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INDEPENDENT COMMISSION AGAINST CORRUPTION

REPORT ON CORRUPT CONDUCT AFFECTING THE ADMINISTRATION OF JUSTICE IN THE WAGGA WAGGA AND OTHER LOCAL COURT AREAS

ICAC REPORT
MARCH 2010

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REPORT ON CORRUPT CONDUCT AFFECTING THE ADMINISTRATION OF JUSTICE IN THE WAGGA WAGGA AND OTHER LOCAL COURT AREAS

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Madam President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on the conduct of Mr John Hart, a barrister, Mr Anthony Paul, a solicitor, and others. The relevant conduct involved giving false information to judicial officers, a scheme to improperly obtain money from the Attorney General's Department by falsely inflating a claim for legal costs and, in the case of Mr Hart, making false representations to clients that he could arrange payments to corrupt public officials to affect the prosecution process and outcomes.

The former Commissioner, the Hon Jerrold Cripps QC, presided at the public inquiry held in aid of this 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 section 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours faithfully

The Hon David Ipp AO QC
Commissioner

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Executive summary

The investigation

This report concerns an investigation conducted by the Independent Commission Against Corruption ("the Commission") into allegations that:

1. John Hart, a barrister, and Anthony Paul, a solicitor, provided false information to judicial officers in criminal proceedings;
2. Mr Hart represented to clients that he could achieve a favourable outcome for them by making payments to public officials, including a representation to Jason Kelly that in return for a payment of $15,000 Mr Hart would pay $10,000 to an officer of the Director of Public Prosecutions ("the DPP") to ensure that no prosecution would be commenced against Mr Kelly or others arising from a sexual assault allegation under police investigation; and
3. Mr Hart, Mr Paul and Mr Kelly sought to obtain money improperly from the Attorney General's Department (now part of the Department of Justice and Attorney General) by agreeing to submit a deliberately inflated claim for legal costs.

The Commission's investigation initially arose as a result of dissemination of information from the NSW Police on 20 May 2008 pursuant to section 68 of the *Telecommunications (Interception and Access) Act 1979*, which indicated that Mr Kelly may have paid money (described as "insurance") to Mr Hart to pass on to an officer of the DPP to ensure a sexual assault allegation made against Mr Kelly and others did not proceed to a prosecution.

During the course of the Commission's investigation other information came to light that identified the additional allegations investigated by the Commission.

The public inquiry

During the course of the investigation evidence was obtained that indicated the likelihood that corrupt conduct had occurred. As part of its investigation the Commission therefore determined it was in the public interest to hold a public inquiry.

The public inquiry was held over eight days, commencing on 21 September 2009. Sixteen witnesses, including Mr Hart, Mr Paul and Mr Kelly, gave evidence. The Hon Jerrold Cripps QC, the then Commissioner, presided. Mr David Staehli SC acted as Counsel Assisting the Commission.

The Commission's findings and section 74A(2) statements

Findings are made in Chapter 2 that Mr Hart and Mr Paul engaged in corrupt conduct in knowingly misleading various courts by providing false information with respect to their clients. The Commission found that Mr Hart's motivation in misleading the courts went beyond seeking to obtain the best results for his clients and included a desire on his part to convince his clients that he could manipulate the justice system and thereby convince them that his services were more valuable.

Findings are made in Chapter 3 of the report that Mr Kelly, Christopher Trinder and Jeffrey Nankivell engaged in corrupt conduct by providing money to Mr Hart they intended would be used by him for the purpose of paying money to an officer of the DPP to adversely affect the exercise of that officer's official functions. No corrupt conduct finding is made against Mr Hart in respect of this allegation because, although he sought and obtained $12,000 on the basis he would use $10,000 to pay an officer of the DPP, he never had any intention of making any payment to any officer of the DPP and never made any payment.

Findings are made in Chapter 4 of the report that Mr Hart, Mr Paul and Mr Kelly agreed to the submission of an artificially inflated costs claim to the Attorney General's Department with the intention of adversely affecting the exercise of official functions by the public official responsible for assessing the costs claim. Findings of corrupt conduct are made against Mr Hart, Mr Paul and Mr Kelly.

Statements are made pursuant to section 74A(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") that the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hart for 10 offences of perverting the course of justice contrary to section 319 of the *Crimes Act 1900* (NSW) ("the Crimes Act") (Chapter 2) and for four offences of false pretences contrary to section 179 of the Crimes Act (Chapter 3).

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Paul for an offence of perverting the course of justice contrary to section 319 of the Crimes Act (Chapter 2) and each of Mr Kelly, Mr Trinder and Mr Nankivell for an offence of offering a corrupt benefit under section 249B(2) of the Crimes Act and an offence of perverting the course of justice under section 319 of the Crimes Act (Chapter 3).

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action under the *Legal Profession Act 2004* against Mr Hart (Chapters 2, 3 and 4) and Mr Paul (Chapters 2 and 4) for unsatisfactory professional conduct or professional misconduct.

Corruption prevention

The investigation raised the following corruption prevention issues:

1. The management and control of sensitive files within courts, such as lists.
2. The manipulation of friendships for the purposes of having matters moved to a magistrate who is viewed as more lenient.
3. The method of assessment of costs by the Attorney General's Department.

The inquiry did not show that any public official had acted corruptly in regard to any of these issues despite the behaviour of Mr Hart. Therefore, no corruption prevention recommendations are made in regard to issues (1) and (2).

Although no public official was shown to have acted corruptly within the Attorney General's Department, the method of assessment of costs appears to be vulnerable to corruption. Mr Hart, Mr Paul and Mr Kelly were able to seek to obtain money from the Attorney General's Department to which they were not entitled without the collusion of any official within the Department.

The Commission has received a letter from the Director General of the Attorney General's Department about measures the Department intends to take to address this issue.

The Commission therefore makes no recommendations on the matter of costs but will monitor the progress of the Attorney General's Department's review.

Chapter 1: Introduction

This report concerns an investigation by the Commission into the conduct of John Hart, a barrister, Anthony Paul, a solicitor, and a number of Mr Hart's clients and associated persons.

The allegations investigated by the Commission are that:

1. Mr Hart and Mr Paul provided false information to judicial officers in criminal proceedings;
2. Mr Hart represented to clients that he could achieve a favourable outcome for them by making payments to public officials, including a representation to Jason Kelly that in return for a payment of $15,000 Mr Hart would pay $10,000 to an officer of the Director of Public Prosecutions ("the DPP") to ensure that no prosecution would be commenced against Mr Kelly or others arising from a sexual assault allegation under police investigation; and
3. Mr Hart, Mr Paul and Mr Kelly sought to obtain money improperly from the Attorney General's Department by agreeing to submit a deliberately inflated claim for legal costs.

The Commission's investigation initially arose as a result of dissemination of information from the NSW Police on 20 May 2008 pursuant to section 68 of the *Telecommunications (Interception and Access) Act 1979*, which indicated that Mr Kelly may have paid money (described as "insurance") to Mr Hart to pass on to an officer of the DPP to ensure a sexual assault allegation made against Mr Kelly and others did not proceed to a prosecution.

During the course of the Commission's investigation other information came to light that identified the additional allegations investigated by the Commission.

Why the Commission investigated

One of the Commission's principal functions, as specified in section 13(1)(a) of the *Independent Commission Against Corruption Act 1988* ("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, while Appendix 2 sets out the definition of corrupt conduct under the ICAC Act.

