

I·C·A·C

INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES



**INVESTIGATION INTO
THE CONDUCT OF THE
COMMISSIONER OF THE NSW
STATE EMERGENCY SERVICE**

**ICAC REPORT
MAY 2014**

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Mr President
Madam Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the conduct of the Commissioner of the State Emergency Service.

The former Commissioner, the Hon David Ipp AO QC, presided at the public inquiry held in aid of the investigation.

The Commission's findings and recommendations are contained in the report.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely



The Hon Megan Latham
Commissioner

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Summary of investigation and results

On 14 May 2013, Murray Kear, Commissioner of the NSW State Emergency Service (SES), summarily dismissed Tara McCarthy from her position as an SES deputy commissioner. Commissioner Kear told Ms McCarthy that he had decided to dismiss her because he had lost trust and confidence in her. The following day, Ms McCarthy contacted the NSW Independent Commission Against Corruption (“the Commission”) and alleged that, amongst other things, she had been dismissed by Commissioner Kear following reports she had made to him that Steven Pearce, another SES deputy commissioner, may have engaged in corrupt conduct.

This investigation by the Commission focused on the manner in which Commissioner Kear dealt with Ms McCarthy in the light of allegations she raised in relation to the conduct and performance of Mr Pearce.

The Commission examined the following allegations, namely, whether:

1. Commissioner Kear took detrimental action against Ms McCarthy, including dismissing her from the position of deputy commissioner, in reprisal for Ms McCarthy making allegations that Mr Pearce had engaged in corrupt conduct
2. Commissioner Kear improperly showed favour to Mr Pearce by failing to appropriately investigate allegations made by Ms McCarthy that Mr Pearce had engaged in corrupt conduct
3. in relation to allegations 1 and 2, Commissioner Kear made false statements to, or attempted to, mislead an officer or officers of the Commission in the exercise of their functions under the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”)
4. Commissioner Kear failed to recognise, disclose and manage a conflict of interest arising out of his friendship with Mr Pearce in connection with the

hiring, managing, performance management and investigation of Mr Pearce and in connection with the dismissal of Ms McCarthy.

Results


A finding is made in chapter 2 of the report that Commissioner Kear engaged in corrupt conduct by deliberately failing to properly investigate allegations against Mr Pearce in relation to the entry into two contracts, the use of SES funds to purchase roof racks and electric brakes for his car, the obtaining of an SES-paid vehicle for an SES manager and the potential falsification of diary entries because of his friendship with Mr Pearce.

A finding is made in chapter 3 of the report that Commissioner Kear engaged in corrupt conduct by dismissing Ms McCarthy from her employment with the SES substantially in reprisal for her making allegations about the conduct of his friend, Mr Pearce. These included the allegations concerning the circumstances in which the SES had entered into two contracts, Mr Pearce’s misuse of SES funds to purchase roof racks and electric brakes for his car, the alleged misuse by Mr Pearce of his SES credit card, and the alleged fabrication of diary notes.

The Commission found that there was insufficient evidence to establish that Commissioner Kear had made false statements to or attempted to mislead Commission officers.

A statement is made that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (the DPP) with respect to the prosecution of Commissioner Kear for an offence under s 20 of the *Public Interest Disclosures Act 1994* of taking detrimental action against a person who has made a public interest disclosure.

The Commission is of the opinion that the minister for police and emergency services, who is responsible for the



SES, should give consideration to the taking of action against Commissioner Kear for disciplinary offences of misconduct with a view to his dismissal. The offences relate to his misconduct in terminating the employment of Ms McCarthy and deliberately failing to appropriately investigate allegations concerning Mr Pearce because of his friendship with Mr Pearce.

The Commission has not made any corruption prevention recommendations in this report. One of the major issues identified during the investigation was Commissioner Kear's failure to properly identify and manage the conflict of interest arising from his relationship with Mr Pearce. The identification and appropriate management of conflicts of interest are key anti-corruption issues and have been discussed in a number of previous Commission reports. Another major issue identified during the investigation was the failure to appreciate, or adhere to, the requirements of the *Public Interest Disclosures Act 1994*. One of the ways the Commission addresses these issues is through its corruption prevention workshops, which are delivered to agencies on request or following an investigation. Workshops are also held that are open to individual public officials. The NSW Ombudsman provides information, advice, assistance and training to public authorities on public interest disclosures and the operation of the *Public Interest Disclosures Act 1994*.

Recommendation that this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session.

Chapter 1: Background

This chapter sets out some background information about the investigation, Ms McCarthy and the SES.

How the investigation came about

This matter first came to the Commission's attention on 15 May 2013 when Ms McCarthy telephoned the Commission to report that Commissioner Kear had dismissed her from the position of the SES' deputy commissioner of corporate services on the previous day. Ms McCarthy told the Commission that, shortly after the commencement of her employment at the SES on 3 September 2012, she reported to Commissioner Kear an allegation that Mr Pearce had engaged in misconduct in relation to the awarding of two SES contracts. She said that she continued to report to Commissioner Kear other allegations of misconduct involving Mr Pearce. Ms McCarthy said that Commissioner Kear and Mr Pearce were friends and she suspected that, as a result of their friendship, Commissioner Kear had failed to conduct appropriate enquiries into the misconduct allegations she had brought to his attention.

Why the Commission investigated

One of the Commission's principal functions, as specified in s 13(1)(a) of the ICAC Act, is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

- (i) *corrupt conduct, or*
- (ii) *conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
- (iii) *conduct connected with corrupt conduct,*

may have occurred, may be occurring or may be about to occur.

The role of the Commission is explained in more detail in Appendix 1.

Ms McCarthy's report to the Commission raised concerns that Commissioner Kear had failed to adequately investigate allegations of misconduct involving Mr Pearce and had acted to the detriment of Ms McCarthy by dismissing her from the SES in reprisal for her making allegations of misconduct against Mr Pearce. The Commission considered it was important to establish whether:

- Ms McCarthy had reasonable grounds for reporting allegations of misconduct about Mr Pearce and, if so, whether Commissioner Kear dealt with those allegations appropriately or in a manner that improperly favoured Mr Pearce
- Commissioner Kear's decision to terminate Ms McCarthy's employment at the SES was done in reprisal for her making allegations of misconduct against Mr Pearce.

If Commissioner Kear failed to properly investigate allegations made by Ms McCarthy concerning Mr Pearce because of his friendship with Mr Pearce, his conduct would amount to corrupt conduct within the meaning of the ICAC Act. This is because such conduct on Commissioner Kear's part could constitute or involve the partial exercise of his official functions within the meaning of s 8(1)(b) of the ICAC Act. Such conduct could also constitute or involve a disciplinary offence within the meaning of s 9(1)(b) of the ICAC Act and reasonable grounds for dismissing, dispensing with the services of or otherwise terminating Commissioner Kear's services as commissioner of the SES within the meaning of s 9(1)(c) of the ICAC Act.

If Commissioner Kear dismissed Ms McCarthy from her position as an SES deputy commissioner substantially

in reprisal for her making allegations that Mr Pearce had engaged in misconduct, Commissioner Kear's conduct would amount to corrupt conduct within the meaning of the ICAC Act. This is because such conduct on Commissioner Kear's part could constitute or involve the partial exercise of his official functions within the meaning of s 8(1)(b) of the ICAC Act. For the purposes of s 9(1)(a) of the ICAC Act, such conduct could also constitute or involve the criminal offence of taking detrimental action against a person in reprisal for that person making a public interest disclosure contrary to s 20 of the *Public Interest Disclosures Act 1994*, a disciplinary offence within the meaning of s 9(1)(b) of the ICAC Act and reasonable grounds for dismissing, dispensing with the services of or otherwise terminating Commissioner Kear's services as commissioner of the SES within the meaning of s 9(1)(c) of the ICAC Act.

Other matters gave rise to concerns that Commissioner Kear had made false or misleading statements to the Commission for the purpose of deflecting any possible Commission investigation into Mr Pearce's conduct and Commissioner Kear's decision to dismiss Ms McCarthy from the SES.

