I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Malcolm Kerr
Chairman
Parliamentary Joint Committee on the ICAC
121 Macquarie Street
SYDNEY NSW 2001

21 October 1992

Dear Mr Kerr,

I received, and have read, the transcript of the Committee's hearing at Kyogle. I understand the Committee is yet to receive some further submissions, which will be passed on to the Commission, and then the Commission will be given an opportunity to respond.

The hearing transcript contains many statements by witnesses and many issues, some outside the Committee's functions. I trust the Committee will not require the Commission to respond at large, but will identify the issues on which it wants to hear from the Commission.

As it seems to me, an important aspect of what your Committee has been doing is a sort of cost/benefit analysis, the question being whether harm to individuals is more than balanced by the public good which flows from examining allegations and exposing malpractices. The good is unlikely to be confined to the Kyogle district, and I suggest that the Committee should contact the Roads and Traffic Authority in that regard. Mr Bernard Fisk, the Chief Executive of the RTA, has given me to understand that the investigation and report were useful from the viewpoint of the organisation he heads. I have not spoken to him since receiving the transcript, and I will leave it to the Committee to take the matter up with him if it sees fit.

A:\CORRESPO\LET.18

ALL CORRESPONDENCE TO: BOX 500 GPO SYDNEY 2001, DX 557
CNR CLEVELAND & GEORGE STREETS REDFERN NSW 2016 TELEPHONE (02) 318 5999 FACSIMILE (02) 699 8067

I will address the substantive issues about the investigation at the appropriate time. However, there is one matter of procedure which I feel bound to raise at this stage. At the hearing the Committee tabled a letter from the Commission to the Committee in response to a complaint by Patrick Knight. It was apparent from the transcript that at least two of the witnesses, Messrs Lovell and Rodgers, who were not parties to Mr Knight's complaint, had received copies of the Commission's letter to the Committee. At least Mr Rodgers had received that copy from the Committee. Mr Rodgers considered that inappropriate. I must agree.

The Commission has been writing to the Committee, in response to complaints forwarded to the Commission, on the understanding that its correspondence was between the Commission and the Committee. On this basis the Commission expected that its correspondence would not be tabled without consultation, and would not be provided to third parties at all, or at least without consultation. Apparently the Commission has proceeded on the wrong basis. If this is so, I would appreciate your advice as to the Committee's procedures in respect of Commission correspondence.

Yours faithfully,

Ian Temby QC
Commissioner

Copy: Bernard Fisk
Chief Executive
Roads and Traffic Authority

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21 October 1992

Mr Malcolm Kerr MP
Chairman
Committee on the Independent
Commission against Corruption
Parliament House
SYDNEY NSW 2000

Dear Sir

Thank you for your advice that your Committee is conducting an examination of the ICAC inquiry into aspects of the administration of Kyogle Shire Council and your invitation to comment upon that inquiry.

I was instructed to appear, by local solicitors, on behalf of Kyogle Shire Council and senior officers including the Shire Clerk, the Shire Engineer, and senior officers responsible to those two people. I was also instructed to represent the interests of the executive of the Shire Council, that is the Shire President and the Deputy Shire President. I did not have direct contact with all shire councillors although I met a number of them during the course of the inquiry. My comments are personal observations and are not made in my capacity as counsel representing an interest.

I hold a number of concerns about this particular inquiry both as to the manner it was investigated, the way it was conducted, the treatment of individuals who appeared before it and the way the presence of the ICAC and the conduct of the proceedings impacted upon the local community. I do not believe however it is productive to be involved in any personal criticism of any individuals however I hope my

observations and comments on matters of general importance are of some assistance to the Committee's work and the future important work of the Commission.

My primary concern is, and was, that the extensive public hearings in relation to the matters which were the subject of investigation by the ICAC were largely unnecessary. It goes without saying that public hearings of necessity involve considerable expense to those granted leave to appear, not to mention the ICAC itself. There were a number of reasons for this situation however whether they relate to ICAC investigations generally or to this matter in particular I am unable to say.

Before the public proceedings commenced I believe there had not been a full and proper examination of all documents that were relevant to the particular issues that ICAC was seeking to address, nor had there been a full and proper examination of all relevant potential witnesses. (I note in this regard that the possible exception was Patrick Knight who for a number of months prior to the conduct of the public inquiry was overseas on extended leave. I accept that the ICAC had little opportunity between the time of his return and the commencement of public hearings to fully examine him).

It should be noted in this regard that the Kyogle Shire Council and its staff were fully prepared at any time to provide information to the ICAC to assist it in relation to its inquiries. The record of the proceedings reveals that such statements as were obtained prior to the conduct of the public inquiries from relevant Shire officers were cursory or lacking completely in their examination of relevant issues that were examined at the public hearing. Large numbers of documents which were lawfully seized from the council offices by ICAC investigators early in 1991 remained largely uninterpreted by the makers of the documents or those whose experience and knowledge of local government, and particularly the workings of the Kyogle Shire Council, could cast light upon them. The Council through its legal representatives produced a large number of documents which could have easily been obtained by the ICAC investigators and which if known of before the public hearings may have shortened them. Furthermore, during the course of the

proceedings issues arose which need not have troubled the public hearings if the relevant documentation had been fully explained to the ICAC investigators by those with knowledge of the council's accounting system and the reasons for particular records coming into existence. An inquiry of Mr Geoff Sowiak, the Deputy Shire Clerk and Council accountant, would confirm the extent to which not only was his knowledge and expertise not used to assist the inquiry before it commenced, but the frustrations he faced during the course of the inquiry getting access to documents in the possession of the ICAC to assist with their interpretation or identify and ascertain their significance.

I appreciate that the purpose of conducting hearings, be they private or public, is to facilitate the investigative process, particularly having regard to the extensive powers that the ICAC has to compel witnesses giving evidence before it to supply information. However a great deal of the information which was elicited at public hearings in this matter could have far more easily been obtained by further investigation by interview and if need be selective private hearings. Such private sessions may have given the Commissioner the opportunity of making a proper assessment of individuals upon whom ICAC inquiries relied and isolate issues that properly required public examination.

Part of the problem that the ICAC faced in this particular inquiry was that, acting as it was on the information provided by a number of informants, it was reluctant to give too much notice of the matters which were the subject of investigation. Whilst one can appreciate the dilemma between maintaining the integrity of an investigation, and at the same time facilitating its progress, full investigation before a decision was made as to whether there should be a public inquiry is possible without unnecessarily revealing the identity of informants. I don't believe in any event on any objective assessment of the totality of the material presented to the ICAC that any of the informants had anything to fear by way of retribution etc from those in authority.

From my experience as counsel assisting the Royal Commission into Aboriginal Deaths in Custody I am aware of the need to undertake as full as an investigation as possible before any public hearing is

undertaken. Before each public inquiry of that Commission an issues paper was prepared and served setting out the general factual background identifying areas of individual responsibility and the general or underlying issues that the inquiry would examine or might arise. Usually a short directions meeting between Commission staff and parties who may seek leave to appear to further refine matters in issue occurred before public hearings commenced. Not only are complete investigations before public inquiries essential for shortening the public hearings, but they obviously must make it easier for the investigating body to identify the issues that need to be addressed in the public hearings. They put the inquisitor on notice of matters that need to be brought to the attention of both individuals and public institutions as matters requiring their comment, for the purposes of improving the efficiency and accountability of public administration and for identifying areas where there is a likelihood or even possibility of adverse findings being made.

In this matter such investigation would have made it easier for the ICAC to be able to identify precisely what matters ought be raised in public, either for the information of a particular community or to provide individuals or organisations with a public opportunity to respond. It is my view that the structure of public hearings will in the future in inquiries of this type be much assisted by the capacity of the ICAC to properly identify the issues to be addressed, the specific areas of concern and identifying the individuals in respect of whom possible adverse findings might be made, before the public inquiry commences.

In a limited inquiry of the type undertaken at Kyogle, there is no reason why the public hearings should not be the last resort, or stage, of the investigation when possible adverse findings against individuals or organisations can be identified from the material gather during investigation. If pre hearing investigation reveals matters which enable the ICAC to give useful directions or advice either in general or specific terms to public authorities to improve procedures so as to prevent corruption, or to increase efficiency and improve methods of accountability, that can be done without the need for public inquiry, unless the affected public authority believes that a public hearing is necessary for it to justify its previous conduct and requests it.

Individuals should only be asked to answer specific allegations of wrongdoing when the Commission itself is satisfied, on full investigation, that it is appropriate that such an affected individual respond. In this inquiry an allegation contained in a statement, that Mr Harry Grayson the works engineer had solicited a bribe, was revealed by flesh and blood examination to be at worse a bad joke, at best a complete fabrication. Mr Grayson, who was on the verge of retirement, was forced to bear the damage to his reputation by the public airing of the allegation (subsequently publicly reported) and the further humiliation of having to respond to it publicly, for no other justifiable reason other than the 'right of the public to know', given that the ICAC was locked into public hearings.

Another matter of concern was the impact of the presence of a powerful investigative organisation like the ICAC in a small community such as Kyogle conducting a public investigation. The fact that lessons are to be learnt for the benefit of the local community in an investigation of this type, does not of itself necessitate a full public inquiry with all the related hysteria and innuendo, not to mention eventually unsustained allegation, that will arise in the course of such public hearings extensively covered by the local media. In this regard I felt that the ICAC's investigation and its subsequent handling of the public inquiry, revealed an ignorance of a number of the political realities and undercurrents within the Council and the community generally. Not only did the ICAC fail to interview or fully interview relevant witnesses within the council staff in relation to a number of matters which were the subject of allegation, but a number of councillors who were present at important council meetings and were involved in private negotiations and discussions in relation to council business were never interviewed by the ICAC either before the conduct of the public inquiry or during the public inquiry. Statements were tendered from a number of them notwithstanding the apparent lack of interest by the ICAC. Neither were all councillors spoken to about their views of the political complexities of local government in the area. This was particularly neglectful bearing in mind that in part the ICAC inquiry was based upon allegations being made by some of the councillors who on any objective assessment of council business, formed a relatively small but consistent minority in council decision making. The detail of the political complexities of the

Kyogle community are obviously matters for which local people are better placed than I to make appropriate observations, however I feel that the ICAC's investigation may have been assisted by endeavouring to at least get, if only from the protagonists themselves, some understanding of the politics (in the widest sense) of the Council.