The matter which came to the notice of the Commission as a result of the disseminated information from the NSW Police was serious and would, if established, constitute corrupt conduct within the meaning of the ICAC Act.

The Commission determined that it was in the public interest to conduct an investigation for the purpose of establishing whether corrupt conduct had in fact occurred and whether there were any corruption prevention issues which needed to be addressed. As further information came to light indicating the possibility that Mr Hart, Mr Paul and Mr Kelly had submitted a false costs claim to the Attorney General's Department and that Mr Hart and Mr Paul may have deliberately misled various judicial officers, it was determined that these matters should also be investigated.

Conduct of the investigation

The Commission's investigation involved an examination of a large volume of documents obtained from courts, banks, the NSW Bar Association, the DPP and other sources, as well as interviewing and obtaining statements from a number of witnesses.

In order to obtain relevant evidence, the Commission obtained seven telecommunications interception warrants under the *Telecommunications (Interception and Access) Act 1979* which authorised the Commission to intercept telephone calls to and from Mr Hart, Mr Kelly and Mr Trinder. The Commission also obtained and executed four search warrants under section 40 of the ICAC Act and two surveillance device warrants under section 17 of the *Surveillance Devices Act 2007*.

The Commission conducted nine compulsory examinations to obtain further relevant evidence.

The public inquiry

The ICAC Act provides that for the purposes of an investigation the Commission may conduct a public inquiry if it considers it is in the public interest to do so.

Section 31(2) of the ICAC Act provides that:

> *Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:*
>
> *(a) the benefit of exposing to the public, and making it aware, of corrupt conduct,*
>
> *(b) the seriousness of the allegation or complaint being investigated,*
>
> *(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*
>
> *(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The Commission assessed the material gathered during the investigation and the evidence given at the compulsory examinations. Taking into account these factors and each of the matters set out in section 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry having regard to the following considerations:

- The serious nature of the matters being investigated which involved allegations of bribery of a public official and deliberate misleading of the courts and the Attorney General's Department.
- There appeared to be compelling evidence of corrupt conduct.
- It was considered desirable to expose the corrupt conduct for the purpose of educating and deterring others who might be minded to engaged in similar conduct.
- The risk of prejudice to the reputation of persons who would be called to give evidence at the inquiry was not, in the circumstances, undue.
- There was a substantial public interest in exposing the relevant matters that was not outweighed by any public interest in preserving the privacy of the persons concerned.

The public inquiry commenced on 21 September 2009 and was conducted over eight days. The Hon Jerrold Cripps QC, the then Commissioner, presided at the inquiry. Mr David Staehli SC acted as Counsel Assisting the Commission. A total of 16 witnesses including Mr Hart, Mr Paul and Mr Kelly gave evidence at the public inquiry.

Following the conclusion of the public inquiry, the Commission served detailed written submissions from Counsel Assisting on all witnesses who gave evidence at the public inquiry or on their legal representatives. Further additional submissions were subsequently provided to Messrs Hart, Paul, Kelly, Trinder and Nankivell. The submissions set out possible findings and recommendations. Submissions received in response were considered in preparing this report.

Investigation findings and section 74A(2) statements

Findings are made in Chapter 2 that Mr Hart and Mr Paul engaged in corrupt conduct in knowingly misleading various courts by providing false information with respect to their clients. The Commission found that Mr Hart's motivation in misleading the courts went beyond seeking to obtain the best results for his clients and included a desire on his part to convince his clients that he could manipulate the justice system and thereby convince them that his services were more valuable.

Findings are made in Chapter 3 of the report that Mr Kelly, Mr Trinder and Mr Nankivell engaged in corrupt conduct by providing money to Mr Hart they intended would be used by him for the purpose of paying money to an officer of the DPP to adversely affect the exercise of that officer's official functions. No corrupt conduct finding is made against Mr Hart in respect of this allegation because,

although he sought and obtained $12,000 on the basis he would use $10,000 to pay an officer of the DPP, he never had any intention of making any payment to any officer of the DPP and never made any payment.

Findings are made in Chapter 4 of the report that Mr Hart, Mr Paul and Mr Kelly agreed to the submission of an artificially inflated costs claim to the Attorney General's Department with the intention of adversely affecting the exercise of official functions by the public official responsible for assessing the costs claim. Findings of corrupt conduct are made against Mr Hart, Mr Paul and Mr Kelly.

Statements are made pursuant to section 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hart for 10 offences of perverting the course of justice contrary to section 319 of the *Crimes Act 1900* (NSW) ("the Crimes Act"), namely by knowingly providing false information to a number of local courts in NSW and for four offences of false pretences contrary to section 179 of the Crimes Act, namely by falsely representing to his clients that he could influence the outcome of their criminal matters by making payments to officers employed in the administration of the justice system.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Anthony Paul for one offence of perverting the course of justice contrary to section 319 of the Crimes Act, by knowingly providing false information to the Downing Centre Local Court.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of each of Mr Kelly, Mr Trinder and Mr Nankivell for an offence of offering a corrupt benefit under section 249B(2) of the Crimes Act and an offence of perverting the course of justice under section 319 of the Crimes Act.

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action under the *Legal Profession Act 2004* against Mr Hart and Mr Paul for unsatisfactory professional conduct or professional misconduct.

Corruption prevention

The investigation raised the following corruption prevention issues:

1. The management and control of sensitive files within courts, such as lists.
2. The manipulation of friendships for the purposes of having matters moved to a magistrate who is viewed as more lenient.
3. The method of assessment of costs by the Attorney General's Department.

The inquiry did not show that any public official had acted corruptly in regard to any of these issues despite the behaviour of Mr Hart. Therefore, no corruption prevention recommendations are made in regard to issues (1) and (2).

Although no public official was shown to have acted corruptly within the Attorney General's Department, the method of assessment of costs appears to be vulnerable to corruption. Mr Hart, Mr Paul and Mr Kelly were able to seek to obtain money from the Attorney General's Department to which they were not entitled without the collusion of any official within the Department.

The Commission has received a letter from the Director General of the Attorney General's Department about measures the Department intends to take to address this issue. He advised:

> *in response to issues identified in the public inquiry into Mr Hart, the Legal Services Branch of this Department in conjunction with the Crown Solicitors Office, are reviewing existing procedures for processing applications to minimise fraud. One measure that has already been put in place is a request that applicants provide a copy of relevant costs agreements. Further, all solicitor invoices which are required for moderation must be addressed to the client rather than to the Department of Justice and Attorney General as occurs on some occasions.*

The Commission therefore makes no recommendations on the matter of costs but will monitor the progress of the review.

Recommendation that this report be made public

Pursuant to section 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either presiding officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

Chapter 2: Provision of false information to judicial officers

This chapter examines instances in 2008 and 2009 where Mr Hart and Mr Paul deliberately misled various local courts by providing false information (such as false residential address or employment details of their clients) in order to secure the transfer of the matters from one court to another. In some cases Mr Hart also provided false information with the intention of influencing the sentencing outcome so as to achieve a lighter penalty than might otherwise have been received.

Todd Donohue's matter

Todd Donohue was Mr Hart's client. He was charged with the offences of affray and common assault on 27 June 2008. Todd Donohue's father, Chris Donohue, engaged Mr Hart to represent Todd Donohue in relation to these matters.