During Ms McCarthy's initial complaint to the Commission on 15 May 2013 she referred to the fact that, on 16 October 2012, she reported to the Commission that Mr Pearce may have engaged in corrupt conduct in relation to the awarding of SES contracts. Section 11 of the ICAC Act imposes a duty on the principal officer of a public authority to report to the Commission any matter the person suspects on reasonable grounds concerns, or may concern, corrupt conduct. Ms McCarthy reported the matter to the Commission in the absence of Commissioner Kear, who was on leave at the time. On 29 October 2012, however, Commissioner Kear wrote to the Commission and advised that he had undertaken his own enquiries into the allegation reported by Ms McCarthy and had formed the view that Mr Pearce had not engaged in corrupt conduct. On the basis of this advice, the Commission decided not to investigate the matter.

On 17 May 2013, Commissioner Kear contacted the Commission by telephone and said that he anticipated that Ms McCarthy would complain to the Commission about her dismissal but that there was no substance to her allegations of impropriety.

In these circumstances, the Commission decided that it was in the public interest to conduct an investigation to establish whether corrupt conduct had occurred.

Conduct of the investigation

During the course of the investigation, the Commission:

- obtained documents from various sources by issuing 21 notices under s 22 of the ICAC Act requiring production of documents
- interviewed and/or took statements from a number of persons
- lawfully executed a search of SES premises and obtained various documents relevant to the investigation
- conducted eight compulsory examinations.

During the course of the investigation, the Commission obtained a statement from Ms McCarthy and she was required to give evidence at a compulsory examination. Evidence obtained from Ms McCarthy and the SES indicated that, between October 2012 and April 2013, she had reported to Commissioner Kear that Mr Pearce had:

- failed to correctly supervise Kevin Pallier, an SES employee who was dismissed by Commissioner Kear for misconduct
- potentially falsified evidence that was relevant to unfair dismissal proceedings brought by Mr Pallier before the Industrial Relations Commission
- used his corporate credit card for non-approved expenditure
- failed to comply with relevant procurement guidelines in the awarding of two SES contracts
- was involved in offering an SES-paid motor vehicle, contrary to the relevant guidelines, in the course of recruiting a person to a senior position within the SES.

While the Commission did not set out to establish the truth of the allegations concerning Mr Pearce, the evidence obtained by the Commission suggested that Ms McCarthy had a proper basis for reporting these matters to Commissioner Kear.

Commissioner Kear and Mr Pearce were required to give evidence at compulsory examinations. Mr Pearce acknowledged in his evidence that since 2006 he and Commissioner Kear were "very close mates". Commissioner Kear said that they were friends. The Commission, however, was unable to locate any SES records indicating that Commissioner Kear had disclosed his friendship with Mr Pearce in the course of hiring him as an SES deputy commissioner or investigating the allegations that Mr Pearce had engaged in misconduct.

Commissioner Kear told the Commission that he believed that some of the conduct engaged in by Mr Pearce that gave rise to the allegations of misconduct resulted from mistakes made by Mr Pearce and did not constitute corrupt conduct. The evidence, however, indicated that Commissioner Kear had failed to undertake independent or appropriate enquiries into many of the allegations of misconduct. This suggested that Commissioner Kear's view that the conduct of Mr Pearce was explicable on the basis that he had made mistakes was not properly based, unduly favourable to Mr Pearce and was influenced by his friendship with him.

The public inquiry

The Commission reviewed the information that had been gathered during the investigation and the evidence given at the compulsory examinations. After taking into account the matters set out in s 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry.

The Commission also had regard to the following considerations in determining that it was in the public interest to hold a public inquiry:

- the allegations were serious
- there was evidence that supported the allegations
- the public interest in exposing the relevant conduct was not outweighed by any public interest in preserving the privacy of the persons concerned.

The public inquiry was conducted over four days, commencing on 3 December 2013. The Hon David Ipp AO QC, Commissioner, presided at the inquiry. Michael Fordham SC and Callan O'Neill acted as Counsel Assisting the Commission. Evidence was taken from nine witnesses.

At the conclusion of the public inquiry, Counsel Assisting prepared written submissions setting out the evidence and the findings and recommendations the Commission could make based on the evidence. These submissions were provided to all relevant parties and submissions were invited in response. All the submissions received in response have been taken into account in preparing the report.

The SES

The NSW SES is an emergency and rescue service made up almost entirely of volunteers, with 10,000 members in

229 units located throughout NSW. The SES sits within the portfolio of the minister for police and emergency services.

Founded in 1955 (but subsumed by Civil Defence shortly after until 1989), the SES and its members are well recognised in the community, in particular by their distinctive orange overalls. The SES' reputation was built on the hard and selfless work of volunteers who gave (and continue to give) freely of their time to assist their communities. In addition to over 10,000 volunteer members, the SES employs approximately 329 full-time or part-time staff. The SES' headquarters is in Wollongong, where the commissioner and his staff are located.

The SES is the lead agency for floods, storms and tsunami, as specified by the *State Emergency and Rescue Management Act 1989*. It also assists the NSW Police, the Ambulance Service of NSW and various other state bodies.

The SES' powers are set out in the *State Emergency Services Act 1989*. Relevantly for the purposes of this inquiry, the SES consists of two major divisions, each overseen by its own deputy commissioner. They are:

- Corporate Services and Planning – a division set up for the management of the SES, its finance and logistics, its marketing and similar activities
- Operations – a division that manages the SES response in the field.

Both deputy commissioners report to the commissioner who, in turn, reports to the minister for police and emergency services.

Commissioner Kear, as a chief executive officer of a NSW public sector agency, had delegation to hire and fire senior executives.

Tara McCarthy

Ms McCarthy had a significant background in the public sector having worked at, amongst other places, the WorkCover Authority.

Commissioner Kear appointed Ms McCarthy to the role of deputy commissioner of corporate services. She commenced her employment on 2 September 2012.

Sometime prior to the appointment of Ms McCarthy, it was resolved to create two deputy commissioners and to split their roles. Initially, Commissioner Kear employed Dieter Gescke as deputy commissioner of operations, with Mr Pearce as deputy commissioner of corporate services.

However, in mid-2012 Mr Gescke retired, leaving his position vacant. Mr Pearce expressed some interest in the operational role.

After Mr Gescke resigned, both Mr Pearce and Ms McCarthy were considered for each of the deputy commissioner roles.

Ms McCarthy was offered the role of deputy commissioner of corporate services. Mr Pearce was laterally transferred into the role of deputy commissioner of operations.

Ms McCarthy's key tasks were set out in a performance agreement dated 15 November 2012 and signed by Commissioner Kear. Some of the terms of her agreement were to:

- by 2013, undertake a review of all current procurement contracts to ensure 100% legislative compliance
- recast existing budget allocations to achieve corporate overtime savings based on increased governance frameworks, ensuring overtime is pre-approved and directed and paid in accordance with award conditions
- achieve budget savings through the implementation of the correct payment of excess travel allowances
- decrease the agency's annual leave liability by implementing the award provisions for "suspension of flex and monthly reporting at SEG [Senior Executive Group] of annual leave management plans for officers with credits in excess of 35 days".

Ms McCarthy's contract was terminated by Commissioner Kear on 14 May 2013, after approximately nine months

of active service. In his letter to Ms McCarthy, Commissioner Kear stated that:

...the employer of an executive officer may remove the executive officer from an executive position at any time for any or no reason and without notice.

The reason being that you have lost my confidence and trust.

Ms McCarthy was then escorted from the SES.

The circumstances leading to her dismissal and the reasons for it are examined in the following chapters of this report.

Chapter 2: Matters raised by Ms McCarthy

This chapter examines whether:

- Ms McCarthy had grounds for raising concerns that Mr Pearce had engaged in corrupt conduct
- Commissioner Kear improperly showed favour to Mr Pearce by failing to appropriately investigate the allegations raised by Ms McCarthy.

The Commission accepts that Ms McCarthy had grounds for raising concerns in relation to the conduct of Mr Pearce.

