understanding of all the constituents of whether ICAC has 'worked' or not. From this a reasonably specific diagnosis of problems could occur from which appropriate remedial action could be taken, be it legislative, administrative or financial.

4. PUBLIC EXPECTATIONS ABOUT THE ICAC

Complicating the evaluation of the ICAC are the various expectations voiced in public discourse. Whilst it may be proper to say that being independent, the ICAC is not vulnerable to these demands and should disregard them,⁶⁶ they are not so easily dismissed in public and political debate over how to evaluate the ICAC. These have been of essentially four sorts but all focus on the ICAC in its investigative capacity:

1. The ICAC should principally investigate major criminals and corrupt senior public officials with a view to their prosecution and severe punishment.

66 As argued by Mr Temby in a letter issued upon his appointment to head the ICAC published in SMH 14.9.1988 p 9

2. The ICAC is to conduct an anti-Labor witch-hunt and the vanguard of the "New McCarthyism".
3. At an operational level the ICAC may experience some of the same problems as the NCA.
4. The ICAC is so independent as to have a menacing effect on all political parties.

It is noteworthy that while at early stages of the ICAC debate the ICAC in Hong Kong⁶⁷ was considered a model for the ICAC in NSW, it is no longer mentioned as a model upon which to build expectations. This is no doubt because of the differences in the size, structure and powers of the two agencies and the different practical contexts in which they must work.⁶⁸

Expectation 1: The ICAC should investigate major criminals and corrupt senior public officials.

It cannot be denied that the investigative function of the ICAC is important but one may legitimately ask what ICAC investigations are meant to achieve and whether/how this really contributes significantly to minimising official corruption in NSW.

Behind what I will call 'Expectation 1' is a fairly simple philosophy:

- corruption is about evil people;
- the only way to deal with them is to take them out of positions of influence;
- they must also be severely punished for their crimes;
- this has the advantage of producing obvious, objective criteria (the extent to which the ICAC investigation leads to the prosecution of major and usually 'known' criminal and corrupt figures);
- accordingly investigation leading to conviction and punishment is the only real way to attack corruption; and
- non-enforcement strategies against corruption are of secondary and probably marginal significance; a body like the ICAC should not waste too much of its time on them.

This approach is implicit in much of the support given to the ICAC.⁶⁹

67 For detail see: Lethbridge, H. *Hard Graft In Hong Kong* (1985); Findlay, M. *Lessons In Fighting Corruption* 13 LSB 141-145 (1988); Findlay, M. (1988) Institutional responses to corruption : some critical reflections on the ICAC 12 *Criminal Law Journal* pp 271-285; Harding, R. Policing official corruption : the Hong Kong connection *Bulletin* 20.12.1988 pp 34-35

68 Bersten, M. (1988); Bersten, M. (1988a)

69 Sturgess, G. "Against the crimes of the powerful" *Weekend Australian* 2.7.1988 p 24; *Sydney Morning Herald* editorial support for the ICAC: "Case for a new government" SMH 18.3.1988 p 16; "Shambles over the ICAC Bill" SMH 13.6.1988 p 8; "ICAC: Hoping for the best" SMH 27.5.1988 p 18; Moore, M. "Squeaky clean, and a winner all the way" SMH 28.5.1988 p 32; *Daily Telegraph* editorial supports ICAC proposal: "Vital reform that is 200 years overdue" DT 25.5.1988 p 10; Armstrong, D. "Corruption: A new nemesis" DT 25.5.1988 p 10; Journalist Bob Bottom "Legislation 'Must not be blocked'" DT 8.6.1988 p 17; Mr John Hatton MLA (South Coast): NSW Legislative Assembly 2.8.1988 debates pp 2276-2277; NSW Police Commissioner John Avery is reported to back ICAC proposal: Coulton, M. "Police Commissioner backs anti-corruption Commission" SMH 25.2.1988 p 4

Some less enthusiastic supporters of the ICAC agree that the conviction rate will be held up as the criteria of success. For example the Leader of the Opposition in the Legislative Council, the Hon. Mr Jack Hallam MLC, claiming that the record of successful corruption-related prosecutions under Labor were "major achievements...(and a) testimony to the success of measures introduced by the Wran and Unsworth governments and their determination to punish wrongdoing." He stated that "The success or failure of the Independent Commission Against Corruption will be measured in exactly the same terms."⁷⁰

Well known commentator on criminal justice matters, Professor of Social Work at the University of NSW, Dr Tony Vinson, had this to say:

...the Commission would fulfil some people's worst expectations if it simply went after alleged crime bosses. But Mr Temby's understandable reluctance to be portrayed as a scalp hunter needs to be balanced by the equally understandable concern of many of us that his Commission hits its mark.

The most convincing evidence of that will be the successful investigation and conviction of those engaged in corrupt practices. Mr Temby may yet have to overcome his personal difficulties and report a few bullseyes.⁷¹

At this point it is important to report the attitude of Mr Temby who said at the first public hearing of the ICAC on 13 March 1989: "Perhaps the most important function of the Commission is to conduct investigations..."

The variable in this range of views is the relative importance of the conviction rate arising out of ICAC investigations. Regrettably the focus of the media has been on precisely this point, speculating on who in the ALP is likely to be investigated. Some prominent journalistic identities such as Mr Brian Toohey, in the context of the National Crime Authority (NCA) but presumably with equal application to the ICAC, have said that a good performance depends upon "...nailing some of the big players."⁷²

This narrow, conviction-based criterion flies in the face of the growing recognition that it is extremely difficult to measure the performance of law enforcement agencies.⁷³ The sensible approach, taken by the NSW Premier Greiner Government, the Leader of the NSW Opposition and the Joint Parliamentary Committee on the NCA⁷⁴ is to evaluate agencies like the ICAC and NCA in terms of

70 NSW Legislative Council 8.6.1988 debates p 1681

71 Vinson, T. "Targeting' is just newspeak camouflage" SMH 12.4.1989 p 13

72 B Toohey "Time the NCA lifted its game" Sun Herald 14.5.1989 p 46

73 For example, NCA Annual Report 1985-1986 p 2 (Parliamentary Paper 86/1987); **Royal Commission on Standards of Conduct in Public Life (1974-1976)** Chairman Rt Hon Lord Salmon HMSO 1976 CMND 6524 ("Salmon Royal Commission") which stated at para 34 of its report "...There is no objective way of making a true assessment of the amount of public sector corruption that exists now or whether the amount has changed over recent decades."

74 Parliament of the Commonwealth of Australia (1988) **The National Crime Authority - An Initial Evaluation Report** by the Parliamentary Joint Committee On The NCA. They argued that the criteria by which to evaluate the NCA was not quantitative (paras 4.1-4.5) but qualitative in terms of certain objectives specified in ch.2 of the Report (para 4.6). These were essentially a breakdown of the goal of suppressing organized crime into principal goals (various operational law enforcement goals : para 2.41) and ancillary matters (some law enforcement, some organisational, legal and administrative reform; public awareness : para 2.43)

a qualitative assessment of the extent to which their performance achieves specified goals.

A further difficulty with the emphasis on the ICAC's investigative outcomes is that it simply ignores the non-investigative statutory functions of the ICAC which may be broadly described as corruption prevention and education.⁷⁵ As has already been noted, these matters have been accorded a high priority by the Greiner Government (see propositions 4 and 5, above). On this point Mr Temby said:

In the medium term, which is to say before the end of the current year, we will be attending to the discharge of our non-investigatory functions, namely public education and corruption prevention. Because I am determined that the size of the Commission will be kept within manageable proportions, no more than a handful of staff will be devoted to either area. However they will be of high calibre and capacity. I am anxious to ensure that each of these areas is given appropriate emphasis.

Despite the necessary imprecision with which priorities are framed and operations evaluated against them, it is clear that the ICAC is not intended to be merely investigative. Despite the virtual absence of media interest in the non-investigative functions of the ICAC, law enforcement is apparently not intended to be the only or even the principal anti-corruption strategy. A balance is intended, one which is to a large extent left to the discretion of the ICAC itself. This discretion is here emphasised because shortly it will be considered in more detail.

The law enforcement expectation is unjustified as a matter of policy. It is naive and idealistic to think that corruption can be minimised or eradicated simply by law enforcement efforts against individuals. That approach does not address the systematic features of corruption such as

- the conditions which make corruption possible and likely such as opportunity structures and insufficiently accountable discretion over public assets, operations and decision-making;⁷⁶ and
- displacement caused by law enforcement activities such as the opportunity for others to move in which taking a corrupt individual out of circulation leaves and, second, the adaptation in corrupt practices so as to avoid detection and prosecution that enforcement in a way often causes.⁷⁷

Moreover experienced identities in the field of organised crime and corruption such as Mr Frank Costigan QC⁷⁸ and Mr Temby QC (in his former

75 Sections 13 and 14 ICAC Act

76 *Ibid*, footnotes 40 & 48

77 Braithwaite, J. (1983) "A clash of criminological imbeciles: The great crimes commission debate" in Sydney University Institute of Criminology *A National Crimes Commission?* Proceedings No 58 (1983) at 22-27, 23; also Justice Michael Kirby in the forward to those proceedings p 12

78 Royal Commission into allegations against the Ship Painters and Dockers Union

capacity as the federal Director of Public Prosecutions)⁷⁹ have dismissed utopian strategies of total enforcement because they lead to the kind of totalitarian society most Australians would not want to live in. The Federal Government Committee Review of Systems for Dealing with Fraud on the Commonwealth, suggested in 1987 that

Not all fraud can be prevented or countered. A watertight system would require controls of Orwellian dimension and prohibitive cost.⁸⁰

Expectation 2 : The ICAC is an anti-Labor witch-hunt and the vanguard of the "New McCarthyism".

A corollary of the expectation that the ICAC is to be for all practical purposes an investigative agency has been that its agenda is dominated by a program of anti-Labor investigations. Further the special powers of the ICAC in both its investigations and hearings will involve infringements of civil liberties in the style of McCarthyism.