Court records obtained by the Commission show that on 11 December 2008 Mr Hart appeared at Milton Local Court and told the magistrate that Todd Donohue had been transferred to Wagga Wagga to work on a major project that would last for three months and that he lived at an address in Wagga Wagga. On 12 January 2009, Anthony Paul appeared for Todd Donohue at Wagga Wagga Local Court under instruction from Mr Hart and informed the court that Todd Donohue was working in Wagga Wagga for a company called Fugen Holdings. There is no evidence to suggest that Mr Paul knew this was not true. On 12 February 2009 at Sutherland Local Court when Todd Donohue was sentenced, Mr Hart again appeared for him and told the magistrate that Todd Donohue had gone to Sydney and obtained work as a brickies' labourer with Fugen Industries, had worked in Wagga Wagga on a big job, was now at Caringbah on a major site and was enrolled in TAFE at Gymea to become a brickie.

Todd Donohue was given a good behaviour bond for 12 months under section 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for the offence of affray, the common assault charge having been withdrawn.

Todd Donohue told the Commission that except for the fact that he was indeed working as a bricklayer, none of the above information about his residential and employment details provided to the court by Mr Hart and Mr Paul was true.

He said he met Mr Hart for the first time at Sutherland Local Court on 12 February 2009 when his matter was finalised and this was when Mr Hart had told him what he was going to tell the court. He said he knew some of the things Mr Hart told the court were not true, but he did not understand why Mr Hart said those things. He said:

> *I just thought that's what happened or that's what they did.*

The Commission considers Todd Donohue to be a credible witness and accepts his evidence.

Chris Donohue denied any knowledge of false information having been provided to court by Mr Hart on Todd Donohue's behalf. The Commission considers Chris Donohue to be a credible witness and accepts his evidence on this issue.

Mr Hart admitted that he arranged for Todd Donohue's matter to be transferred from Milton to Wagga Wagga by giving false information to Milton Local Court about Todd Donohue's circumstances, including that he lived at an address in Wagga Wagga (which belonged to Mr Hart's friend Warren Peacock) and thereby deliberately misled the court.

He also accepted that he misled the Wagga Wagga Local Court on 12 January 2009 by instructing Mr Paul to tell the court that Todd Donohue had been working in Wagga Wagga for Fugen Holdings, which was untrue.

He further admitted that he misled the Sutherland Local Court on 12 February 2009 by telling the court various things about Todd Donohue's work and his TAFE education, knowing these to be untrue.

Benjamin Bleckman's matter

Benjamin Bleckman was charged with a mid-range drink-driving, or Prescribed Concentration of Alcohol ("PCA"), offence on 21 February 2009. Mr Hart was retained by Mr Bleckman's mother, Deborah Graham, to represent Mr Bleckman in relation to this charge. Although the offence occurred in Revesby and Mr Bleckman was living in Milperra at the time, his matter was transferred from Bankstown Local Court, where it was originally listed on 18 March 2009, to Sutherland Local Court where the matter was finalised. Mr Bleckman received a fine of $800 and was disqualified from driving for a period of 14 months.

Court records show that Mr Hart told the magistrate at Sutherland Local Court, at Mr Bleckman's sentencing proceedings on 23 April 2009, that Mr Bleckman had been unable to pay his rent at Milperra because he had lost Saturday work as a result of the charge. He also told the court that Mr Bleckman had moved back to live with his parents at Engadine and the travel to his work took up to five or six hours per day. All this information was false.

Mr Bleckman told the Commission that he met Mr Hart for the first time at Sutherland Local Court on 23 April 2009 and spent only a few minutes with him during which he told Mr Hart about his true circumstances. He said that during this brief meeting, Mr Hart quickly explained what he was going to tell the court on Mr Bleckman's behalf, some of which Mr Bleckman knew to be untrue. When asked whether he raised the issue of false information being provided to the court with Mr Hart, he said:

> *I, I just put my trust in him and that was it. I, I don't know nothing about law or nothing like that.*

Ms Graham told the Commission that there was no discussion between herself and Mr Hart as to what should be said to the court about where her son lived and that she did not tell Mr Hart that her son had moved back home with her.

The first time she heard of these things was when she was sitting in court. She did not know why Mr Hart gave false information to the court. When asked if she believed what Mr Hart had done was wrong, she replied, "I suppose so, yes".

The Commission considers both Mr Bleckman and Ms Graham to be witnesses of credit and accepts their evidence.

Mr Hart told the Commission that he vaguely recalled appearing for Mr Bleckman at Sutherland Local Court. He admitted that he misled the court on that occasion by telling the court that Mr Bleckman was living at Engadine with his parents, contrary to what he was told by Mr Bleckman and by providing other information relating to Mr Bleckman's circumstances which he knew to be untrue.

Mr Hart also admitted that he secured a transfer of Mr Bleckman's matter from Bankstown Local Court to Sutherland Local Court by misleading the court in relation to Mr Bleckman's residence.

Bradley Wheaton's matter

Bradley Wheaton was charged with the offences of mid-range PCA and failing to stop at a red light on 27 June 2008. He subsequently contacted Mr Hart seeking representation in relation to these matters which were initially listed at the Downing Centre Local Court.

Court records show that Mr Wheaton's matter was transferred to Camden Local Court on the basis that he was residing in Oakdale (which is close to Camden), where his matter was finalised on 25 November 2008 with Mr Wheaton receiving a fine of $1,000 and disqualification for six months.

The Commission lawfully intercepted a telephone conversation between Mr Hart and Mr Wheaton on 10 July 2008, during which Mr Hart told Mr Wheaton " .... we've got to get the right magistrate and that's what you pay me for right?"

Mr Hart admitted that he misled the Downing Centre Local Court on 17 October 2008, by falsely informing the court that Mr Wheaton lived at an address in Oakdale, in order to get the matter transferred to Camden Local Court. He agreed that he did this because he was representing to Mr Wheaton that he could get a better result for him from the magistrate in Camden.

During a telephone conversation on 20 October 2008, the following exchange took place.

Hart:	*Mate what I might – whereabouts are you basing at the moment ?*
Wheaton:	*Um, still living in – still living in – living in Bondi, working up at North Ryde.*
Hart:	*You're actually living at fuckin' Oakdale, okay.*
Wheaton:	*Right, I've got a new address, do I ?*
Hart:	*Yep.*
Wheaton:	*Yeah.*
Hart:	*That's sweet. In case anyone pulls you over you're living at Oakdale, alright?*
Wheaton:	*Yeah, okay, do you want me to find an address or have you already got – ?*
Hart:	*I've got one.*

Mr Hart admitted that during this telephone conversation he had encouraged Mr Wheaton to get his court referees to falsely mention that he was working or residing at Oakdale.

Mr Hart admitted that he misled the Camden Local Court by falsely representing an address in Oakdale as Mr Wheaton's place of residence.

Mr Wheaton conceded that the transfer of his matter to Camden would have been in his interest. However, he sought to minimise his role by saying that he never intended claiming he lived at Oakdale. He said he did not attach much significance to the address suggested to him by Mr Hart at the time, but that in retrospect, he should have taken more care and notice. He also pointed out that he was not present in court on the day when his matter was transferred to Camden. This is confirmed by court records.

