

FILED

- 8 SEP 2015



## SUMMONS (JUDICIAL REVIEW)

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law Division
List	Administrative Law List
Registry	Sydney
Case number	2015/263337

### TITLE OF PROCEEDINGS

Plaintiff	Jeffrey Raymond McCloy
First defendant	The Honourable Megan Latham
Second defendant	Independent Commission Against Corruption

### PROCEEDINGS BEING REVIEWED

Title	"Operation Spicer"
Decision-maker	First and second defendants
Dates of hearing	28 April 2014 to 12 September 2014
Decision of	First and second defendants

### FILING DETAILS

Filed for	Jeffrey Raymond McCloy, plaintiff
Legal representative	Richard Pegg, Toomey Pegg
Legal representative reference	RMP:126225
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### HEARING DETAILS

This summons is listed at

9am 16/9/15

### TYPE OF CLAIM

Administrative Law

**ORDERS SOUGHT**

- 1 An order restraining the first defendant (the Commissioner) from further presiding over or otherwise participating in, any public inquiry in respect of the investigation styled 'Operation Spicer' being conducted by the second defendant (the Commission), or any other investigation conducted by the Commission into matters falling within the scope of Operation Spicer, as amended on 27 August 2014 and 12 September 2014.
- 2 An order restraining the Commission, by its officers, employees or agents, from preparing, furnishing to the Houses of the Parliament of New South Wales or otherwise publishing, any report in relation to any matter that is the subject of Operation Spicer, to the extent that such report is based on any evidence that was heard or adduced in any compulsory examination or public inquiry presided over by, or involving the participation of, the Commissioner.
- 3 An order restraining the Commissioner from preparing or continuing to prepare, or otherwise participating or continuing to participate in the preparation of, any report prepared, furnished to the Houses of the Parliament of New South Wales, or otherwise published, by the Commission in relation to any matter that is the subject of Operation Spicer.
- 4 An order restraining the Commission, by its officers, employees or agents, from referring to any other person, agency or authority any evidence, matters of fact or allegations in relation to any matter that is the subject of Operation Spicer, to the extent that such referral is based on or includes any evidence that was heard or adduced in any compulsory examination or public inquiry presided over by, or involving the participation of, the Commissioner.
- 5 Upon application, interim relief to the effect of orders 1 to 4 above, pending final determination of these proceedings or further order.
- 6 Costs.
- 7 Such further or other order as the Court thinks fit.

**DETAILS OF DECISION**

- 1 The plaintiff apprehends that the Commissioner will exercise her statutory powers by further presiding over or otherwise participating in a public inquiry in respect of Operation Spicer, and other investigations or other activities conducted by the Commission into matters falling within the scope of Operation Spicer.

- 2 The plaintiff apprehends that the Commission will make a decision, and/or take steps in the exercise of public power leading to making a decision, by way of preparing, furnishing to the Houses of the Parliament of New South Wales or otherwise publishing, a report in relation to any matter that is the subject of Operation Spicer, based on evidence that was heard or adduced in compulsory examinations or public inquiries presided over by, or involving the participation of, the Commissioner.
- 3 The plaintiff apprehends that the Commissioner will engage in the exercise of her statutory powers by way of preparing or continuing to prepare, or otherwise participating or continuing to participate in the preparation of, a report prepared, furnished to the Houses of the Parliament of New South Wales, or otherwise published, by the Commission in relation to any matter that is the subject of Operation Spicer.
- 4 The plaintiff apprehends that the Commissioner will make a decision by way of referring to some other person, agency or authority evidence, matters of fact or allegations in relation to matters that are the subject of Operation Spicer, based on or including evidence that was heard or adduced in compulsory examinations and public inquiries presided over by and involving the participation of the Commissioner.
- 5 The plaintiff seeks relief in respect of all of the apprehended conduct described above.

## GROUNDS

- 1 The First Defendant is the Commissioner for the Second Defendant appointed pursuant to section 5 of the *Independent Commission Against Corruption Act 1988* (NSW) ("ICAC Act"). The First Defendant is herein referred to as the Commissioner and the Second Defendant as the Commission.
- 2 Between 28 April 2014 and 12 September 2014 the Commission conducted a public inquiry in the investigation styled by it as Operation Spicer, conducted by the Commissioner, purportedly pursuant to s 31 of the ICAC Act. The Commission amended the scope and purpose of Operation Spicer on each of 27 August 2014 and 12 September 2014.
- 3 Cumulatively, the grounds set out below lead to the conclusion that a fair-minded observer might reasonably apprehend that the Commissioner might not bring an impartial and unprejudiced mind to the resolution of the questions of what findings to make in and what action to take consequent upon Operation Spicer. Insofar as

these grounds deal with the Commissioner's actions and prospective findings in relation to persons other than the plaintiff, they indicate what a fair-minded observer might reasonably consider to be an attitude or tendency which may be manifested in the Commissioner's actions and prospective findings in relation to the plaintiff.

The grounds set out below deal with the following matters:

Conduct by the Commissioner prior to the commencement of Operation Spicer	[4]-[8]
Discrimination between witnesses in aid of Commission's predetermined case theory: treatment of Mr Gunasinghe; Ms McKay and Mr Tinkler; Mr di Girolamo; Mr Carter; Mr Webber and Mr Hartcher	[9]-[48]
The Commission's "Practice Direction"	[49]-[52]
Matters put to the plaintiff or other witnesses or in submissions without a proper factual or legal basis	[53]-[78]
Refusal to permit questions on critical facts in issue: "matter for submissions"	[79]-[80]
Indications of political bias by Counsel Assisting and Commissioner	[81]-[90]
Lack of even-handed treatment by Commissioner of conduct of Counsel Assisting: conduct during submissions, during questioning of various witnesses including the plaintiff; appearance of a personal interest in the public inquiry	[91]-[169]
Other aspects of persistent and apparently wilful want of procedural fairness: applicability of the Barristers' Rules to Counsel Assisting; access to documents and scheduling of witness appearances; questioning on privileged matters; questions put to the plaintiff without notice and/or beyond the scope of Operation Spicer	[170]-[220]
Conclusion: Apprehension of bias	[0]-[223]

#### **Conduct by the Commissioner prior to the commencement of Operation Spicer**

4 On 24 February 2014, the Commissioner gave a speech to members of the New South Wales Bar Association, a recording of which was subsequently published on the Internet, in which the Commissioner stated that:

- a. "inquisitorial litigation is fantastic ... you are not confined by the rules of evidence. You have a free kick. You can go anywhere you want to go. And it is a lot of fun";
- b. for Counsel Assisting, questioning witnesses during public inquiries is "like pulling wings off butterflies" because "you have actually worked out what you

want to get out of the witness” and “you know exactly what you expect that witness to say”;

- c. “the thing about the role of counsel assisting in ICAC is that you are actually part of a team”; and
- d. it “is much more difficult for counsel who are representing the relevant witness and it’s a very very limited role for those counsel”.

5 From the statements set out at paragraph 4 above and the conduct summarised below, a fair-minded observer might reasonably infer that the Commissioner had opinions and intentions to the following effect:

- a. that the Commission’s and Counsel Assisting’s obligations of fairness towards witnesses and persons of interest had no qualities or standards akin to those which apply in judicial processes, in spite of the gravity of the potential consequences of the Commission’s exercises of power, and in spite of the applicability of the Barristers Rules as then in force to the conduct of Counsel Assisting;
- b. that advocates representing witnesses and persons of interest ought rightly to be confined to a much more limited role than Counsel Assisting;
- c. that the Commissioner and Counsel Assisting would during a public inquiry be jointly pursuing a preconceived agenda;
- d. that it was proper for the Commission to have already determined what findings of fact would be established through the public examination of witnesses, prior to any public hearing occurring;
- e. that any opportunity to be heard, by way of submissions or questioning of witnesses, which is provided to witnesses or persons of interest should be provided perfunctorily and disingenuously, such that it would never be capable of having any real effect on the findings the Commission ultimately makes;
- f. that the Commission’s so-called public hearings have and should have the character of a show trial, in that they are not intended to and do not affect the Commission’s predetermined ultimate findings;
- g. that it was proper and desirable for the Commission in its public hearings to be seen to be causing pain and harm to witnesses appearing before it; and
- h. that each of the matters described at subparagraphs (a) to (e) above are features of the Commission’s processes which give the Commissioner personal joy, glee and satisfaction.

- 6 On 7 August 2015, the Commissioner stated, during a public hearing of the Committee on the Independent Commission Against Corruption of the Parliament of New South Wales, that:

"if counsel assisting asks a series of questions, which are entirely proper within the confines of the scope and purpose of the inquiry, then counsel assisting is permitted to run. Might I say, there are other counsel who appear regularly in the jurisdiction for various witnesses, who also get to have that free kick ... They get to have that free kick as well; that is a feature of advocacy in the jurisdiction that anybody at the Bar will confirm."