Predictably it has been from within the ALP that concerns have been expressed that the ICAC has an anti-Labor agenda.⁸¹ These however have not been vigorously pursued at the parliamentary level by Opposition Leader, Mr Bob Carr.⁸² The main advocates of civil libertarian concerns have been:

- the Labor party in parliamentary debate on numerous aspects of the ICAC legislation;
- the Bar Association of NSW through its President, Mr Ken Handley QC;⁸³

79 Costigan, F. "Organized crime and a free society" 17 *Australian and New Zealand Journal of Criminology* (1984) pp 7-19; Temby, I. "Stewart, Costigan...Temby? : D.P.v organised crime", outline of address at the National Conference Australian Society of Labor Lawyers, Adelaide 13.10.1984

80 Special Minister of State (1987) *Review of Systems for Dealing with Fraud on the Commonwealth* AGPS Australia paragraph 3.1.1

81 Kitney, G. "Corruption inquiry worries Labor" *AFR* 15.8.1989 p 5; Farr, M. "Fine line between mates and morality" *DM* 16.8.1988 p 8; Coultan, M. & Dunn, R. "The Man Who Takes On Either Side" *SMH* 14.9.1988 p 9

82 Carr reported to have "gently resisted" ALP NSW Head Office line on ICAC (Moore, M. "Carr's crash course in survival may save Labor" *SMH* 26.5.1988 p 28; Carr reported to accept ICAC legislation as evidence of change in party thinking and recognition of mistakes (Moore, M. "Carr's political crafting" *SMH* 8.4.1989 p 81)

83 Lagan, B. "Lawyers in fierce attack in ICAC" *SMH* 3.6.1988 p 3; Hogarth, M. "Lawyers warn of "Gestapo-like" probe" *Australian* 7.6.1988 p 4; Legislative Council debates 3.6.1988 pp 1550-1551, 1554, 1558; 8.6.1988 pp 1682-1684, 1691, 1697, 1701-1703, 1736-1741; 9.6.1988 pp 1833-1839; 14.6.1988 pp 1891-1892; 1894-1899, 1901; 3.8.1988 pp 2308-2313, 2315, 2317-2318

- the Council for Civil Liberties, principally through its Secretary, a Barrister, Mr Tim Robertson;⁸⁴
- the Australian Journalists Association in relation to matters affecting its members such as leaks of information by public officials to them, the tapping of journalists' phones and search and seizure of journalists' working notes;⁸⁵
- the Australian Criminal Lawyers Association resolved at the June 1988 International Criminal Law Congress, Surfer's Paradise:
 - that the existence of the Independent Commission Against Corruption (N.S.W.) represents a major infringement of basic civil liberties;⁸⁶
- concern in sections of the NSW Judiciary over whether the ICAC will investigate complaints against them which led to a very public conflict within judicial ranks and strong editorial statements in favour of the ICAC investigating the Judges from the *Sydney Morning Herald*;⁸⁷
- *The Bulletin*;⁸⁸
- *The Daily Telegraph*;⁸⁹
- *The Australian*.⁹⁰

84 Keenan, A. & Moore, M. "Corruption body's powers attacked" *SMH* 25.5.1988 p 6; NSW Legislative Council 3.6.1988 debates p 1550; 8.6.1988 pp 1692, 1699, 1704-1706, 1713; 9.6.1988 p 1825; 14.6.1988 p 1492; 3.8.1988 pp 2308, 2311, 2313

85 For example, concerns voiced by AJA Federal Secretary Chris Warren : Grealy, M. "Crime body's powers feared" *Sun Herald* 29.5.1988; NSW Legislative Council 8.6.1988 debates pp 1691-1692, 1705, 1713

86 Volume 13 (1989) *Criminal Law Journal* 87-88; Solomon, D. "NCA, ICAC a 'denial of rights'" *Weekend Australian* 25-26.6.1988 p 11

87 Lagan, B. "Judges seek filter on complaints" *SMH* 31.5.1988 p 9; "Judges oppose inquiry" *SMH* 6.6.1988 p 1; Lagan, B. "Judges Oppose inquiry powers" *SMH* 6.6.1988 p 3; Lagan, B. "Judges fall out on ICAC powers" *SMH* 9.6.1988 p 1; Cooper, J. "Judges divided over commission against corruption" *Australian* 9.6.1988 p 2; Moore, M. "Judge attacks Chief Justice over corruption letters" *SMH* 11 June 1988 p 1; Lagan, B. "Judges step up attack on ICAC Bill" *SMH* 11.6.1988 p 4; Slee, J. "Squabbling judges on display" *SMH* 17.6.1988 p 10; Slee, J. "Squabbling judges make up" *SMH* 1.7.1988 p 12; Cooper, J. "Judges unite on crime body" *Australian* 8.7.1988 p 4; McLelland, J. "The day AJ dressed quietly, but Neville brought his usual speech" *SMH* 14.7.1988 p 3; Editorial "Law and justice, law and order" *SMH* 16.3.1988 p 14; Editorial "ICAC and judge's independence" *SMH* 8.6.1988 p 16

88 Cover story: Jarratt, P. "The Smear Society" *Bulletin* 26.7.1988 : 44-45, 48, 50-51, 53-54; Harding, R. "The case for legal reform" *Bulletin* 26.7.1988 p 50-51

89 Editorial "Anti-corruption law puts rights at risk" *DT* 9.6.1988 p 10

90 Editorial "Bill is too damaging to civil liberties" *Australian* 7.6.1988 p 16; Editorial "Bicentenary a bad year for freedoms" *Weekend Australian* 18-19.6.1988 p 18. The *Australian* also editorialised that the Greiner Government was rushing and mishandling a number of pieces of legislation including the ICAC Bill : "Greiner Government should slow down" *Australian* 14.6.1988 p 8; "Speaking of Upper Houses..." *Australian* 16.6.1988 p 16. In response to allegations of undue haste, the Attorney-general Mr John Dowd told Parliament : "Had we waited until we had the

Those who have expressly raised the "New McCarthyism" claim included legal commentator Mr David Solomon⁹¹ and former NSW Premier Neville Wran.⁹²

The character of debate over the expected impact of the ICAC on civil liberties has been reminiscent of the debates in 1983-1984 over the proposed national crimes commission, the NCA and the impact of the Costigan Royal Commission, in particular on prominent business identity Mr Kerry Packer. The prospect of a "New McCarthyism" was raised then as well.⁹³

Similarly, advocates of civil liberties are being criticised as indirectly promoting the interests of criminals and ignoring the interest of the public at large in having their civil liberties protected from interference by the criminal and the corrupt.⁹⁴

Whether the ICAC Act has the potential to have an unjustified impact on civil liberties was a matter debated in detail during the passage of the ICAC legislation and to which little new can be added at this stage. A more immediately relevant issue is whether there is any foundation in the expectation that the ICAC will have an adverse effect on civil liberties.

Predictably the Greiner Government must deny the charge that the ICAC will involve a witch-hunt, as does Mr Temby.⁹⁵

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- 91 Solomon, D. "NSW Resurrects The Ghost Of Joe McCarthy" *Weekend Australian* 18-19.6.1988 p 19; Solomon, D. "Temby: low-key crime crusader"; "The man whose powers match McCarthy's" *Australian* 13.10.1988 pp, 13
- 92 Wran, N. "The New McCarthyism" *Bulletin* 28.6.1988 p38
- 93 Kennedy, T. "Packer and the New McCarthyism - A Bill Of Rights Is needed" *Bulletin* 9.10.1984 pp 26-27; *Bulletin* Cover story: "Costigan & Packer : The New McCarthyism" 13.11.1984; Sykes, T. "The New McCarthyism : Trial by smear" *Bulletin* 13.11.1984 p 26-32; Spender, J. "Costigan Inquiry: A blow to natural justice" *Bulletin* 4.12.1984 p39-41; St John, E. letter to editor *SMH* 4.10.1984 p 8; *SMH* editorial Civil Liberties And The Law *SMH* 11.8.1984 p 12; Killen, J. "Golden thread tarnished" *SMH* 10.10.1984 p 9; Ellicott, R. "Commission justice must be for all" *SMH* 24.7.1985 p 11; Journalist Bob Bottom attacked the views of the Council for Civil Liberties on the national crimes commission proposal on the grounds of being ill-conceived and that CCL was in now ay representative of community views in Bottom, B. (1983) "A National Crimes Commission?" in Sydney University Institute of Criminology (1983) *A National Crimes Commission? Proceedings* No 58 : 15-21 at 20
- 94 Slec, J. "Individual liberty and ICAC" *SMH* 10.6.1988 p 6; Slec, J. "Wran calls up some old ghosts" *SMH* 24.6.1988 p 10; Slec, J. "Mistaken identity as Wran warns of threat to justice" *Age* 27.6.1988 p 13; McClelland, J. "The day Al dressed quietly, but Neville brought his usual speech" *SMH* 14.7.1988 p 3; Simper, E. "Mates match wits with McCarthyism" *Australian* 14.7.1988 p 1; Sturgess, G. "Against the crimes of the powerful" *Weekend Australian* 2.7.1988 p 24
- 95 Milne, G. "ICAC may cross state borders, says Temby" *SMH* 7.10.1988 p 2; Campbell, R. "Temby : I hope we get it right" *CT* 14.9.1988 p 1-2; Grimshaw, P. & Romei, S. "Temby gets \$6m to fight corruption" *DT* 14.9.1988 p 2; Letter from Mr Temby reproduced in *SMH* 14.9.1988 p 9; Statement by Mr Temby at the first public hearing of the ICAC 13.3.1989

Occasional statements from the Greiner Government suggesting that Labor will be the main focus of the work of the ICAC give cause for concern that the Government hopes that ICAC will be a political witch-hunt. They should not however be given too much weight as they are essentially in the nature of parliamentary banter out of step with the considered views of the Government in the second reading speeches on the ICAC legislation. For example the Attorney-General, Mr John Dowd MLA, in Parliament on 18 May 1988 stated

The honourable member for Ashfield (Paul Whelan MLA) should wait until the Independent Commission Against Corruption is established. A lot of material will go before that Commission for consideration. The Commission will spend much time examining the workings of the Labor Party. The Government will not direct the Commission.⁹⁶

On 31 May 1988 Mr Dowd told Parliament

It is inevitable that if in the past twelve years one government has been in office for two months and the other has been in office for the remainder of that period, the corruption of the latter government will be examined.⁹⁷

As to the statement on 18 May 1988, the *Sydney Morning Herald* editorialised that "Mr Carr is quite right to remind Mr Dowd of the foolishness of his remark..."⁹⁸ Relying on this and other statements, Mr Carr claimed that Mr Dowd had "politicized" the ICAC.⁹⁹

Others have suggested that unless the NSW Labor party is pursued, corruption will not be stopped. For example, prominent journalistic identity Ms Wendy Bacon stated in 1987, obviously prior to the current interest in the ICAC but with clear relevance to it, "...unless there is a major investigation into the NSW ALP, going right to the bottom of the Enmore conspiracy case, right to the bottom of the Love Boat business, you'll never get to the core of corruption in NSW".¹⁰⁰

Related to the concern that the ALP is to be a target of the ICAC is a perception by some that it is politically unwise for the ALP to resist the *ICAC Act* in any way (such as call for changes). This kind of view could have a paralytic effect on Labor despite there being a sound basis to criticise the *ICAC Act* and propose reforms. A good example of this view was put by political commentator Matthew Moore who said just after the ICAC Bill was introduced into the NSW Parliament:

Because some ALP personalities have the taint of corruption about them the party can't even whinge about the ICAC Bill. To resist on any grounds would leave it open to the charge that it was running scared, afraid of an investigation.