Mr Wheaton claimed that not being a lawyer and not having had a lot of experience with the criminal justice system, he was not aware of what was necessary for a matter to be transferred from one local court to another. He said that he relied on Mr Hart's advice and did not think there was anything untoward about what Mr Hart told him.

Mr Wheaton also agreed that some of the submissions put to the court at Camden by Mr Hart on his behalf, such as his employment details, were not correct. He claimed that his wish to speak to the magistrate directly was overruled by Mr Hart who told him to sit down and not say anything. He conceded, however, that even if he had been given such an opportunity, he would not have addressed the fact that he did not live in Oakdale.

Although the Commission is of the opinion that Mr Wheaton was not entirely candid in his testimony and attempted to minimise his own responsibility in the matter, the Commission believes that he was basically a truthful witness and accepts his evidence.

Jessica Smith's matter

Jessica Smith was charged with a mid-range PCA offence on 21 February 2009 and instructed Mr Hart to represent her. Court records show that her matter was originally listed at Sutherland Local Court but was transferred to Wagga Wagga Local Court where it was initially listed on 14 April 2009.

On 14 April 2009, the matter was again adjourned to 4 May 2009 at Wagga Wagga Local Court. On 4 May 2009, Ms Smith was sentenced to a good behaviour bond for 12 months without a conviction being recorded or a disqualification being imposed.

Mr Hart admitted that he misled Sutherland Local Court on 19 March 2009 by falsely telling the court that Ms Smith had been transferred to Wagga Wagga. He agreed that he did this because, as he told Ms Smith, he thought he could get a better result for her in Wagga Wagga.

He accepted that a lawfully intercepted telephone conversation between him and Ms Smith on 6 April 2009 revealed him encouraging her to have false information provided by referees about her transfer to Wagga Wagga. No such references were in fact presented to the court. He also admitted that he had sought to involve his friend Warren Peacock in providing a false address in Wagga Wagga for Ms Smith to use. This was confirmed by Mr Peacock.

Mr Hart agreed that in a series of calls on 14 April 2009, he constructed a false story to enable Ms Smith's matter to be adjourned to a later date, so that a particular magistrate would hear her matter. He admitted that he first lied to Ms Smith (who was at the airport about to board a flight to Wagga Wagga) by telling her that his "bloke" (his preferred magistrate) had gone off sick when this was not in fact the case. He went on to suggest to her that it would be a good idea for her to miss her flight. He acknowledged that he did this so that Ms Smith would not appear in Wagga Wagga and that would facilitate the matter being adjourned. When asked whether he thought it was wrong to do that, Mr Hart replied: "I do now". As

an experienced barrister, Mr Hart would have been well aware at the time that what he was doing was wrong.

One of the lawfully intercepted calls on 14 April 2009 was a conversation between Mr Hart and Sergeant Steve Turner, a police prosecutor from Wagga Wagga Police. Mr Hart admitted that he lied to Sergeant Turner by telling him that Ms Smith had rung him and said that she could not get a flight from the Gold Coast.

Mr Hart also admitted that on 14 April 2009 he dictated a letter to Louise Grant, a secretary at Anthony Paul's firm, to be sent to the court on his behalf, in which he knowingly and falsely alleged that Ms Smith had difficulties in getting to the court on that day. He did that with a view to obtaining an adjournment.

Mr Hart again admitted that he misled the Wagga Wagga Local Court when Ms Smith's matter was finalised on 4 May 2009, by making a number of sentencing submissions to the magistrate which were untrue, including the claim that she was working in Wagga Wagga four days per week. He claimed he could not explain why he did this.

Mr Hart was also questioned about a voicemail message he left Ms Smith on 4 May 2009 telling her not to tell anyone what had happened in court. He sought to explain this message by saying that he did not want Ms Smith to tell people that she had received the benefit of a non-conviction bond for a mid-range PCA offence and resisted the proposition that he did not want her to tell people he had lied to the court. The Commission rejects Mr Hart's evidence on this issue. The Commission is satisfied that Mr Hart wanted to ensure that Ms Smith did not tell anyone that he had lied to the court.

Ms Smith recalled that there had been a discussion between herself and Mr Hart about getting her matter heard at some court other than Sutherland Local Court. She denied, however, that she had any knowledge that her matter was transferred from Sutherland as a result of Mr Hart having provided the court with false information that she was working in Wagga Wagga at the time. She also denied that she knew Mr Hart gave false explanations to the court in Wagga Wagga about the reasons why she could not attend on 14 April 2009.

She said that she did not obtain any references containing false information about her having transferred to Wagga Wagga as suggested to her by Mr Hart. This is supported by the court papers which indicate that no such references were tendered or used in the course of her proceedings.

As to the submission made to the court on her behalf by Mr Hart on 4 May 2009, that she was a special needs teacher (which according to the transcript of the court proceedings appears to have impressed the magistrate) when in fact she was not (although she had some experience in working with children with disabilities), she said that she did not know Mr Hart was going to say this in court until just before they went into court. She said that although she thought Mr Hart telling lies to the court was wrong, she did not say or do anything about it. She said that she trusted Mr Hart to do the right thing. She said that she had never before appeared in court, had no knowledge of the legal system, knew Mr Hart to be a barrister of some years' standing and relied on the advice that he provided her. She said that when she first met him to provide him with instructions for her matter, she gave him a document addressed to the magistrate in which she had set out her truthful personal circumstances.

The Commission considers Ms Smith to be a credible witness and accepts her evidence.

Narelle Oehm's matter

In a lawfully intercepted telephone conversation between Mr Paul and Sergeant Turner on 16 June 2009, Sergeant Turner informed Mr Paul that a particular magistrate was sitting in court on that day. Mr Paul then asked Sergeant Turner to re-list Ms Oehm's matter (which was listed in court on the following day) to that day. He mentioned to Sergeant Turner Ms Oehm's university commitments on the following day as the basis of the request.

When asked at the public inquiry whether what he had told Sergeant Turner about Ms Oehm's university commitments was truthful, Mr Paul was unable to say one way or another. He claimed that he could not remember what Ms Oehm's exact circumstances were.

In the Commission's opinion an honest legal practitioner would have no difficulty in being able to say that such a statement was true if it indeed was. However, the Commission does not consider there is sufficient evidence to establish that Mr Paul was in fact acting dishonestly in relation to this matter.

David Kirkwood's matter

Mr Paul acted for David Kirkwood in relation to a PCA charge.

Mr Paul conceded to the Commission that during the lawfully intercepted telephone conversation between himself and Mr Kirkwood on 19 April 2009, he suggested that Mr Kirkwood should claim to have moved to Wagga Wagga, so that his matter could be transferred there from Sydney and said that he had probably written a letter to court to that effect. He accepted that on the basis of this false information, Mr Kirkwood's case was transferred to Wagga Wagga.

Mr Paul said he did this because Mr Kirkwood was a mate of his and he thought Mr Kirkwood would get a better result in Wagga Wagga. He agreed that this was not a sufficient justification for him to provide false information to the court.

Asked whether he had encouraged clients, be they friends or otherwise, to give false information to the court on other occasions, Mr Paul replied that he did not recall any other such instance and it was not his normal practice.

Mr Kirkwood was not called to give evidence at the public inquiry and the Commission makes no finding that he has engaged in any improper conduct.

Mr Hart's conduct and motivation

One of the issues considered in the course of the investigation was Mr Hart's motivation for misleading the various courts.