To reach that finding, it was unnecessary for the Commission to find that Mr Pearce or any other person in any way actually engaged in corrupt conduct. Rather, once the Commission was satisfied that grounds for raising the concerns existed, the focus of the inquiry then shifted to consider how Commissioner Kear dealt with those concerns.

For the reasons set out below, the Commission also accepts that Commissioner Kear improperly showed favour to Mr Pearce by failing to investigate allegations raised by Ms McCarthy. That impropriety breached the *SES Code of Conduct and Ethics* guidelines and constituted corrupt conduct by demonstrating the partial exercise of Commissioner Kear's official functions.

Contracts

One of Ms McCarthy's principal tasks during her employment was to undertake a review of all (then) current procurement contracts to ensure 100% legislative compliance by 2013.

On or about 10 October 2012, during her review of a number of contracts to which the SES was a party, Ms McCarthy formed the view that two existing consultancies under her portfolio were failing to deliver

what was required. Those consultancies or agreements were with:

1. Karoshi Pty Limited ("Karoshi")
2. and Performance Drivers.

Ms McCarthy's attention was particularly drawn to the Karoshi contract because of concerns she had that the consultant was performing what she described as "fairly low-level work".

When Ms McCarthy went to terminate the Karoshi agreement, she realised it was not in the standard NSW government contract format. Both the Karoshi and Performance Drivers contracts were non-compliant with standard government contracts. They both contained termination clauses that operated to the disadvantage of the SES by locking it into extended termination notice periods. Ms McCarthy also realised that, having regard to the value of both contracts, appropriate procurement guidelines relating to tendering and the obtaining of quotes did not appear to have been followed.

Mr Pearce conceded to the Commission that he was intimately involved in the entering into both contracts on behalf of the SES. Mr Pearce also conceded that both contracts exceeded the amount for which the SES could contract without a competitive procurement process. Mr Pearce informed the Commission that he neither checked the requisite procurement guidelines before entering into either contract on behalf of the SES nor conducted a competitive procurement process. In making these concessions, Mr Pearce made admissions against his own interest and the Commission accepts his evidence in this regard.

Mr Pearce's evidence to the Commission was that the wording for the Karoshi contract first originated from Frank Eggert, the principal of Karoshi. Mr Pearce then

provided SES badging and logos to Mr Eggert so that the documents would look like SES documents.

Mr Pearce relied solely on Mr Eggert of Karoshi to satisfy himself that the contracts were appropriate. Mr Pearce correctly conceded to the Commission that the process undertaken by him, which led to the SES entering into the Karoshi contract, and in particular his reliance solely on Mr Eggert, was inappropriate.

In making these findings, the Commission makes no adverse finding in relation to Karoshi, Performance Drivers or Mr Eggert. They were not represented at the public inquiry and were not the focus of the inquiry. Rather, the Commission looks to these circumstances to analyse whether or not Ms McCarthy had grounds to raise concerns and to evaluate Commissioner Kear's responses.

When she discovered these matters on or about 15 October 2012, Ms McCarthy telephoned Commissioner Kear, who was at that time holidaying in Tasmania. While the Commission heard slightly varying versions of the conversation, the common element was that Ms McCarthy gave Commissioner Kear a broad outline of what she had uncovered. Commissioner Kear then told Ms McCarthy to get legal advice.

A public interest disclosure is a disclosure by a public official of information about suspected misconduct in the public sector in accordance with the applicable requirements of the *Public Interest Disclosures Act 1994*. In the case of a disclosure by a public official to a principal officer of a public authority, s 14(1) of the *Public Interest Disclosures Act 1994* provides that:

To be protected by this Act, a disclosure by a public official to the principal officer of, or officer who constitutes, a public authority must be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration, serious and substantial waste of public money or government information contravention by the authority or any of its officers or by another public authority or any of its officers.

The Commission is satisfied that Ms McCarthy's disclosure to Commissioner Kear of information concerning Mr Pearce's conduct with respect to the two contracts constituted a public interest disclosure, as it was a disclosure by a public official to the principal officer of the SES that the public official honestly believed on reasonable grounds showed, or tended to show, corrupt conduct or maladministration.

A public official who makes a public interest disclosure in accordance with the *Public Interest Disclosures Act 1994* is protected from reprisals that might otherwise be inflicted on them because of their disclosure.

On 16 October 2012, Ms McCarthy reported the entry into the contracts by the SES and Mr Pearce to the Commission. Given the way in which the contracts had originated, namely by way of Mr Eggert providing the contract's wording and in the absence of a competitive procurement process, it is the Commission's view that there were reasonable grounds for Ms McCarthy to suspect that corruption may have been involved and that the referral by Ms McCarthy was appropriate.

On or about 29 October 2012, Commissioner Kear returned from leave and discussed the Karoshi and Performance Drivers contracts with Ms McCarthy. During that conversation, Commissioner Kear told Ms McCarthy that he was not going to take any action.

There was never any suggestion by Commissioner Kear that he had conducted any formal investigation into the circumstances in which the contracts came into being and Mr Pearce's involvement with those contracts. Nor did Commissioner Kear declare any conflict of interest due to his friendship with Mr Pearce that could hinder his ability to investigate the issue formally (a matter which is considered in further detail below).

The process that Commissioner Kear undertook was to compare the contracts to the requisite government standard and then rely on his trust of Mr Pearce. No independent party was engaged to investigate how it was the contracts had been entered into. No enquiry was made of the contracting parties. No independent person was appointed to analyse and/or investigate.

In his evidence, Commissioner Kear said that he spoke to both Les Tree and Brad Scutella, respectively chief executive and chief of staff of the Ministry for Police and Emergency Services, in relation to the contracts issue while he was holidaying in Tasmania. Commissioner Kear gave the following evidence to the Commission:

[Counsel Assisting]: Now in your conversations with Mr Tree and Mr Scutella from Tasmania you had no more information than it appeared that there are anomalies in the process for the engagement of these two consultants did you?

[Commissioner Kear]: ---That's right.

You had undertaken no investigation yourself because you were on holidays?

---No, I was in Tasmania [sic], that's right.

You had not looked at the contract?

---Not from Tasmania, no.

You had not spoken to the contracting parties?

---No.

You had not interviewed anybody than perhaps Mr Pearce to get his version of events?

---That's correct.

And when you spoke to Mr Tree and Mr Scutella, you weren't able to give them very much information, were you?

---Only the information that Miss McCarthy had given me by phone.

Now -- --?

---And I believe Miss McCarthy also gave them the information herself.

One of the things that was discussed between you and Mr Tree was whether or not the matter should be reported to ICAC wasn't it?

---That's right, I think I rang them up, I rang Mr Tree up a second time um, because in my first conversation I was under the impression that he had said that he hadn't said to Miss McCarthy to report to ICAC.

Mr Tree advised that the matter should be reported to ICAC didn't he?

---In the second conversation he indicated something along the lines of Miss McCarthy if she thought it was right to do so.

At no stage did Mr Tree offer an opinion as to whether or not Mr Pearce's conduct was corrupt or not, did he?

---It was my understanding from the conversation that he had in fact um, inferred that it wasn't corruption.

...

At no stage did Mr Tree say to you that Mr Pearce was not corrupt in relation to these contracts, did he?

---My recollection of the discussion was that he had in fact said that it didn't appear to be corruption. I think I asked him a question something like, these two issues, does that sound like it could be corruption to you? That was my recollection of the discussion.

Both Mr Tree and Mr Scutella gave evidence to the Commission. Mr Tree's evidence in relation to the conversation he had with Commissioner Kear was as follows:

[Counsel Assisting]: Was there any discussion about whether or not the matters should be referred to ICAC?

[Mr Tree]: ---My recollection is that I gave Mr Kear the same advice that he should report the matter or ensure the matter was reported.

During the course of that conversation did you ever say anything to Mr Kear to the effect that you did not consider DC Pearce's conduct to be corrupt conduct?

---That, I don't recall saying that at all.

There's a difference between I do not recall and I did not say it

---Right

Sitting here today ... did you say to Mr Kear that you did not consider DC Pearce's conduct to be corrupt conduct?