- 7 When on that occasion the Commissioner was repeatedly asked questions to the effect of "how you perceive the role of counsel assisting as being akin to a person pulling the wings off butterflies", the Commissioner responded with words including:

- a. "I just do not regard it as a relevant question";
- b. "I have explained the context. I do not think you have a complete transcript of what was said because—";
- c. "I am not suggesting I did not use those words";
- d. and, eventually:

"Sometimes an investigation has gone on for six to nine months and you have a wealth of information in front of you. ... So you, in fact, know exactly where the witness who has just responded to a series of questions has tried to mislead the commission, has lied to the commission or has said something which can be proved to the contrary by objective evidence. In that context where you are in possession of all the material it allows you to, in effect, draw that witness into a trap."

- 8 From those words, a fair-minded observer might reasonably infer that the Commissioner:
- a. was reluctant to explain her own previous remarks because they were improper, insofar as they suggested a deliberate strategy of unfairness and brutality towards witnesses;
  - b. was disingenuously asserting, contrary to her previous assertion that the role of counsel other than Counsel Assisting was "very very limited", that in fact all legal practitioners appearing before the Commission would have equal status, privileges and opportunity to adduce evidence and make submissions;

- c. was not resiling from her earlier apparent opinion that it was proper for the Commission to have already determined what findings of fact would be established through the public examination of witnesses, prior to any public hearing occurring;
- d. was further asserting that it was proper and desirable to "trap" witnesses, irrespective of whether the witness has had fair notice of all relevant evidence.

**Discrimination between witnesses in aid of Commission's predetermined case theory**

- 9 On numerous occasions in the course of the public inquiry in respect of Operation Spicer, as set out in paragraphs 11 to 48 below, the Commissioner and Counsel Assisting displayed an ongoing tendency to favour and protect witnesses whose evidence was or was expected to be favourable to a case theory already formulated by Counsel Assisting, and to attack or disadvantage or denigrate witnesses who were apparently anticipated to be the subject of adverse findings by the Commission in accordance with that case theory, or whose evidence was or was expected to be adverse to that case theory.
- 10 Insofar as such conduct was engaged in by Counsel Assisting, the Commissioner failed to admonish, disclaim or otherwise discourage such conduct. A fair-minded observer would think she was adopting that conduct and approving of it.

***Mr Gunasinghe***

- 11 On 1 May 2014 during questioning of Mr Gunasinghe by Counsel Assisting, both Counsel Assisting and the Commissioner treated the witness with open aggression.
- 12 The witness attempted to provide a correct statement of his evidence in spite of an erroneous prior statement made during what was on his account a brief and pressured private interview by staff of the Commission.
- 13 Counsel Assisting stated:  
"I can't believe this, Mr Gunasinghe, I cannot believe you're going to go down this line. No harm will come to you if you admit that you were approached by Tim Koelma?" (T2995)
- 14 Both Counsel Assisting and the Commissioner proceeded to warn the witness that he was at risk of penalties for giving false evidence, in terms which suggested a conviction already formed that the evidence previously given was correct and the witness was on this occasion attempting to give false evidence (before that evidence had been fully given).

15 Counsel Assisting proceeded immediately to state:

"I'm going to put to you that you're lying now through your teeth, Mr Gunasinghe, just to save a bit of time"; and

"You don't have to tell your story, we're not going to believe it anyway".  
(T3067)

16 Following questioning by the Commissioner, the Commissioner stated that:

"It's an insult, Mr Gunasinghe, it's an insult to this Commission for you to sit there and maintain with a straight face that that was all done under pressure. Anyway, I've said what I've said. Go on, Mr Watson." (T3068)

17 Counsel assisting proceeded to state:

"Look Mr Gunasinghe, we won't bother going through this sham". (T3068)

18 A fair-minded observer might reasonably infer that, by the conduct described at paragraphs 11-17 above, both the Commissioner and Counsel Assisting revealed that their views on findings of fact adverse to particular persons of interest were already formed, and they were unwilling to countenance any change to such views.

19 The conduct described at paragraphs 11-17 above would further indicate to a fair-minded observer that both the Commissioner and Counsel Assisting were of the opinion that the witness was prone to giving unreliable evidence, but were willing to adopt and rely upon such evidence, irrespective of its suspected unreliability, so long as the evidence given publicly was favourable to the case theory the Commission had already formulated.

### ***Ms McKay and Mr Tinkler***

20 On 1 May 2014 during questioning of Ms McKay, whose evidence generally was favourable to the case theory of Counsel Assisting and favoured by the Commission, the Commissioner interrupted questioning by the legal representative of an interested person, Mr Tinkler.

21 Mr Tinkler's legal representative asked Ms McKay the question:

"So you have no recollection of calling Mr Tinkler to discuss [a particular issue?" (T3059)

22 The Commissioner described that question as "very unfair". (T3059)

23 The Commissioner erroneously stated that the question had been "you don't recall having any discussions with him about the subject", when counsel's question had in

fact been consistent with the evidence the witness had previously given (the point of difference being whether the witness had approached Mr Tinkler).

24 The Commissioner thereby erroneously precluded Mr Tinkler's representative from putting to Ms McKay the proposition that she had taken steps to solicit a political donation from Mr Tinkler.

25 On 16 May 2014 during questioning of Mr Tinkler by Mr Tinkler's own legal representative, Mr Tinkler gave evidence that Ms McKay had first raised with Mr Tinkler the question of financial support for her campaign.

26 Mr Tinkler's legal representative thereupon asked the following question:

"just to be clear, Mr Tinkler, was it your understanding in that discussion with Ms McKay that she solicited a political donation from you in support of her re-election campaign in 2011?" (T4515)

27 Counsel Assisting objected to that question in the following terms:

"By golly, Commissioner, that's a serious allegation". (T4515)

28 The Commissioner supported the objection on the ground that this proposition had not been put to Ms McKay, notwithstanding that it was the Commissioner herself who had prevented the proposition from being put.

29 A fair-minded observer might reasonably conclude that the Commissioner and Counsel Assisting, by their conduct described above, sought actively to prevent evidence being adduced which was unfavourable to the case theory already determined and preferred by the Commission.

***Mr di Girolamo***

30 On 9 May 2014 during questioning of Mr di Girolamo by Junior Counsel Assisting, with respect to the identity of a person referred to in documents as "Mike", the witness gave evidence that "Mike" referred to Mr Mike Baird (who was Shadow Treasurer at the time the documents were created but is now Premier of New South Wales) (T3869).

31 Senior Counsel Assisting interrupted the aforementioned questioning to draw the Commissioner's attention to media publicity concerning that evidence, and to contradict the assertion the witness had made.

32 Senior Counsel Assisting again interrupted by contradicting the assertion the witness had made by referring the Commissioner to documents which were said to indicate that "Mike" meant Mr Michael Gallacher (T3875).

33 Senior Counsel Assisting did not direct any questions to, or prompt Junior Counsel Assisting to direct any questions to, the witness in relation to those documents, or otherwise in relation to the veracity of the evidence the witness had given.

34 On 12 May 2014, during submissions by Senior Counsel for Mr Gallacher, the Commissioner stated that:

"I do not propose to prevent Counsel Assisting from correcting something that is being falsely publicised of which he is aware when Counsel Assisting is in a position to know ... because of other information that might be in the hands of Commission officers". (T3885)

35 Following a submission that the evidence given by the witness had not been misrepresented, and that if the evidence was to be contradicted by Counsel Assisting then the evidence "can be tested in the usual way", the Commissioner stated that counsel for an interested person could not do as Counsel Assisting had done:

"because you don't have the responsibility of Counsel Assisting". (T3886)

36 The Commissioner did not admonish Counsel Assisting or take steps to ensure that the evidence of the witness was properly tested.

37 A fair-minded observer might reasonably conclude that the Commissioner and Senior Counsel Assisting, by their conduct described above, sought actively to prevent evidence being adduced which was unfavourable to the case theory already determined and preferred by the Commission.

**Mr Carter**

38 On 12 May 2014 during questioning of Mr Carter, who had been described by Counsel Assisting during opening submissions as having previously given false evidence on oath, Counsel Assisting stated that the witness had now "come clean" insofar as further evidence had been given which was consistent with the case theory formulated by the Commission (T3992).

39 Neither Counsel Assisting nor the Commissioner put to the witness the allegation that he had previously given false evidence.

40 When Senior Counsel for an interested person, Mr Hartcher, sought to question the witness for a duration estimated at an hour, the Commissioner responded in an exasperated manner:

"Oh what?" (T4004)

- 41 A fair-minded observer might reasonably conclude that, by this conduct, the Commissioner demonstrated:
- a. a propensity to treat witnesses favourably only so far as they publicly gave evidence consistent with the Commission's case theory;
  - b. a willingness to rely upon such favourable evidence irrespective of whether there were grounds to consider the witness unreliable; and
  - c. a propensity to impede the development of evidence or argument adverse to the case theory already determined and preferred by the Commission.