96 In course of 2nd reading debate on Evidence (Crown Privilege) Amendment Bill: NSW Legislative Assembly 18.5.1988 debates p 296

97 NSW Legislative Assembly 31.5.1988 debates p 851

98 Editorial "Mr Temby and the ICAC" SMH 14.9.1988 p 18

99 NSW Legislative Assembly 13.9.1988 debates p 1173; Farr, M. "Fine line between mates and morality" DM 16.8.1988 p 8; Cooper, J. "Headless ICAC 'too politicized'" *Australian* 16.8.1988 p 4; Coultan, M. & Dunn, R. "Temby Accepts Reins Of ICAC" SMH 14.9.1988 p 9; see also comments of Hon Jack Hallam MLC NSW Legislative Council Leader 8.6.1988 debates p 1680

100 Interview with Wendy Bacon in *Penthouse* September 1987 p 110

On corruption the NSW ALP is on the back foot and that's where it will stay for a good while yet.¹⁰¹

Along the same lines Premier Greiner was reported to say that Labor initiated amendments to the ICAC Bill, passed by the NSW Legislative Council, relating to lawyer/client privilege had the effect of protecting criminals, including Mr Bigs.¹⁰² The political logic of this sort of statement is the same - Labor is on the back foot if it tries to amend the ICAC Bill - with the added objective of scaring Labor into believing it themselves.

In my view such statements are probably no longer true, if they ever were, in as much as Labor should have nothing to fear from arguing for well reasoned, useful reforms after the ICAC has been given a fair shake in practice.

Whilst it cannot be predicted with any certainty, it is my judgement that the ICAC will not engage in an anti-Labor witch-hunt or wilfully disregard civil liberties as:

- the kind of debate that has gone on so far has put the ICAC on notice that large sections of the community will not tolerate witch-hunts or abuse of ICAC powers; and
- Mr Temby and his staff can be expected to approach their work in good faith and be scrupulous in staying within the the *ICAC Act*.

Nevertheless legitimate concerns over specific provisions of *the Act* remain which should be addressed in a few years when the whole *ICAC Act* should be reviewed, not the least of which are those powers over and above those enjoyed by the NCA:

- the power for the Commissioner of the ICAC to issue search warrants (section 40); and
- the availability to the ICAC on application to the Supreme Court of injunctions to restrain any person from performing any conduct that affects the subject of an investigation or proposed investigation (section 27).¹⁰³

Also of significance is an appreciation of the breadth of the field within the investigative scope of the ICAC. The definition of "corrupt conduct" (sections 7-9 of the *Act*) is so broad as to hardly limit the ICAC at all. Of special concern is the inclusion of misuse of information by a public official within that definition, allowing the ICAC to in effect become an "official secrets" watch-dog. This may have a chilling effect on media/public sector relations, especially in relation to leaks of information in the public interest such as:

- in the case of Mr Clive Ponting who leaked information to the English press about the real facts surrounding the sinking of the "General Belgrano" in the Falklands conflict and was charge with an offence against the *English Official Secrets Act*; and

101 Moore, M. "Squeaky clean and a winner all the way" SMH 28.5.1988 p 32

102 Nicholson, L. Corruption Commission plan derailed DT 10.6.1988 p 2; Hocking, J. "ALP protects crims: Greiner" DM 10.6.1988 p 2; Lagan, B. "Govt outrage at filuted ICAC powers" SMH 10.6.1988 p 3; "Shambles over the ICAC Bill" SMH 13.6.1988 p 8

103 On criticism of the ICAC Act see further Bersten, M. (1989)

- in the case of Sergeant Arantz who suffered greatly for having leaked the real rather than doctored police crime statistics to the press.

The point here is that unlike the NCA and State Drug Crime Commission, who only investigate matters which are referred to them, the ICAC can investigate what it likes as long as it relates to "corrupt conduct", subject only to a reference from both Houses of Parliament.¹⁰⁴ In comparison, this makes the ICAC far less accountable.

A further feature which must be emphasised very strongly is that the special powers of the ICAC are not powers that should be given to the police generally. This is an important aspect of law enforcement accountability, that special investigative powers are only given to special agencies with special functions.

A close watch should be kept on these matters to see whether these and other possible changes to the *ICAC Act* are warranted.

Expectation 3: At an operational level the ICAC may experience some of the same problems as the NCA.

This expectation has been voiced¹⁰⁵ as the ICAC and NCA share a number of common features:

- they both have significant investigative functions with special 'Royal Commission'-style powers not available to the police;
- some of the matters they deal with involve considerable difficulty, take a considerable length of time to investigate, possibly requiring the use of informers, phone-tapping and surveillance;

104 Section 13 ICAC Act

105 Bersten & Hogg (1988) at 149

- they are both required to publish annual reports to Parliament;
- they both bear to some extent on the field of organised crime and corruption; and
- at various points in their work secrecy is required either by statute, to aid their investigations, to protect the reputations of individuals and to avoid pre-trial prejudice.

In some of these areas, the NCA has experienced problems. To take some examples:

- over the use of informers, especially "Mr X", in a number of failed prosecutions, leading to doubts about the propriety of their use¹⁰⁶ and a recent report that Mr X may be charged in relation to giving false evidence;¹⁰⁷
- potential embarrassments such as a report that the arrest of Mr Bruce Cornwell, regarded as a sufficiently major catch as to warrant mention in both the 1986-1987 NCA Annual report and a special report to Parliament, was by accident¹⁰⁸ further compounded by the apparently inconsistent implication in reports to Parliament that the arrest was planned;¹⁰⁹

106 Keenan, A. "Do Police use 'tainted' super-grasses?" SMH 13.4.1988 p 10; Keenan, A. "A first defeat for Mr Mystery" SMH 14.5.88 p 1; Turner, P. "Grassby clear by court" SMH 14.5.1988 p 1; Keenan, A. "A disturbing calm at the NCA" SMH 17.5.1988 p 15; Rintoul, S. "Lawyer demands inquiry into NCA's Mr Smith" *Australian* 17.5.1988 p 3; Kelly, H. & Wilson, D. "More accountability, police involvement urged for NCA" *Age* 18.5.1988 p 1; Wilson, D. "MP's Duck Challenge To Put Spot-Light On Crime-Fighter" *Age* 18.5.1988 p 6; Dunn, R. "Watchdog backs NCA on Grassby" SMH 18.5.1988 p 13; Eccleston, R. "Parliamentary watchdog defends NCA" *Australian* 18.5.1988 p 6; "Who polices the NCA?" (editorial) SMH 19.5.1988 p 16; Keenan, A. "Chief Judge of Puzzle Palace" SMH 21.5.1988 p 69; Frail, R. "'Supergrass' protection under scrutiny" *Age* 24.5.1988 p 13; Harbutt, K. "NCA witness protection policy under attack in Senate" *Australian* 27 May 1988 p 3; Collis, B. "Stay of prosecution for Grassby queried" *Age* 30.5.1988 p 5; "Protection for 'The Walking Dead'" (editorial) *Age* 30.5.1988 p 13; Blenkin, M. "Detective work earned Grassby victory" *CT* 30.5.1988 p 2; "Politicians to quiz NCA on Grassby" *CT* 31.5.1988 p 1; Slee, J. "Grassby not out of the woods" SMH 3.6.1988 p 8; Eccleston, R. & Egan, C. "MP lashes court over attack on NCA" *Australian* 7.6.1988 p 3; Wilson, D., Robinson, P. & Bottom, B. "Crimebusters pledge a more open approach" *Age* 8.6.1988 p 10; Hardaker, D. "Legal split over police supergrass" *Sunday Telegraph* 26.6.1988 p 14; "What is wrong with the NCA?" SMH 30.6.1988 p 14; Keenan, A. "Career check for supergrass" SMH 7.7.1988 p 8; Keenan, A. "Why a Supergrass fell from grace" SMH 16.7.1988 p 8-9; Turner, P. "Supergrass loses another case" SMH 27.10.1988 p 3; Harbutt, K. "Officer freed as protected witness is branded a liar" *Australian* 27.10.1988 p 6

107 "Supergrass may be charged" SMH 7.4.1989 p 3

108 "Police arrested drugs king by accident in UK" *Age* 23.6.1988 p 4; Keenan, A. "The drug boss who was caught by accident" SMH 23.6.1988 p 8

109 *NCA Annual Report 1986-1987* AGPS Australia p 16 (Parliamentary Paper 353/1987); *NCA (1987) Operation Silo: Report Of The Investigation* AGPS Australia (Parliamentary Paper 369/1987) p 5

bad publicity over the acquittal of a Senior NSW Police Drug Officer, Superintendent Jim Willis, arising out of a prosecution based on an NCA investigation;¹¹⁰

- difficulties since June 1988 in finding a successor for retiring Chairman, Justice Stewart, apparently resolved by the decision reported on 11 May 1989 to appoint a Melbourne QC, Mr Peter Faris;¹¹¹
- being dogged by public controversy over whether it is a success or a failure;¹¹² and

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- 110 "Cleared Police Chief says probe NCA" *DM* 27.6.1988 p 13; Kennedy, L. "NCA action malicious, says top cop" *DT* 28.6.1988 p 5; *DT* editorial "How the NCA operates - it's a crime" 28.6.1988 p 10; Harbutt, K. "Angry Superintendent demands probe into NCA 'monster'" *Australian* 28.6.1988 p 3; Levitt, C. "NCA a failure says policeman" *SMH* 28.6.1988 p 3; Corns, C. letter to Editor *Age* 28.6.1988 p 12; Kennedy, L. "Top drug cop goes back to his old job" *DT* 29.6.1988 p 4; "What is wrong with the NCA?" *SMH* 30.6.1988 p 14
- 111 Keenan, A. "Push For Stewart to stay at NCA" *SMH* 17.5.1988 p 4; Egan, C. "Despairing NCA Chief to quit" *Australian* 22.6.1988 p 1; "NCA Chairman wants to quit" *DT* 22.6.1988 p 7; "NCA Head won't extend his term" *SMH* 22.6.1988 p 9; Kelly, H. "Policeman may co-chair NCA" *Age* 4.1.1988 p 16; Conroy, P. "Legal body supports Vincent for NCA post" *Age* 20.3.1989 p 5; Forell, C. "A Government veto on nation's crime fighters" *Age* 22.3.1989 p 13; Wilson, D. "Victorian judge turns down NCA leadership" *Age* 23.3.1989 p 6; Keenan, A. "Top post on NCA rejected by two more" *SMH* 14.4.1989 p 5; Wilson, D. "Time running out in quest for top crime-buster" *Age* 29.4.1989 p 25; Grattan, M. "Stewart to direct new resources body after NCA" *Age* 29.4.1989 p 5; Australia Senate 10.5.1989 question without notice pp 2177-2178; Bruer, M. & Innes, P. "New NCA chief will move office to Melbourne" *Age* 11.5.1989 p 3; Chipperfield, M. & Taylor, L. "NCA's new boss picked because he makes the charges stick" *Australian* 11.5.1989 p 3; Innes, P. "Crime fighter on the side of the underdog" *Age* 13.5.1989 p 2; Wilson, D. & Bottom, B. "Tales of Justice: The Confessions of Donald Stewart" *SMH (Good Weekend)* 27.5.1989 p 23-29
- 112 Editorial "Just the ninth police force?" *SMH* 18.2.1988 p 12; Harbutt, K. "Why police hate crime authorities" *Australian* 28.4.1988 p 11; "Police Union attacks 'superfluous' NCA" *SMH* 2.4.1988 p 4; Arnold, A. "'NCA not doing its job', says Costigan" *SMH* 3.5.1988 p 3; Attwod, A. "Crimebuster on the ropes" *Time* 11.7.1988 p 118-119; Toohey, B. "Time the NCA lifted its game" *Sun Herald* 14.5.1989 p 46; Bottom, B. "Inside the NCA" *SMH* 3-5.1.1989 (series); Bottom, B. "Authority should get the credit it deserves" *SMH* 5.1.1989 p 10 where Bottom states: "As valid as some of the criticism might be, much of the criticism derives from people with limited knowledge of the realities inherent in fighting organized crime."