---No.

Mr Scutella's evidence was as follows:

[Counsel Assisting]: And at that stage follow[ing] the initial phone call with Mr Kear and specifically in relation to the conduct of Mr Pearce did you ever say to Mr Kear that you did not consider DC Pearce is, had engaged in corrupt conduct?

[Mr Scutella]: ---No sir, I had no opinion.

Based on their evidence, neither Mr Tree nor Mr Scutella was possessed of sufficient information to make an assessment of corrupt conduct at the time of the notification and did not do so. Both Mr Tree and Mr Scutella gave their evidence in a clear and cogent manner. Both testified that they had not formed any opinion in relation to Mr Pearce's conduct such that they could provide any useful comment to Commissioner Kear. The manner in which the evidence was expressed by all three witnesses, and the hesitation on the part of Commissioner Kear, leads the Commission to conclude that the evidence of Mr Tree and Mr Scutella is to be preferred to that of Commissioner Kear.

Commissioner Kear was in the same position as Mr Tree and Mr Scutella. He was not in possession of enough information to be able to form any reasonably reliable opinion in relation to corrupt conduct. He, nevertheless, formed the view that no corrupt conduct was involved. By his own admission, he did so based solely on his trust of Mr Pearce.

Commissioner Kear's approach of placing trust in a person he described as a "mate", without undertaking any objective enquiry, is materially inconsistent with the notion of unbiased, objective decision-making. The entry into the contracts resulted in state funds being wasted. There was no independent assessment as to whether any element of corruption was involved, despite Ms McCarthy requesting an investigation. Contrary to the submission made by counsel for Commissioner Kear, this conduct on Commissioner Kear's part fell so far short of the standards required of him that it gives rise to a strong inference that it was conduct that involved a partial exercise of Commissioner Kear's official function.

Both contracts were cancelled. The Karoshi contract required a termination payment. Mr Pearce was placed on a performance management plan. As is discussed more fully below, that performance management plan contained no real plan for performance review. In fact, Mr Pearce was later given a pay increase. These matters reinforce the inference that Commissioner Kear, being motivated by bias in favour of Mr Pearce, wished to take steps to exculpate him.

After Ms McCarthy had reported to the Commission the entry into the contracts by the SES and Mr Pearce, the Commission commenced examining the issues she had raised. By letter dated 29 October 2012, Commissioner Kear informed the Commission that there was nothing for it to consider.

Commissioner Kear's conduct in representing to the Commission that there was no basis to suspect that

Mr Pearce had engaged in corrupt conduct was the subject of the allegation that Commissioner Kear had sought to mislead a Commission officer. Commissioner Kear clearly allowed his mateship with Mr Pearce to cloud his judgment in sending this letter but, in the absence of further evidence establishing that Commissioner Kear intended to mislead a Commission officer, the Commission is not satisfied that the allegation can be made out.

Corporate credit cards

In or about early November 2012, Mark Pride from the finance team within the SES provided Ms McCarthy with a reconciliation of SES spending that indicated that Mr Pearce had purchased roof racks for his vehicle on 20 November 2010 to the value of \$286. Mr Pearce admitted to the Commission that the roof racks were to carry his surfboards. He did not require the surfboards for work purposes.

Ms McCarthy's further investigations revealed that, on 13 September 2011, Mr Pearce had also invoiced the SES \$398 for the supply and installation of electric brakes for the towing of his camper trailer on his motor vehicle. This was clearly for personal use.

Ms McCarthy brought both of these matters to the attention of Commissioner Kear, indicating that they needed to be properly investigated.

The Commission is satisfied that Ms McCarthy's disclosure to Commissioner Kear of information concerning the alleged misuse of SES funds by Mr Pearce constituted a public interest disclosure, as it was a disclosure by a public official to the principal officer of the SES that the public official honestly believed on reasonable grounds showed, or tended to show, corrupt conduct.

The allegations that Mr Pearce had used SES funds to purchase roof racks to accommodate his surfboards and electric brakes for his motor vehicle were serious and required an appropriate investigation by Commissioner Kear to determine whether Mr Pearce had deliberately and knowingly misused SES funds for his personal benefit.

Instead of causing such an investigation to be undertaken, Commissioner Kear informed Ms McCarthy that he intended to raise the matter directly with Mr Pearce. Having done so, Commissioner Kear told Ms McCarthy that Mr Pearce had explained his conduct on the basis that he had made a mistake and that he intended to repay the money. It is difficult to accept, however, that a senior employee in Mr Pearce's position could mistakenly use employer funds to purchase items for personal use. It is, on its face, a blatant wrongdoing. Nevertheless,

Commissioner Kear justified his lack of investigation by the fact that the money spent by the SES on the installation was to be repaid by Mr Pearce. On 8 November 2012, Mr Pearce repaid the money to the SES. The repayments were, respectively, two years and 14 months after each purchase. The repayments were made only after Ms McCarthy had discovered the irregularities.

In the circumstances, the failure to investigate the incurring of these expenses further was conduct on the part of Commissioner Kear that was partial to Mr Pearce.

On or about 25 March 2013, a further number of credit card statements for Mr Pearce were brought to Ms McCarthy. Ms McCarthy reviewed the expenses and determined, correctly, that many of them appeared to fall outside relevant SES expenditure guidelines. They included expenses incurred by Mr Pearce in relation to hotel accommodation in Sydney in places such as the Sofitel and the Hilton, which appeared to exceed the relevant SES limit on accommodation expenses, and the unauthorised purchase of alcohol, meals and morning and afternoon teas. Evidence at the public inquiry indicated that Commissioner Kear had provided Mr Pearce with verbal authorisation to incur the expenses related to morning and afternoon teas, provided they were business-related. It appears, however, that at the time Ms McCarthy undertook the review of Mr Pearce's expenses she was unaware of this arrangement. She determined that she would engage the Independent Audit Bureau (IAB) to conduct a desktop audit of Mr Pearce's credit card expenditure.

The IAB finished its audit on 5 April 2013. That audit concluded that there were 154 claims made by Mr Pearce that required further investigation, with the potential for irregularities to exceed \$11,000.

On 22 April 2013, Ms McCarthy provided to Commissioner Kear a memorandum that contained details of the 154 claims made by Mr Pearce and a recommendation that a disciplinary investigation take place.

The Commission is satisfied that Ms McCarthy's disclosure to Commissioner Kear of this information constituted a public interest disclosure as it was a disclosure by a public official to the principal officer of the SES that the public official honestly believed on reasonable grounds showed, or tended to show, corrupt conduct.

Commissioner Kear did not undertake the disciplinary investigation recommended by Ms McCarthy. Counsel for Commissioner Kear pointed out that the IAB concluded that disciplinary action was not warranted against Mr Pearce and submitted that, in the circumstances,

Commissioner Kear could not be faulted in not taking any disciplinary action against Mr Pearce in regard to the 154 claims. There is force in this submission and the Commission makes no finding of corrupt conduct in relation to Commissioner Kear's failure to undertake any disciplinary investigation in regard to the 154 claims. Nevertheless, the Commission notes that the failure to take Mr Pearce's misuse of his credit card further is yet another decision on the part of Commissioner Kear that exculpated Mr Pearce and forms part of the general pattern of conduct on the part of Commissioner Kear that tended to overlook misconduct by Mr Pearce.

In light of the potential misuse uncovered, the Commission is satisfied that Ms McCarthy had a sound basis for making the disclosure to Commissioner Kear.

Kevin Pallier

In or about late September 2012, Ms McCarthy became concerned about overtime and motor vehicle usage by Mr Pallier, then director of finance, fleet and logistics. Up until the appointment of Ms McCarthy in August 2012, Mr Pearce had supervised Mr Pallier.

Upon discovering what she thought were anomalies, Ms McCarthy brought her concerns to the attention of Commissioner Kear, who suspended Mr Pallier pending a formal investigation. Helen Colbey, an investigator from the IAB, was engaged by Commissioner Kear to undertake an investigation into Mr Pallier. Commissioner Kear appointed Ms McCarthy to manage the investigation.