***Mr Webber***

- 42 On 19 May 2014, during questioning of Mr Webber, Counsel Assisting had suggested Mr Webber was not working for Mr Gallacher in August 2010.
- 43 The witness referred to a document to contradict the suggestion Counsel Assisting had made.
- 44 The Commissioner thereupon admonished the witness in such a manner as to suggest that the evidence he was expected to give was only the evidence which Counsel Assisting wanted him to give:

"I really would advise you just to answer the questions. You start volunteering information, we don't know where it's going to go". (T4546)

***Mr Hartcher***

- 45 On 19 May 2014, during questioning of Mr Hartcher, the Commissioner tolerated comments made by Counsel Assisting directed towards Mr Hartcher in place of asking questions, and stated that such a comment
- "helps Mr Hartcher to know what ... adverse findings might be made against him which is the whole point of this exercise". (T4625)
- 46 From that conduct, a fair-minded observer would infer that the Commissioner assumed that the public questioning of witnesses was not an exercise in ascertaining the truth to be approached objectively, but was rather an exercise in putting persons on notice of prospective findings and giving them "the opportunity to respond".
- 47 The Commissioner however proceeded to criticise Mr Hartcher on the basis that:
- "recently his answers have been entirely unrestrained". (T4625)

- 48 From that comment, a fair-minded observer would infer that the Commissioner expected that any responses to be made to prospective adverse findings would or should be "restrained".

**The Commission's "Practice Direction"**

- 49 On several occasions during the public inquiry, the Commissioner otherwise made rulings with respect to the questioning of witnesses (including Mr Bandle, Mr Tinkler, Mr Lusted and Senator Sinodinos) in such a way as to impede potentially adverse questioning of witnesses whose evidence in chief was favourable to the case theory of Counsel Assisting, or to impede questions which would elicit evidence unfavourable to that case theory.
- 50 The rulings referred to at paragraph 49 were made in reliance upon a Practice Direction of the Commission to the effect that person (including counsel) other than Counsel Assisting were permitted to ask questions of witnesses only to the extent that a "positive case" was thereby put.
- 51 The Practice Direction is procedurally unfair in that it restricts the ability of persons other than Counsel Assisting to test evidence before the Commission, for no discernible reason other than to disadvantage such persons.
- 52 A fair-minded observer might reasonably conclude that, insofar as she sought to enforce the Practice Direction on those occasions, the Commissioner displayed a predisposition to impose such a procedural disadvantage on such persons where such a disadvantage would favour maintenance of the case theory of Counsel Assisting.

**Matters put to witnesses or in submissions without a proper factual or legal basis**

***Prejudicial questions put to and in relation to the plaintiff***

- 53 On 12 September 2014, Counsel Assisting put to the plaintiff in questioning the following allegations:
- a. that payments the plaintiff made for the election campaigns of Messrs Cornwell and Owen were "bribes" or "buying preference"; and
  - b. that a payment made for the election campaign of Mr Baumann was "buying Baumann, buying Craig Baumann and a favourable decision"; (T7598)
- and on 10 October 2014 Counsel Assisting restated each proposition in final written submissions (where each payment was characterised as a "bribe"), in spite of the facts set out in paragraphs 54 to 60 below.

- 54 On 14 August 2014, the plaintiff gave evidence before the Commission, which evidence was never seriously challenged, that his motive in donating was that:
- "Newcastle had been disadvantaged for a very long period of time politically ... if Labor [won the local seat at the 2011 State election] it was still always going to be Labor so the city would still get [no] money". (T5321)
- 55 At the time that the plaintiff donated funds for the election campaigns of Messrs Owen and Cornwell (including through Mr Hugh Thompson), neither of those men were public officials and nor have they ever been and, accordingly, the payments could not have amounted to bribery at common law.
- 56 At no time did Counsel Assisting make any suggestion of, or identify, what "favourable decision" the plaintiff could ever have obtained from Mr Baumann on any matter, or *a fortiori* that the plaintiff was aware of. On the contrary, no challenge was made to the plaintiff's evidence that:
- "Craig Baumann [couldn't] give a favourable decision ... [he] is only one of 10 or 12 Councillors ... [the relevant decision] had to go through this massive formal process via much scrutiny by the Department of Planning which [it] did do and at the end of that process it was rejected". (T7598)
- 57 The land the subject of the decision-making process referred to at paragraph 56 above was purchased by a company associated with the plaintiff as part of a larger area which the local government body of which Mr Baumann was a councillor had already determined to rezone for development, which was the reason why in 2002 the land was so purchased.
- 58 At all relevant times, the aforementioned facts were known to the Commissioner and to Counsel Assisting.
- 59 The allegations described at paragraph 53 above were not stated in any written process or in Counsel Assisting's opening address as being part of the general scope of Operation Spicer or the nature of the allegations under investigation.
- 60 The allegation against the plaintiff in relation to Mr Baumann was also not within the amended scope and purpose of Operation Spicer as amended on 12 September 2014 (being the same day on which the plaintiff was questioned, in relation to events which had taken place about seven years previously).
- 61 Notwithstanding her knowledge of all of the foregoing facts, at no time has the Commissioner sought to disavow these allegations or to admonish Counsel Assisting for making the allegations.

- 62 Notwithstanding that the plaintiff has made submissions to the Commission to the effect that generalised allegations of bribery with respect to Messrs Cornwell and Owen have no foundation as a matter of law, the Commission has failed to indicate that it will not take any further steps adverse to the plaintiff in respect of those allegations.
- 63 A fair-minded observer might reasonably conclude from the matters described at paragraphs 53 to 61 above that the Commissioner, and/or Counsel Assisting with the encouragement and approval of the Commissioner:
- a. had a propensity to put sensational allegations without a proper basis in fact or in law;
  - b. did so for the purpose of attracting mass media attention favourable to the Commission and unfavourable to the plaintiff;
  - c. did so in spite of the plaintiff's inability fairly to respond to those allegations; and
  - d. intends to take steps adverse to the plaintiff irrespective of whether there is a lawful basis to do so.
- 64 Further, during questioning of Mr Baumann on 12 September 2014, Counsel Assisting referred to the documents in Exhibit Z110 (the "Port Stephens Bundle") and an article from the Newcastle Herald entitled "Property Moguls Benefit as Council Slashes Fees", explicitly stating the title of that article (T7585). Counsel Assisting proceeded to ask the witness:
- "And then there's a reference to in the past five years that Wallalong Landowners Group avoided paying more than half a million dollars. Do you see that?--[Baumann:] Yes.
- "What do you know about that?--[Baumann:] Um, I saw the article, I know nothing else, nothing else about it." (T7585)
- 65 Mr Baumann ceased to be a member of Port Stephens Council in 2008.
- 66 The documents in Exhibit Z110 establish that:
- a. the fees in question were initially assessed based upon the Port Stephens Council Fees and Charges Schedule 2009/2010;
  - b. in 2013 the Wallalong Land Owners Group stated to the Council that its fees were higher than those of other Hunter region councils, and the Group withdrew a formal planning proposal previously lodged in 2012;

- c. on 13 August 2013 the Council adopted a new Fees and Charges Schedule 2013/14, which was placed on public exhibition, with submissions considered by the Council, which subsequently adopted the recommendations of its administrative staff;
- d. in October 2013 the Group lodged a new planning proposal in October 2013, and the Council assessed new fees based upon its new Fees and Charges Schedule 2013/14.

67 A fair-minded observer might reasonably conclude that, by putting to Mr Baumann the headline of the Newcastle Herald article and the reference to the Wallalong Land Owners Group "avoid[ing]" paying fees, Counsel Assisting, with the encouragement and approval of the Commissioner:

- a. had a propensity to put sensational allegations without a proper basis in fact or in law;
- b. did so for the purpose of attracting mass media attention favourable to the Commission and detrimental to the reputation of the Wallalong Land Owners Group and its members, including the plaintiff;
- c. did so in spite of the contents of the newspaper article being unverified, and in spite of his knowledge, based upon the documents in Exhibit Z110, that the Wallalong Land Owners Group did not unfairly or unlawfully "avoid" paying any legally required fees;
- d. did not approach the topic of dealings between the Wallalong Land Owners Group and Port Stephens Council with an open mind or a willingness to consider whether those dealings were in fact entirely proper.

***Prejudicial questions put to other witnesses***

68 On several occasions, as set out in paragraphs 69 to 77 below, the Commissioner misdirected witnesses during questioning by reference to their own earlier evidence, by putting matters to those witnesses without a proper basis. The Commissioner thereby demonstrated a propensity to treat witnesses' evidence as worthy of criticism when it was not, and to question such witnesses in a manner which was procedurally unfair, irrespective of the merits of doing so.