Another deficiency which emerged in the course of the public inquiry was the seeming lack of expert opinion available for the Commission's consideration before the commencement of public proceedings, independent of the council itself if need be, in relation to matters the subject of investigation. Local government accounting procedures, Road Traffic Authority accounting procedures and engineering matters, were the subject matter of extensive evidence in public inquiry, fuelled by the ICAC's desire to obtain relevant information, on occasions without a great deal of direction or focus. The ICAC should before such proceedings have available to it not only all (or nearly all) relevant documentation, at least in the possession of the relevant public bodies and individuals, but as well some detailed explanation of that material from relevant individuals and a proper analysis of the material and the explanations by either independent advisers with sufficient expertise or the advice of "experts" who have an interest in the proceedings. A large amount of time was spent in the public inquiry examining the Shire Engineer's thought processes in the course of making a multitude of professional decisions over a lengthy period of time some years prior to giving evidence. This was principally concerned with decision making concerning the "Wiangaree" deviation, which was a major road work undertaken by the council with Road Transport Authority funds. An investigation before public hearings commended of the Road Traffic Authority and its views of the professional competence of the council staff, the efficiency of the roadworks undertaken by the council and the quality of the work done would have saved considerable public inquiry time in testing the Shire Engineer's recollection of events which in the end were of little or no consequence to the ultimate objective of the inquiry.

Some other matters that I have identified that may require further consideration by the ICAC and your Committee as appropriate in future inquiries of this type include the following:

i) The need to limit the extent of openings by counsel assisting so as to prevent the possibility of unfairly damaging the reputations of individuals and organisations by airing allegations which at the conclusion of proceedings are not sustained.

ii) Better identification of issues to be addressed during public hearings in such opening and the order in which they will be addressed.

iii) Greater vigilance to protect the interests of unrepresented witnesses who have previously admitted in the course of an investigation to wrongdoing which could constitute a basis for criminal prosecution.

iv) Prior warning to affected parties of allegations of misconduct to be raised in public hearing without compromising the integrity of the investigation.

v) Greater advance notice of relevant documentary material (including statements) to be tendered, particularly giving notice to the individual or organisation that provided that documentary material. Such notice will prevent incomplete records being provided to the Commission and save unnecessary wastage of time putting the complete picture before the Commissioner.

I believe the ICAC inquiry into Kyogle Shire Council demonstrated that there was considerable good will towards the ICAC's responsibilities and objectives held by those in public office and those who have the responsibility of performing professional duties on behalf of public authorities. ICAC did not take advantage of this in this inquiry. Notwithstanding initial suspicions the ICAC might have about the conduct of individuals it would be far more productive for the ICAC, to encourage the necessary co-operation so as to enable the ICAC to fully

understand the matters referred to it for investigation and to properly identify the issues that need to be addressed by further investigation. This could have been facilitated by better and more consistent communication with the public authorities concerned.

Yours faithfully

Stephen Norrish QC

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COMMITTEE ON THE ICAC

10 November 1992

Mr Oral Gould
[redacted]

Dear Mr Gould

Enclosed for your information is a copy of the corrected, final version of the Committee's transcript of evidence from its hearing in Kyogle on 01 October 1992.

The Committee would be pleased to receive a submission or comments from you on the issues raised during the Kyogle hearings.

Thank you for your assistance with the Committee's inquiry.

Yours sincerely

[redacted]

David Blunt
Project Officer

kyogle\gould.001

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COMMITTEE ON THE ICAC

11 November 1992

Mr Ian Temby QC
Commissioner
ICAC
GPO Box 500
SYDNEY NSW 2001

Dear Mr Temby

I refer to your letter of 21 October 1992, concerning the Committee's Kyogle hearing.

Please find attached, firstly, a list of key issues that the Committee specifically requests the Commission to address in detail. Although some of these issues relate specifically to the Kyogle Inquiry; generally they appertain to the more important concern over the exercise of the Commission's functions. The Committee has taken great care to frame these questions in light of its own functions under section 64(1) of the ICAC Act. This list of key issues should be read in conjunction with the transcript of the Committee's hearing in Kyogle.

Secondly, attached is a letter, received by the Committee, from Mr Stephen Norrish QC. This letter raised more specific questions in relation to the conduct of the Kyogle Inquiry. The Committee considers that Mr Norrish's concerns require consideration by the Commission and response in full. The Committee believes Mr Norrish's concerns fall within section 64(1) of the ICAC Act.

The Committee considers that these two attachments require separate consideration by the Commission. The Committee has the task to generally monitor and review the Commission's operations and more closely examine the specific reports emanating from the Commission. It could be said, but not strictly, the first attachment relates to the former, the second to the latter.

Mr Temby
11 November 1992

The Committee is still expecting some written submissions concerning its Kyogle hearing. These will be forwarded to the Commission once they are received.

Yours sincerely

M J Kerr MP
Chairman

temby.046

KYOGLE INQUIRY

KEY ISSUES

1 After a determination has been made to investigate a matter how does the Commission come to an understanding of the issues involved in an inquiry? For example, if accounting, engineering or local political issues arise how does the Commission come to an understanding of these?

2 In the process of holding an investigatory hearing how does the Commission determine whether experts, with relevant knowledge, are needed to understand specific procedures, practices or technicalities that may arise in an inquiry? For example, in the Kyogle inquiry would it have been beneficial to have someone from the Institute of Municipal Management or the Local Government Engineers' Association assist the Commission?

3 What is the role of experts, for example persons with specialised technical knowledge, in an inquisitorial system as compared with an adversarial system?

4 What criteria does the Commission have for determining that a public hearing is necessary in an investigation?

5 Specifically, what factors does the Commission take into account in determining whether to conduct a public hearing is in the public interest?

6 What criteria has the Commission developed in determining which witnesses should be called in a hearing?

7 In the Kyogle Report the Commission forms a number of *opinions* on certain persons. Does the Commission believe that the Report should show how these opinions have been formed? Specifically, should the Report show how those opinions have *followed* from the results of its investigations?

8 The Commission appoints a number of different Assistant Commissioners to conduct inquiries. What procedures or guidelines has the Commission developed to promote a consistency in style, quality and approach to Reports?

9 What guidelines or criteria has the Commission developed to determine who shall be appointed as an Assistant Commissioner on a particular inquiry?

10 What is the role of Counsel Assisting in the inquisitorial model on which the Commission is based?

11 Can the Commission forward to the Committee a more detailed break-down of the cost of the Kyogle Inquiry than that provided in the *Annual Report to 30 June 1992* (including details of the $489 000 spent on overheads)?

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COMMITTEE ON THE ICAC

11 November 1992

Mr Ian Temby QC
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Dear Mr Temby

I refer to your letter 21 October 1992, concerning the Committee's hearing at Kyogle.

The purpose of this letter is to address a matter of procedure which was raised in your letter. This related to the Committee's distribution of the Commission's response to the complaint which the Committee had received from Patrick Knight earlier this year. Your letter expressed the view that it was inappropriate that the Commission's response had been made available to persons "who were not parties to Mr Knight's complaint". Your letter then asked for advice as to the Committee's procedures in respect of Commission correspondence.

Dealing with the general question first, the Committee's procedure with regard to Commission correspondence is that it is treated as between the Commission and the Committee. However, as agreed between the Commission and the Committee at a meeting at the ICAC premises on 10 September 1991, where the Commission correspondence represents a response to a complaint, the complainant is provided with a copy.

Mr Temby
11 November 1992

In the case of Mr Knight's complaint there was a complicating factor. That is that Mr Knight's complaint was forwarded to the Committee by the Member for Lismore, Bill Rixon MP, in much the same way as a Member of Parliament makes representations on behalf of constituents to Ministers. A copy of the letter from Bill Rixon MP is enclosed. As you can see, Mr Rixon's letter refers to a number of Kyogle people having expressed concerns about the Kyogle inquiry. Therefore, when the Committee received the Commission response to Mr Knight's complaint a copy was forwarded to Mr Rixon. Enclosed is a copy of my covering letter to Mr Rixon.

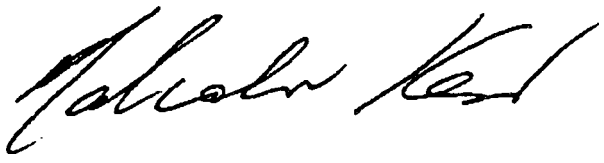
The Committee subsequently received a reply from Mr Rixon which reiterated the value in the Committee visiting Kyogle. The Committee subsequently resolved to undertake such a visit.

I do not know whether Mr Rixon made the Commission response available to those Kyogle people who had expressed concerns about the Kyogle inquiry. However, I believe it was most appropriate for the Committee to make a copy of the Commission response to Mr Knight's complaint available to Mr Rixon. It ensured that careful consideration was given to the question of whether the Committee should visit Kyogle.

In relation to Mr Rodgers receiving a copy of the Commission response a check of the Committee records indicates that Mr Rodgers did receive a copy direct from the Committee. In retrospect it is acknowledged that this was not appropriate and was contrary to the Committee's procedure for dealing with Commission correspondence.

You will receive a separate letter in relation to the substantive issues arising from the Committee's Kyogle hearing on which the Committee would like the Commission's response.