a widely-held perception that the NCA is too secretive and needs to improve its communication with other agencies and the public.¹¹³

It is noteworthy however that:

- the sunset clause on the NCA, that the *Act* expire after five years, was repealed in 1988, making the NCA a permanent statutory authority and indicating a vote of confidence from the Federal Parliament; and
- the Joint Parliamentary Committee on the NCA recommended in 1988 that the NCA be given seven years from when it began operations (1984) before it should be fully reviewed (1991).¹¹⁴

Although one can do little more now than record these possible areas of difficulty, it is noteworthy that in relation to secrecy, Mr Temby stated on 13 March 1989

Our approach generally will be that we are working on behalf of the public, and should be prepared to let them know what we are doing. This is subject to the important caveat that successful outcomes and fairness to individuals cannot be obtained unless security is maintained relative to pending and current investigations.¹¹⁵

No doubt the emphasis on fairness is in part because the ICAC can hold hearings in public,¹¹⁶ whilst the NCA must hold them in private,¹¹⁷ creating greater opportunities for damaging the reputations of individuals and pre-trial prejudice unless special care is taken such as holding private hearings in appropriate cases.

A further problem with secrecy is that without the ICAC positively trying to communicate to the public at large the nature and significance of the work it performs the ICAC loses the opportunity to correct misinformation and build

- 113 Wilson, D., Robinson, P. & Bottom, B. "Crimebusters pledge a more open approach" *Age* 8.6.1988 p 10; Harbutt, K. "Crime fighter Glasnost" *Weekend Australian* 25-26.6.1988 p 10; Wendy Bacon in an interview in *Penthouse* September 1987 edn p 134; Toohey, B. "Time the NCA lifted its game" *Sun Herald* 14.5.1989 p 46; the Parliamentary Joint Committee on the NCA has recommended a more open approach: Parliamentary Joint Committee on the National Crime Authority (1988) *The National Crime Authority - An Initial Evaluation* Parliament of the Commonwealth of Australia, June 1988: para 4.34.; on the need for ICAC not to be secretive see comments of Mr John Hatton MLA who argued that closed bureaucracy promotes corruption : NSW Legislative assembly LA 31.5.1988 debates p 866
- 114 Parliamentary Joint Committee on the National Crime Authority (1988) *The National Crime Authority - An Initial Evaluation* Parliament of the Commonwealth of Australia, June 1988 : para 4.31. On 7.6.1988 the PJC began an inquiry into Drugs, Crime and Society. A Report of the same name was tabled in Parliament on 25 May 1989
- 115 Address at first sitting of ICAC See also: Goodsir, D. "Temby vows to avoid muckraking" *DT* 14.3.1989 p 9; "ICAC plans to conduct public hearings" *CT* 14.3.1989 p 3; McAsey, J. "Temby says ICAC will operate independently" *Age* 14.3.1989 p 18
- 116 Section 31 *ICAC Act*
- 117 Section 25(5) *National Crime Authority Act 1984* (Cwth)

support for what it does. From a purely practical standpoint the ICAC and the Operations Review Committee (whose function it is to advise on the handling of complaints of corrupt conduct¹¹⁸) can well do without the massive paperwork generated by misconceived, frivolous or unsubstantiated complaints.

The ICAC seems to be aware of this problem judging by:

- the fact that of 750 complaints received between October 1988 and March 1989 many did not involve corruption or lacked supporting details; according to Mr Temby "These were of no use to us but we were left with a small number of useful and interesting pieces of information which will be investigated."¹¹⁹
- the message sent through the press and news advertisements that those who complain about corruption must back up their allegations.¹²⁰

This kind of problem does not arise for the NCA or SDCC as neither can investigate matters unless referred under the mechanisms provided by statute.

On a different issue, a problem that can however occur for the NCA, SDCC and ICAC is the difficulty in finding an appropriate person to head the organisation. The NCA experience is a salutary warning for future recruitment of people to head the ICAC, especially in the light of the widespread agreement that the choice of Commissioner can make or break the agency.¹²¹

Expectation 4 : The ICAC is so independent as to menace all major political parties.

Although not given as wide currency as the first two expectations, this expectation has been put on occasion.¹²²

I for one hold it because it is the natural corollary of the ICAC behaving in accordance with its *Act*.¹²³ To an extent I agree with the words of journalist and former ALP adviser Mr Richard Farmer in a commentary which was apparently

118 Section 59 ICAC Act

119 Hall, B. "Corruption informers to 'back' charges" DM 8.3.1989 p 4

120 "ICAC advertises for complaints" SMH 6.3.1989 p 6; Hall, B. "Corruption informers to 'back' charges" DM 8.3.1989 p 4

121 Editorial "Case for a new government" SMH 18.3.1988 p 16; Editorial "ICAC: Hoping for the best" SMH 27.5.1988 p 18; Editorial "Uneasy lies the ICAC's head" SMH 4.8.1988 p 14; R Harding "Policing official corruption: the Hong Kong connection" *Bulletin* 20.12.1988 p 34-35

122 Coultan, M. & Dunn, R. "The man who takes on either side" SMH 14.9.1988 p 9; Farmer, R. "Don't say Joh didn't warn you" *Australian* 26.10.1988; Bersten, M. (1989)

123 It will be recalled earlier that I stated that the ICAC can be expected to follow its *Act* in a *bona fide* manner

intended to be prophetic: "There's no chance at all of knowing which stones will be turned over, let alone which little black bugs will run where".¹²⁴

I believe this built-in unpredictability will be a major key to the ICAC meeting its main aim (see proposition 1, above) as the prospect that anybody can expect to be investigated for alleged corrupt conduct should have a significant deterrent effect on those considering whether to engage in corrupt activity.

I part company with Farmer, however, on his other points, namely that giving ICAC such independence is an error of political judgement which will backfire on the Greiner Government.¹²⁵

5. THE DISCRETION TO INVESTIGATE

A fundamental feature of the ICAC compared to other recently created investigative agencies is that, subject only to a direction from both House of Parliament, it can choose to investigate any matter it considers to involve "corrupt conduct".¹²⁶ In contrast:

- The NCA can only investigate matters referred to with the approval of the Inter-Governmental committee, the request for a reference being initiated by either the Commonwealth, a State or by the NCA.¹²⁷
- The SDCC can only investigate matters referred to it by the Management Committee set up under the *SDCC Act*.¹²⁸

Given the breadth of discretion given to the ICAC as to what it may investigate, the issue arises as to how this discretion is to be exercised.

Section 12 of the *ICAC Act* provides some guidance to the Commission by specifying general objectives. It provides:

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

This provision is notable in that it does not specify investigation of corrupt conduct leading to major prosecutions as the paramount concern of the ICAC. Its emphasis is on more general outcomes: "protection of the public interest" and "prevention of breaches of public trust".

The structure of the *Act* appears then to give the ICAC various functions and powers to exercise in its discretion, subject to the *Act*, so as to honour these concerns.

124 Farmer, R. "Don't say Joh didn't warn you" *Australian* 26.10.1988

125 Farmer stated: "(ICAC will turn) out to be a major factor in Labor regaining office in NSW ...I quite expect 6 or 12 months of mild embarrassment for the Labor Party looks at the litany of Labor 'crimes' over the past five years. But I'll be surprised if anything is uncovered that results in any significant political figure being prosecuted for anything And three years down the track when there are no major scalps on the commission's belt, people will be questioning its very worth...Maybe then its investigators will start looking for post-Labor corruption if only because its easier. Easier because key participants aren't dead, evidence hasn't been destroyed and the memories of conversations haven't become warped."

126 As defined in ss 7-9 of the Act

127 Sections 9-14 National Crime Authority Act 1984 (Cwth)

128 Sections 6, 24, 25 State Drug Crime Commission Act 1985 (NSW)

Putting aside the various forms of accountability for a moment, the *Act* does not give the ICAC a discretion to exercise in an unstructured, whimsical, discriminatory or peremptory fashion. As Mr Temby himself said the ICAC is set up "to attack a special problem in a systematic way".¹²⁹

The issue is therefore how to properly structure this discretion, not through external influence or regulation but through self-regulation within the ICAC itself. In other words, under what internal guidelines should the ICAC operate in the exercise of its various discretions under the *Act*? In my view the ICAC should consider the following matters:

1. The relevant statements in parliamentary debates over the ICAC Bill, particularly those from the Leaders of the Government in the second reading stage.
2. The ICAC should not investigate matters which can be appropriately investigated by other agencies, a point underlying the important requirement that the ICAC (like the NCA¹³⁰ and SDCC¹³¹) co-operate with other law enforcement agencies in the performance of its functions.¹³² It is noteworthy that in the cases of the NCA and the SDCC, approval to refer a matter to them is conditional upon the consent of a supervisory committee (Inter-Governmental Committee in the case of the NCA and the Management Committee of the SDCC) which must consider whether "ordinary police methods of investigation into the matter are likely to be effective".¹³³ As the *ICAC Act* clearly provides for referral of matters to other agencies¹³⁴ this power should be used where possible so that the ICAC investigates only the 'hard' cases. There are principally two situations which amount to 'hard' cases:
 - (i) where the special powers available to the ICAC¹³⁵ (those not generally available to other bodies such as the police) are genuinely required to effectively investigate the matter; or