69 On 30 April 2014, during questioning of Mr Osborne, the Commissioner put to him that:

"Not five minutes ago in answer to a question from me you said that between 28 January and 9 February you made arrangements for [a] caveat to be withdrawn and you effectively had no interest in the property?". (T2808)

70 Upon his answer "I don't know if that's correct or not", the Commissioner said:

"Well then why did you say it?" (T2808)

71 Mr Osborne's evidence had relevantly been "Ah, I don't, I don't know. Probably. Probably ... I'd have to get that information for you." (T2807)

72 On 1 May 2014, during questioning of Mr Hesky, the Commissioner put to him that he "said earlier he didn't want [a particular donation] to go to the Liberal Party because he was upset with them for losing the election" (T3005).

73 Mr Hesky's evidence had relevantly been that:

"I've been a Member of the Liberal Party for many years since 1974 and I was upset with them for losing the '07 State Election which I contributed a bit of money too and I was very upset that what was going on at the time in um, in Federally where Labor had won with three independents and the Greens and so I was looking for somewhere to send the money that might stop that Federally ... I was trying to mess up the Federally, the Greens and the, and the Labor Party and the three Independents." (T3003)

74 Consequent upon the Commissioner's question, Counsel Assisting put to Mr Hesky that he had given inconsistent evidence, and the Commissioner stated that the witness was failing to answer a question when plainly he was doing so.

75 On 2 May 2014, during questioning of Mr Williams, Counsel Assisting put to him that:

"you're saying that [Mr David Sharpe] had teed [a meeting] up somehow or another and you were just drawn in because you were in the office?" (T3084)

76 Mr Williams' evidence had relevantly been, in answer to the question of how the meeting was "teed up", "I'm not sure I was just asked to come into the board room the meeting was already there" and did not make any assertion as to why he was included in the meeting (T3084).

77 In response to an objection by Mr Williams' counsel on the ground that the proposition misstated the evidence, Counsel Assisting stated:

"Well he can reject, he can deny it",

and the Commissioner responded:

"All right. Yeah, well he can, he can put his own spin on it" (T3084).

- 78 A fair-minded observer might reasonably conclude from the matters described at paragraphs 53 to 77 above that the Commissioner, and/or Counsel Assisting with the approval of the Commissioner:
- a. had a propensity to misinterpret and misrepresent witnesses' evidence, to the disadvantage of the witness; and
  - b. had already decided to disbelieve any evidence the witnesses gave which was perceived as inconsistent with the case theory already determined and favoured by the Commission.

**Refusal to permit questions on critical facts in issue: "matter for submissions"**

- 79 On numerous occasions in the course of the public inquiry, the Commissioner discouraged or refused to permit questioning by counsel acting for various interested persons, or overruled objections to questions from Counsel Assisting, on the basis that such questions were merely on "matters for submissions". In particular:
- a. "if it's a question about the construction of the offence for the purposes of the Act then that is a matter for submissions" (T2727);
  - b. "[Counsel:] the positive case ... is that the facts that have emerged during this witnesses examination and that have been stated in the opening do not amount in any way, shape, or form on any sensible understanding of the law to any sort of illegality ... [Commissioner:] That is not a positive case. ... that is a matter for submissions" (T3626-3627);
  - c. "[Counsel:] Did you think that at any stage what you were doing ... was unlawful? [Commissioner:] ... what he thinks is lawful or unlawful as I said, at the end of the day that remains a matter for submissions" (T3634);
  - d. "whether or not that access would have been granted without the donations is a matter for submissions" (T4642);
  - e. "so now we've got three versions of the one conversation with Mr Gallacher?" can be made "a matter for submissions" (T5847);
  - f. "you're asking him to adhere to the evidence that he gave on 6 May and to assert ... that that is true ... and it can only be true to the extent that it's not in conflict with the evidence he's given here today and that ultimately is a matter for submissions" (T6183);

- g. "if Mr Watson asks a question which doesn't provide any meaningful answer in terms of whether or not it falls within the definition of a statute that is or isn't applicable that is a matter for submissions as you have already indicated and so can we just move on and then at the end of the day you can make a submission that the answer goes nowhere" (T6997);
- h. "[Counsel] when Mr Brinkmeyer was asked that question, Mr Watson didn't give any indication to him as at what point in time he was asking about how long he had known about the Free Enterprise Foundation ... [Commissioner] Well, that might be a matter for submissions" (T7499).

80 A fair-minded observer might reasonably conclude that:

- a. such matters were properly matters for evidence;
- b. the Commissioner's invocation of "matters for submissions" was used, disingenuously, as a means of imposing a disadvantage on any interested person seeking to adduce evidence unfavourable to, or to object to evidence favourable to, the case theory already determined and favoured by the Commission; and
- c. the Commissioner desired that the public inquiry would be perfunctory in nature, and would not provide a real opportunity for interested persons to adduce material before the Commission which would assist in establishing truthful facts favourable to those persons.

#### **Indications of political bias by Counsel Assisting and Commissioner**

- 81 Counsel Assisting made comments during the questioning of witnesses and during submissions and at other times which suggested hostility towards the Liberal Party of Australia, with which various witnesses and persons of interest in Operation Spicer are or have been associated, as set out in paragraphs 82 to 90 below.
- 82 On 28 April 2014, during his opening address, Counsel Assisting referred to an internal Liberal Party memorandum dated 1 December 2009 dealing with the motives behind the Bill introduced by the Labor Government in 2009 which imposed a prohibition on political donations by property developers which stated that the Bill was "designed to cause maximum damage to [the Liberal Party]" (T2651).
- 83 Counsel Assisting denied that such was the purpose of the aforementioned Bill, in terms which a fair-minded observer might reasonably conclude were fatuous, disingenuous, demeaning and sympathetic to a legislative agenda which was motivated by animosity towards the Liberal Party.

- 84 Further during his opening address on 28 April 2014, Counsel Assisting referred to a private organisation, the Free Enterprise Foundation, which has been a substantial donor to the Liberal Party, in terms which a fair-minded observer might reasonably conclude were intended to imply that the Free Enterprise Foundation was an organisation which promotes an extremist political philosophy worthy of ridicule ("It sounds like Ayn Rand wrote this" : T2651).
- 85 On 29 April 2014, during questioning of Mr Lusted, Counsel Assisting described a chance meeting with the Prime Minister, Mr Abbott, as "what otherwise sounds like a potentially good night out wrecked by bumping into" the Prime Minister (T2703).
- 86 On 30 April 2014, during questioning of Mr Henry by Senior Counsel for Mr Hartcher, on the topic of interference with publicly disseminated electoral material (T2898-2902):
- a. Counsel Assisting interrupted a question about interference with Liberal Party electoral material to ask rhetorically "Was that done by the Liberal Party?", which remarks a fair-minded observer might reasonably conclude were intended to imply that the Liberal Party was particularly guilty, or was the only party really guilty, of unfair tactics in conducting elections.
  - b. The Commissioner described the tactics to which those remarks referred as "dirty pool".
  - c. The Commissioner sought to curtail counsel's questioning of Mr Henry on this topic notwithstanding having failed to curtail questioning on the same topic by Counsel Assisting.
  - d. During earlier questioning of the same witness on the same topic by Counsel Assisting on 30 April 2014, the Commissioner failed to admonish Counsel Assisting against persisting in this line of questioning, and indeed participated in it, in spite of its obvious irrelevance to the subject-matter of Operation Spicer.
  - e. Counsel Assisting commented to the witness "you can hear people are spontaneously laughing at that silly answer", which remarks a fair-minded observer might reasonably conclude were intended to denigrate the witness and the Young Liberals organisation (of which the witness was a member).
- 87 On 1 May 2014, Counsel Assisting referred to the Millennium Forum, an organisation associated with the Liberal Party, as "an evil organisation" (T3004).

- 88 On 1 May 2014, Counsel Assisting referred to attendees at a Liberal Party fund-raising event who may have spent money on raffle tickets as "[c]razy mad gambling Liberal Party people" (T3024).
- 89 In an interview with the Australian Financial Review, excerpts of which were published by that publication on 25 July 2014, Counsel Assisting stated: "I have never known anybody to kick and scratch more than the bloody Liberal Party".
- 90 The Commissioner has not at any time admonished, disclaimed or otherwise discouraged the conduct of Counsel Assisting in this respect.

**Lack of even-handed treatment by Commissioner of conduct of Counsel Assisting**

- 91 Counsel Assisting further persistently behaved in the course of the public inquiry in Operation Spicer in such a manner as to bully, insult and belittle witnesses and fellow legal practitioners, including Senior Counsel, as set out in paragraphs 94 to 165 below.
- 92 The Commissioner persistently intervened less in respect of such conduct engaged in by Counsel Assisting than she did in respect of conduct of a similar general nature, albeit on its face plainly less serious, engaged in by other practitioners.
- 93 A fair-minded observer might reasonably conclude that the Commissioner was thereby adopting a position of partiality towards, and a tendency to indulge the excesses of, Counsel Assisting, and an attitude of disdain towards other practitioners.