During the course of the investigation into Mr Pallier, Ms McCarthy became concerned about a number of matters involving Mr Pearce's supervision of Mr Pallier. Principally, those concerns related to Mr Pearce's approval of overtime on the part of Mr Pallier in the amount of nearly \$60,000 and flexible working arrangements relating to him. Ms McCarthy's concern was that Mr Pearce had failed to appropriately supervise Mr Pallier.

Mr Pallier told Ms Colbey that he was obliged to work the excessive overtime, as there was a shortage of staff and the work urgently needed to be done. He pointed out that Mr Pearce had authorised his claim for overtime. Mr Pearce did not seriously challenge Mr Pallier's claim during his evidence before the Commission and conceded that he had failed to appropriately manage Mr Pallier (in the sense that he should not have allowed Mr Pallier to work overtime to that extent). The Commission, therefore, accepts that Ms McCarthy was correct to be concerned.

Mr Pallier was found to have engaged in workplace misconduct. In or about January 2013, Commissioner

Kear terminated Mr Pallier's employment with the SES. He was later reinstated at a lower grade (after commencing unfair dismissal proceedings).

The approach taken by Commissioner Kear towards Mr Pallier is to be differentiated from the performance review process put in place for Mr Pearce. Counsel for Commissioner Kear submitted that it was appropriate that Mr Pallier and Mr Pearce be treated differently because their actions demanded it. That submission has some force, nevertheless, their respective behaviour was not so different that one's employment deserved to be terminated while the other was barely given an admonishment. The vast difference between the measures demonstrates the partial treatment shown to Mr Pearce by Commissioner Kear.

Phil Schafer

On or about 21 October 2012, Ms McCarthy met with Phil Schafer, manager of marketing and sponsorship at the SES. During this meeting, they discussed the fact that Mr Schafer was not paying for the private use of his corporate motor vehicle.

Mr Pearce had arranged with Mr Schafer that he would give him the private use of a motor vehicle in order to induce him to take the job that Mr Schafer had been offered with the SES. In order to do so, Mr Pearce arranged that the SES would use NRMA sponsorship monies to cover the cost of the vehicle. Ms McCarthy informed Commissioner Kear of these facts.

Mr Pearce sought to explain what had happened with Mr Schafer as a "miscommunication" between Mr Schafer and himself. Counsel for Commissioner Kear submitted that "Mr Pearce never approved the arrangement that Ms McCarthy brought to Mr Kear's attention". The Commission, however, accepts the evidence that supports the facts set out in the previous paragraph. The suggestion that there was a misunderstanding between Mr Schafer and Mr Pearce is difficult to understand. The fact is that Mr Schafer was given the private use of a motor vehicle and the SES bore the cost of that usage.

A few days later, Commissioner Kear informed Ms McCarthy that there was nothing to be concerned about and that he would not be conducting an investigation.

On 12 November 2012, Mr Pearce produced to Commissioner Kear a briefing note in which he appears to have investigated his own involvement in this issue. Mr Pearce recommended in the briefing note that any money owed by Mr Schafer in relation to his private use of the motor vehicle should be waived by Commissioner Kear

for various reasons, including the fact that there had been a "miscommunication" between Mr Schafer and himself. Commissioner Kear, again, simply accepted what Mr Pearce had put to him.

On 15 November 2012, Commissioner Kear waived the debt of Mr Schafer, owed to the SES, in relation to his car. As at the date of the waiver, Commissioner Kear had not ascertained the value of the waiver.

Commissioner Kear's action in allowing Mr Pearce to provide his own briefing note to justify a clear transgression is another instance of Commissioner Kear acting unusually to exculpate Mr Pearce from blame for what arguably was misconduct on his part. Commissioner Kear's actions in relation to Mr Pearce's provision of a car to Mr Schafer demonstrate Commissioner Kear's partial treatment of Mr Pearce.

Diary entries

Mr Pearce told the Commission that he had a number of concerns about the extent of overtime worked by Mr Pallier and counselled him about those matters.

During the process of gathering evidence for Mr Pallier's unfair dismissal proceedings, Mr Pearce was requested to provide any diary entries that supported his contention that he had counselled Mr Pallier in relation to the issues for which he was subsequently terminated. Rather than producing a written copy of his notes, Mr Pearce produced a typed version.

In March 2013, a mediation session was held as part of the unfair dismissal proceedings brought by Mr Pallier. On the morning of the mediation, Ms McCarthy, Lorna Calder (nee Grange), manager of human resources at the SES, and barrister Elaine Brus, who was briefed to appear for the SES in the unfair dismissal proceedings, met at a coffee shop in Wollongong. Ms McCarthy informed the Commission that, in a meeting before Ms Brus arrived, Ms Calder disclosed to her that she had some reservation about the authenticity of Mr Pearce's notes. Ms McCarthy alleges that Ms Calder told her that, in her opinion, the notes, possibly, were falsified.

In her evidence to the Commission, Ms Calder agreed that, while she did not recall using the word "falsify", she used a word similar to falsify.

Prior to the mediation, the three women had a conversation about the potential falsification of the diary entries.

Ms Brus gave evidence to the Commission in respect of that conversation. Ms Brus was an impressive witness and

her evidence was unequivocal. The following exchange occurred:

[Ms McGlinchey, counsel for Ms Calder]:

In relation to the use of that word "fabricated" is it possible that the context of the conversation was about the possibility of a fabrication?

...

[Ms Brus]:

---That's not my recollection of the context of the conversation.

Can you just expand on what you, what your recollection is of the context then?

---I was, I was stressing to both Ms Calder and Ms McCarthy that I believed that Mr Pearce was going to be central to this case if it were to run because his name and his role as Mr Pallier's manager was critical particularly given what I saw to be a major problem with the matter of the overtime and we would have to put Mr Pearce into the witness box. I recall that there was a look of I suppose dissatisfaction with that proposal from both Ms McCarthy and Ms [Calder] at that suggestion. I asked them both why ah, "Is that a problem?" I recall either one or both, I do not know which said, "It could well be." And there was some comment I believe by Ms McCarthy that Mr Pearce's management skill, management of Mr Pallier left a lot to be desired and I believe it was then or around about then that the comment was made about the fabrication of the diary notation, or notations.

[ICAC Commissioner]: *And Ms Brus, may I just ask you this. The, I'm not asking now about the conversation but your misgivings as to the strength of the SES's case against Mr Pallier ... my impression is that your misgivings were based on the fact that at least as regard to the overtime Mr Pearce had approved the overtime albeit late. Am I right in that?*

---That was certainly one of the key areas why I was concerned, yes.

In the circumstances, Ms McCarthy was justified in bringing the fabrication issue to the attention of Commissioner Kear. As Ms Brus said, the performance of Mr Pearce was to have significant ramifications in Mr Pallier's unfair dismissal case.

On 22 April 2013, Ms McCarthy provided to Commissioner Kear a memorandum setting out the information relayed to her by Ms Calder about the possible fabrication of the diary notes by Mr Pearce and recommended that a disciplinary investigation into the allegations be undertaken. The Commission is satisfied that the memorandum constituted a public interest disclosure by Ms McCarthy, as it was a disclosure by a public official to the principal officer of the SES that the public official honestly believed on reasonable grounds showed, or tended to show, corrupt conduct.

Commissioner Kear did not undertake an investigation beyond reviewing the handwritten notes and speaking to Ms Calder. Ms Calder told the Commission that, in producing her memorandum to Commissioner Kear about the event on 15 May 2013, she turned her mind only to the use of the *actual* word "falsify". She said that Commissioner Kear asked her only if she had used the word "falsify". He did not ask her about the context of the conversation.

Counsel for Commissioner Kear submitted that Ms Calder had told him that she did not use the word falsify and that this was enough to justify the limited enquiries undertaken by Commissioner Kear. The problem with that submission is that it fails to engage with the fact that Commissioner Kear was faced with conflicting versions of events but did not seek to investigate further and, in particular, did not speak to Ms Brus.