129 SMH 14.9.1988 p 9

130 Section 17 **National Crime Authority Act 1984** (Cwth)

131 Section 7 **State Drug Crime Commission Act 1984** (NSW)

132 Section 16 **ICAC Act**

133 Section 9 (2) **National Crime Authority Act 1984** (Cwth); s 25(2) **State Drug Crime Commission Act 1985** (NSW)

134 Sections 53-57 **ICAC Act**

135 Such as the following powers under the **ICAC Act**: power to seek information and documents from a public authority or public official (ss 21, 22) and enter public premises (s 23); power to seek from the Supreme Court an injunction to restrain corruption-related conduct (s 27); the 'Royal Commission' style powers to require the production of documents and the answering of all questions (s 35); power to issue its own search warrants (s 40); protect witnesses (s 50)

- (ii) where there is reasonable prospect that the investigation will not proceed effectively for reasons such as likely corruption or obstruction of the investigation if given to another agency.
3. The ICAC should aim to avoid conflict with other agencies over investigative territory, mutual assistance and control of information¹³⁶ as it can be expected that other agencies will seek to protect their independence and what they regard as their proper domains. Accordingly special care must be taken in using statutory powers to:
 - require the provision of information and documents from other law enforcement agencies;¹³⁷
 - enter their premises;¹³⁸ and
 - follow up matters referred to other agencies.¹³⁹
 4. Informers and protected witnesses¹⁴⁰ should be used with the utmost circumspection given the many difficulties and costs involved as has recently occurred with the NCA over its use of an informer, the so-called "Mr Smith", leading to failed prosecutions following lengthy, costly and complex investigations. Evidence of informers must be independently corroborated. Once it is reasonably clear that corroboration is not forthcoming, an investigation dependent on the evidence of an informer should be suspended or discontinued.
 5. Investigations should not be mounted unless contemporary relevance can be established such as that
 - (i) key figures under investigation still hold positions of influence;
 - (ii) the institutional setting in which the corrupt conduct is alleged to have occurred is so open to abuse as to require special attention to reform it to prevent corruption in the future.
 6. Although it would be artificial to create a cut-off date having the effect that investigations should not be conducted in relation to matters prior to it, investigations should not be mounted where the passage of time can reasonably be expected to result in:
 - (i) a stale prosecution; or
 - (ii) evidence being in such an incomplete or deteriorated state (eg missing documents; failed memories or death of key witnesses) as to make a successful prosecution unlikely.

6. ICAC IN OPERATION : WHAT WILL IT INVESTIGATE?

So far I have concentrated on matters of policy. I turn now to specific possibilities for investigation.

136 Harding, R. "Policing official corruption: the Hong Kong connection" *Bulletin* 20.12.1988 p 34-35; see s 16 ICAC Act

137 Sections 21-22 ICAC Act

138 Section 23 ICAC Act

139 Sections 54-57 ICAC Act

140 Section 50 ICAC Act. On the issue generally see Parliamentary Joint Committee on the NCA (1988) *Witness Protection* AGPS

Labor-related allegations

A number of statements have been made suggesting that certain Labor-related allegations will not be investigated:

- Mr Temby has stated that many such allegations are too old to be pursued.¹⁴¹
- Mr Greiner has stated that his Government will not refer the allegations relating to incidents in 1975 involving Labor Politician Mr Laurie Brereton and the Botany Municipal Council.¹⁴²

Nevertheless there are a number of Labor-related allegations of corruption which may be investigated by the ICAC including;

- The so-called Enmore conspiracy case, which Mr Greiner has said will be referred to the ICAC;¹⁴³
- The prisoner early-release scheme in relation to which former NSW Labor Minister Mr Rex Jackson was convicted and imprisoned, which Mr Greiner has said will be referred to the ICAC;¹⁴⁴
- Allegations relating to alleged corruption in office by Former NSW Labor Minister Mr Frank Walker such as misuse of funds, which Mr Greiner has said will be referred to the ICAC; and¹⁴⁵
- Allegations that late NSW Labor Minister Mr Paul Landa took bribes whilst in office.¹⁴⁶

Other areas of inquiry

Other areas of inquiry have been generally hinted at:

141 Power, J. & Boylen, L. "Temby appointed ICAC Chief" AFR 14.9.1988 p 5

142 Interview: SMH 15.3.1988 p 8

143 Ibid

144 Coultan, M. "Jackson's jail release scam to go before ICAC" SMH 19.8.1988 p 7

145 Garcia, L. "Walker misused funds : Premier" SMH 3.6.1988 p 1; Lourenz, T. Letter to Editor SMH 17.6.1988 p 10

146 "Temby given Landa probe" Sunday Telegraph 30.4.1989 p 168 : see also The Landa Syndrome The Eye October 1987 p 6; Coultan, M. "Police probe Landa 'hand-over-fist' bribe allegations" SMH 21.11.1987 p 1; Coultan, M. "Bribe allegations against Landa are scurrilous, says Premier, as police investigation begins" SMH 23.11.1987 p 3; "Landa: more comes out" The Eye February 1988 p 7; Keenan, A. "Landa had second Stathis no-bill application" SMH 8.3.1988 p 3; Keenan, A. "Landa bribe claim inquiry" SMH 25.3.1988 pp 1, 7; Keenan, A. & Coultan, M. "Paul Landa inquiry inconclusive" SMH 27.8.1988 p 7; Keenan, A. "The other stars of the Landa Inquiry" SMH 23.1.1989 p 10; see also footnote 5

- Matters involving the Chinese community were reported to be amongst those that will be referred by the Greiner Government to ICAC,¹⁴⁷
- Matters involving rural NSW as well as Sydney metropolitan region,¹⁴⁸ and
- Matters with an inter-state element such as investigating links between NSW and Queensland police involved in illegal activities relating to poker machines.¹⁴⁹

Local Government

Most publicity however has been given to ICAC investigations relating to alleged corruption in Local Government. As the *Sydney Morning Herald* editorialised:

Local government has a powerful reputation for corruption; it is the logical place for Mr Temby to start.¹⁵⁰

Particular interest as to the roles of Tweed¹⁵¹ and Waverley¹⁵² Councils in handling matters related to property development. The Waverley Council investigation relates to matters dating from July 1982.¹⁵³

This focus is in step with the English experience prior to the wide-scale abolition or restructuring of Local Councils under the Thatcher Government. The Royal Commission on Standards of Conduct in Public Life (1974-1976), chaired by Rt Hon. Lord Salmon, arose out of the so-called Poulson Affair wherein an architect with interests in the construction industry was involved in systematic bribery of Local Councillors and Officials of all major political parties. Subject to some dissents and elaborations the Royal Commission made recommendations for a whole range of legal and institutional reforms.¹⁵⁴ No recommendation was made for a new anti-corruption agency or increased powers for existing law enforcement bodies.

147 Garcia, L. "Chinese community can expect ICAC calls" SMH 8.6.1988 p 5

148 "Corruption body will go to rural areas" CT 20.3.1989 p 12

149 Milne, G. "ICAC may cross state borders, Says Temby" SMH 7.10.1988 p 2; Roberts, G. "Call for ICAC to check on Qld link" SMH 11.7.1988 p 3

150 Editorial "Mr Temby, QC, opens shop" SMH 30.1.1989 p 10

151 Hogarth, M. "Tweed set to help graft investigator" SMH 30.1.1989 p 6; "Temby probes Tweed Council" DT 9.5.1989 p 7; Hogarth, M. "Shire President reports on corruption claims" SMH 10.5.1989 p 8

152 ICAC advertisement to announce public hearings relating land development applications since July 1982 submitted to Waverley Council *Australian* 9.5.1989 p 7; Coomber, S. "Council first on ICAC list" DT 22.3.1989 p 5; Coultan, M. "Temby's corruption fighters raid Council" SMH 22.3.1989 p 3; "ICAC begins first hearing" CT 18.5.1989 p 4

153 *Australian* 9.5.1989 p 7

154 Salmon Royal Commission pp 101-109. Recommendations related to: reform of law of bribery and corruption (rec.1-6); public officials to disclose conflicts of interest (rec.7-12); registers of interests (rec. 13-15); staff rules (rec.16-19); codes of conduct (rec.20-21); management responsibilities (rec.22-24); administrative procedures in public bodies (rec.25-27); responsibilities of political parties (rec.28-32); police procedures (rec.33-35); new offence of bribery of MP (rec.36); wider issues should be examined : constitutional, historical, social (rec.37). Many of these recommendations are similar to those of the Bowen Committee which examined conflict of interest and corruption problems relating to the federal public sector, Federal Parliament and the defence forces: see Bowen, N. (Chairman) *Public Duty and Private Interest* AGPS 1979, Parliamentary Paper 353/1979

The comments of the Royal Commission on corruption in Local Government are relevant:

Without making the slightest excuse for anybody, we nevertheless feel that the conditions created by Parliament in the field of planning law and in urban and housing development have put greater strain than has been generally realised upon our system of locally elected councils, whose members may enter public life with little preparation and may find themselves handling matters on a financial scale quite beyond their experience in private life. The power to make decisions which lead to large capital gains or business profits has given rise to obvious temptations on both sides.

The local authorities most vulnerable to corruption have tended to be those in which one political party has unchallenged dominance. Not only are such authorities at risk because of the absence of an effective opposition which can scrutinise their decisions, but investigations and the making of complaints in such areas may also be inhibited by the feeling that there is no way round the local party machine.¹⁵⁵

Matters the ICAC is not investigating

Two matters at this stage appear not be up for investigation by the ICAC:

- claims on the television program "Four Corners" relating to the Transport Workers Union and Justice John Varnum of the NSW Industrial Commission; these have apparently been referred by the Greiner Government to the conduct division of Judicial Commission but not to ICAC,¹⁵⁶ and
- allegations of fraud on the government;¹⁵⁷ in deciding not to investigate allegations of multi-million dollar fraud on the GIO, the ICAC stated "The ICAC is concerned with corruption within government departments rather than frauds committed upon them."¹⁵⁸

The decisions noted above are indicative of the ICAC informally limiting its jurisdiction in some ways:

- not going too far back in time (eg to investigate old Labor-related corruption allegations);
- not investigating matters appropriate for other agencies (eg the Judicial Commission); and

155 Salmon Royal Commission paras 38, 39

156 Cooper, J. & Higgins, E. "Greiner orders probe into union corruption" *Australian* 10.5.1989 p 2

157 See generally: Nethercote, J., Challenger, D. & McKenna, H. (1988) **Fraud In the Public Sector** AIC/Canberra Bulletin of Public Administration Australia (edited collection of papers from 1988 Autumn Seminar "Ethics, Fraud And Public Administration" (2.5.1988) & AIC Seminar "Fraud On Government" (18-20.7.1988); Special Minister of State (1987) **Review of Systems for Dealing with Fraud on the Commonwealth** March 1987 AGPS; summary in 62 (1988) *Australian Law Journal* p 196-198

158 Lyons, J. "ICAC to stay out of GIO's fraud inquiry" *SMH* 11.5.1989 p 8; Lyons, J. & Leser, D. "Phantom car smashes: \$300m scam uncovered" *SMH* 15.4.1989 p 1; Lyons, J. "Law Society hits out at GIO's fraud allegations" *SMH* 19.4.1989 p 9; Clark, P. "MP attacks some lawyers as corrupt" *SMH* 19.4.1989 p 7; Editorial "Self-regulation of lawyers" *SMH* 20.4.1989 p 12; Leser, D. & Lyons, J. "Net spreads wider in \$300m third-party fraud investigation" *SMH* 29.4.1989 p 8

- limiting the definition of "corrupt conduct" to exclude fraud on the government.