***Conduct during submissions***

- 94 On 2 May 2014, during discussion about the manner in which documents had been made available to legal representatives of interested persons, and the amount of notice which had been provided to those representatives of impending questioning of witnesses in such a way as to be potentially adverse to their clients, the Commissioner responded to an attempted submission by Senior Counsel for Mr Hartcher by warning that she did not
- "want this to degenerate into ... everybody's opportunity to whinge". (T3107)
- 95 A fair-minded observer might reasonably conclude that the remarks described at paragraph 94 above revealed an assumption or expectation that any such submission, or any submission by the Senior Counsel in question, would be a mere "whinge".

- 96 The Commissioner thereafter responded to the submission (being a simple statement adopting a submission earlier made by another member of the Bar) in a dismissive manner:

"I'm sure you do". (T3107)

***Conduct during questioning of Ms McNamara***

- 97 On 2 May 2014, during questioning of Ms McNamara by a legal representative of an interested person, Counsel Assisting interjected to express the view that the form of a question asked of the witness ("you've been caught up in the spin of Mr Watson, correct?") was "really quite insulting" and "if it was said by a gentleman" Counsel Assisting would have taken offence (T3201-3202).
- 98 The Commissioner failed to admonish Counsel Assisting for directing an unsolicited insult at another legal practitioner (being the implication that the questioner was not a gentleman).

***Conduct during questioning of Messrs Williams and Hartcher***

- 99 On 2 May 2014, during questioning of Mr Williams, when Counsel Assisting characterised Mr Williams and Mr Hartcher as having behaved "like two young lovers", the Commissioner responded dismissively to an objection by Senior Counsel for Mr Hartcher that the question was offensive:
- "all right, well, it's flourish ... let's move on". (T3100)
- 100 Counsel Assisting purported to apologise to Mr Hartcher's Senior Counsel as "the only person in the room who was offended by it".
- 101 On 13 May 2014, during questioning of Mr Hartcher by Counsel Assisting, Mr Hartcher's Senior Counsel objected to the use by Counsel Assisting of informal modes of address (referring to Mr Hartcher as "Hartcher" while having referred to other witnesses in a formal manner), and in response the Commissioner at first resisted the objection by stating incorrectly, and irrelevantly, that:
- "he's been doing it for a considerable number of days". (T4108)
- 102 After the Commissioner required Counsel Assisting to "revert to the formal mode of address", Counsel Assisting stated "Yes, I'm sorry. It's only the big issues we deal with here in ICAC, that's for sure" and proceeded to refer to Mr Hartcher sarcastically, applying a faux French accent, as "Monsieur Hartcher" (T4109).

- 103 The Commissioner failed to admonish Counsel Assisting for the remarks described above which a fair-minded observer would conclude were disingenuous and deliberately disrespectful.

***Further conduct during questioning of Mr Williams***

- 104 On 5 May 2014, during questioning of Mr Williams, Counsel Assisting made a remark about the witness which was derogatory and prejudicial to findings with respect to the credibility of the witness, to the effect that, when resuming cross-examination after the luncheon adjournment the witness had had an improbable revival of memory because over lunch he "might have eaten some spinach" (T3278).
- 105 Following objections to those remarks by several Counsel, without admonishing Counsel Assisting or disclaiming his conduct, the Commissioner dismissed all such objections:

"Everyone, everyone, everyone has aired their grievance. Can we please get on with it" (T3278).

***Conduct during questioning of Mr Palmer***

- 106 On 5 May 2014, during questioning of Mr Palmer by Counsel Assisting, as the witness attempted to answer a question, Counsel Assisting interrupted the answer:

"Well, but, 'But obviously Darren [Williams] knows.' Knows what?—I'm not sure, Darren knows- - It's your email, Mr Palmer". (T3318)

- 107 Upon objection by several Counsel, the Commissioner first treated the objection dismissively:

"Well, that's very helpful, Mr Koops ... I know you're trying to be helpful but we just have to move along",

then explained and justified the interruption by Counsel Assisting:

"If [an answer is not] responsive I think Counsel's entitled to point out that it's not responsive". (T3318-3319)

- 108 The Commissioner made the remarks recorded immediately above without having received any submission from Counsel Assisting to that effect, and in circumstances in which, because of the interruption, there had been no opportunity to determine whether the answer was indeed responsive.

***Conduct during submissions on timetabling matters***

- 109 On 5 May 2014, during a discussion of timetabling matters, Senior Counsel for Mr Gallacher pressed for a resolution to an issue which was of concern to Senior Counsel and his client, being that Counsel Assisting had "made a very serious allegation on Friday, presumably one would hope with proper basis to do so, we'll soon find out no doubt" (as a result of which allegation Mr Gallacher resigned as Police Minister) (T3331).
- 110 During that discussion, Counsel Assisting interjected by stating "Oh, really, that's just deliberately insulting" and shouted "And what you should do is just pull your head in" (T3331).
- 111 The Commissioner proceeded to admonish Senior Counsel for Mr Gallacher that it:  
"really isn't appropriate ... to make a veiled accusation against [Counsel Assisting] that he is misleading this Commission ... by making an allegation which he regards as unfounded" (T3332).
- 112 On the face of the statement by Senior Counsel for Mr Gallacher, and in its context, there was no such veiled accusation, but merely a concern being raised that the very serious allegation which had been made needed to be shown to be substantiated and could not fairly be left hanging in the air indefinitely.
- 113 On 6 May 2014, during subsequent submissions on the same matter by Senior Counsel for Mr Gallacher, Counsel Assisting persisted in interrupting the submission and appeared to assert that "we've [i.e. the Commission] got a very busy [schedule]" (T3367), notwithstanding that an adjournment was under discussion.
- 114 Upon complaint by Senior Counsel about the interruption by Counsel Assisting, the Commissioner appeared to dismiss that complaint ("All right. All right. ... Can we please ... get on with it") while endorsing the remark made at the same time by Counsel Assisting ("Just get on with it") (T3367).
- 115 On 6 May 2014, during submissions by Senior Counsel for a person who had, during Counsel Assisting's opening submissions to the Commission, been implicitly associated with allegations of serious criminal conduct, Counsel Assisting interrupted and demanded that Senior Counsel:  
"move to the point. We're a very busy Commission. He's visiting for the day, that's great, but we've got to get on with our important work" (T3352).

- 116 The Commissioner failed to admonish Counsel Assisting for the interruption and for his obviously and gratuitously disrespectful and dismissive remark directed to a senior practitioner whose client had a significant interest in the inquiry, which interest arose directly from the submissions previously made by Counsel Assisting himself.
- 117 However, the Commissioner did admonish Senior Counsel for the manner in which he attempted to respond to that remark, which attempted response was curtailed by the Commissioner's admonition:

"[Newlinds SC] Listen, Geoff – [Commissioner] No, I don't want ... any kind of degeneration of this ... application by way of you addressing Counsel Assisting directly" (T3352).

***Conduct during questioning of Mr Nicholas Gazal***

- 118 On 7 May 2014, during questioning of Mr Nicholas Gazal by Counsel Assisting, Senior Counsel for Mr Gazal objected to a question on the basis that the evidence did not support what was put. Counsel Assisting withdrew the question.
- 119 Upon elaboration of the basis of the objection and the reason why it needed to be raised as an objection rather than merely a subsequent submission ("It should not have been put"), Counsel Assisting interjected ("That's ridiculous, it should be put") in spite of having withdrawn the question (T3558).
- 120 Counsel Assisting proceeded to put in substance the same proposition and, following a further objection on the same ground, Counsel Assisting threatened "to ask you in a moment, Commissioner, to withdraw [Senior Counsel's] leave to appear" (T3560).
- 121 The Commissioner proceeded to describe Senior Counsel's objection as "a little bit precious" (T3560).

***Conduct during questioning of Mr Bandle***

- 122 On 7 May 2014 during questioning of Mr Bandle, who was a trustee of a discretionary trust, objection was taken by Senior Counsel to a question:
- "So there's no means of protecting any of the recipients of the money from receiving money via the [trust] which happens to be from a prohibited donor. Is that so?" (T3592),
- on the ground that the question disregarded the legal effect of the trustee's exercise of discretion.

123 The Commissioner responded to the objection in the following terms:

“Oh, here we go. ... I didn’t understand that we were in the territory of the law of trusts, but anyway.” (T3592)

124 In response to the proposition that the question was wrong as a matter of law, the Commissioner reframed the question (“all he’s being asked is did he carry out any checks in relation to the moneys that was [sic] donated to the [trust]”, which was a question already asked, answered and not objected to) and did not otherwise deal with the substance of the objection, but proceeded to state that the question did not need to be asked and was a “matter for submissions” (T3593).

125 During further questioning of the same witness on the same day, another objection was taken by the same Senior Counsel, on the ground that the question was a nonsense. The Commissioner’s response was:

“it wouldn’t be the first time that someone’s asked a question that’s nonsense” (T3601).

126 In answer to Senior Counsel’s response that such questions should not be allowed, the Commissioner stated in a sarcastic manner “Gee I’d love that” (T3601).