Mr Hart acknowledged that on a number of occasions he gave false information to various courts. He claimed that at the time he was an alcoholic and not thinking straight. When pressed, however, he acknowledged that the reason for misleading the courts was to enable him to present himself as a person who could manipulate the justice system to achieve a desired outcome. While it may have been the case that he was an alcoholic, the Commission is satisfied that, as an experienced barrister, Mr Hart at all times knew what he was doing was wrong.

The available evidence indicates that in some cases Mr Hart made false statements about a client's place of residence with the specific intention of having a matter heard by a magistrate he regarded as being lenient. He perhaps regarded such conduct as being in the best interests of his client, but the clash with the obligation he owed to the court and with the public interest is obvious. What was done was a form of "judge-shopping" which has the potential, as Palmer J said in *Sirius Shipping Corporation v The Ship "Sunrise"* [2007] NSWSC 766 at 52, albeit in the context of civil litigation, "to completely undermine the efficient, orderly and transparent administration of justice". The appearance of "judge-shopping" has also been deprecated in criminal matters.

However, the Commission is satisfied that Mr Hart's intention to obtain the best result for his client by such mechanisms was only part of his motivation. The Commission is satisfied that he did such things as part of an attempt to make his clients believe that he could manipulate the system, with the overriding object of convincing such clients that his services were more valuable because of that "skill".

Apart from misleading the relevant courts, his conduct had the real potential to bring the system of justice into general disrepute by giving those he represented (and those with whom they communicated about what he did) the understanding that it was appropriate or acceptable to tell lies to a court in order to achieve a desired outcome.

Sergeant Turner

Two intercepted telephone conversations between Sergeant Turner and Mr Hart on 14 April 2009 relating to Ms Smith's matter and the telephone conversation between Sergeant Turner and Mr Paul on 16 June 2009 relating to Ms Oehm's matter were played to Sergeant Turner at the public inquiry. During these telephone conversations, Mr Hart and Mr Paul asked Sergeant Turner to get their respective clients' matters re-listed and provided reasons as to why such a request was made. In the case of Mr Hart, the reasons he provided for requesting Ms Smith's matter to be adjourned were false. The evidence available to the Commission does not establish whether or not the reason Mr Paul provided for requesting Ms Oehm's matter to be re-listed, namely university commitments, was true or not.

Sergeant Turner said he did not have any doubts as to the truth of what he was told by Mr Hart or Mr Paul. This is supported by Mr Hart's evidence in the public inquiry. Mr Hart said that he told Sergeant Turner lies in relation to Ms Smith's matter partly because he knew that Sergeant Turner would not be a party to misleading the court.

Sergeant Turner agreed that in one of the telephone conversations he told Mr Hart when a particular magistrate would be sitting alone at Wagga Wagga Local Court so that Mr Hart might have his matters listed before him rather than before another magistrate. He said he did not regard this as improper and claimed that he provided similar information to other legal practitioners.

Sergeant Turner said that he had both a professional and personal relationship with Mr Hart and Mr Paul and they were both his friends. He denied that his personal relationship with them ever impinged upon his professional duties.

He said that he received a ham from Mr Hart as a gift on two occasions for Christmas but did not receive any other benefits other than occasional drinks or meals which were reciprocated by him. Mr Hart corroborated this evidence.

The Commission has no reason to believe that Sergeant Turner was not a credible witness and accepts his evidence. The Commission is also satisfied that the evidence does not establish that Sergeant Turner acted improperly.

Findings of fact

Based on the evidence referred to above, the Commission is satisfied that the following facts have been established to the requisite standard of proof :

1. Between December 2008 and February 2009, John Hart knowingly misled the Local Courts in Milton, Wagga Wagga and Sutherland by providing false information regarding the residential and employment details of Todd Donohue.
2. In 2009, John Hart knowingly misled Bankstown Local Court by providing false information about where Benjamin Bleckman lived in order to get the matter transferred to Sutherland Local Court. He also knowingly misled Sutherland Local Court by providing false information about Mr Bleckman's circumstances relating to his residence and employment.
3. In 2008, John Hart knowingly misled Downing Centre Local Court by providing a false residential address for Bradley Wheaton in order to get the matter transferred to Camden Local Court. He also knowingly misled the Camden Local Court by falsely representing that Mr Wheaton resided in Oakdale.
4. In 2009, John Hart knowingly misled Sutherland Local Court by providing false information regarding Jessica Smith's employment details in order to get the matter transferred to Wagga Wagga Local Court where he believed he could obtain a better result for Ms Smith. He also knowingly misled Wagga Wagga Local Court on two separate occasions, by providing false explanations for Ms Smith's alleged inability to attend court so that he could get her matter adjourned to another date and by providing false information regarding her work circumstances.
5. His motivation in knowingly misleading these courts went beyond seeking to obtain the best results for his clients and included a desire on his part to convince his clients that he could manipulate the justice system and thereby convince them that his services were more valuable.
6. In each matter referred to above, the proposition to mislead the court was initiated by Mr Hart, although each of Todd Donohue, Mr Bleckman, Mr Wheaton and Ms Smith had varying degrees of knowledge that Mr Hart was going to provide false information to the court and none of them took steps to prevent him from doing so.
7. In 2009, Anthony Paul knowingly misled the Downing Centre Local Court by providing false information regarding his client David Kirkwood, namely that he was working in Wagga Wagga, for the purpose of obtaining a transfer of the matter from Sydney to Wagga Wagga.
8. In respect of finding 7, the proposition to mislead the court was initiated by Mr Paul, not Mr Kirkwood, although Mr Kirkwood was made aware of what Mr Paul was intending to do on his behalf.

Corrupt conduct

In determining findings of corrupt conduct, the Commission has applied the approach set out in Appendix 2 to this report.

Before examining whether the conduct engaged in by Mr Hart and others comes within the definition of corrupt conduct in the ICAC Act, it is relevant to briefly consider what are the relevant criminal and disciplinary offences for the purposes of section 9 of the ICAC Act.

Section 312 of the Crimes Act provides:

> *A reference in this Part to perverting the course of justice is a reference to obstructing, preventing, perverting or defeating the course of justice or the administration of the law.*

Section 319 creates the offence in question:

> *A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.*

The section adopts a formulation which is consistent with the position in relation to the previous offence available at common law, namely, whether or not the conduct in question succeeds in perverting the course of justice is irrelevant: see *R v Rogerson* (1991-2) 174 CLR 268 at 275-7. As to what constitutes such a perversion, Brennan and Toohey JJ said at 280:

> *The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and*

powers including the powers of executing its decisions. An act which has a tendency to effect any such impairment is the actus reus of an attempt to pervert the course of justice.

There is little doubt that such statements also apply to the sentencing process. One example is *R v Purtell* (2001) 120 A Crim R 317 at 319, a case where the appellant had been prosecuted under section 319 after he had tendered a forged testimonial in the Local Court when being sentenced for assault. When the severity appeal came before the Court of Criminal Appeal Giles JA said:

> *[11]. … it was submitted that putting a document before a court on a question of penalty as distinct from in relation to guilt or innocence did not bring less seriousness to the offence, either generally or in this case. It was said that sentencing sometimes involved a degree of informality in providing materials such as letters attesting to character, and that the effective functioning of the criminal justice system called for honesty in the sentencing process in relation to such letters and for the protection of the integrity of the sentencing process just as much as when the issue was one of guilt or innocence. It was submitted that a deliberate attempt to affect a sentencing outcome was not to be regarded as of a low order of seriousness. In my view this point also is well taken.*
>
> *[12] … The respondent must have intended to produce a lesser penalty in the Local Court, and surely succeeded in doing so.*

These statements are apposite to Mr Hart's use of false material in sentencing matters in the various local courts where he appeared.