Yours sincerely



Malcolm J Kerr MP
Chairman

temby.047

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COMMITTEE ON THE ICAC

18 November 1992

The Hon Wal Murray MP
Minister for Public Works
Minister for Roads
Room 906/7
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Murray

On Thursday 1 October 1992 the Committee on the ICAC visited Kyogle to take evidence from a number of people who had concerns about the ICAC's inquiry into Road Works in the Shire of Kyogle, which was conducted in 1991 and reported upon in January 1992. A copy of the transcript of the Committee's hearing in Kyogle is enclosed for your information.

I am writing to you about this matter for two reasons.

Firstly, during the course of the hearing in Kyogle a number of witness spoke about the system by which funds for road works are made available to Local Government by the Roads and Traffic Authority. I would like to seek, through you, the response of the Roads and Traffic Authority to the comments made in this regard by the witnesses who appeared before the Committee.

Secondly, The ICAC has suggested that the Roads and Traffic Authority has a number of views about the value of the ICAC's inquiry into Road Works in the Shire of Kyogle. Once again I would like to seek, through you, the comments of the Roads and Traffic Authority on the value of the ICAC's inquiry into Road Works in the Shire of Kyogle.

Yours sincerely

M J Kerr MP
Chairman

murray.003

PARLIAMENTARY JOINT COMMITTEE ON I.C.A.C.

Mr Chairman,

Dear Sir,

Thankyou for the opportunity to forward this submission to you.

In November 1983 the Overseer Mr Ken Henry died suddenly. Mr S.L. (Lex) Moss became the Overseer. The changes were sudden and dramatic.

One group of men became the "Bosses Mates". They were given the top jobs and pay, working overtime weekends.

The second group of men were often abused, taken off plant and given a shovel or stop and go sign. The way the Time Sheets were filled out also changed. Council roads and private works were booked out to the R.T.A. The setup was a mess.

I expressed my concerns to the late Eric Secombe, giving him details of jobs and plant used.

In 1987, Lex Moss was off sick and Mr Bob Grahamm was releif Overseer. I again expressed my concerns about the way jobs were being done and the way men were abused. No action was taken by the Council or anybody else.

In 1989, Iwas approached by Councillor Missingham and asked if I could give her and Councillor Smith any information on Council matters in relation to Bonalbo Works Depot.

I met with Councillor Smith. (This was the first yime I had ever seen or met Berwin Smith) and Councillor Missingham (whom I had met once or twice before) at Councillor Missingham's home in Woodenbong. From this meeting a submission was forwarded to the I.C.A.C and The Local Government Inquiry held in Kyogle by Mr Cornish and Mr Maltby in November 1989

I first met with two I.C.A.C. investigators in Lismore in August 1990. This meeting went over four hours. At no time was any pressure applied on me. The information I gave, I gave of my own free will.

I continued to give information to I.C.A.C. on a regular basis up to the inquiry. This information included jobs and job numbers, where gangs of men were working and plant used.

Never was I pressured to give this information or was it ever suggested to me. What I did, I did on my own.

During the inquiry I was treated well by all concerned. I do not feel that I was treated unfairlyor in my opinion was anybody else, and if they were they have not complained to me.

The weeks immediately after the inquiry were mixed. Some people

[redacted]

6-12-92

whom I had known for years shunned me while others who I had never met came up and shook my hand.

I have been treated well by the four releiving overseers. Of the nineteen Bonalbo Depot workers there are only four who have abused and harassed me. On one occasion the back wheel of my push bike was kicked inside out. This happened inside the Bonalbo Depot

I reported this harassment to Pat Knight twice. Once in September 1991 and again in February 1992. Again no action has been taken. To a lesser extent this harassment is still going on.

Being a whistle blower is not easy. The personal stress and that for my wife and three sons has at times been great. Given the same set of cicumstances I would do it all again.

The I.C.A.C. in my opinion is a well set up and run organization that N.S.W. needs for the routing out of corruption.

CONCLUSIONS

I did not conspire with anybody nor did anybody conspire with me.

Mr Pat Knight refused to take the oath at the inquiry but was quite happy to do so at the Parliamentary Joint Committee on I.C.A.C. hearing.

I have never met Mr McIntyre so how the man can make a judgement on my personality I do not know.

I agree with Mr David Lovell when he said, and I quote "It is true that some incidents of what the I.C.A.C. Act refers to as corrupt conduct were found during the four week hearing" unquote.

Mr Pat Knight, at two staff meetings at Bonalbo depot stated that "Yes. Things were wrong at Bonalbo Depot".

[redacted]

6-12-92

Northern Star
7 Dec. 1992

The bitter

A special report by JENNY AUSTIN: Pictures by NICK CUBBIN

Stress taking its toll on Bonalbo folk

IN 1988 the NSW Government came up against the full strength of community action when it attempted to close the Bonalbo Hospital.

An impressive defensive action was mounted by the community which lasted for months, and when the dust finally settled the community had not only saved their hospital but secured a multi-million dollar grant for extensions.

That sense of community still remains strong in Bonalbo but it has been seriously damaged by the ICAC investigation into the operations of the Kyogle Shire Council's Bonalbo roadworks depot.

The town's only local doctor, Dr Phillip Prescott, says there has been a marked increase in stress-related conditions among people in the community after the ICAC investigation.

"They appear to be related to antagonism and conflict within the community and the pressures of the whole inquiry," he said.

"A lot of that conflict and antagonism remains or has heightened, and there has certainly been no noticeable decline in stress-related illnesses since the investigation was completed."

Dr Prescott said ICAC had created a situation where people were pitted against each other and he was highly critical of the lack of follow-up assistance for the community, either from ICAC or the Kyogle Shire Council.

He said he was also deeply disturbed about the specific treatment to which ICAC had subjected some people, and it was past time for the situation to be redressed.

Dr Prescott said the problem was not limited to one section of the workforce, or to any one of the divisions which had been created in the community, but it had affected every member of the community either directly or indirectly.

"ICAC and the council and the workers need to thrash it out so all members of the community can begin to get on with their lives," he said.

Another leading member of the Bonalbo community, Mrs Jo Birch, said Bonalbo was gripped by fear during the ICAC investigation and had remained that way.

Mrs Birch was the spokeswoman for the successful Save the Bonalbo Hospital Campaign in 1988, is a member of the town's Health and Welfare Council, president of the senior citizens' group and an active member of Red Cross.

She is highly critical of Commissioner Temby's final report regarding Bonalbo, which she says is contradictory and does not clarify issues.

"For one thing Commissioner Temby describes Lex Moss as corrupt in one part of the report, but elsewhere describes him as a good bloke . . . no wonder people are confused and upset," she said.

Mrs Birch also believes ICAC didn't have the faintest idea about "actual country life, or how country people think and act differently" from those in metropolitan areas.

She said ICAC failed to realise that many people in country communities were related and that its activities could have a great impact on people's relationships with each other in the community.

"Now we have a situation where everybody is frightened to talk to each other in case what they say is repeated and so on; they are frightened to mention names and they are frightened to speak about ICAC," Mrs Birch said.

"It is like a sore spot and we need to cut it open, to let the pus out and the clean air in, but people have felt they just had to hug it to themselves."

Mrs Birch said Bonalbo people should remember that ICAC was not something to be frightened of.

JOHN Williamson is one of those people who would gladly put the ICAC experience behind him, if only he could.

He was employed as a grader operator attached to the Bonalbo works depot and was interviewed at length by ICAC investigators, then subsequently questioned on a number of matters during the public hearings.

Commissioner Ian Temby made no adverse findings against Mr Williamson, who until a few months ago had remained an employee of the Kyogle Shire Council.

Disheartened and traumatised by the entire experience, Mr Williamson said he took sick leave for several weeks but subsequently decided he could no longer work at the Bonalbo depot, and has since resigned from the council.

Mr Williamson is also angry about the way ICAC went about its investigation, and he has brought a number of related issues to the attention of the Parliamentary Standing Committee which is looking into ICAC's operations.

These include concerns about the level of investigation ICAC carries out into the motivation and credibility of those who provide it with information, and the level of opportunity that others receive to counter that information or provide an explanation in wider context.

Mr Williamson also formed the view that some people were assisted more than others by ICAC to provide it with 'good quality' information, and that ICAC had classified people into heroes and villains.

"They were single-minded from the start; they had been provided with information and I always had the impression they had made their minds up then and there, and didn't want to know about the real, entire story," he said.

"They actually never resolved anything to anybody's satisfaction — not one single issue, and because these issues were left up in the air people still think terrible corruption went on at the Bonalbo depot and we were all involved in it."

Bob Duffy is another Bonalbo council worker who says he is finding it extremely difficult to rid himself of the sour taste of ICAC.

Mr Duffy was questioned at length and found it necessary to take two months off work during the course of the investigation.

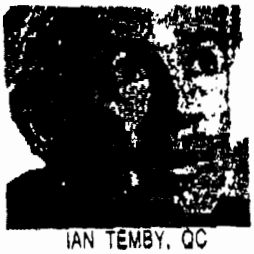
However, he says he is more concerned now about the situation which remains among workers at the Bonalbo depot.

Mr Duffy said the workers are still divided over the ICAC investigation and view each other with distrust and suspicion.

But that situation is now also exacerbated by those who want to forget about it, and those who feel they can't.

He said because some matters raised by ICAC often verged on the trivial, some workers now were too frightened to voice an opinion or to exercise ini-

aftermath of ICAC



IAN TEMBY, QC

tiative and get on with the job.

"You're not working to your full capacity, you're not looking after the gear as you should, you're just frightened all the time you're going to be reported for doing the wrong thing," Mr Duffy said.

He said workers were still under enormous pressure, and men who previously had excellent work records over a long period with the council now had extended periods of sick leave recorded against them.

Mr Williamson said attempts had been made several times to talk to the Kyogle Shire Council about these and other issues emanating from ICAC to 'clear the air', but the council had made it quite clear ICAC was a closed subject.

"We had a meeting at one stage with shire president David Liska, shire engineer Patrick Knight and second engineer Bruce Leach, and they said what a good job we were doing and praised us up and all that, but they wouldn't let us talk about ICAC.