***Conduct during questioning of Mr Koelma***

127 On 14 May 2014, during questioning of Mr Koelma by Counsel Assisting, after Counsel for an interested person (Mr Spence) successfully took objection to a trivial aspect of a proposition put to the witness, Counsel Assisting gratuitously stated

“Great. Oh, that’s a real victory” (T4231)

128 The Commissioner did not respond to that comment.

129 Around the time of questioning of Mr Koelma on 14 May 2014, Senior Counsel Assisting made a derogatory remark about the witness, sotto voce, to Junior Counsel Assisting with respect to Mr Koelma (“he didn’t come down in the last f...ing shower”), which remark was noticed and reported publicly by journalists and other persons.

130 On 15 May 2014, during questioning of Mr Koelma by Senior Counsel for Mr di Girolamo, Counsel Assisting repeatedly interrupted, attempted to discourage the questioning or to encourage the Commissioner to intervene, and made remarks about the questioning and the witness in terms which included the following:

- a. “Oh, look, sorry, it’s got to stop. Please get to the point” (T4319);
- b. “Maybe not a beer but a lemonade” (T4320);

- c. "You've got to be joking" (T4320);
- d. "Could you [Commissioner] direct Mr Alexis to get on with something relevant" (T4320);
- e. "I mean, that's just ... nonsense" (T4320);
- f. "Dear me" (T4321).

131 The Commissioner did not admonish Counsel Assisting for the conduct described at paragraph 130 above. Rather, a fair-minded observer might reasonably conclude that the Commissioner acceded to the invitation from Counsel Assisting to intercede in the questioning.

***Conduct during questioning of Mr Tinkler***

132 On 16 May 2014, during questioning of Mr Tinkler, Counsel Assisting put an irrelevant proposition to the witness (that, during the luncheon adjournment, the witness had said "This is some of the most boring shit I've ever seen": T4486) and, following an objection by Mr Tinkler's legal representative, Counsel Assisting persisted with his questioning.

133 The Commissioner at first attempted to explain the utility of the irrelevancy, then said to Mr Tinkler's legal representative:

"[T]he point is made, there's no need to get hysterical, just sit down and we'll move on" (T4487).

134 The Commissioner did not admonish Counsel Assisting for introducing the irrelevancy.

135 Later during the same questioning of Mr Tinkler, Counsel Assisting needlessly referred to Mr Tinkler's legal representative as "a very, very irritating man" (T4490).

136 The exchange drew no response whatsoever from the Commissioner.

137 Shortly thereafter, Counsel Assisting needlessly directed an insult to Mr Tinkler:

"Good lord, you realise you're sitting here in a witness seat at ICAC?"  
(T4503)

138 Despite objection that the remark was offensive, the Commissioner again ignored:

"Well, no, I mean at the end of the day ----" (T4503).

**Conduct during questioning of Mr Hartcher**

- 139 On 19 May 2014, during questioning of Mr Hartcher, following Mr Hartcher's denial of a proposition put to him by Counsel Assisting, Counsel Assisting shouted at the witness repeatedly in (inter alia) the following terms (T4584):
- a. "Don't you, don't you dare tell me --?";
  - b. "You resent anything I do, I've got a job, job to do and you know that?".
- 140 Following objection by Mr Hartcher's Senior Counsel, the Commissioner admonished Senior Counsel to "Take a seat", requested all concerned to "just back off right now" and further admonished the witness ("Mr Hartcher, please") (T4585).
- 141 The Commissioner further admonished the witness:
- "Counsel Assisting has a job to do ... And you started talking over the top of him before he had a chance to finish the question. Now, ... let him finish the question" (T4585),
- in spite of the fact that the only substantive questions (as opposed to shouted abuse) which had been put to the witness by Counsel Assisting had been fully stated before the witness responded and the witness had not talked over the top of Counsel Assisting.
- 142 After a further objection by Senior Counsel, and a specific request to the Commissioner to admonish Counsel Assisting ("Could you please request Counsel Assisting not to scream at the witness?"), the Commissioner's response was:
- "Yes. And I would also make the same point in relation to the witness. They're both setting each other off so I think everybody needs to take a backward step" (T4585).
- 143 The Commissioner did not at any time specifically admonish Counsel Assisting in connection with his professional obligations, save that the Commissioner referred to the incident later as "Counsel Assisting has already had a bit of a temper tantrum" (T4593).
- 144 On 19 May 2014, during further questioning of Mr Hartcher, Counsel Assisting sought to put a proposition ("You used your nephew ... as a conduit to launder money which didn't belong ... to you": T4586) to which objection was taken by Mr Hartcher's Senior Counsel.
- 145 The Commissioner's response was to rephrase the question so as to avoid the use of the objectionable term "launder".

- 146 In spite of the agreement between the Commissioner and Mr Hartcher's Senior Counsel to the rephrased question, Counsel Assisting persisted in putting "that Mr Hartcher laundered the money" (T4587).
- 147 Following further objection, the Commissioner acceded to Counsel Assisting without further explanation and stated that "he's entitled to put it if he wants an answer to it" (T4587), in spite of:
- a. the Commissioner's prior acknowledgment of the difficulty with the question;
  - b. the absence of a proper basis for the question; and
  - c. the objectively apparent purpose of the question being to create a media sensation.
- 148 On 19 May 2014, during further questioning of Mr Hartcher, Counsel Assisting interrupted Mr Hartcher's answer to a question ("Why didn't you tell them to ring Koelma? -- I could have but I'm a polite person, they say we're going to—") with a personal snipe:
- "So I've noticed" (T4628).
- 149 Upon objection by Mr Hartcher's Senior Counsel, the Commissioner failed to admonish Counsel Assisting, and responded to the objection dismissively:
- "Yes, yeah, yeah, that's helpful" (T4629).
- 150 During subsequent debate over further commentary by Counsel Assisting directed towards Mr Hartcher, Counsel Assisting directed a personal insult towards Mr Hartcher's Senior Counsel:
- "He's getting a bit whingey now" (T4630).
- 151 Rather than admonishing Counsel Assisting for that remark, the Commissioner sought to justify the commentary objected to and ultimately rejected the objection.
- 152 On 19 May 2014, during further questioning of Mr Hartcher, following Mr Hartcher referring to the death of a friend as "a very sad, sad occasion", Counsel Assisting retorted "Oh no, please, spare me" (T4636).
- 153 Following objection by Senior Counsel for Mr Hartcher, the Commissioner and Counsel Assisting both denied that Counsel Assisting had been mocking the witness, in circumstances where a fair-minded observer would conclude that Counsel Assisting was in fact mocking the witness.

154 On 20 May 2014, when further matters were under discussion between the Commissioner, Counsel Assisting and Senior Counsel for Mr Hartcher, Counsel Assisting made remarks about the conduct of other practitioners:

"I'm getting pretty sick and tired of having to fend these sort of nasty allegations off day after day which are ... put in an intemperate manner and ... by people who should ... be careful" (T4738-4739).

155 An attempt by Senior Counsel for Mr Hartcher to answer that statement ("Well - - -") was cut off by Counsel Assisting shouting, while seated, "Do not, please don't respond to that. Really, let's get on with it" (T4739).

156 On complaint from Senior Counsel about that conduct, the Commissioner did not dispute his characterisation of what had occurred, but also did not admonish Counsel Assisting for his intemperate conduct.

***Conduct during questioning of Mr Owen***

157 On 11 August 2014, during questioning of Mr Owen, Counsel Assisting inquired as to a meeting between Mr Owen and the plaintiff. Following the evidence of the witness that the plaintiff "just handed over a thin envelope", Counsel Assisting asked, in a manner a fair-minded observer would infer had derogatory connotations:

"What, no foreplay?" (T5063)

***Conduct during questioning of the plaintiff***

158 On 14 August 2014, during questioning of the plaintiff, Counsel Assisting repeatedly addressed the plaintiff in a sarcastic manner by reference to his office of Lord Mayor of Newcastle ("Mr Mayor", "Mayor McCloy": T5336, 5344), and made irrelevant references to the make of the plaintiff's motor vehicle (a Bentley).

159 A fair-minded observer might reasonably conclude that the conduct described above was calculated to:

- a. insult and aggravate the plaintiff; and
- b. maximise adverse media comment concerning the plaintiff.

160 On 12 September 2014, during questioning of the plaintiff, Counsel Assisting put to the plaintiff, without prior notice, matters relating to the source of funding for electoral expenses for another candidate in the Newcastle City Council election in 2012, being a matter that was not part of the matters being investigated by the Commission.

161 Following the questioning described at paragraph 160 above, the plaintiff's legal representatives provided documents to Counsel Assisting for the purpose of, and with the effect of, demonstrating that the propositions which were put to the plaintiff on those matters lacked a proper foundation and were not true.

162 Upon Senior Counsel for Mr Hartcher admonishing Counsel Assisting in this respect (incorrectly attributed in transcript to Senior Counsel for the plaintiff), Counsel Assisting responded "What is wrong with you? You really are, I'm sick —" (T6976).