The use of false addresses and the encouragement of others to use such addresses to enable the transfer of matters from one court to another, apparently with the object of seeking a hearing before another magistrate, can also amount to an offence under section 319 of the Crimes Act.

When a legal practitioner is dishonest in submissions to a court, that could also constitute or involve unsatisfactory professional conduct or professional misconduct under the *Legal Profession Act 2004* (NSW), Section 498(1)(a) coupled with Rule 21 of the Barristers Rules, and Rule A21 (in Rule 23) of the Revised Professional Conduct and Practice Rules 1995 (NSW) applicable to solicitors, and that in turn could constitute or involve a disciplinary offence within the meaning of section 9(1)(b) of the ICAC Act.

Mr Hart's conduct in knowingly misleading various local courts as set out in findings of fact 1, 2, 3 and 4 is conduct that:

- could have adversely affected the exercise of official functions by judicial officers of the relevant local courts and which could also involve perverting the course of justice, within the meaning of section 8(2)(g) of the ICAC Act;
- could constitute, within the meaning of section 9(1) of the ICAC Act, the criminal offence of perverting the course of justice contrary to section 319 of the Crimes Act; and
- could constitute, within the meaning of section 9(2) of the ICAC Act, disciplinary offences of professional misconduct or unsatisfactory professional conduct under the *Legal Profession Act 2004*.

The Commission accordingly finds that Mr Hart engaged in corrupt conduct in relation to his conduct set out in findings of fact 1, 2, 3, and 4.

Mr Paul's conduct in knowingly misleading the Downing Centre Local Court as set out in finding of fact 7 is conduct that:

- could have adversely affected the exercise of official functions by the relevant judicial officer of the Downing Centre Local Court and also involve perverting the course of justice, within the meaning of section 8(2)(g) of the ICAC Act;
- could constitute, within the meaning of section 9(1) of the ICAC Act, the criminal offence of perverting the course of justice contrary to section 319 of the Crimes Act; and
- could constitute, within the meaning of section 9(2) of the ICAC Act, disciplinary offences of professional misconduct or unsatisfactory professional conduct under the *Legal Profession Act 2004*.

The Commission accordingly finds that Mr Paul engaged in corrupt conduct in relation to his conduct set out in finding of fact 7.

The Commission does not find that Todd Donohue, Mr Bleckman, Mr Wheaton or Ms Smith engaged in corrupt conduct for the following reasons:

i. whilst they have all been complicit in Mr Hart's corrupt conduct in varying degrees, in that they were each made aware of Mr Hart's

intention to provide false information to the court on their behalf at some stage before their matters were finalised in court (and in the case of Mr Wheaton, took part in the planning of the provision of such false information in prior discussions with Mr Hart), they did not themselves give false information, or expressly instruct Mr Hart to provide false information to the court on their behalf, although their consent to Mr Hart to do this may be considered to have been tacitly given;

ii. although they had a theoretical opportunity to inform the court that Mr Hart was providing false information after they had heard it said by Mr Hart on their behalf and take steps to prevent Mr Hart from continuing to mislead the court, it is not realistic to expect them to have done so in all the circumstances;

iii. all of them were by all accounts ordinary people who got caught up in difficult, stressful and vulnerable situations and were led by Mr Hart, who was their barrister and, from their point of view, a person in a position of trust and authority whom they believed would do the best for them.

The Commission is also satisfied that there is no evidence to suggest that Deborah Graham, David Kirkwood or Steve Turner have engaged in corrupt conduct.

Section 74A(2) statement

In making a public report, the Commission is required by the provisions of section 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 Director of Public Prosecutions 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 specified 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 section 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 concerned.

For the purposes of this report relevant to this chapter, John Hart, Anthony Paul, Todd Donohue, Benjamin Bleckman, Deborah Graham, Bradley Wheaton, Jessica Smith and David Kirkwood are "affected" persons.

John Hart

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hart for 10 offences of perverting the course of justice contrary to section 319 of the Crimes Act, namely by knowingly providing false information to:

i. Milton Local Court on 11 December 2008 in relation to Todd Donohue;

ii. Wagga Wagga Local Court on 12 January 2009 in relation to Todd Donohue;

iii. Sutherland Local Court on 12 February 2009 in relation to Todd Donohue;

iv. Bankstown Local Court on 18 March 2009 in relation to Benjamin Bleckman;

v. Sutherland Local Court on 23 April 2009 in relation to Benjamin Bleckman;

vi. Downing Centre Local Court on 17 October 2008 in relation to Bradley Wheaton;

vii. Camden Local Court on 25 November 2008 in relation to Bradley Wheaton;

viii. Sutherland Local Court on 19 March 2009 in relation to Jessica Smith;

ix. Wagga Wagga Local Court on 14 April 2009 in relation to Jessica Smith;

x. Wagga Wagga Local Court on 4 May 2009 in relation to Jessica Smith.

Mr Hart gave his evidence before the Commission under objection and therefore, pursuant to section 37(3) of the ICAC Act, his evidence is not admissible against him in any criminal proceedings except for the prosecution of offences under the ICAC Act.

The DPP, in determining whether to prosecute Mr Hart for the above offences, will have available by way of evidence the relevant court records, the evidence of the clients he represented and the telephone intercepts.

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action under the *Legal Profession Act 2004* against Mr Hart for unsatisfactory professional conduct or professional misconduct. In stating this opinion, the Commission is cognisant of the fact that Mr Hart has surrendered his practising certificate and he is no longer practising as a barrister. However, absent any formal finding of unsatisfactory professional conduct or professional misconduct, he may be entitled to seek the re-issuing of a practising certificate.

Anthony Paul

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Paul for one offence of perverting the course of justice contrary to section 319 of the Crimes Act, namely by knowingly providing false information to the Downing Centre Local Court in April 2009 in relation to Mr Kirkwood.

Mr Paul gave his evidence before the Commission under objection and his evidence is therefore not admissible against him in any criminal proceedings pursuant to section 37(3) of the ICAC Act except in respect of offences under the ICAC Act.

In determining whether to prosecute Mr Paul for the above offence, the DPP will have available the evidence of the telephone intercepts, court records and Mr Kirkwood.

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action under the *Legal Profession Act 2004* against Mr Paul for unsatisfactory professional conduct or professional misconduct. In stating this opinion, the Commission is cognisant of the fact that Mr Paul has surrendered his practising certificate and he is no longer practising as a solicitor. However, absent any formal finding of unsatisfactory professional conduct or professional misconduct, he may be entitled to seek the re-issuing of a practising certificate.

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Todd Donohue, Benjamin Bleckman, Deborah Graham, Bradley Wheaton, Jessica Smith or David Kirkwood for any criminal offences.

Chapter 3: Making representations of payments to public officials

This chapter examines representations Mr Hart made to Mr Kelly in 2008 that he was able to ensure that no prosecution would be commenced in relation to a sexual assault allegation made by a complainant ("Miss X") against Mr Kelly, Christopher Trinder and Jeffrey Nankivell. He represented this would be achieved by payment, through him, of $10,000 to a person employed at the Office of the Director of Public Prosecutions in Wagga Wagga. The conduct of Messrs Kelly, Trinder and Nankivell is also examined.