"We just feel that you've done the right thing by the council for years, then you have to go through all this and you don't get any support."

Lex Moss was overseer at the Bonalbo depot during the period ICAC's investigation was concerned with, and admits he is now haunted by the ICAC experience.

In his final report Commissioner Temby found that consideration should be given (by the council) to the dismissal of Mr Moss.

But the council decided against that action, and Mr Moss remains employed at the depot in a different capacity but on the same pay scale.

Mr Temby said the question of why Mr Moss 'did what he did' remained 'puzzling'.

Although Mr Temby found that Mr Moss had engaged in corrupt conduct within the meaning of the Act, he had 'not been able to discern any personal financial motive for his actions. Furthermore, it does not seem that there was any opportunity for Lex Moss to be promoted ...'

JOHN WILLIAMSON: (ICAC) never actually resolved anything to anyone's satisfaction — not a single issue'.

Nor did Mr Temby recommend that Mr Moss should be prosecuted over any of the incidents which had been investigated by ICAC.

"Yet people still say to me, 'oh there must be something in it for ICAC to have taken an interest', or you know those kinds of comments and gossip, so people still really believe all those accusations were true!" Mr Moss said.

Mr Temby may, however, have been on the right track when he spoke of Bonalbo's relative isolation from the administration centre of the Kyogle Shire, of additional duties which deflected Mr Moss from the proper administration of the depot, and his description of Mr Moss as a 'typical country man'.

Mr Moss is keen to add to ICAC's understanding of bush communities.

He said country councils such as Kyogle had for generations expected and depended on their workers to show a high level of initiative, and to be able to make decisions.

Mr Moss said they also expected their overseers in isolated areas to do the job cost-effectively.

"It's the workers who know where the trouble spots, the danger spots are and I'm sure the council is aware I saved them a lot of money during my time," he said.

"The other thing is that you work for the benefit of the people, so of course if a tree has come down in the middle of the road, or people have to get their cattle out quickly during flood times, or the police ring you in the middle of the night because dangerous road conditions have developed, or a bit of gravel can avoid an accident, or for dozens of other reasons, you do the job without worrying straight away about whether you should get it authorised or which paperwork should apply.

"In bush communities people help one another the best way they can. Is that corrupt conduct?"

LEX MOSS: Country councils have always expected their workers to show a high level of initiative.

ROBERT DUFFY: Bonalbo depot workers still regard each other with distrust and suspicion

Kyogle Shire roadworks findings raise doubts over crime watchdog

WHEN Commissioner Ian Temby handed down his report on the Independent Commission Against Corruption's investigation into roadworks in the Kyogle Shire almost a year ago, he was critical of the behaviour of various individuals in that report.

However, the Commissioner also made it clear that ultimate responsibility for the practices uncovered lay with the Kyogle Shire Council.

Since that time the council says it had taken a number of measures to address those problems and many individuals, in addition to the council, have decided to put the rather bitter experience behind them.

For others, this is not so easy.

Some feel there are still issues which remain unresolved and until they are, the spectre of ICAC will remain, tainting their reputations and affecting their relationships with others in the community.

The operations and methods of investigation used by the Independent Commission Against Corruption during its inquiries have been the subject of criticism from many quarters.

The State Government subsequently set up a Parliamentary Standing Committee on ICAC, to review the corruption body's operations.

Since then it has received submissions from the public covering a range of ICAC's inquiries, including the Kyogle experience.

Late submissions are still being received and the committee's findings are not likely to be available before the end of the year.

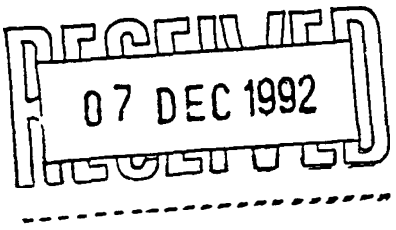
However, it is known that many of the concerns raised in the local submissions reflect the concerns expressed by others spoken to in the preparation of this report.

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Malcolm Kerr MP
Chairman
Committee on the ICAC
121 Macquarie Street
SYDNEY NSW 2000

7 December, 1992



Dear Mr Kerr,

The Commission's responses to the Committee's key issues in its "Kyogle Inquiry" are attached. The Commission has sought the views of Chris Maxwell QC, who was Counsel Assisting in the Kyogle hearing, about Mr Norrish's letter to the Committee, so is not yet in a position to respond to that letter.

The Commission has not yet received the further submissions referred to in your letter of 11 November.

It would be fair to say that the majority of witnesses who gave evidence to the Committee in Kyogle on 1 October were not objective, independent observers of the Commission's work and that that probably contributes to the generally negative tone of the evidence. The Commission understands that there are some in Kyogle who have, and wished to express to the Committee, positive views about the Commission and its investigation. Those views may contribute to a more balanced picture of the matter for the Committee. It is perhaps unfortunate that the Committee's busy schedule did not permit it time to take evidence from those people in Kyogle; hopefully they will not be deterred from expressing their views by the submission process.

The Commission has not addressed all of the matters contained in the transcripts of the Committee's hearing. A deal of the evidence seems to be concerned with matters which the Committee cannot investigate or reconsider. Also, the witnesses are obviously not people with expertise in investigations, a matter which the Committee may take into account in the weight it accords some of the evidence.

However, if the Committee wishes the Commission to consider any particular matter in the evidence, not covered by the key issues, the Commission will do so. No doubt the Committee would seek comments from the Commission before it reported any critical comment about the Commission or made any such criticism, which the Commission had not yet addressed.

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The Commission has taken note of the comments about conducting hearings in small country centres. Initially the Commission considered conducting the hearing in a slightly bigger nearby centre, such as Lismore or Casino; in fact some interviews were conducted early in the investigation in Casino for reasons of confidentiality. Assistant Commissioner Collins decided that the hearing should be conducted in Kyogle for the convenience of witnesses and members of the community interested in the hearing. The Commission will bear in mind the views expressed about conducting the hearing in Kyogle should the need arise for future hearings in country centres.

Yours faithfully,

[redacted]

Deborah Sweeney
Solicitor to the Commission

PJC KYOGLE INQUIRY

Key Issue 1: After a determination has been made to investigate a matter how does the Commission come to an understanding of the issues involved in an inquiry? For example, if accounting, engineering or local political issues arise how does the Commission come to an understanding of these?

and

Key Issue 2: In the process of holding an investigatory hearing how does the Commission determine whether experts, with relevant knowledge, are needed to understand specific procedures, practices or technicalities that may arise in an inquiry? For example, in the Kyogle inquiry would it have been beneficial to have someone from the Institute of Municipal Management or the Local Government Engineers' Association assist the Commission?

The Commission comes to an understanding of the issues involved in an investigation and informs itself on those issues by a choice of a number of techniques depending on the complexity and novelty or otherwise of the issues. They include an examination of material assembled in fieldwork, questioning witnesses during hearings, speaking to experts outside hearings or calling expert witnesses in hearings, obtaining material through research processes, including relevant academic and professional literature, and obtaining information from relevant interstate or overseas organisations.

The issues with which the Commission's investigation in Kyogle were concerned were basically simple: observance of or compliance with tendering and contracting requirements and procedures, conflicts of interest, the use of public funds for the intended public purpose or private use and the accountability and supervision of public employees. They are issues exemplified in the evidence of Mr H J Standfield to the Committee:

> "My greatest time in life is the last three or four months for government contracts, because we know they have to spend the money and we usually put ourselves up 10 or 20 per cent. We know they have to use us. It is too stupid. I have been on a lot of forestry jobs where they come and ask us to spend the money. Naturally when someone comes and asks us nicely we put

> the money up. We are always friendly with the engineers." (p27, Minutes of Evidence taken before the Committee on the ICAC at Kyogle on 1 October 1992).

They were all issues with which the Commission was familiar.

Knowledge of engineering was not the central issue; the issue was that a different machine than was advertised for was selected, over a complying tender, without re-advertising, and without giving all tenderers or potential tenderers the opportunity to tender for the equipment chosen.

The importance of the issues should not be underestimated. When matters similar to those which the Commission investigates were uncovered in the Coles Myer group of companies, that is private work being done at employees' homes at cost to the company and company employees forming private companies which won contracts from Coles, there was great public concern, and an investigation by an elite police investigatory group. The amounts of money involved in the Kyogle situation were smaller than may be disclosed in the Coles investigation, but the investigation alerted the RTA about the accountability of its road funding grants to councils, of which there are more than 170 in New South Wales. The conduct and issues in the Kyogle investigation have significance beyond that Council, and beyond local government.

If there was a need to understand engineering or accounting issues, then Mr Bruce Collins QC, the Assistant Commissioner in charge of the investigation, was suited to do so, as his practice includes major construction cases and appearances before the Disciplinary Committee and the Appeal Committee of the Institute of Chartered Accountants and he is a member of the Australian Construction Law Association.

Key Issue 3: What is the role of experts, for example persons with specialised technical knowledge, in an inquisitorial system as compared with an adversarial system?

The Commission is able to assist the Committee in respect of the role of experts in the adversarial court system and in the Commission.

Expert evidence in the adversarial court system

Expert evidence is an exception to the evidentiary rule which precludes witnesses from stating opinions, rather than personally observed facts.

Experts can give opinions on matters within their area of expertise, but first the court must inquire and be satisfied that the subject matter requires expert evidence, being beyond the skill, experience and knowledge of the jury or court, and that the witness is a qualified expert and able to give evidence about the particular subject. Only then is the witness's evidence admissible: **Clark v Ryan** (1960) 103 CLR 486; **Shephard v Pike** (1954) 72 WN (NSW) 1985.

An expert's qualifications may involve formal study or training or experience, although courts have sometimes rejected evidence based on experience alone.