163 Counsel Assisting disingenuously purported to apologise, and immediately proceeded to state:

"I was merely commenting on the fact that I have had to put up with constant chirping from this fellow, I've really quite had it with him." (T6976)

164 The Commissioner made no response to this exchange other than "I didn't hear it" and did not admonish Counsel Assisting for his remarks. A fair-minded observer might reasonably conclude that the Commissioner was indulging Counsel Assisting in his intemperate remarks and seeking to accommodate his pursuit of a preconceived agenda to make adverse findings in relation to the plaintiff and others, and otherwise to damage their reputations.

***Other conduct towards witnesses***

165 Counsel Assisting repeatedly threatened witnesses, with imprisonment in connection with the evidence they gave. The witnesses concerned included:

- a. Mr Osborne, on 30 April 2014;
- b. Mr Gunasinghe, on 1 May 2014;
- c. Mr Williams, on 2 May 2014; and
- d. The plaintiff, on 14 August 2014.

***Appearance of a personal interest in the public inquiry***

166 In an interview with the Australian Financial Review, excerpts of which were published by that publication on 25 July 2014, Counsel Assisting posed for a photograph in which he was shown seated in the corner of a boxing ring, accompanying an article describing him as Counsel Assisting the Commission on an ongoing basis including in Operation Spicer.

167 A fair-minded observer might reasonably conclude that:

- a. Counsel Assisting was promoting himself publicly as a hero, and thereby publicly demonizing the persons against whom adverse findings may be made in Operation Spicer;
- b. Counsel Assisting had a personal interest in the outcome of Operation Spicer;
- c. Counsel Assisting was consciously adopting an aggressive or pugilistic approach to his role in Operation Spicer;
- d. Counsel Assisting considered himself not to be bound by the NSW Barristers Rules in relation to his conduct in the Operation Spicer public inquiry;
- e. The Commissioner was aware of and condoned Counsel Assisting's conduct in posing for the photograph, and was aware of and condoned the apparent objectives of so posing and participating in the interview.

***Conclusions with respect to the role of Counsel Assisting***

168 In contrast to the extensive latitude provided by the Commissioner to Counsel Assisting in respect of the conduct described above, on only two occasions in the first 17 days of public hearing in Operation Spicer did the Commissioner exercise overt restraint upon the conduct of Counsel Assisting (on 19 and 20 May 2014).

- 169 A fair-minded observer might reasonably conclude, by reference to the conduct described at paragraphs 91 to 165 above, that the Commissioner:
- a. condoned and encouraged conduct of Counsel Assisting which she did not condone or encourage on the part of other legal practitioners representing interested persons;
  - b. considered that advocates representing witnesses and persons of interest ought rightly to be confined to a much more limited role than Counsel Assisting;
  - c. considered that any opportunity to be heard, by way of submissions or questioning of witnesses, which is provided to witnesses or persons of interest should be provided perfunctorily and disingenuously;
  - d. considered that it was proper and desirable for the Commission in its public hearings to be seen to be causing pain and harm to witnesses appearing before it; and
  - e. considered that it was proper and desirable to "trap" witnesses, irrespective of whether the witness has had fair notice of all relevant evidence.

**Other aspects of persistent and apparently wilful want of procedural fairness**

***Denial of applicability of the obligations of Counsel Assisting under Barristers' Rules***

- 170 On 3 September 2014, the Commissioner asserted incorrectly that rules 82, 84, 85 and 94 of the New South Wales Barristers' Rules as then in force, and binding on all barristers throughout New South Wales under s 711(1) of the *Legal Profession Act 2004* (NSW) as then in force, were inapplicable to the conduct of Counsel Assisting in the public inquiry before the Commission.
- 171 It is to be inferred that the Commissioner conducted the whole of the Operation Spicer public inquiry on the erroneous basis that the NSW Barristers' Rules were inapplicable to the conduct of Counsel Assisting in that public inquiry.
- 172 Accordingly, the Commissioner persistently failed to require of Counsel Assisting conformity with those rules in respect of the conduct described at paragraphs 91 to 169 above, and a fair-minded observer might reasonably conclude that the Commissioner condoned and encouraged that conduct.

***Unfair provision of access to documents and scheduling of witnesses' appearances***

- 173 The Commission, whether or not by the agency or with the assistance of either the Commissioner or Counsel Assisting, conducted the public inquiry in a manner which was, in respects other than those described above, procedurally unfair, as set out in paragraphs 174 to 213 and 216 to 219 below.
- 174 Such procedural unfairness flowed in particular from the apparently calculated denial of an opportunity for interested persons and their legal representatives effectively to prepare their submissions on complex matters of fact by way of the timely review of voluminous evidence, prior to taking up such perfunctory opportunities to be heard as the Commission purported to provide.
- 175 On 23 April 2014 a large quantity (about 14 lever-arch folders) of documentary material was made available on the Commission's electronic system for access to evidence by interested persons (the "restricted website"), but the Commission failed to provide any notice to such persons or their legal representatives, notwithstanding that the material was made available with only one business day before the public inquiry commenced.
- 176 On 28 and 29 April 2014 a further substantial quantity of material (eight written statements of evidence) was made available on the restricted website without any notice to interested persons or their legal representatives, notwithstanding that the material was made available on days on which the public inquiry was ongoing.

- 177 On 30 April 2014 Counsel Assisting tendered evidence in a volume in excess of 150 pages, which material had not been made available on the restricted website or at all until the time of tender, and no notice had been provided at all about of any intention to tender that material.
- 178 On 30 April 2014 a further substantial quantity of material (five written statements of evidence) was made available on the restricted website without any notice to interested persons or their legal representatives, notwithstanding that the material was made available on days on which the public inquiry was ongoing.
- 179 In the course of a complaint by counsel for one of the interested persons concerning the matters described at paragraph 178 above, Counsel Assisting repeatedly interrupted to divert attention to another matter, and the Commissioner failed to admonish or distance herself from that interruption by Counsel Assisting.
- 180 In further response to complaint about the abovementioned matters the Commissioner asserted that:
- "[T]hese inquiries operate on a basis that doesn't necessarily accord with the way adversarial proceedings are conducted. Questions of fairness can only be met by asking the witness to be recalled. Developments happen on the run." (T2838)
- 181 The documents which had been made available that day had, on their face, been in existence and in the possession of the Commission for between five and eight weeks.
- 182 In answer to this complaint, Counsel Assisting asserted that "there is actually no obligation whatsoever that we provide even one document before [the inquiry] starts" (T2838).
- 183 Upon an attempt being made to respond to that submission by Counsel Assisting, Counsel Assisting interrupted the first sentence of the intended answer with "No, answer my question" (T2838).
- 184 The Commissioner agreed with the submission of Counsel Assisting, and contrasted the Commission's inquiry procedures with adversarial litigation "where notions of procedural fairness are more commonly invoked" (T2839).
- 185 A fair-minded observer might reasonably think the Commissioner had failed to think through what she was required to do with respect to the provision of procedural fairness to persons interested in the subject-matter of the public inquiry.

- 186 On 8 May 2015, when Senior Counsel for two interested persons (Mr Hartcher and Mr Webber) sought to defer the appearance of those persons as witnesses before the Commission, the Commissioner dismissed that application on the basis of written submissions only without providing further opportunity for oral address.
- 187 The Commissioner expressed the view that:
- "[The] touchstone [of procedural fairness] is the provision of an opportunity to be heard before an adverse finding is made against a person: Provided that opportunity is afforded it matters not that there is no advanced notice by way of particulars or supply of other material which might support an adverse finding." (T3747)
- 188 The Commissioner repeated such views at other times during the public inquiry in the course of rejecting applications for timely access to information and documents.
- 189 A fair-minded observer might reasonably think that the Commissioner:
- a. considered that all that needed to be provided was an opportunity to be, in the most literal sense, heard, irrespective of whether the response which is provided is an adequately informed or prepared response; and
  - b. had already decided that "an adverse finding" would be "made against a person" who was provided with such an opportunity.
- 190 On 8 May 2014, Counsel Assisting tendered a record of interview of a witness, Mr Stevens, which document had not been made available at the time when Mr Stevens gave evidence on 1 May 2014.
- 191 On 9 May 2014, upon the matter described at paragraph 190 above being raised by Senior Counsel for Mr Hartcher, Counsel Assisting stated "I don't accept that's accurate" and the Commissioner stated "It might have been ... an oversight on your part, Mr Henskens" (T3879).
- 192 Neither the Commissioner nor Counsel Assisting indicated any willingness to accept the possibility that such unfairness had occurred, and the Commissioner concluded "All right. You have it now" (T3879).
- 193 A fair-minded observer might reasonably conclude from the conduct of the Commissioner and Counsel Assisting described above that the Commissioner, and/or Counsel Assisting with the tacit agreement and encouragement of the Commissioner, was willing to conduct the public inquiry in a manner which was persistently procedurally unfair to persons who may be the subject of adverse

findings by the Commission, and to make such findings in spite of that persistent unfairness.