This chapter also examines other instances where Mr Hart represented to other clients and/or associated persons that he was able to bring about a more favourable outcome for those clients if payment was made to him in addition to his legal fees, implying that such an outcome could be achieved by him paying public officials in either the police, the DPP or the courts.

The Kelly matter

Background

On 29 November 2006, Mr Kelly and a co-accused were charged with sexual assault offences. The matter proceeded to trial in the District Court of NSW in Wagga Wagga on 18 February 2008, resulting in both Mr Kelly and the co-accused being acquitted of all charges on 26 February 2008. Mr Kelly was represented by Mr Paul and Mr Hart.

Before and after the trial, Wagga Wagga detectives were investigating a separate allegation of sexual assault made by another complainant, "Miss X", who identified Mr Kelly and two other men, Christopher Trinder and Jeffrey Nankivell, as the alleged offenders. Mr Kelly was aware of this investigation.

The arrangement

Mr Kelly told the Commission that on the day of his acquittal on 26 February 2008, Mr Hart told him that Detective Tina Hall, the officer in charge of the investigation which led to Mr Kelly's trial, had threatened "to get" Mr Kelly. Mr Kelly understood this to mean that she would pursue him over the allegations of sexual assault made by Miss X.

According to Mr Kelly, Mr Hart said words to the effect "Well I can make a payment to some people" and "I can make a payment and make it go away".

Mr Hart told him it would cost him $10,000 plus another $5,000 for Mr Hart to facilitate the arrangement. When Mr Kelly, either then or subsequently, told Mr Hart that he had no money left after paying for his trial, Mr Hart suggested to him that he talk to Messrs Trinder and Nankivell and get them to contribute.

Initially, Mr Kelly said that Mr Hart did not identify the "people" he had in mind. However, he later claimed that either on that day or a few days later Mr Hart told him "when the file hits on somebody's desk it won't go any further" and although Mr Hart did not at that time mention a name, he made a reference to the DPP.

Mr Kelly told the Commission that he accepted that Mr Hart could make the matter go away and was therefore prepared to pay Mr Hart the amount he asked. However his financial circumstances at that time were such that it was impossible for him to raise the $5,000, being his share of the total amount of $15,000 required. He therefore explained his situation to Mr Hart during a further conversation. Mr Hart then agreed to accept $2,000 instead of $5,000 as payment for his part in facilitating the arrangement, so that the total amount was reduced from $15,000 to $12,000.

By this stage Mr Kelly clearly understood that Mr Hart was proposing to pay someone at the DPP to ensure that the investigation into Miss X's complaint did not result in a prosecution. That this was his understanding is confirmed by what Mr Kelly said in evidence concerning his initial conversations with Messrs Trinder and Nankivell.

Mr Kelly rang Mr Trinder (who was living in Queensland at this time) a day or two later. He said he told Mr Trinder that Mr Hart had told him "that Tina Hall was coming

after me and we could make it go away if we, if we made a payment to the DPP".

Mr Trinder told the Commission that when Mr Kelly rang him, Mr Kelly told him what Mr Hart had said about the police investigation and asked him for a contribution of $5,000 that ".... was going to get paid to someone in the department that was going to get, eventually get the bit of paper across their desk and he would just sign off on it", by which he understood the matter would be stopped. Mr Trinder did not say that Mr Kelly specifically mentioned the DPP in the conversation. He claimed that it was only after he made the payment to Mr Kelly and during a telephone conversation on 21 April 2008 (referred to later in this chapter) that Mr Kelly mentioned the DPP.

Mr Kelly said he also contacted Mr Nankivell. He repeated what he told Mr Trinder. Mr Kelly said Mr Nankivell told him that his reputation and potentially his business could be ruined if he had to go through a trial arising out of Miss X's allegations. According to Mr Kelly, Mr Nankivell agreed to the proposition and said "Do whatever it takes. There's no way I'm going through what you boys have just been through."

Mr Nankivell recalled Mr Kelly asking him for $5,000 to be paid to Mr Hart. He claimed there was no indication that what was to be done by Mr Hart was illegal and that he believed the payment was for legitimate legal expenses. After this evidence was put to him, Mr Kelly told the Commission that he had told Mr Nankivell that the money would be paid to someone at the DPP and did not accept Mr Nankivell's recollection of their conversation as accurate.

The understanding that Mr Trinder and Mr Nankivell had of the arrangement is discussed in greater detail below.

Mr Kelly initially said Mr Nankivell paid him $5,000 cash which he deposited into Mr Hart's TAB account. He said Mr Trinder transferred $5,000 to his bank account which he then withdrew and paid into Mr Hart's TAB account. Mr Kelly said he also gave $2,000 in cash directly to Mr Hart.

When it was pointed out to him that Mr Hart's TAB account showed only a single deposit of $7,000 on 8 March 2008, Mr Kelly reconsidered his evidence. He then said he may have confused the payments, thinking of the money he later paid to Mr Hart after receiving payment of his legal costs from the Attorney General's Department. He said he may have made a deposit of $7,000, comprising the $5,000 received from either Mr Trinder or Mr Nankivell and his own $2,000, into Mr Hart's TAB account and given Mr Hart the balance of $5,000 in cash.

Notwithstanding this imprecision in Mr Kelly's account, the Commission does not doubt Mr Kelly's evidence that ultimately a total amount of $12,000 was paid to Mr Hart.

After the payments were made, Mr Trinder became aware that the police investigation into the allegations made by Miss X was continuing as Detective Hall had asked to interview him. He complained about this to Mr Kelly by way of a text message seeking his money back.

In a lawfully intercepted telephone conversation between Mr Kelly and Mr Hart on 18 April 2008, shortly after Mr Trinder had sent the text message asking for his money back, the following exchange took place.

Kelly:	*Um I just got a phone call from Chris Trinder, he said he just got off the phone from Tina Hall.*
	....
Hart:	*Ah with, because I, I, my bloke said he wouldn't do anything about that.*
Kelly:	*Well Tina –*
Hart:	*Leave it. Leave it with me.*
Kelly:	*Yep.*
Hart:	*Leave it with me otherwise, it'll be straight back, don't worry about that.*
Kelly:	*What's that ?*
Hart:	*Otherwise it'll be straight back.*
Kelly:	*Well, I'd rather not fuckin' have it come to that.*
Hart:	*Oh [unintelligible] that'd be fuckin' right otherwise it'd be straight back, don't worry about that, they're the rules. Mate they're the rules. Mate she just fuckin' hates you mate. Ah well anyway I'll tell you my bloke said he would not do anything about it. I'm tellin' ya. Alright ? That's what we, we organised.*

Mr Kelly told the Commission he understood the references to "otherwise it'll be straight back" to mean that if the investigation resulted in prosecution action the $12,000 would be refunded.

Sometime later Mr Kelly was advised that Detective Hall wanted to interview him in relation to Miss X's complaint. He rang Mr Hart on 27 April 2008 to discuss this.