Ms McCarthy had reasonable grounds to raise the falsification of the notes. The manner in which Commissioner Kear then dealt with the allegation was inappropriate.

Favouritism and conflict of interest

Both Commissioner Kear and Mr Pearce were former officers of what is now known as Fire and Rescue NSW. The two had known each other from at least 2006.

In an email to Commissioner Kear, Mr Pearce describes him as "a very authentic mate and a good boss" and notes that those factors were "probably the two major reasons I left the fires that I love".

Commissioner Kear gave the Commission a statement in which he stated that he did not have a longstanding friendship with Mr Pearce. In his oral evidence, Commissioner Kear admitted that he and Mr Pearce had been friends and mates since 2008.

Commissioner Kear sat on the original interview panel when Mr Pearce first applied to join the SES. Commissioner Kear did not disclose a conflict of interest on that occasion.

Mr Pearce was not appointed at that time but was later appointed by Commissioner Kear from a reserve list that Commissioner Kear activated. Commissioner Kear disclosed no conflict of interest during that action.

During all the events that were the subject of the inquiry, where Commissioner Kear dealt with complaints made by Ms McCarthy about the conduct of Mr Pearce, Commissioner Kear failed to disclose the friendship between them.

There were a number of differences that emerged in the way that Commissioner Kear treated each of his deputies.

In two almost identical emails that Commissioner Kear sent to each of his deputies in relation to the apparent conflict between them, in the sign-off to Mr Pearce, Commissioner Kear used the words “Your boss and mate”. In the similar email to Ms McCarthy, Commissioner Kear simply signed it off without any such reference.

In Commissioner Kear’s notes that he wrote in preparation for a meeting with his two deputies, he set out numerous deficiencies of Mr Pearce including that he was “...trying to come to terms with knowing that Tara is not doing anything wrong / her actions in addressing the issues are exposing your deficiencies”.

The notes also state that Mr Pearce was to be “performance managed” and that Commissioner Kear would not “tolerate any repeats”. This sentiment, however, did not make its way into Mr Pearce’s performance management letter.

The performance management letter and alleged plan put in place by Commissioner Kear lacked substance and detail. It did not set “deliverables” or “targets” – language that the SES ordinarily used in its staff performance agreements. It provided no way of measuring how Mr Pearce was to “demonstrate to [Commissioner Kear] [Mr Pearce’s] effective performance management of [his] direct reports” in monthly meetings. It made no mention of the consequences of Mr Pearce failing to perform in the future. It was an entirely inadequate response to the situation.

After the performance management letter was sent to Mr Pearce, Commissioner Kear and Mr Pearce went camping together the following weekend and, over a month later, Mr Pearce was given a pay rise.

This approach is to be contrasted with that taken by Commissioner Kear when he suspended, and later dismissed, Mr Pallier. The approach can be further contrasted with the instant dismissal of Ms McCarthy.

During cross-examination, Commissioner Kear, who was trained in conflict management, could not articulate the concept of conflict of interest. Commissioner Kear admitted that he did not see investigating his “mate” as a conflict of interest, even in the face of the clear words of the SES *Code of Conduct and Ethics* policy to the contrary.

The SES *Code of Conduct and Ethics* policy relevantly provided:

5.6.1 Conflict of Interest

Conflicts of interest exist when it is likely that a member could be influenced, or could be perceived to be influenced, by a personal interest in carrying out their public duty. Conflicts of interest that lead to partial decision making may constitute corrupt conduct.

Examples of situations which might lead to conflict are:

- *Personal beliefs, attitudes, relationships or loyalties that influence a member’s impartiality or professionalism in their actions or decisions.*

...

Members who are making or influencing decisions must ensure that not only are they impartial and objective, but they must demonstrate that these decisions are impartial, transparent and objective.

Where a member of the SES becomes aware that their involvement in an issue or a decision may create a possible conflict of interest, or a perceived conflict of interest, they have an obligation to inform their Controller, Supervisor or Manager or the appropriate level of management at State Headquarters, without delay.

The SES *Code of Conduct and Ethics* policy required Commissioner Kear to be impartial and objective. It also required Commissioner Kear to demonstrate that he was being impartial and objective. He failed to comply with these requirements. Given the nature of his conflict of interest, he should have disqualified himself from dealing with the allegations made against Mr Pearce and should

have arranged for the allegations to be investigated impartially.

Counsel for Commissioner Kear submitted that Commissioner Kear did not believe that he was in a position of a conflict of interest and, therefore, did not intentionally breach the SES *Code of Conduct and Ethics* policy.

The SES *Code of Conduct and Ethics* policy is in place to prevent an actual or perceived conflict of interest. Intention is, therefore, but one aspect of ensuring that conflicts of interest do not arise. Commissioner Kear should have known he was in a position of conflict. It is not a high hurdle.

At no stage did Commissioner Kear identify, acknowledge or appropriately manage the clear conflict of interest that arose out of his relationship with Mr Pearce.

His failure to recognise the conflict of interest was indicative of a lack of impartiality in relation to dealing with Mr Pearce.

The Commission is satisfied that Commissioner Kear deliberately failed to properly investigate reasonably based allegations that Ms McCarthy made against Mr Pearce. Those allegations included the entry into the Karoshi and Performance Drivers contracts by Mr Pearce on behalf of the SES, Mr Pearce's inappropriate use of SES corporate credit cards to purchase his roof racks and electric brakes without appropriate authorisation, the involvement of Mr Pearce in obtaining an SES-paid vehicle for Mr Schafer, and potential falsification of diary entries by Mr Pearce in relation to the dismissal of Mr Pallier.

In addition, Commissioner Kear failed to appropriately performance manage Mr Pearce in relation to all of the above matters and in relation to his handling of the employment of Mr Pallier. These were all matters that Ms McCarthy had validly brought to his attention.

The Commission is satisfied that Commissioner Kear failed to discharge his duties in the manner described above because he was unduly influenced by his friendship with Mr Pearce and sought to exculpate him from any allegation of misconduct.

Corrupt conduct

The Commission's approach to making findings of corrupt conduct is set out in Appendix 2 to this report.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms

of s 8(1) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) of the ICAC Act.

In the case of subsection 9(1)(a), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

Commissioner Kear's conduct in deliberately failing to properly investigate allegations against Mr Pearce in relation to the entry into the Karoshi and Performance Drivers contracts, the use of SES funds to purchase roof racks and electric brakes, the obtaining of an SES-paid vehicle for Mr Schafer and the potential falsification of diary entries in relation to Mr Pallier because of his friendship with Mr Pearce is corrupt conduct.

This is because his conduct is conduct that adversely affected his honest or impartial exercise of his official functions within the meaning of s 8(1)(a) of the ICAC Act. His conduct could also constitute or involve the partial exercise of his official functions and therefore come within s 8(1)(b) of the ICAC Act. His conduct could also constitute or involve a breach of public trust and therefore come within s 8(1)(c) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the appropriate civil standard and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Commissioner Kear has committed a disciplinary offence, namely misconduct, and that his conduct could constitute or involve reasonable grounds for his dismissal.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74A(2) statement

In making a public report, the Commission is required by the provisions of s 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

- (a) obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence

-
- (b) the taking of action against the person for a specified disciplinary offence
 - (c) the taking of action against the person as a public official on specific grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An “affected” person is defined in s 74A(3) of the ICAC Act as a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of, or in connection with, the investigation.

In respect of the matters canvassed in this chapter, the Commission is satisfied that Commissioner Kear is an “affected” person.

Commissioner Kear gave his evidence subject to a declaration made pursuant to s 38 of the ICAC Act. Section 114A of the ICAC Act provides that evidence given to the Commission by a public official may be admitted and used in disciplinary proceedings against the public official, despite the evidence having been given under objection, where a finding has been made by the Commission in its report under s 74 of the ICAC Act that the public official has engaged in corrupt conduct. As such a finding is made in this chapter, it follows that Commissioner Kear’s evidence to the Commission can be admitted and used in disciplinary proceedings against him. There is also other available admissible evidence, including the evidence of Ms McCarthy and documentary evidence that would be available to a disciplinary body.