7. CORRUPTION PREVENTION

Corruption prevention is one of the principal functions of the ICAC To lay a strategic basis for any specific prevention program it is helpful to elaborate on a general level why corruption prevention matters.¹⁵⁹

In an address to a Conference on Police Corruption on July 12 of this year, Justice Stewart, Chairman of the NCA, made a number of pertinent points. He said

We must examine organisational structures and systems for their capacity to encourage or facilitate corrupt practice, both in individual organisations and within our society at large...¹⁶⁰

Referring to the ICAC and the NCA as anti-corruption agencies he said

The creation of new law enforcement agencies to investigate corruption may appear to be an obvious answer. Such an approach however may tend to focus too much attention on the problem at the individual level rather than looking at the system which encourages corruption. This can very easily become the "rotten apple" approach, a reactionary approach rather than a progressive one. I think most of us have rejected, once and for all, the theory that there are only a few "rotten apples" in the forces - and that all that is required is to identify them and the problem is solved. This is an illogical and defensive attitude. Corruption is an institutional problem in police forces and the potential for corruption will remain in an imperfect society. Police management must formally reject this theory if the problem of corruption is to be adequately dealt with.¹⁶¹

Along the same lines, in a paper delivered at this forum six years ago on the then proposed "National Crimes Commission" criminologist John Braithwaite stated with equal application to the ICAC:

...there would be little merit in experimenting with a closed crimes commission model which focussed narrowly upon obtaining convictions. To have any hope of impact on organised crime, a commission would need to have an open, public quality and an analytical mission. A crimes commission is an idea worth trying, but only if it focuses on manipulating the structure of criminal markets and criminal organisations (as opposed to being another police force)...¹⁶²

159 See generally Bersten, M. (1988), (1988a), (1988b), (1989); Bersten, M. & Hogg, R. (1988)

160 Speech delivered at Australian Police Staff College Conference, Manly, New South Wales, "Police Corruption: Identification And Prevention" 12 July 1988

161 *Ibid*

162 Braithwaite, J. (1983) "A Clash Of Criminological Imbeciles: The Great Crimes Commission Debate" in Sydney University Institute of Criminology (1983) *A National Crimes Commission? Proceedings No 58 p 22-27 at 27*

As these quotations indicate, it is no longer credible to argue that an anti-corruption agency built principally around law enforcement is the best way to deal with organised crime and corruption. Increasingly corruption and government illegality is seen as a problem less of bad people but rather a systematic problem in the public sector.¹⁶³ As Justice Kirby put it in 1983, referring to the landmark series of papers on organised crime by Douglas Meagher QC,¹⁶⁴ Counsel assisting the Costigan Royal Commission, "If organized crime is as big in Australia, as Mr Meagher asserts, it is big with the participation of very many ordinary Australian citizens".¹⁶⁵

The implication is that organised crime and corruption cannot be explained away as individual deviance. Law enforcement efforts directed against evil individuals is far from the total answer. Organised crime and corruption is something that so many ordinary people are routinely involved in, one way or another, as to require an explanatory domain at a social, political and historical rather than individual level. State initiatives should be on this level as well as preserving the rule of law by bringing criminals to book.

In this context, corruption prevention takes on the guise of organisational and management reform and restructuring. To carry it out adequately seems to involve at least some of the following elements:

1. systematic study of the public sector to identify the conditions which make corrupt conduct possible and likely in particular institutional settings;
2. typically this will involve identification of the key points in government decision-making, service delivery and project management where benefits or losses, monetary or otherwise, can be conferred corruptly;
3. risk analysis to rank areas of most likely corrupt conduct; the experience in the investigative wing of the ICAC should be taken into account;
4. focus on the mechanisms of accountability which apply to various discretions and decisions vested in particular officials or agencies
5. prime examples include all the various discretions exercised
 - in property development by Local and State Government agencies and officials;
 - in the grant, review and cancellation of government licences and permits;
 - in the legal system from police through prosecutors, courts and correctional systems;
 - in the grant, review and cancellation of government services and benefits;
 - in public expenditure not governed by the tender process; and

163 Grabosky, P. (1988) "Wayward Governance: Illegality and its control in the Australian Public Sector" prepared for presentation at the Annual Meeting of the Law and Society Association, Colorado, USA 11.6.1988; being an edited version of a forthcoming book; Grabosky, P. & LeLievre, I., eds (1987) *Government Illegality* Australian Institute of Criminology

164 Meagher, D. (1983) *Organised Crime* AGPS

165 In foreword to Sydney University Institute of Criminology (1983) *A National Crimes Commission? Proceedings* No 58 p 13

- government contracts involving the provision of services purchase, management or disposal of public assets by tender or otherwise.
6. co-operation with agencies, which is contemplated under the *ICAC Act*,¹⁶⁶ with an established role and expertise in public accountability such as the Office of the Auditor-General, the Ombudsman, the Public Accounts Committee of the NSW Parliament and the Office of Public Management.

As can be seen from the above suggestions, corruption prevention largely involves

- analysis of the institutional context so as to identify the conditions which make corrupt conduct possible and likely;
- offering advice so as to manipulate these conditions to reduce the possibilities or likelihood of corrupt conduct (eg administrative or legal reform of the institutional setting in which key discretions are exercised) and
- follow-up measures to ensure that advice is properly considered and acted upon.

Two particular difficulties may face corruption prevention:

1. With its emphasis on systems of accountability, it may in truth or perception produce a regulatory environment at odds with the interest in public sector efficiency. The conflict between accountability and efficiency is well-recognised in public administration,¹⁶⁷ becoming acute with the goal of de-regulation in many areas of the public sector. Without making a prediction, it will be interesting to see whether the ICAC finds cases where de-regulation has enhanced opportunities for corrupt conduct in the public sector.
2. With proposals for reform at an organisational level may come conflict with powerful public sector trade unions unless they are properly consulted. Special difficulties can be expected if proposals are made involving public officials having to register their financial interests, be subjected to additional security checks, be transferred against their will to other positions or lose entitlements.

Whilst much of what has been said is directed at the of institutional level rather than that of particular individuals, education is also part of corruption prevention but will be dealt with under its own heading.

8. ANTI-CORRUPTION EDUCATION

Educating people about corruption is an important part of corruption prevention because it helps to change attitudes so that:

1. individuals choose not to engage in corrupt conduct despite the opportunities to do so;
2. a climate of intolerance is developed so that corrupt conduct, rather than being encouraged or condoned, is rejected as a socially acceptable practice; and
3. the public become aware of services to call on to deal with corrupt conduct either to report allegations to the appropriate authorities or to obtain advice as to how to minimise corruption in a particular setting.

¹⁶⁶ Section 16

¹⁶⁷ For example, Cole, R. (1988) "The Public Sector: The Conflict Between Accountability And Efficiency" 47 *Australian Journal Of Public Administration* p 223-232

Consequently corruption is more than moral training.

No doubt the ICAC will employ the usual range of educational programs to get its message across such as:

- education targeting particular groups such as in schools, particular parts of the public sector; and
- advertising and publications.

An especially useful program would involve education to facilitate workplace-level practices to prevent corruption. This would enhance the prospects of localised solutions to particular corruption problems by allowing corruption to become an issue within the setting of equal opportunity, industrial democracy and union/management co-operation. This may prove more efficient in some cases than law enforcement or organisational change imposed from above or external to an area of the public sector.

9. THE ICAC ANNUAL REPORTS TO PARLIAMENT

The ICAC is required to make an annual report to the NSW Parliament.¹⁶⁸ The report must contain a number of matters which almost all relate to its investigative functions such as a description of the matters referred to the Commission, matters investigated by the Commission, recommendations for legal or administrative reform, action following investigations and the number of search warrants issued.¹⁶⁹ The only other matter which ICAC must cover is "a description of its activities during that year in relation to its educating and advising functions."¹⁷⁰

These reporting requirements are similar to those placed on the NCA and SDCC except that both must

1. not identify persons suspected of having committed offences or identify persons as having committed offences unless they have been convicted of them;¹⁷¹ and
2. include " a description, which may include statistics, of any patterns or trends, and the nature and scope, of any ("criminal activity" : NCA; "drug trafficking activity" : SDCC) that have come to the attention of the (agency) during that year in the course of its investigations".¹⁷²

The first of these is clearly intended to both protect the reputation of the innocent and to avoid pre-trial prejudice. It is hard to see how such a requirement could hinder the ICAC in the discharge of its major functions as at present the ICAC is required to take appropriate action, such as deferring a report, so as avoid prejudice to any person whilst legal proceedings are pending.¹⁷³

The second of these requirements is intended to provide more general material on the profile of criminal activity within the field covered by the agency. This

168 Section 76 ICAC Act

169 Sub-section 76 (2) ICAC Act

170 Sub-section 76 (2) (g) ICAC Act

171 Sub-section s 31 (3) State Drug Crime Commission Act 1985 (NSW); Sub-section 61 (3) National Crime Authority Act 1984 (Cwth)

172 Sub-section s 31 (2) State Drug Crime Commission Act 1985 (NSW); Sub-section 61 (2) (b) National Crime Authority Act (Cwth)

173 Section 18 ICAC Act

assists the public and policy makers in appreciating the nature and scope of the problems at hand and gives a context in which to evaluate the impact of the agency on them.

Regrettably, the NCA and SDCC have included little of this sort of information in their Annual Reports despite its relevance as evidence upon which conclusions can be drawn about the effectiveness and efficiency of the agencies.

The importance of the ICAC regularly and systematically presenting information about the profile of corrupt conduct in NSW should be recognised by the ICAC aiming to satisfy this requirement now. At an appropriate time the Parliament should add such a requirement to the annual report provision of the *ICAC Act*.

As to the substance which should be reported on to meet this sort of requirement, I have in mind a descriptive analysis of some length which will provide a breakdown of the corruption problem and ICAC's response to it in relation to each section of the NSW public sector. In particular it would indicate:

1. number and type of complaints of corrupt conduct;
2. action taken by the ICAC, investigative, advisory or educational in relation;
3. follow-up action of other agencies;
4. an assessment of the effectiveness of ICAC and follow up activity;
5. an assessment of the displacement factor produced by ICAC and follow up activity;
6. an assessment of conditions making corruption possible and likely; and
7. legal and administrative reforms which address the these conditions.