The opinion of expert witnesses cannot be received on a subject matter which does not require specialised experience or study in order to understand it, particularly where the witness is produced merely to present in a cogent and vivid form the case of the party calling him: **Clark v Ryan; ULV Pty Ltd v Scott** (1990) 19 NSWLR 190. An expert cannot be permitted to point out to a jury matters which the jury could determine for themselves: **Clark v Ryan.**

In courts non-experts are not permitted to express opinions on matters which are the domain only of experts, but there are some subjects on which both experts and non-experts can offer opinions. One example is handwriting, in which the courts can prefer the evidence of non-experts over that of experts: **R v Leroy** (1984) 2 NSWLR 441.

The duty of an expert witness is "to furnish the judge and jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of those criteria to the facts proved in evidence": **Davies v Edinburgh Magistrates** (1953) SC 34 at 40, where the court rejected the suggestion that the judge or jury is bound to adopt the views of an expert, even if uncontradicted. Mr Justice Von Doussa of the South Australia Supreme Court relied on this case in warning against relying unduly on expert opinions rather than on the primary facts and the court's ability to apply commonsense and intelligence (Von Doussa 621)

Courts will not generally permit experts to answer questions on the ultimate issues which the court itself has to decide. In **Ancher, Mortlock, Murray and Wooley Pty Ltd v Hooker Homes Pty Ltd** (1971) 2 NSWLR 278 Street J said: "The fact that one particular expert of the highest authority and of unimpeachable credit is permitted to swear to an opinion does not relieve the court of the responsibility of forming its own opinion on this issue... a court is entitled, and indeed bound, to form and act on its own original opinion".

The court's duty is to look not only to the expertise of the expert witness but to examine the witness's credibility and the substance of the opinion expressed. In some cases where experts differ, the tribunal of fact will apply logic and common sense in deciding which view is to be preferred or which parts of the evidence are to be accepted: **Holtman v Sampson** (1985) 2 Qd R 472.

Opinion evidence, like any other evidence, is subject to the principle of relevance. Thus, an inference, although expressed by a qualified person, which is mere speculation will be rejected as such: **Straker v The Queen** (1977) 15 ALR 103 (High Court).

A trial judge is not obliged to accept the opinion of an expert witness in preference to direct evidence of fact given by eye witnesses, or to regard such an opinion as decisive upon a question of credibility: **Hollingsworth v Hopkins** (1967) Qd R 168.

Juries may reject uncontradicted expert evidence: **Samuel v Flavel** (1970) SASR 256, or conflicting expert evidence: **Gawne v Gawne** (1979) 2 NSWLR 449. However the trier of fact must act rationally on the basis of evidence, therefore the power to reject the evidence of experts or to choose one party's evidence must be based on rational grounds, such as a witness' lack of credibility: **Repatriation Commission v O'Brien** (1985) 55 CLR 422, the witness' failure to conduct thorough tests or the inconclusiveness or implausibility of the witness' opinion as judged by other evidence or by common experience. A witness can also be rejected for apparent bias, or for being less qualified than an opposing witness or on the basis of the witness' previous professional mistakes: Aronson Hunter and Weinburg 1036.

It is the role of the jury or court to consider which of conflicting evidence it will accept: **Chamberlain v The Queen** (No. 2) (1984) 153 CLR 521, Gibbs CJ and Mason J at 558 and Brennan J at 598. The court is not compelled to accept the evidence of the only expert called: **Minister v Ryan** (1963) 9 LGRA 112. Expert evidence is admitted to aid and guide the court, not to decide the issue (Von Doussa 621).

An expert witness must identify the facts assumed in his opinion. He cannot act as an advocate without making his assumptions clear. It is impermissible to use an expert witness to filter the facts, asking him to hear or read all the evidence and then express factual conclusions as that involves the expert making his own unstated findings of fact: **Arnotts Ltd v Trade Practices Commission** (1990) 97 ALR 555, **R v Fowler** (1985) 39 SASR 440.

In a seminar paper delivered in 1964 and published in 1970 Mr G J Samuels (later Mr Justice Samuels of the Court of Appeal) referred to the following reasons for restricting expert evidence: to discourage a plethora of competing opinions, secondly to prevent expert opinions from overbearing the jury's duty to make up its own mind and thirdly to preclude the danger of advocacy in the guise of expert opinion. His Honour Mr Justice Von Doussa has also referred to doubts about partisan experts and parties who are suspected of having shopped extensively to find experts sympathetic to their cases (Von Doussa 616-617), although His Honour recognised the assistance which expert witnesses can provide the court.

Other learned commentators have warned about partisan experts presenting evidence in a way to suggest inferences which are not supported (Aronson et al p1038) and the danger of experts giving evidence on matters which do not require specialised knowledge, "dressing up matters which are within the ordinary experience of the tribunal of fact in a beguiling scientific garb which may conceal the blemishes within": Cross on Evidence, p29023.

Some jurisdictions have attempted to put limits on the number of expert witnesses parties can call. Experts can be expensive, and not just for their time in giving evidence, but for their time taken in research, conducting tests and attending conferences.

As to the admission of opinion evidence and the use of experts in Commission hearings the rules of evidence do not apply to Commission hearings (s17) although the principle of relevance does. The Commission can inform itself on any matter in such a manner as it considers appropriate (s17(1)). The Commission sometimes draws on the longstanding experience of witnesses, for example experienced police officers or public servants, as to practices and procedures known to them, in order to obtain information about the operation and effectiveness or otherwise of systems. That can also be done more formally by seeking information in writing from public authorities. The Commission sometimes avails itself of expert witnesses, where necessary. The Committee was informed of details of past use of experts when the Commissioner appeared before the Committee on 9 November 1992.

References:

Cross on Evidence, Australian Edition, Butterworths 1991

Aronson, Hunter and Weinberg Litigation: Evidence and Procedures 4th Edition Butterworths 1988

The Hon Justice Von Doussa (Supreme Court of South Australia) "Difficulties of Assessing Expert Evidence" (1987) 61 ALJ 615

Key Issue 4: What criteria does the Commission have for determining that a public hearing is necessary in an investigation?

and

Key Issue 5: Specifically, what factors does the Commission take into account in determining whether to conduct a public hearing is in the public interest?

Absent statutory provision, the courts have recognised that inquiries can be held in public or private: **Clough v Leahy** (1905) 2 CLR 139 at 159; **Toohey v Lewer** (1979) 1 NSW LR 673 at 682.

The Commission's hearing procedures are governed by s31 of the ICAC Act, which presently provides that a hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission. Section 31 of the Act was so amended in December 1991. Before then the statutory presumption was in favour of public hearings. At the time the hearing was held in aid of the Investigation into Roadworks in the Shire of Kyogle (July and August 1991) s31 was in its old form, with that presumption.

Hallett (Royal Commissions and Boards of Inquiry, Law Book Co, 1982) says that publicity is of fundamental importance to the success of an inquiry as a means of restoring public confidence, and as a means of independent scrutiny into those areas of government administration where a problem has arisen (173). He refers to the Salmon Royal Commission which concluded that it was desirable that inquiries be held in public, as that was essential to achieve the purpose of inquiries of restoring the confidence of the public in the integrity of public life, and to Gillard J's observations in **Bretherton v Kaye and Winneke** (1971) VR 111 that serious allegations which involved injurious imputations upon the reputations of named individuals must be probed "not as a matter of private information for the Executive Government, but for public information and confidence." (Hallett 173).

The Committee expressed similar views in November 1990:

> "...the arguments in favour of public hearings are formidable. Exposure is a key weapon in the fight against the secret crime of corruption. Furthermore public hearings ensure the ICAC is publicly accountable - the way it exercises its special powers is open to public scrutiny and the public can inform itself of the Commission's activities. The public has a right to know what the Commission, which was established to protect the public interest, is doing." (Inquiry Into Commission Procedures and the Rights of Witnesses -First Report, para 2.6.1, p9).

The Commission's reasons for holding hearings in public are based on those principles and have been stated previously in the Commission's Report on the Investigation Relating to the Park Plaza Site (October 1989) and the Report on the Investigation Relating to the Raid of Frank Hakim's Office (December 1989). The relevant extracts are reproduced here. They set out some of the public interest factors taken into account in particular decisions to hold hearings in public or private.

It should be noted that these decisions refer to s31 in its previous form. The principles remain relevant.

Report on the Investigation Relating to the Park Plaza Site (pp15-16)

> *"As a general rule Commission hearings are held in public. It will be helpful to state the more important reasons for that being so.*
>
> 1. *The ICAC Act so provides - section 31(1). That would be a sufficient reason, standing alone. However those that follow would generate the same general rule, even if the Commission had an unfettered discretion.*

2. *Although not a court of law, the Commission is required to act in a fair and just manner, and to reach important conclusions. These things are best done in the open, with the fact or possibility of public scrutiny. Any person inclined to act in a bullying or irrational manner would always wish to do so behind closed doors. And nobody will never err in respects such as these.*

3. *The Commission is required by its Act to regard the protection of the public interest as a paramount concern - section 12. The work it does is for the public, it must be prepared to give an account of itself to the public, and to perform its tasks openly will be conducive to that end.*

4. *In particular matters it may be quite essential that the public should know a particular matter is under investigation so individuals can come forward with information. Each of the two public hearings conducted to date has proved the truth of that observation.*

5. *Finally, one of the functions of the Commission is that of public education, and publicity generated by open hearings can be of benefit in convincing the people generally that public sector corruption is a social evil which ought not to be tolerated.*

But there are exceptions, and unusual circumstances made the present case one.

It seemed positively likely, particularly after Mr Taylor gave evidence, that Kumagai Gumi was a completely innocent party: indeed that there would be no evidence of corrupt conduct on the part of anybody. In that respect the

investigation was far more advanced than most will be when the decision as to public or private hearing had to be made. Secondly, there was the real prospect that Mr Taylor was a hoaxster, or even involved in a confidence trick against Kumagai Gumi, and a public hearing before the Commission would have contributed to the harm his actions had already caused the company. A third important reason was that the matter was not one with respect to which valuable information from members of the public could be anticipated.