The Commission is of the opinion that the minister for police and emergency services should give consideration to the taking of action against Commissioner Kear for the disciplinary offence of misconduct in relation to his failure to properly investigate allegations made against Mr Pearce with a view to his dismissal.

Chapter 3: The termination of Deputy Commissioner McCarthy's employment

This chapter examines whether Commissioner Kear took detrimental action against Ms McCarthy by dismissing her from the position of deputy commissioner of corporate services in reprisal for her making allegations that Mr Pearce had engaged in corrupt conduct.

In her nine months as a deputy commissioner, Ms McCarthy accomplished a significant amount of change in the SES. It was in five key areas, however, that she attracted the attention of both Commissioner Kear and Mr Pearce. Those areas have been dealt with in the preceding chapter.

In addition to those issues, Ms McCarthy caused appropriate governance measures to be implemented at the SES. These measures altered SES employees' rights to overtime, use of motor vehicles, parking and travel.

Commissioner Kear acknowledged that Ms McCarthy satisfactorily discharged the tasks required of her under her performance agreement.

In the month prior to her dismissal, Ms McCarthy had, in an open forum, criticised Mr Pearce and the management abilities of Commissioner Kear in relation to his handling of Mr Pearce.

On or about 10 April 2013, Commissioner Kear and Ms McCarthy were present at a senior executive group team building meeting in Port Macquarie. During that meeting, Commissioner Kear raised the matter of the conflicts between Ms McCarthy and Mr Pearce in the context of a personality clash and a "values disconnect" that, he asserted, existed between them. Ms McCarthy responded that it was not a personality conflict but rather a matter of "honesty and integrity and professional competency". Commissioner Kear indicated to those persons present at the meeting that it was open to him to terminate either one or both of his deputy commissioners and that he intended to give the matter some thought

over the next few months. Ms McCarthy said that Commissioner Kear made a similar comment at a senior executive group meeting on 6 May 2013 but on that occasion prefaced his remarks by stating that "Tara has a misguided view of Steve Pearce", which he did not support.

In early May 2013, Ms McCarthy attended a leadership workshop in Manly. During the course of the workshop and in response to an invitation to express a view about Commissioner Kear's leadership, Ms McCarthy said that, in her view, Commissioner Kear "has difficulties making hard decisions when it involves people he knows". This statement was later relayed to Commissioner Kear, who was not present at the workshop.

On 8 May 2013, Commissioner Kear approached Graham Head, NSW Public Service Commissioner. Commissioner Kear and Mr Head had a discussion in relation to Ms McCarthy. Commissioner Kear enquired about the effects of s 77 of the *Public Sector Employment and Management Act 2002*, a provision concerning the dismissal of executive officers from public office. Mr Head informed Commissioner Kear of the limits of s 77 and, in particular, the need to afford procedural fairness in allowing the employee some time to respond to the notice, which is a minimum of 48 hours.

Mr Head further counselled Commissioner Kear about the delicate nature of what he was thinking of doing. In particular, Mr Head was appropriately concerned given the fact that public interest disclosure matters were involved. Commissioner Kear informed the Commission that he could not recall this advice.

It was suggested to Commissioner Kear by Mr Head that the NSW Ombudsman be contacted prior to any action being taken. The Ombudsman did not give oral evidence to the Commission, but Chris Wheeler, Deputy Ombudsman,

provided a statement to the Commission that confirmed that he did not speak with Commissioner Kear until after Ms McCarthy's employment was terminated.

On 14 May 2013, Commissioner Kear and Mark Morrow, an SES assistant commissioner, met with Ms McCarthy and terminated her employment with the SES. In his letter to Ms McCarthy, Commissioner Kear stated that:

...the employer of an executive officer may remove the executive officer from an executive position at any time for any or no reason and without notice.

The reason being that you have lost my confidence and trust.

Ms McCarthy was given no meaningful opportunity to offer a response to the decision to dismiss her. She was then escorted from SES premises.

Shortly after her termination, Ms McCarthy commenced unfair dismissal proceedings against her former employer, the SES. Those proceedings were later settled.

On 17 May 2013, Commissioner Kear contacted the Commission by telephone and said that he anticipated that Ms McCarthy would complain to the Commission about her dismissal but that there was no substance to her allegations of impropriety and no evidence to support her allegations that Mr Pearce had engaged in misconduct. These representations by Commissioner Kear became the subject of the second allegation that Commissioner Kear had sought to mislead a Commission officer. The Commission is not satisfied, however, that the allegation is proven in the absence of further evidence establishing that Commissioner Kear intended to mislead a Commission officer.

Commissioner Kear attempted to explain the reason for terminating Ms McCarthy to the Commission:

[Counsel Assisting]: It's the case isn't it that in the course of her tenure what Ms McCarthy had done was raise reports to firstly you, correct?

[Commissioner Kear]: ---Yes.

ICAC?

---Yes.

And refer matters to the IAB for the investigation of Mr Pearce?

---Yes.

That's right isn't it?

---Yes, and the Minister's office and the Ministry.

She had questioned his competence, that's right isn't it?

---Yes.

She had raised what you understand to be Public Interest Disclosures in relation to a number of these issues where she sought thorough investigation?

---I didn't know if they were Public Information [sic] Disclosures, she wrote me memos and she made some complaints about the contracts.

She wrote memos in which she suggested you take the matter further and conduct proper investigations pursuant to the relevant acts didn't she?

---Yeah, she recommended I take a disciplinary investigation into those issues.

She raised these issues into a man you regard as your mate, correct?

---She raised them in regards to Steve Pearce who I perceive as a mate, yes.

You regard as your mate, you don't perceive him as anything, he's your mate isn't he?

---Oh, he is, sorry, yes.

And she raised questions in relation to your competence?

---I don't know if she ever raised queries about my competence, certainly that I couldn't make decisions if that's what you're alluding to.

She made adverse comments about you in public didn't she?

---Yes.

And you sacked her in reprisal for doing those things and by that I mean reporting Mr Pearce, questioning you and criticising both Mr Pearce and you?

---They weren't the only reasons, no.

In his answer to the last question of this exchange, Commissioner Kear admitted that he terminated

Ms McCarthy's employment at least partly in reprisal for the matters put to him in that question.

Elsewhere in his evidence, Commissioner Kear told the Commission that he dismissed Ms McCarthy for the following reasons, namely, that she:

- lacked leadership skills in creating a high-performing team
- was a divisive member of the senior executive group
- was unable to resolve her conflict with Mr Pearce
- openly criticised him and other SES officers
- on occasions, provided him with inadequate advice.

The Commission does not accept that the reasons enumerated by Commissioner Kear were a factor in his decision to dismiss Ms McCarthy for the following reasons.

Commissioner Kear told the Commission that he spoke openly to Mr Pearce and Ms McCarthy about their poor performance and told both of them they were at risk of losing their jobs. But the evidence of Commissioner Kear never went as far as to suggest that he told Ms McCarthy she was at risk of termination for the reasons he advanced in his evidence at the public inquiry. The following exchange is noteworthy:

[ICAC Commissioner]: Did you ever warn Ms McCarthy that lest she changed in specific respects she was in jeopardy of losing her job?

[Commissioner Kear]: ---I informed both the Deputy Commissioners that they were both in risk of losing their jobs.

Yes but do you mind answering my question?

---I thought I did, Commissioner.

I asked you whether you had ever informed Ms McCarthy that for specific reasons she was in jeopardy of losing her job?

---Well they, those times when I spoke about the possibility of either Deputy Commissioner losing their job I was quite specific about the need to develop high performing teams ---

Are you saying that, in these arenas as you term them you warned

Ms McCarthy that she was in jeopardy of losing her job?

---I stated on a number of occasion[s], Commissioner, that either one or both of them could lose their job and when there was only two in the meeting ---

How long before you actually fired Ms McCarthy did you first say this to her?

---Um, it would have been many months.

Well, I note that this was never put to Ms McCarthy?