From this an appreciation of corruption in NSW and the impact of the ICAC can be developed, allowing for the operations of the ICAC to be interrogated with some specificity but without interfering in particular investigations.

This kind of analysis allows for a historical record of corruption in NSW and the operations of the ICAC to develop so as to allow for a qualitative evaluation of the ICAC against specified criteria.

It is noteworthy that the lack of an adequate information base was expressed as one of the reasons behind the Parliamentary Joint Committee on the NCA being forced to make only an initial rather than final evaluation of the NCA in its recent study published in June 1988, over three years after the NCA commenced operations.¹⁷⁴

This situation must be avoided in the case of the ICAC. The only way to do it is for the ICAC to start now and the Annual reports seem to be the appropriate vehicle in which to present much of this material.

174 Parliamentary Joint Committee on the National Crime Authority (1988) *The National Crime Authority - An Initial Evaluation Parliament of the Commonwealth of Australia, June 1988* p vii, paras 4.1 - 4.5, 4.31

10. POSSIBLE CORRUPTION-RELATED REFORMS

Elsewhere I have gone into a little detail over specific reforms to the *ICAC Act*.¹⁷⁵ Some of the amendments are of technical interest only, largely sharpening up the drafting of an act that was rumoured to have been drafted not through the usual channels of the Parliamentary Draftsman but largely by a prominent Australian QC.¹⁷⁶ I have also suggested earlier various other changes worth considering in a few years when the ICAC should be thoroughly reviewed.

Anti-corruption legal reforms

Reforms of the law directed against corruption should be considered. Although the Greiner Government announced over a year ago¹⁷⁷ that work was to begin on reforming the substantive law of corruption offences, nothing has yet eventuated. Meanwhile bribery and corruption is the subject of Discussion Paper number 19, issued in November 1988 by the Review of Commonwealth Criminal Law, chaired by former High Court Chief Justice Sir Harry Gibbs.

There are a number of other possible areas of legal reform such as:

- whistle-blower legislation to protect public sector employees from workplace repercussions when they notify authorities of possible corrupt conduct; a precedent for this is found in the legislation governing federal civil servants in the USA; and¹⁷⁸
- revising the approach to corporate crime penalties where corrupt conduct has benefited or is intended to benefit or has been performed on behalf of a corporation.

Accountability Reforms

As I have suggested elsewhere, I think the ICAC is insufficiently accountable.¹⁷⁹ Should these concerns be borne out in practice, I have three specific proposals to strengthen accountability for the ICAC:

1. Oblige the Operations Review Committee (ORC) to report annually to the ICAC Parliamentary Joint Committee (PJC).
2. The PJC should be able to make recommendations to the government on the appointment of senior ICAC personnel such as the Commissioner and Assistant Commissioners.
3. Give the PJC the power to issue guidelines to the ICAC on matters of general policy affecting the discharge of its functions.

175 Bersten, M. (1989)

176 NSW Legislative Council debates 8.6.1988 p 1686; 9.6.1988 debates p 1837; Bersten, M. (1989)

177 NSW Legislative Assembly 26.5.1988 debates p 673; Legislative Council 1.6.1988 debates p 982

178 Suggested at an Australian Institute of Criminology conference by legal academic John McMillan: McKnight, D. "Call To Protect 'Whistle-Blowers'" SMH 20.7.1988 p 12; see also Caiden, G. & Truelson, J. "Whistleblower Protection In the USA: Lessons Learnt And To Be Learnt" (1988) 47 *Australian Journal of Public Administration* p 119-129; whistleblower legislation has also been recommended for the UK see Zellick, G. (1987) *Whistle-Blowing In United States Law Public Law* p 311-313

179 Bersten, M. (1988); (1988a); (1989); Bersten, M. & Hogg, R. (1988)

Accountability proposal 1: The ORC must report annually to the PJC

Independent NSW member of the Legislative Assembly has suggested that the chairman of the PJC also be a member of the ORC so as provide a window of accountability into the workings of the ORC. This suggestion was rejected by government on the basis that the two bodies should be separate as they perform different functions.¹⁸⁰

Nevertheless it seems to be an odd omission that the ORC does not have to report to the Parliament or any other body. No harm would come from the ORC reporting to PJC so as to inform them at least of the profile of complaints received by the ICAC and the general guidelines applied in their advice to the ICAC. This would add useful information to the public record on the operations of the ICAC.

Accountability proposal 2: The PJC should be able to make recommendations to the government on the appointment of senior ICAC personnel such as the Commissioner and Assistant Commissioners.

A proposal along these lines put in debate over the ICAC Bill by Labor Shadow Attorney-General, Mr Paul Whelan MLA but was rejected.¹⁸¹ It is noteworthy that the Police Board has a similar but far more extensive power.¹⁸² It is hard to see, if the ICAC is to be independent of the government of the day, why that government can still choose the Commissioner. To strengthen the independence of the ICAC, whilst also increasing its accountability to the Parliament, this proposal should be considered.

Accountability proposal 3: The PJC be given the power to issue guidelines to the ICAC on matters of general policy relating to the performance of its functions.

The proposal is this:

- the PJC be given the power to issue guidelines to the ICAC on general policy matters relating to the performance of its functions;
- these guidelines should be expressly circumscribed so as not to allow the PJC to investigate any "corrupt conduct" itself or review a decision of the ICAC in a particular investigation; and
- the guidelines are only valid if the ICAC is consulted, the guidelines are in writing and they are published in the government gazette and tabled in the NSW Parliament within 15 sitting days of being issued to the ICAC.

The background to this proposal is as follows:

In the event that the exercise of its various discretions proves unsatisfactory, suggesting that the internal guidelines ICAC sets itself are either inadequate or not observed, consideration should be given to strengthening mechanisms of accountability. Nevertheless it is not easy to strengthen accountability as this may in truth or perception interfere with the central feature of the ICAC structure, namely its independence from external, government direction. Accordingly external

180 NSW Legislative Assembly 31.5.1988 debates p 860-863

181 NSW Legislative Assembly 31.5.1988 debates p 845-849

182 Sub-section 7 (2) Police Board Act 1983 (NSW)

regulation such as making the ICAC subject to Ministerial direction or investigation by the Ombudsman may prove antithetical to the basic philosophy of having an agency like the ICAC.

There is however a half-way position, one which exists in relation to a number of agencies which are regarded as properly having considerable independence,¹⁸³ namely the NSW Police, The Australian Federal Police (AFP), the Federal Director of Public Prosecutions (DPP) and the NSW DPP, the SDCC and the NCA. This position is the statutory provision for guidelines to be issued by some external authority such as the Minister or a monitoring agency¹⁸⁴ These guidelines generally provide for matters of general policy, rather than intervention in specific operational matters. Consequently the issuing authority is able to at once influence the general operations of the agency but must assume responsibility for such policies as the guidelines cover. A further advantage of guidelines is that by making their validity depend upon publication in the *Government Gazette* and tabling in Parliament, no valid but secret guidelines or directions, formal or informal can be issued by the government.¹⁸⁵ It is noteworthy also that guidelines can vary from being mandatory to being merely advisory and from being limited to general matters to being quite specific.

In the case of the NCA, the Minister may issue guidelines as to the "performance of its functions".¹⁸⁶ They must be approved by the NCA Inter-Governmental Committee¹⁸⁷ but once in place the NCA must comply with them.¹⁸⁸ No guidelines have ever been issued under this power.

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- 183 As to police independence see: Hogg, R. & Hawker, B. "The Politics Of Police Independence" 8 (1983) *LSB* 160-165, 221-224; Marshall, G. (1986) *Constitutional Conventions*, Oxford, ch 8 and select bibliography at p 251; *R v Metropolitan Police Commissioner Ex Parte Blackburn* [1968] 1 All ER 763; Yardley, D. (1970) *A Source Book Of English Administrative Law* 2nd edn ch 9
- As to prosecutorial independence see: Edwards, J. (1964) *The Law Officers Of The Crown*, Sweet & Maxwell, chs 10, 11; Edwards, J. *The Attorney General, Politics And The Public Interest* Sweet & Maxwell; Tombs, J. (1987) "Independent Prosecution Systems" in Zdenkowski, G., Ronalds, C. & Richardson, M., eds (1987) *The Criminal Injustice System* Vol. 2, Pluto, p 90-111; Potas, I. (1984) (ed) *Prosecutorial Discretion Seminar Proceedings* No.6, Australian Institute of Criminology; Annual Reports of the DPP (Cwth); Temby, I. (1987) "The D.P.P. And Ministerial Responsibility" 61 *Law Institute Journal* 568-569
- 184 In England ss 66 and 67 of the *Police and Criminal Evidence Act 1984* provide for the issue of codes of practice by the Minister. They may cover virtually all aspects of police investigation, search and seizure and detention, treatment, questioning and identification of suspects. Section 105 of that Act provides for guidelines to be issued by the Minister with respect to the discharge of police functions under the Act and police discipline
- 185 Of the agencies mentioned earlier, only the Police Board and the SDCC Management Committee are under no requirement to gazette or table their guidelines or directions. This is required by the ss 18 (4) *National Crime Authority Act 1984* (Cwth); *Australian Federal Police Act 1979* (Cwth); ss 8 (3) the *Director of Public Prosecutions Act 1983* (Cwth); ss 26 (4) *Director of Public Prosecutions Act 1986* (NSW)
- 186 Sub-section 18 (1) *National Crime Authority Act 1984* (Cwth)
- 187 *Ibid*
- 188 Sub-section 18 (2) *National Crime Authority Act 1984* (Cwth)

The position of the SDCC is the same as that for the NCA except that the guidelines are issued by the SDCC Management Committee, not the Minister, and there is no equivalent to the Inter-Governmental Committee in the *SDCC Act*.¹⁸⁹

In the case of the AFP the Minister may issue guidelines as to the "general policy to be pursued in relation to the performance of the functions of the Australian Federal Police".¹⁹⁰ The wording of the guidelines provision together with the provision giving the Police Commissioner control of operations¹⁹¹ and authority to issue General Orders and General Instructions¹⁹² indicate that the guidelines do not extend to operational matters. Ministerial guidelines have been issued on two occasions, each popularly known as "the AFP Charter". Both settle the general priority which the AFP should give to aspects of its operations.¹⁹³

In the case of the NSW Police, a Police Board, of which the Commissioner is a member, was set up in 1983. It seems to have a significantly interventionist role in a whole range of general management matters.¹⁹⁴ Subject to the mandatory requirement that the Commissioner implement decisions of the Board, the Commissioner has responsibility "for the superintendence of the police force and its operational command and day-to-day management."¹⁹⁵

In the case of the Federal DPP, subject to consultation with the Director, the Director must follow such directions or guidelines as the Attorney-General issues in writing.¹⁹⁶ The scope for guidelines or directions is very broad and may be given in particular cases.¹⁹⁷ In fact only one guideline has ever been given, relating to the delivery of DPP files to the Parliamentary Commission of Inquiry on allegations against Justice Murphy.¹⁹⁸