I decided that the public interest would be best served by holding the hearing in private, but making the report public. In that way all would know of the Commission's investigation and its findings, but harm to individuals would be avoided in the situation - likely to be unusual - that the Commission did not need assistance from the public relative to the particular matter. It cannot be in the public interest to do harm - in this case to Kumagai Gumi - which is both gratuitous and avoidable in circumstances where no particular compensating benefits flow."

Report on Investigation Relating to the Raid on Frank Hakim's Office (pp48-50)

"The question for decision is whether this hearing should proceed in public or in private. It is a most difficult decision. I have given careful consideration to the arguments put to me and in particular the contributions by Counsel Assisting and by Assistant Commissioner Lauer, to whom I am indebted for the care and thought they put into their respective addresses.

...

I interpolate the important observation that these are merely allegations. They remain so notwithstanding that the Commission has decided to conduct a formal investigation in relation to them. This followed receipt of a report of possible corrupt conduct from the Chairman of the Police Board and field investigation which dispelled one of the

anonymous allegations made but not the other of them. It is obviously of high importance that senior officers of Police, and especially the Assistant Commissioner in charge of Professional Responsibility, should be above suspicion of improper conduct.

It is necessary to put to one side the hurt, even anguish, which will be suffered by the Police officers concerned if the hearing proceeds in public. Similar considerations apply to members of their respective families. The reason is that the Act states as a general rule that all hearings will be in public, unless in a particular case the Commission is satisfied a private hearing is desirable in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given.

Relevant considerations favouring a private hearing are these:

1) It is no easy matter to attract the best and brightest members of the Police Force to work and work well in the fight against internal police corruption, and to maintain that high morale which is essential to a resolute discharge of their duties. That will become the more difficult if they feel themselves to be beleaguered, and lacking in support from natural allies such as this Commission. If they feel that their natural enemies, the corrupt and their allies, can easily cause to be convened hearings which must embarrass them, then they will at best tend to work less effectively, and at worst seek to work elsewhere. That was Mr Lauer's principal argument, put in my words. It has undeniable strength.

2) The allegations may be seen to have little substance, as they are not new and such scrutiny as they have received have failed to sustain them. In particular, a Magistrate who convicted Mr Hakim of possessing heroin must have been satisfied beyond reasonable doubt

that he did not have drugs planted upon him, and that police witnesses told him the truth.

Arguments tending in the contrary direction are these:

1) *Police officers must not be put in a more favourable position than ordinary members of the public who become involved in Commission investigations. Equal treatment before the law, and the perception of such equal treatment, are about equally important.*

2) *Senior Police must set an example to their junior colleagues, in acknowledging by their words and deeds that while a hearing such as this is an unpleasant event, it is on occasions a necessary aspect of accountability. Good, honest Police officers will not be deterred by the possibility of false allegations being made against them in public. Indeed that happens on a daily basis before the criminal courts. At least sometimes those allegations are true.*

3) *Justice is best dispensed out in the open and the public will tend to have the necessary faith in the Commission only if it does its job openly. It is not an unknown phenomenon for those who urge a private hearing to complain about the way it has been conducted if the outcome is not fully favourable to them.*

4) *The most important consideration, statute apart, is that members of the public will not know that the Commission is interested in receiving their assistance by providing truthful information unless they know what the Commission is from time to time looking into. Both of the public hearings conducted to date have led to much valuable information flowing to the Commission, which has greatly assisted in the investigations. It must be recognised as a possibility that such*

information could flow in this case once the public become aware of the general nature of the allegations under investigation. If the job is to be done thoroughly and well, then that must be of high importance.

I think the arguments are nicely balanced. I have given due weight to such of them as were put forward and have not been dealt with above.

In such circumstances one is inevitably thrown back to the general statutory rule. In the absence of facts and circumstances that fit the requirements of section 31(4), there must be a public hearing.

The Act imposes an overriding obligation on the Commission to conduct hearings in public. The public have a right to know what the Commission is doing and how it is doing it. Public hearings are a means of creating a bond of trust between the Commission and the public, and of ensuring that the Commission is accountable to and judged by the public it serves."

Because of the importance the Commission places on public hearings as a means of informing the public and making the Commission accountable to the public, most of the Commission's hearing work will continue to be done in public, unless there are reasons why the hearing should be in private.

The main criteria for holding hearings in private are set out in the Commission's "Procedure at Hearings". They are to avoid prejudice to current indictable criminal proceedings, to prevent harm to a person's safety or well-being, to protect an informant's identity, to prevent unfair or unnecessary damage to reputation arising from anticipated evidence, to prevent publication of commercial secrets.

For example it was decided that it was in the public interest to hold the hearing in the Investigation into the Sydney Water Board and Sludge Tendering in private, because the tender process being examined was continuing and the investigation involved an examination

of confidential documents obtained from the Water Board and from other sources. (Report, page 4)

The hearing in the Investigation into the Conduct of Peter Blackmore was held in private because of the possibility of unbalanced perceptions arising from media reporting of evidence against the possibility that the allegation under examination might be false (Report, pages iii and iv).

In light of the criticism of the Commission's conduct of both those hearings, and particularly questioning the thoroughness of the hearing in the latter investigation, the Commission has been moved to consider whether it might have been better to conduct those hearings in public, open to scrutiny by the public and those interested in the investigations and their outcomes. The public would then be in a position to be informed and able to assess comments about the Commission's performance of its investigation functions in those matters.

The Commission decides to hold hearings when further resolution of a matter cannot be achieved by fieldwork, that is by interviewing people, obtaining and examining documents.

Hallett recognises (174) that the main advantage of oral evidence is that evidence is given personally and the person who has to assess the evidence has the opportunity of observing and assessing the credibility of the witness. An assessment of a person's veracity and the reliability of the person's evidence can generally be more reliably made by observing the witness in person rather than by reading a statement or record of interview by that person.

Further, the Commission's experience is that people may be more forthcoming in hearings, than in an interview situation or if asked to provide a statement.

People will, in the Commission's experience, tell more and be more inclined to tell the truth in a hearing situation than in an interview situation. Of course, in accordance with the Act

people are compelled to answer questions in hearings but can refuse to participate in interviews or provide a statement.

Questioning witnesses can be a more efficient way of obtaining information than a prolonged examination of documents, which even at the end may not provide complete answers. Commission officers can spend a deal of investigative time examining documents to see what conduct they establish, but it may be quicker and more productive to ask the person to tell the Commission what conduct he has participated in. As noted above, such questions can be asked in interview situations but may be met with refusals or denials. The Commission has had more success in obtaining information and ultimately truthful information in hearings. Oral examination of witnesses has also proved successful in resolving conflicts between accounts given by various participants in particular events, which cannot necessarily or easily be done on paper.

These principles are illustrated by the Kyogle investigation. Field investigations were conducted (although not continuously due to other investigative tasks) for almost a year before the public hearing commenced. Seventy-seven people were interviewed prior to the hearing and 599 of the total 622 pieces of property obtained during the investigation were obtained before the hearing. A number of the complaints and allegations received by the Commission were not pursued in the hearing. An effective filtering process was undertaken.

Both the Council and the Roads and Traffic Authority co-operated with the Commission before the hearing and provided information and documents and explained procedures. At the hearing 196 exhibits were tendered, which included 34 exhibits tendered by counsel for the Council and further exhibits tendered by counsel for the Roads and Traffic Authority and counsel for Mr Moss, a substantially and directly interested person.

Key Issue 6: What criteria has the Commission developed in determining which witnesses should be called in a hearing?

The primary criterion for deciding which witnesses should be called in a hearing is relevance, that is can the witness give evidence of relevance to the real issues the subject of the investigation: **Attorney-General v Mulholland** [1963] 2 QB 477; **Attorney-General v Clough** [1963] 1 QB 773. The test of relevance applies to witnesses called by Counsel Assisting and witnesses which any party to the hearing wishes to be called.

The Commission will be more disinclined to permit the calling of witnesses who give evidence solely related to credit and collateral issues relative thereto rather than issues in the investigation.

Key Issue 7: In the Kyogle Report the Commission forms a number of *opinions* on certain persons. Does the Commission believe that the Report should show how these opinions have been formed? Specifically, should the Report show how those opinions have *followed* from the results of its investigations?

The Commission does believe that its reports should show how opinions and findings have been arrived at. The Commission is of the view that the Kyogle Report does indicate how the findings and opinions follow from the evidence.

Commission reports are not court judgments. They should not be overly legalistic, because they should be readable by the public sector and the public, because they have to be useful in the performance of the Commission's public education and corruption prevention functions. It has been said that a Commission's report is its principal visible product, and an attractive and readable report, written in language easily understood by the general public, is more likely to reach and influence the audience for which it is intended: Dalhousie Law Journal Vol 12, No 3, January 1990 p67.

The Commission reports summarise the evidence accepted by the Commission as the basis of its findings. Obviously it is a matter of judgment as to how much detail is warranted in each matter, commensurate with the breadth and complexity of the facts, issues and evidence involved. There is no need to report the evidence in detail because the transcripts and exhibits are generally publicly available and anyone can easily examine or obtain a copy of them.

If any guidance can be drawn from the requirements for judges to explain their reasoning process, Hunt J of the New South Wales Supreme Court said in **Kelly v Fay** (1982) 1 NSWLR 232 that the common law obligation upon judges to explain their reasoning processes is restricted to cases in which the determination of facts involves a complex process of reasoning: Citing **Pettitt v Dunkley** (1971) 1 NSWLR 376; **Gamser v Nominal Defendant** (1977) 136 CLR 145; **Sharman v Evans** (1977) 138 CLR 563; **Wright v Australian Broadcasting Commission** (1977) NSWLR 697; **McCarroll v Fitzmaurice** (1979) 2 NSWLR 100.

Obviously the Commission must have regard to probative evidence; the weight it gives evidence is a matter for the Commission.