***Access to full recording of search of Mr Hartcher's office repeatedly frustrated***

- 194 On 19 May 2014 Counsel Assisting put an excerpt from a video recording to a witness (Mr Hartcher) and subsequently tendered as Exhibit S96 "the whole of the DVD [containing the video recording] not just the excerpt".
- 195 Given that Exhibit S96 had not previously been made available to interested persons, Counsel Assisting agreed to make available copies of that document at the end of the day's hearing, but the Commission did not do so.
- 196 On 20 May 2014, notwithstanding that the whole recording had already been tendered, Counsel Assisting stated:
- "I'm just going to tender an excerpt [from the video recording]" (T4666).
- 197 On the issue being raised by Senior Counsel for Mr Hartcher, the Commissioner stated that she had believed that only the excerpt had been tendered.
- 198 Following reference to transcript the Commissioner encouraged Counsel Assisting to make the whole video available.
- 199 Notwithstanding his initial agreement to do so, Counsel Assisting also sought to suggest that Mr Hartcher's Senior Counsel had to be "putting" a "positive case" in order to justify access to the whole video.
- 200 The Commissioner subsequently adopted that proposition:
- "unless you can explain to me a positive case in respect of the need to look at that video before you go any further then I'm struggling to understand the relevance of that to your client's case" (T4671).
- 201 During the luncheon adjournment that day a DVD was provided which did not contain a full recording of the relevant events.
- 202 When that issue was raised by Senior Counsel for Mr Hartcher, the Commissioner again resisted the notion:
- "unless you have instructions to put a positive case that the documents shown to the witness were not in the blue folder ... otherwise there is no point" (T4735).
- 203 The partial recording had also shown relevant events prior to the excerpt which was shown to Mr Hartcher, such that the proposition put to Mr Hartcher as to where the "blue folder" was found was inaccurate.

204 A fair-minded observer might reasonably conclude that, by the conduct described above, the Commissioner was indulging the repeated reluctance by Counsel Assisting and Commission staff to make the full recording available, and was unwilling to allow interested persons full access to material required for the proper examination of witnesses and which was potentially unfavourable to the case theory already determined and preferred by the Commission.

***Questions about privileged matters put to Ms Ficarra MLC while unrepresented and without advice as to her rights with respect to privilege***

205 On 8 May 2014, during questioning of Ms Ficarra MLC, while the witness did not have a legal representative present, Counsel Assisting asked questions which elicited privileged evidence from the witness (T3735-3736).

206 In the absence of a legal representative Counsel Assisting and the Commissioner ought fairly to have advised the witness of her rights with respect to legal professional privilege and waiver under s 37(5) of the ICAC Act, but did not do so.

207 A fair-minded observer might reasonably conclude from the Commissioner's failure to warn the witness as to her rights with respect to privilege that the Commissioner was willing to countenance making adverse findings without regard to the substantive rights of witnesses and in circumstances in which such findings might not have been able to be made had those rights been asserted.

***Questions put to the plaintiff without notice and/or beyond the scope of Operation Spicer***

208 On 14 August 2014, Counsel Assisting questioned the plaintiff in relation to matters (being the source of funds for electioneering material used by another candidate for the Newcastle City Council in the local government election of 2012: T5342-5344) which were not within the general scope of Operation Spicer or the nature of the allegations as disclosed by the Commission prior to that questioning, and in particular by Counsel Assisting during his opening address.

209 Neither the Commission nor Counsel Assisting gave any notice that such questions were to be asked.

210 Propositions which were put to the plaintiff during the aforementioned questioning were incorrect, and such was foreshadowed to the Commissioner in submissions in the public inquiry.

211 There is no public record of the documentary material provided on behalf of the plaintiff having been formally admitted into evidence by the Commissioner,

notwithstanding agreement of Counsel Assisting to do so, or having been made publicly available as an exhibit in the public inquiry.

- 212 The Commission has not at any time demonstrated a proper factual basis for those propositions.
- 213 A fair-minded observer might reasonably conclude that, by the aforementioned conduct, the Commissioner and Counsel Assisting sought to surprise the plaintiff, expose him to unfair or adverse publicity and to make adverse findings against him about matters which he had not had a proper opportunity to consider or respond to.
- 214 On 29 July 2014, Counsel Assisting stated, during a private meeting with among others Mr Tim Owen (a witness in Operation Spicer), that:  
"We want Grugeon, Hartcher, McCloy and Gallacher, not you".
- 215 A fair-minded observer might reasonably conclude that, by this statement, which was made prior to the conclusion of public hearings in Operation Spicer, Counsel Assisting implied that the Commission generally ("we"), had a predetermined objective which it was seeking to achieve, being adverse findings with respect to the named persons including the plaintiff, and that the aforementioned statement by Counsel Assisting represented an intention or desire held by the Commissioner.
- 216 The final written submissions put before the Commissioner by Counsel Assisting on 8 October 2014 effectively denied the plaintiff procedural fairness by reason of the general words and phrases in which they were expressed, in such a manner as to indicate an intentional lack of precision. The relevant submissions fail to articulate the elements of any criminal offence alleged to have been committed by the plaintiff or any other person, whether under statute or at common law, nor any of the elements which would need to be proved in order to establish that such conduct was corrupt conduct.
- 217 A fair-minded observer might reasonably conclude that, by means of the manner in which the written submissions of Counsel Assisting were drafted, Counsel Assisting sought to impose a disadvantage upon counsel for the plaintiff in answering the allegations made against him before the Commissioner.
- 218 The Commissioner has at no time required Counsel Assisting to file further submissions.
- 219 A fair-minded observer might reasonably conclude that the Commissioner is willing to countenance making findings against the plaintiff in circumstances in which the plaintiff has not had a fair opportunity to respond to allegations to that effect.

220 The procedural unfairness created by the conduct of both the Commissioner and Counsel Assisting described above was persistent and appeared wilful, such that a fair-minded observer might reasonably apprehend that such unfairness was calculated to work to the disadvantage of persons who were the target of adverse findings which the Commissioner already intended to make, was seeking to bolster at every opportunity, and was seeking to maximise publicity for.

**Apprehension of bias**

221 Owing to the cumulative effect of the circumstances described above, a fair-minded observer might reasonably apprehend that the Commissioner might not bring an impartial and unprejudiced mind to the resolution of the questions of what findings to make in and what action to take consequent upon Operation Spicer.

222 The Commissioner has been requested to disqualify herself from further participation in Operation Spicer by persons other than the plaintiff and has refused to do so.

223 By reason of the grounds stated above, the plaintiff is entitled to the relief sought herein.

**SIGNATURE OF LEGAL REPRESENTATIVE**

This summons does not require a certificate under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014*.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on record

Date of signature

8 September 2015

**NOTICE TO DEFENDANT**

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the plaintiff's costs of bringing these proceedings.

Before you can appear before the court you must file at the court an appearance in the approved form.

**HOW TO RESPOND**

**Please read this summons very carefully. If you have any trouble understanding it or require assistance on how to respond to the summons you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the summons from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

Court forms are available on the UCPR website at [www.lawlink.nsw.gov.au/ucpr](http://www.lawlink.nsw.gov.au/ucpr) or at any NSW court registry.

**REGISTRY ADDRESS**

Street address	Law Courts Building, 184 Phillip St, Sydney NSW
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	(02) 9230 8628

**PARTY DETAILS****PARTIES TO THE PROCEEDINGS****Plaintiff**

Jeffrey Raymond McCloy

**Defendants**

The Honourable Megan Latham, First  
 Defendant  
 Independent Commission Against  
 Corruption, Second Defendant

**FURTHER DETAILS ABOUT PLAINTIFF****Plaintiff**

Name	Jeffrey Raymond McCloy		
Address	Suite 1	Level 3	
[The filing party must give the party's address.]	426	King	Street
	NEWCASTLE	NSW	2300

#Frequent user identifier [include if the plaintiff is a registered frequent user]

[repeat the above information as required for the second and each additional plaintiff]

**Legal representative for plaintiff**

Name	Richard Pegg		
Practising certificate number	5107		
Firm	Toomey Pegg Lawyers		
#Contact solicitor	[include name of contact solicitor if different to solicitor on record]		
Address	Level 8		
	50	Carrington	Street
	SYDNEY	NSW	2000
DX address			
Telephone	(02) 8297 1000		
Fax	(02) 9262 1775		
Email	rpegg@toomeyegg.com.au		
Electronic service address	rpegg@toomeyegg.com.au		

**DETAILS ABOUT DEFENDANTS****First Defendant**

Name **The Honourable Megan Latham**  
Address **The Independent Commission Against Corruption**  
**Level 7, 255, Elizabeth Street**  
**SYDNEY NSW 2000**

**Second Defendant**

Name **The Independent Commission Against Corruption**  
Address **Level 7, 255, Elizabeth Street**  
**SYDNEY NSW 2000**