---Sorry, can you say that again?

It was never put to Ms McCarthy that you had warned her that unless she changed her behaviour she would lose her job?

---That's what I'm saying, Commissioner, that I did say to Ms McCarthy and Mr Pearce that there was a chance that either one of them or both of them could lose their job.

You said this to both of them several months before?

---Yes.

At no stage did Commissioner Kear warn Ms McCarthy that she was in jeopardy of losing her job for specific reasons, including lack of leadership, inadequate advice or for openly criticising him and other members of his executive team. Counsel for Commissioner Kear never suggested to Ms McCarthy that she was so warned. In answer to a question put to her by senior Counsel Assisting, Ms McCarthy said that at no stage did Commissioner Kear say to her that, if she failed to change her behaviour, she would be dismissed. The Commission accepts this evidence. Commissioner Kear never placed Ms McCarthy on any performance review or commenced any other form of disciplinary process based on his purported concerns about her conduct, about which he gave evidence at the public inquiry. When he dismissed Ms McCarthy, Commissioner Kear provided no explanation to her as to why he had lost confidence in her.

Commissioner Kear was well-versed in the disciplinary process leading up to the termination of an employee as evidenced by his suspension, investigation and dismissal of Mr Pallier. That Commissioner Kear failed to notify Ms McCarthy of his purported concerns about her

conduct, or utilise appropriate procedures to discipline her, casts considerable doubt on whether these purported concerns were the actual reasons for dismissing her.

Counsel for Commissioner Kear submitted that Commissioner Kear explained the basis of his decision to dismiss Ms McCarthy in the course of making statements to various persons prior to and after Ms McCarthy's dismissal. These statements were to the effect that the relationship between Mr Pearce and Ms McCarthy was "toxic" and incapable of resolution by reason of the fact that Ms McCarthy was unable to deal with Commissioner Kear's decisions with regard to the allegations of misconduct she had made against Mr Pearce. It was suggested by Commissioner Kear that Ms McCarthy's resentment about his decisions concerning these matters manifested itself in her public criticisms of him, Mr Pearce and other SES officers. Counsel for Commissioner Kear submitted that Ms McCarthy was dismissed for these reasons and not as a reprisal for making allegations that Mr Pearce had engaged in misconduct.

The Commission does not accept this submission. At the Port Macquarie meeting in April 2013, Commissioner Kear publicly stated that he was considering the dismissal of Ms McCarthy or Mr Pearce or both as a way of resolving the conflict of personality and "values disconnect" that had affected their relationship. But references by Commissioner Kear to his deputies experiencing relationship problems were misleading. The truth of the matter is that Ms McCarthy had exposed issues about Mr Pearce's integrity and competence that required investigation. In the Commission's view, Commissioner Kear disingenuously framed the issue as a personality conflict and "values disconnect". He did so as a means of diverting attention from the allegations of misconduct raised by Ms McCarthy about Mr Pearce and from Ms McCarthy's concern that his response to the allegations was inadequate. This was a further example of Commissioner Kear's general attempt to exculpate his friend, Mr Pearce, from allegations of misconduct.

The statements of Commissioner Kear, relied upon by his counsel to explain his reason for dismissing Ms McCarthy, should be seen in the same light. They simply served as a pretext for taking that action and a convenient means of deflecting attention from the serious allegations of misconduct she had made against Mr Pearce.

The Commission is satisfied that Commissioner Kear dismissed Ms McCarthy on 14 May 2013 because of the allegations of misconduct she had made against Mr Pearce. In coming to that conclusion, the Commission has had regard to the fact that Ms McCarthy was performing satisfactory work at the time of her dismissal – a matter

acknowledged by Commissioner Kear – and the pattern of partial treatment of Mr Pearce by Commissioner Kear leading up to her dismissal.

Corrupt conduct

The Commission is satisfied that Commissioner Kear engaged in corrupt conduct by dismissing Ms McCarthy from her employment with the SES substantially in reprisal for her making allegations about the conduct of his friend, Mr Pearce. These included the allegations concerning the circumstances in which the SES had entered into contracts with Karoshi and Performance Drivers, Mr Pearce's misuse of SES funds to purchase roof racks and electric brakes for his car, the alleged misuse by Mr Pearce of his SES credit card, and the alleged fabrication of diary notes.

This is because his conduct is conduct that adversely affected his honest or impartial exercise of his official functions within the meaning of s 8(1)(a) of the ICAC Act. His conduct could also constitute or involve the partial exercise of his official functions and therefore come within s 8(1)(b) of the ICAC Act. His conduct could also constitute or involve a breach of public trust and therefore come within s 8(1)(c) of the ICAC Act.

In considering s 9(1)(a) of the ICAC Act it is relevant to have regard to s 20 of the *Public Interest Disclosures Act 1994*. That section provides that a person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence.

The Commission has found that Ms McCarthy made a number of public interest disclosures to Commissioner Kear.

Detrimental action is defined in the *Public Interest Disclosures Act 1994* and includes dismissal from employment.

Section 20(1A) provides that in any proceedings for an offence under the section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a public interest disclosure.

The Commission is satisfied that, if the facts if found were to be proved on admissible evidence to the criminal standard and accepted by an appropriate tribunal, there would be grounds on which that tribunal would find that Commissioner Kear committed a criminal offence of taking detrimental action against Ms McCarthy substantially in reprisal of her making public interest disclosures contrary to s 20 of the *Public Interest Disclosures Act 1994*.

The Commission is also satisfied for the purposes of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the appropriate civil standard and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Commissioner Kear has committed a disciplinary offence, namely misconduct, and that his conduct could constitute or involve reasonable grounds for his dismissal.

Accordingly, the Commission is satisfied that jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74A(2) statement

The Commission is satisfied that, in respect of the matters canvassed in this chapter, Commissioner Kear is an “affected” person.

Commissioner Kear’s evidence was made under declaration pursuant to s 38 of the ICAC Act. The effect of the declaration is that his evidence cannot be used against him in any subsequent criminal prosecution, except for a prosecution in relation to an offence under the ICAC Act.

There is, however, other admissible evidence that would be available. This includes evidence from Ms McCarthy in relation to the circumstances surrounding her termination, SES records relating to the allegations she made against Mr Pearce and the enquires conducted by Commissioner Kear in relation to those allegations. In the light of this evidence, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Commissioner Kear for an offence under s 20 of the *Public Interest Disclosures Act 1994* of taking detrimental action in reprisal for a person making a public interest disclosure.

Section 114A of the ICAC Act provides that evidence given to the Commission by a public official may be admitted and used in disciplinary proceedings against the public official, despite the evidence having been given under objection, where a finding has been made by the Commission in its report under s 74 of the ICAC Act that the public official has engaged in corrupt conduct. As such a finding is made in this chapter, it follows that Commissioner Kear’s evidence to the Commission can be admitted and used in disciplinary proceedings against him. There is also other available admissible evidence, including the evidence of Ms McCarthy and documentary evidence, which would be available to a disciplinary body.

The Commission is of the opinion that the minister for police and emergency services should give consideration

to the taking of action against Commissioner Kear for the disciplinary offence of misconduct in relation to his termination of Ms McCarthy’s employment with a view to his dismissal.

Appendix 1: The role of the Commission

The ICAC Act is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of NSW, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

The ICAC Act applies to public authorities and public officials as defined in s 3 of the ICAC Act.

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The principal functions of the Commission, as specified in s 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and cooperating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both s 8(1) or s 8(2) and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Section 8(1) provides that corrupt conduct is:

- a. *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
- b. *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- c. *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- d. *any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

Section 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Section 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- a. *a criminal offence, or*
- b. *a disciplinary offence, or*

- c. *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
- d. *in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.*

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Section 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Section 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in s 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

The Commission adopts the following approach in determining whether corrupt conduct has occurred.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the

jurisdictional requirements of s 9(5). In the case of s 9(1)(a) and s 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of s 9(1)(b), s 9(1)(c) and s 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In

such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

See also *Rejtek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution*, Queensland, 1977 (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.



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