Key Issue 8: The Commission appoints a number of different Assistant Commissioners to conduct inquiries. What procedures or guidelines has the Commission developed to promote a consistency in style, quality and approach to Reports?

Assistant Commissioners have substantial responsibility for preparation of the reports of investigations over which they preside. This must be so, because they have heard the evidence and seen the witnesses, and are in the position to make assessments about credibility and to decide how to resolve conflicts between evidence of different witnesses. This is even more the case in long running and detailed inquiries, where the detail of an investigation could not be absorbed by someone not involved in the investigation in any way which would permit him or her to make a useful contribution to the report.

Findings of fact, assessment of evidence and witnesses and statutory findings must be the preserve of the Assistant Commissioner who heard the evidence and saw the witnesses. As in any hearing, witness demeanour is significant. Those assessments cannot be properly made on the basis of the written record of the proceedings.

Final responsibility for reports rests with the Commission, in accordance with the ICAC Act. Assistant Commissioners provide the reports they prepare to the Commissioner for consideration, discussion and comment. During the report preparation process the Assistant Commissioners receive assistance from the Commission staff involved in the investigation by way of checking transcript and evidentiary references. The Assistant Commissioners may also discuss the report with the Commissioner during the preparation of the report, in terms of style, Commission policies or views on certain topics expressed in previous reports, and matters of law. The Commissioner plays a close supervisory role in the completion of reports. Reports are then edited by professional editors in accordance with usual editorial conventions.

The Commission encourages Assistant Commissioners to write reports in a style which is less legalistic and more easily read and understood by the likely readers, public officials and the public.

Key Issue 9: What guidelines or criteria has the Commission developed to determine who shall be appointed as an Assistant Commissioner on a particular inquiry?

Generally speaking, there has developed a practice of appointing senior barristers and retired judges to conduct inquiries and commissions. Serving judges consider it undesirable to undertake the duties of royal commissioners for reasons associated with the role of judges and the independence of the judiciary.

Hallett says that the reasons barristers are often chosen to conduct inquiries is because by their training they are "accustomed to research, inquiry and the evaluation of facts", and their training and practice of their profession teaches them to approach problems impartially and assess facts objectively; although he notes that lawyers do not necessarily have a monopoly on those qualities (57).

The ICAC Act sets out the qualifications for Assistant Commissioners: clause 1, Schedule 1. Those qualifications are that the person be a former judge or qualified to be a judge of a Supreme Court, the Federal Court or the High Court. The qualifications necessary to be a judge of the High Court and Federal Court are to be a legal practitioner of not less than five years' standing or a judge of another court. The qualifications necessary to be a judge of the Supreme Court of New South Wales are to be a judge of another court, a barrister of not less than five years' standing or a solicitor of not less than seven years' standing.

The Commission chooses Assistant Commissioners for particular investigations on the basis of the complexity and difficulty of the particular investigation, their ability to preside over and direct a hearing, ability to write a report, and availability, given the time commitments involved in presiding over investigations. Many of the Assistant Commissioners appointed to date have had previous experience in commissions of inquiry, either as commissioners or counsel assisting, or have presided as judges or acting judges.

Key Issue 10: **What is the role of Counsel Assisting in the inquisitorial model on which the Commission is based?**

The inquisitorial system of criminal justice as it operates in Europe does not have counsel assisting, but prosecutors. The prosecutor's role in inquisitorial systems is to supervise investigations, authorise the exercise of intrusive and coercive powers during investigations, represent the state during the trial and propose specific punishments for the accused, and to bring appeals against trial results considered unfavourable to the state. The presiding judges dominate traditional inquisitorial trials. The judge decides what witnesses will be called and questions the witnesses and the accused. The prosecutor and defence counsel can request that supplementary questions be asked by the judge and the judge will consider such requests. The prosecutor and defence counsel address after the questioning of witnesses.

The role of Counsel Assisting in Commission hearings is in part defined by s34 ICAC Act, and is generally similar to the role of Counsel Assisting in Royal Commissions, which is to assist the Commissioner to establish the truth, form conclusions and make findings, by making opening statements, collating and leading the evidence and making closing submissions. Counsel Assisting is responsible for the conduct of the hearing, subject to the Commissioner having ultimate control (Hallett).

Hallett says Commissions and Boards need the assistance of an advocate to present material to the inquiry and examine witnesses, and that much of the success of inquiries depends upon Counsel Assisting.

Gillard J in **Bretherton v Kaye and Winneke** [1971] VR 111 said it is to the public benefit in an inquiry of a "serious character" that the counsel should be briefed to carry out the usual duty imposed upon an advocate, and it is to the public benefit to investigate serious allegations made, carefully and judicially, adopting the practices observed in courts of law of enabling counsel perfect freedom of examination and cross-examination in an attempt, sometimes futile, to discover the true facts. His Honour said counsel should use the utmost

endeavour to arrive at the truth, which can only be done by fearless and robust advocacy.

It may be necessary to extract information from witnesses who prevaricate (Hallett - page 218).

Hallett says the assembly, correlation and presentation of evidence necessarily devolves upon counsel assisting, who must decide the difficult questions of how much information he should provide to the Commission before the evidence is formally presented, and should he ultimately present all the information collated or should he exercise an independent discretion and exclude that which he regards as irrelevant or unhelpful. (pages 214- 215)

In the Communism Royal Commission (1949) Sir Charles Lowe took the view that:

> "Generally speaking, where a Royal Commission is appointed, Counsel are appointed to assist that Commission. The Commissioner himself has nothing to do with the discovery of evidence, with the assembling of it, or with the presenting of it. These are matters which are committed to the Counsel assisting the Commission. Ordinarily, the procedure is that persons other than the Counsel assisting the Commission give whatever evidence they have or think may be relevant to Counsel assisting the Commission to present to the Commission."

That is true enough for an ad hoc body, but the Commission is a standing organisation, and a great deal of work will generally have been done before Counsel Assisting is appointed. The presiding Commissioner may have a significant role in supervising the collection of evidence. However it is always the responsibility of Counsel Assisting to decide what evidence will be lead.

The Beach Police Inquiry (1975) said that Counsel Assisting are completely independent - their function is to present all evidence that they consider to be relevant. (Hallett, p216)

Hallett says there are cogent reasons for allowing counsel assisting a degree of latitude or independence in the performance of his function, subject to the Commission's ultimate control of the inquiry. (Hallett, p217)

Usually an inquiry is commenced by counsel assisting making an opening statement. The degree of detail in the statement varies according to the nature and complexity of the inquiry. An inquiry is vastly different from court proceedings, where the case which is being opened has been prepared for the purpose of presenting it to the court. The inquiry is being held because the "case" is unknown." (Hallett, p217)

The practice followed in many Royal Commissions in Australia is that witnesses are called and examined in the first instance by counsel assisting the commission; then persons with leave to appear ask questions. A witness represented by counsel may be examined by his own counsel, and may be cross-examined by other counsel. If any counsel who has been granted leave to appear wishes that any person be called as a witness he should request counsel assisting the commission accordingly and should furnish him with a statement of the evidence that the proposed witness is expected to give. If counsel assisting declines to call the witness when so requested counsel who wishes him called may make application at the hearing. (Hallett, pp219-220)

The task of counsel assisting is to facilitate the inquiry to arrive at the facts. The members of a Commission or Board are, of course free to ask questions at any time. Nevertheless it would be undesirable for them to have the main responsibility for questioning and cross-examining witnesses at first instance (Hallett, p221)

In litigation a witness will never be called by a party when it is known he will give evidence unfavourable to that party's case. It is only on rare occasions that a witness who is called to give evidence turns hostile. With inquiries the position is different. Having regard to the different functions of an inquiry and a court is not surprising that counsel assisting do, on occasions, need to resort to a line of questioning akin to cross-examination, for example

when a witness whom it is thought is in possession of relevant information refuses to co-operate. (Hallett, p220)

In closing submissions Counsel representing various interests naturally take the opportunity to present the evidence in the most favourable light in regard to those interests. The opportunity is available for counsel assisting to try to present a balanced view of all the evidence and submissions for the benefit of the commission.

The ICAC's approach is that the closing submissions of Counsel Assisting are his, not the Commission's.

Hallett says counsel assisting carries a heavy responsibility and workload over a prolonged period. It is necessary that he be a person with an enormous capacity for work, a depth of knowledge and wide practical experience. He needs a special insight or imagination to enable him to make judgments on the material before him. He has to penetrate, in great depth, those lines of inquiry which will bear fruit, if there is any to borne. The skills needed to perform the task of counsel assisting in an inquiry are those of the advocate. The persons with such skills are to be found at the Bar and so it is to be expected that persons chosen to assist are almost invariably from the ranks of practicing barristers. The art of advocacy, skill and cross-examination and the technique of inquiry is not likely to be found amongst persons who are not daily exercising those skills.

On 30 July 1992 the Bar Council of New South Wales adopted a new rule applicable to members of the private bar appearing as Counsel Assisting, inter alia, the Commission:

> "57E. A barrister's function and purpose in appearing before the Independent Commission Against Corruption, the National Crime Authority, the Australian Securities Commission or any other authority, inquiry or Royal Commission having inquisitorial or investigative powers as counsel assisting that body is to assist that body fairly to arrive at the truth. He or she should fairly and impartially endeavour to ensure that that body has before it all relevant facts

and all applicable law and generally to assist that body to avoid the making of findings that are erroneous as a matter of fact or law. The barrister should not:

(a) by language or conduct endeavour to inflame or prejudice that body;

(b) urge any argument of law or fact that does not carry weight in his or her mind."

There is authority in New Zealand and Canada to the effect that counsel assisting should not be involved in the preparation of the report of a Royal Commission: **Re Royal Commission on Thomas Case** 1982 1 NZLR 252. This is the approach the Commission takes; counsel assisting are not involved in the preparation of Commission reports.