The position for the NSW DPP is very similar to that of the federal counterpart except that guidelines cannot be given in relation to particular cases.¹⁹⁹

Noteworthy also are the limits on the Parliamentary Joint Committee on the ICAC preventing it from investigating a particular case or reconsidering the findings of the Commission.²⁰⁰

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- 189 Section 27 *State Drug Crime Commission Act* 1985 (NSW)
 190 Sub-section 13 (2) *Australian Federal Police Act* 1979 (Cwth)
 191 Sub-section 13 (1) *Australian Federal Police Act* 1979 (Cwth)
 192 Section 14 *Australian Federal Police Act* 1979 (Cwth)
 193 Charter 1 was published in *AFP Annual Report* 1980-1981 p 51-52; Charter 2 dated August 1985 was published in *AFP Annual Report* 1985-1986 p 1-2
 194 Sub-sections 7 (1) (2) *Police Board Act* 1983 (NSW)
 195 Sub-sections 7 (3) (4) *Police Board Act* 1983 (NSW)
 196 Sub-section 8 (1) *Director Of Public Prosecutions Act* 1983 (Cwth)
 197 Sub-section 8 (2) *Director Of Public Prosecutions Act* 1983 (Cwth)
 198 *DPP Annual Report* 1985-1986 AGPS Australia p 8
 199 Section 26 *Director Of Public Prosecutions Act* 1986 (NSW)
 200 Sub-section 64(2) *ICAC Act*; see also sub-section 55(2) *National Crime Authority Act* 1984 (Cwth)

Conclusion

The independence of the ICAC puts it in an invidious position. If it is perceived to have failed or gone wrong the Greiner Government may feel entitled to shift the blame onto Mr Temby on the basis that the Government should not be responsible for an agency which it created but could not and did not control. Yet when the independence of the ICAC is likely to count most, in an investigation affecting the political survival of the government of the day, the ICAC might then experience the most strenuous attempts to interfere with its independence.

In that regard the firing of the first Special Prosecutor into Watergate, Archibald Cox, in what is popularly known as "the Saturday night massacre" is a chilling reminder that even the most public of independent investigators in the world's most famous democracy was subject to political interference.²⁰¹

Only time will tell whether the ICAC works and whether it can remain independent. It is the responsibility of the whole community to be ready to judge that in a fair, rational and informed manner at the appropriate time.

201 Ben-Veniste, R. & Frampton Jnr, G. (1977) *Stonewall : The Legal Case Against the Watergate Conspirators* Touchstone ch. 6

APPENDIX A

States which have promised to create an ICAC-style body include:

- WA (Barker, E. "WA to get anti-graft watchdog" *West Australian* 30.8.1988 p 7)
- SA (Hudson, L. "Bannon to set up corruption body" *Australian* 17.8.1988 p 2; but see S.A. Police Anti-Corruption Initiatives; "Ministerial Statement By The Deputy Premier And Minister Of Emergency Services" *Police Journal* (SA) September 1988 p 25-28 which mentions an 'anti-corruption' unit (it is not clear how close it will be to the ICAC model - it appears to be for investigating SA police, at 26)
- Queensland (Roberts, G. "Permanent anti-graft body likely this year" *SMH* 9 May 1988 p 6). On the ICAC proposal in Queensland see also Roberts, G. "Police and media under attack" *SMH* 5.7.1988 p 3; Whitton, E. "Qld juries put on the spot over corruption" *SMH* 5.7.1988 p 3; Powell, N. "Corruption too entrenched for inquiry, says Fitzgerald" *AFR* 5.7.1988 p 10; Massey, M. "Qld Govt pledges back-up for inquiry" *AFR* 5.7.1988 p 10; Nolan, S. "Fitzgerald admits trying to do too much" *Australian* 5.7.1988 p 3; "Fitzgerald gives up: Inquiry to end" *CT* 5.7.1988 p 1; Simons, M. "Permanent corruption probe gets backing" *Age* 5.7.1988 p 3; "Ahern pledges a free press" *SMH* 11.7.1988 p 6; "Freedom of press" *CT* 11.7.1988 p 6; Roberts, G. "Fitzgerald has doubts on ICAC-style Qld body" *SMH* 28.8.1988 p 7; Ross, D. "Fitzgerald given list of 20 candidates for Police Commissioner's job" *Courier Mail* 17.5.1989 p 1. PNG has decided against an ICAC style body: "PNG to set up squad to fight corruption" *Age* 14.10.1988 p 7

Journalist Bob Bottom has suggested a federal ICAC. ("Criminals on dole : Bottom" *CT* 27.9.1988 p 4)

An ultra-right wing group under guise of "The National Corruption Tribunal" advertised in *CT* 18.2.1989 for councillors to sit on a "Council of Review"; the organisation was to perform investigations on "bona fide complaints of a personal, commercial, political and law enforcement nature"; applications were to be sent to a Queensland PO Box.

APPENDIX B

It has been suggested by Opposition Leader Bob Carr and others that inconsistent measures show that the Greiner Government is not as committed to fighting corruption as they claim. E.g. NSW Legislative Assembly 31.5.1988 debates p 832; Bersten, M. & Hogg, R. (1988) at 149

The measures in question have been:

- abolition of Corrective Services Commission, returning to a system of more direct ministerial control : Garcia "Commission abolished as Greiner cracks whip on jails" *SMH* 25.5.1988 p 1; *Prisons (Amendment) Act* 1988 (NSW)
- the proposal to remove the power of the Ombudsman to investigate "trivial" complaints against police: Coultan, M. "The case of the poll pledge that could die on March 19" *SMH* 25.2.1988 p 1; Aubin, T. "Pickering firm on his Hamburger Policy" *SMH* 29.2.1988 p 5; Coultan, M. "Govt acts to restrict watchdog" *SMH* 7.5.1988 p 2; Lagan, B. & Clark, P. "Anger at Govt plan for police" *SMH* 9.5.1988 pp 1, 7; Editorial "Policing the Ombudsman" *SMH* 10.5.1988 p 16; Lagan, B. "Ombudsman put out of police harassment Cases" *SMH* 11.5.1988 p 4; Garcia, L. "Why can't we trust our police?" asks Pickering" *SMH* 11.5.88 p 4; Lagan, B. "Pickering attacks Ombudsman" *SMH* 18.5.1988 p 2; Lagan, B. "Ombudsman under fire" *SMH* 19.5.1988 p 17; Slee, J. "Storing up trouble for Police" *SMH* 20.5.1988; Levett, C. "Police on charges will get pay, says Pickering" *SMH* 24.5.1988 p 3; Lagan, B. "Be vigilant in fielding complaints, Police told" *SMH* 24.5.1988 p 4; "Rebuff looms on police complaints" *DT* 25.5.1988 p 6; Lagan, B. "Attack on Landa renewed" *SMH* 26.5.1988 p 6; Lagan, B. "Govt loses fight to curb Ombudsman" *SMH* 17.6.1988 p 1; "Police tried to discredit me: Ombudsman" *DT* 30.6.1988 p 4; Lagan, B. "Ombudsman says Police misled over his role" *SMH* 30.6.1988 p 7; Lagan, B. "MP's travels hold up Ombudsman inquiry" *SMH* 7.7.1988 p 3; Lagan, B. "Complaints hit manpower, says Avery" *SMH* 9.7.1988 p 9; Lagan, B. "New claim that plan to curb Ombudsman was for 'Election'" *SMH* 27.7.1988 p 3; Lagan, B. "Police fear getting tough, Inquiry told" *SMH* 28.7.1988 p 5; Lagan, B. "Dowd swept in to Ombudsman row" *SMH* 9.9.1988 p 7; Lagan, B. "Pickering rebuffed on complaints over police" *SMH* 20.4.1989 p 4

The Legislative Council Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill set up 16.6.1988 to consider a bill to reduce the role of Ombudsman in investigating complaints against police unanimously rejected the Greiner Government proposal - Final Report para 22. Interim Report made in Legislative Council on 2.8.1988 debates at 2162; Final Report made on 19.4.1989 at 6662.

- Freedom of information legislation proposal: Garcia, L. "Public will soon have access to Govt papers" *SMH* 20.4.1988 p 8; Slee, J. "A natural tendency to secrecy" *SMH* 22.4.1988 p 12; Garcia, L. "'Tell All' legislation promises much but may offer little" *SMH* 28.4.1988 p 17; Lagan, B. "Strict limits on access to papers" *SMH* 3.6.1988 p 3; Garcia, L. "The information will be free, but you'll pay to see it" *SMH* 4.6.1988 p 3; cartoon *SMH* 6.6.1988 p 14; Editorial "Greiner almost lifts the veil" *SMH* 6.6.1988 p 14; Editorial "Not quite open government" 19.7.1988 p 14.

- The decision not to investigate allegations relating to the Transport Workers Union and public corruption : "Add Nick to the list" The Eye June 1988 pp 7-8; Toohey, B. "Time the NCA lifted its game" Sun Herald 14.5.1989 p 46; In 1987 Wendy Bacon stated : "There's no inquiry set up, nobody mentions it, nobody criticises it in the rest of the press." (interview Penthouse September 1987 p 110)
- The decision not to hold an inquiry into allegations involving the provision of cars to Greiner's staff by a property developer and the role of a body called 'Community Polling' involved in the March 1988 election connected to the Liberal Party : Clark, P. "Developer helped get free cars for Greiner's aides" SMH 19.10.1988 pp 1,14; Frail, R. "Greiner defensive over car allegations" Age 20.10.1988 p 7; Coultan, M. "Greiner defends his driving force" SMH 20.10.1988 p 6; Clark, P. & Moore, M. "Greiner 1, Howard 0 aa top Lib quits" SMH 21.10.1988 p 1; Coultan, M. & Clark, P. "NSW Liberals rebuff Howard" SMH 27.10.1988 p 1; Totaro, P. "Carr threatened with legal action over Commodore affair" SMH 28.10.1988 p 3; Clark, P. & Moore, M. "Fears over poll funding as Liberal row grows" SMH 29.10.1988 p 1; Moore, M. & Clark, P. "Starr Wars" pp 79, 80; "No inquiry, says Greiner" SMH 31.10.1988 p 2; Clark, P. "Secret \$100,000 fund for Greiner" SMH 11.1.1988 p 1; Editorials "Liberals fight the Starr wars"; "Pickering and Parliament" SMH 2.11.1988 p 20; Cooper, J. "Lib cars in use before Party go-ahead" Australian 4.11.1988 p 1; Moore, M. & Clark, P. "No more community polling, Greiner pledges" SMH 7.11.1988 p 4; Frail, R. "Tarnish on the Greiner image" Age 11.11.1988 p 13