Key Issue 11: **Can the Commission forward to the Committee a more detailed break-down of the cost of the Kyogle Inquiry than that provided in the *Annual Report to 30 June 1992* (including details of the $489,000 spent on overheads)?**

A more detailed break-down of the costs of the Kyogle investigation is as follows:

Item	$'000
Hearing Costs	
. Presiding Commissioner	17
. Associate/Attendant	4
. Transcription fees	47
. Rental of premises and miscellaneous costs of country hearing	13
. Witness expenses	14
Counsel Fees	
. Cost of General Counsel	7
Report Costs	
. Cost of Printing	6
Investigative Costs	
. Employee related expenses	88
. Travel and general expenses	79

Overheads

Overheads do not represent a direct cost of the hearing. They are only an apportionment to the hearing of the indirect recurrent costs of operating the Commission. They represent an estimate, arrived at by the formula reported in the Annual Report.

Overheads include such things as executive costs, administrative salaries and costs, rental of the Redfern premises, and general working and maintenance expenses associated with running the Commission.

The overheads of $489,000 reported for the Kyogle Shire matter comprise apportionments of these costs of $260,000 in 1990/91 and $229,000 in 1991/92.

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COMMITTEE ON THE ICAC

22 December 1992

Ms Deborah Sweeney
Solicitor to the Commission
ICAC
GPO Box 500
SYDNEY NSW 2001

Dear Ms Sweeney

I refer to your letter, dated 07 December 1992, in response to the key issues arising from the Committee's hearing in Kyogle on 01 October 1992.

Your letter noted that the Commission "has not yet received the further submissions referred to in your letter of 11 November".

At the hearing on 01 October I made it clear that the Committee would welcome written submissions in relation to the Kyogle inquiry. The Committee subsequently wrote to a number of individuals who expressed interest in making written submissions. These people were provided with a copy of the transcript of the Committee's hearing and invited to make a submission.

To date only one written submission has been received. This is from Mr Oral Gould, dated 06 December 1992. A copy is enclosed for your information.

Yours sincerely

Malcolm J Kerr MP
Chairman

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New South Wales

MC

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Deputy Premier
and
Minister for Roads

Mr M J Kerr, MP
Chairman
Committee on the ICAC
Room 1129
121 Macquarie Street
SYDNEY NSW 2000

4 JAN 1993

Dear Mr Kerr,

I refer to your letter dated 18 November 1992 regarding the review by your Committee into ICAC's inquiry into roadworks in the Shire of Kyogle.

Firstly, in regard to the matters raised about the system by which funds are made available to Councils, the RTA has allocated these funds as Annual Grants to Councils based on funds available and relative priorities of work. The RTA has not been able to guarantee funds to Councils for forward programme years because the availability of such funds is based on State Budget allocations made each year. However, the RTA is considering an alternative method of funding of new Council works whereby a guarantee of total funding of approved works will be provided prior to project commencement. Implementation of any changed funding arrangements would be subject to Treasury approval.

In relation to the Inquiry, the Authority retained the services of a barrister, a solicitor and an engineer during the course of proceedings because of its interest in this matter. The Inquiry, however, did not result in any matters of major significance to the Authority other than the misappropriation of some roadworks funds by Council staff. The Authority will shortly approach Council regarding recovery of these funds.

The Authority does however consider that the Inquiry was of value in that it highlighted, for the benefit of other local Councils, the potential problem which may arise if Councils do not maintain proper job costing and control systems. In this regard, the Authority will continue to carry out regular comprehensive audits of selected Councils each year.

Yours sincerely,

WAL MURRAY MP
DEPUTY PREMIER
Minister for Roads

RECEIVED
08 JAN 1993

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COMMITTEE ON THE ICAC

09 February 1993

Mr Ian Temby QC
Commissioner
Independent Commission
Against Corruption
GPO Box 500
SYDNEY NSW 2001

Dear Mr Temby

I refer to your letter of 21 October 1992 concerning the Committee's hearing in Kyogle on 1 October 1992.

In that letter you suggested that the Committee seek the views of the RTA on the Commission's Inquiry into Roadworks in the Shire of Kyogle.

The Committee subsequently wrote to the Deputy Premier and Minister for Roads seeking, through him, the RTA's views on the Commission's inquiry. Those views were contained in a letter from Mr Murray, dated 04 January 1993, which was considered by the Committee at its meeting on 05 February 1993. The Committee resolved that you should be provided with a copy of this letter. A copy is therefore enclosed for your information.

Yours sincerely

Malcolm J Kerr MP
Chairman

temby.060

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COMMITTEE ON THE ICAC

13 October 1993

Mr Ian Temby QC
Commissioner
ICAC
GPO Box 500
SYDNEY NSW 2001

Dear Mr Temby

At its meeting last night the Committee discussed the visit to Kyogle which it undertook in October 1992.

The Committee noted that it had not yet received a response from the Commission to a submission from Mr Stephen Norrish QC which was referred to the Commission in November 1992.

The Committee resolved on the motion of Mr Hatton, seconded by Mr Gaudry:

> That the Chairman send a reminder letter to the ICAC concerning the response which is still outstanding to the submission received from Stephen Norrish QC.

A copy of Mr Norrish's submission and the covering letter with which it was forwarded to the Commission are enclosed.

Yours sincerely

Malcolm J Kerr MP
Chairman

temby.085

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INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Malcolm Kerr
Committee on the ICAC
Room 925
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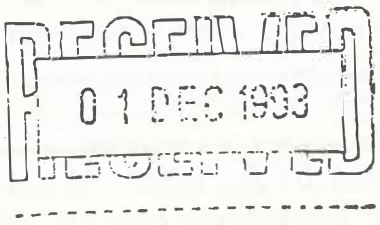
Macquarie Street
SYDNEY NSW 2000

1 December 1993



Dear Mr Kerr

You wrote to the Commission on 11 November 1992 regarding your committee's Kyogle hearing. You requested the Commission address a list of key issues, some of which related to the Kyogle investigation and others more generally relating to the Commission's functions. Under cover of letter dated 7 December 1992 the Commission provided a 27 page response.

You also sought a response to a letter received from Mr Stephen Norrish QC. I apologise for the delay in responding to Mr Norrish's letter, however most of the issues dealt with by Mr Norrish were addressed in the previous correspondence.

Mr Norrish appeared for the Council during the Commission's Kyogle investigation. It should be noted that Mr Terracini of Counsel appeared in his place during the last week of hearing and prepared the submissions on behalf of Council.

Mr Norrish expresses the view that openings should be limited so as to protect reputations, however he also argues that there should be a better identification of issues and the order in which they are to be addressed should be stated in the opening.

The transcript (10-25T; 28-40T) of the Commission's hearing clearly indicates that counsel assisting the Commission Mr Maxwell QC outlined the matters to be covered, the principal issues and indicated the order in which it was proposed to deal with them. The Commission is conscious of the need to avoid unnecessary damage to reputation which may be caused by people being named in the opening when their evidence is to be obtained at some considerably later stage. As you may know, the Commission adopted the approach in its current police and criminals investigation of suppressing the names of those mentioned in the opening when the evidence to be called in relation to them would not occur for some time. The Kyogle matter was of significantly shorter duration then the current investigation.

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The Commission is equally conscious of the need to protect, to the extent possible, unrepresented witnesses. It has adopted the practice of the presiding Commissioner explaining the relevant provisions of the Act to unrepresented witnesses. Both counsel assisting and Mr Norrish raised the question of s.38 declarations at various stages during the Kyogle hearing. However it may be that this could have been more consistently done.

To the extent it can without prejudicing its investigations, the Commission does advise witnesses of allegations made against them prior to hearings. It must be stressed that this can only be done in circumstances where it would not have an adverse effect upon the search for truth. The Commission conducts investigations, not prosecutions. Therefore any analogy to a court hearing in relation to which particulars are provided in advance, is inappropriate. In relation to the Kyogle hearing, all affected persons were on notice of the areas to be covered by the hearing prior to being called. Similarly the Commission endeavours to give notice of, and where practicable provides copies of, documentary material on which it intends to rely, to affected parties. There are often forensic reasons why some documents cannot be made available.

Mr Norrish is of the view that there was insufficient examination of documents and witnesses prior to the public hearing. He bases his comment on the record of proceedings. When conducting an investigation, the Commission generally interviews many people and examines a considerable number of documents prior to the hearing. Not all of the subsequent statements, records of interviews or documents are then used in the hearings. The investigation is properly a filtering process, with the hearing as part of the investigation. The Commission's experience is that some matters are better first put to witnesses in the hearing rather than in earlier interview. The relevance of some documents therefore becomes more apparent during the hearing process.

On each occasion access was sought to documents by interested parties, it was provided. It was not brought to the attention of the instructing solicitor that Council officers were experiencing frustrations in this regard.

The Commission did indeed have discussions with various people concerning the more technical aspects of the investigation. In particular the Deputy Shire Clerk, Mr Sowiak, came to Sydney for two days at the request of the Commission in March 1991 to assist in the interpretation of documents and explaining the accounting procedures used by Council. His statements on these matters were tendered during the hearing. The Commission also liaised with the Roads and Traffic Authority. The issues dealt with by the investigation and the hearing were quite narrow and almost all had been identified prior to the hearing. As can be seen from the Report, its subject matter was confined to three issues. Two of these concerned the award of contracts and the third issue related to road works.

As the transcript (531T) of the hearing discloses, the allegation concerning Mr Grayson was suppressed pursuant to s.112 by the Assistant Commissioner. It was lifted after Mr Grayson had given evidence on that matter. At the time of lifting the order the Assistant Commissioner noted that Grayson had made a categorical denial of the allegations in clear

terms and stressed the need for balanced reporting (612-613T).

The circumstances in which public hearings are held were canvassed in the material provided to the Committee last year, as were, among other matters, the role of expert evidence and the effect of investigations on small communities.

I note the Committee is conscious of its powers under the ICAC Act. Given that constraint, I am confident that the Commission has now addressed the relevant issues raised by Mr Norrish.

Yours faithfully

Ian Temby QC
Commissioner