Kelly:	*…. she's left a message saying that she wants to interview me tomorrow.*
Hart:	*Ohhhh mate well she's entitled to do that. Now, I'm tellin' ya my bloke Gary Corr who's the, the, it's gotta go through him, he said he won't pursue it, I'm telling ya.*
Kelly:	*Righto.*
Hart:	*Alright, and that, as you know, we've, we've organised it.*
	….
	So mate, that's what we're gonna do. I'm tellin' you now it won't go ahead.
Kelly:	*Even without that other insurance I've got no doubt the DPP will fuckin' look at it and just laugh and throw it away from their desk.*
Hart:	*Oh mate, we've got the insurance but I'm tellin' you now, if they ran it again we'd get double costs.*

In his evidence to the Commission Mr Kelly explained that when he used the word "insurance", he was referring to the "payment to the DPP and the fact that whoever it was that Mr Hart had paid the money to wouldn't be pursuing with anything".

In another telephone conversation between Mr Hart and Mr Kelly on 21 May 2008, Mr Hart told Mr Kelly "once it gets to the Crown it won't [go anywhere]".

Mr Kelly accepted that at the time he paid the money to Mr Hart, he appreciated that it was intended to be a bribe that would be paid by Mr Hart to someone else. He clearly understood that making the payment, which he understood would go to an officer of the DPP, was wrong. He told the Commission that he never got any of the money back and that he was never told whether or not the money had in fact been paid by Mr Hart to someone else.

What did Mr Trinder know ?

Mr Trinder agreed to Mr Kelly's proposition to pay Mr Hart $5,000. Although Mr Kelly told the Commission that he told Mr Trinder the money would be paid to someone at the DPP, Mr Trinder said that initially he understood only that the payment would be made to someone in a department.

Mr Trinder told the Commission that at the time Mr Kelly first rang him about the matter, he had just moved to the Gold Coast following his divorce, had just got a new job and was just starting a new life. He was therefore anxious about Miss X's complaint. Complying with Mr Hart's proposition, as put to him by Mr Kelly, seemed like an easy option. He therefore paid Mr Kelly $5,000 by transferring the money from his account to Mr Kelly's account. In his evidence to the Commission he said "I know it was the wrong thing to do".

Whether or not he was initially told by Mr Kelly that the money would be paid to an officer of the DPP, he initially at least knew it was going to be paid to "someone in the department" and if he did not immediately understand the money was to go to an officer of the DPP, he clearly came to understand later that was the arrangement.

The following is an excerpt from a lawfully intercepted telephone conversation between Mr Trinder and Mr Kelly on 21 April 2008.

Trinder:	*Did you talk to your barrister today ?*
Kelly:	*Oh I left a message for him to call me back and find out whether we can get our money back and deal with it ourselves or whether we wait and see if it gets to the DPP and that's the bloke that hits it on the head.*
Trinder:	*Maybe that's what's gonna happen –*
Kelly;	*Huh ?*
Trinder:	*Maybe that's what — the way he was gonna do it.*

Mr Trinder discussed the issue with Mr Kelly in another telephone conversation on 29 April 2008.

Trinder:	*So um, but you know, she was saying that they've gotta send it to the DPP and then he's gotta decide.*
Kelly:	*Yeah.*
Trinder:	*So that's where I'm hoping it'll all kick in.*
	....
Trinder:	*.... You heard from your barrister or not ?*
Kelly:	*Ah yeah he rang the other night and he said when it gets to the next stage is where the insurance kicks in.*
Trinder:	*Yeah that's what I thought so we've got no big worry about it, have we ?*
	....
	Yeah. So you know I'm pretty sure the insurance'll make it go away, won't it ?

Mr Trinder was given further information by Mr Kelly during another telephone conversation on 30 April 2008.

Kelly:	*.... Anyway I spoke to my barrister and he said that he um, that the guy, the head of the DPP is waiting, is expecting a brief of evidence and he said it's gonna go nowhere anyway.*
Trinder:	*There ya go.*
Kelly:	*So Anthony Paul's saying based on what we've given them they've got nothing. And based on, and the other bloke's saying based on what he knows, with the insurance policy they've got nothing.*

Mr Trinder said he did not insist on the return of his $5,000 because from watching shows like "Underbelly", he was worried about getting himself killed if he tried to get his money back as he did not know the kind of people he was dealing with. This was so even though by this time he had doubts as to whether someone at the DPP was going to stop the matter.

Sometime in 2009 Mr Trinder was informed by Detective Hall that no charges were to be laid against him in relation to Miss X's complaint. He believed then that the payment he had made to Mr Kelly had had an effect on the matter not proceeding.

What did Mr Nankivell know ?

Although Mr Nankivell paid Mr Kelly $5,000, he claimed he believed this was a legitimate payment for legal expenses. Mr Nankivell told the Commission that he became aware of the allegations made by Miss X not long after they were first made. When he learnt that a police investigation was underway, he said he became distressed and went to four or five solicitors in an attempt to get some legal advice thinking that he was going to get arrested.

Sometime later he was approached by Mr Kelly who told him that he needed $15,000 to pay his barrister to make the matter go away and that Mr Nankivell could help by contributing $5,000. He understood Mr Kelly was approaching him and Mr Trinder because Mr Kelly did not have the money himself. He gave Mr Kelly the $5,000 in cash.

Mr Nankivell claimed that he did not understand that anything illegal was contemplated. He said he thought the money was to be paid to Mr Kelly's barrister as legal fees to make representations on Mr Kelly's behalf, although the word "representations" was not used by Mr Kelly. He claimed that he thought by helping Mr Kelly he would be helping himself because if Mr Kelly was not prosecuted, neither would he be. He said he understood Mr Kelly had a lot of information which he would be able to give to Mr Hart who would then pass it on to the appropriate people, speed up the investigation and make it go away.

He claimed that the first time he heard the suggestion about there being a condition that the money would be refunded if the investigation did not "go away" was 21 September 2009 when he gave his evidence at the public inquiry.

Mr Nankivell's evidence is in clear conflict with Mr Kelly's evidence that he told Mr Nankivell when he asked him for the money that it would be used by Mr Hart to pay someone at the DPP to ensure the investigation did not result in a prosecution.

In the Commission's view, Mr Kelly's evidence is to be preferred to that of Mr Nankivell. There is no apparent

reason for Mr Kelly to wrongfully incriminate Mr Nankivell. Mr Kelly's account of the reason for the payment to Mr Hart is intrinsically more likely than Mr Nankivell's claim that he understood he was contributing to Mr Kelly's legal expenses.

The Commission therefore rejects Mr Nankivell's evidence that the payment of $5,000 he made to Mr Kelly was made as a contribution to Mr Kelly's legitimate legal expenses, and is satisfied that he knew the $5,000 was intended to be used to pay someone at the DPP to ensure that no prosecution was commenced.

Mr Hart's involvement

Mr Hart agreed he told Mr Kelly that Detective Hall had told him that she would get Mr Kelly if it was the last thing she did. He was initially adamant that he never sought money from Mr Kelly to pay someone to ensure no prosecution arose from Miss X's sexual assault allegations.

Mr Hart initially claimed the cash deposit of $7,000 into his TAB account on 8 March 2008 was Mr Kelly's payment of his legal fees for the extra days spent on the District Court trial. He later changed his evidence and said that although he could not recall a conversation with Mr Kelly in which he sought money to pay someone at the DPP, he accepted that such a conversation could have occurred. He claimed that if he had asked Mr Kelly for money for such a purpose, he did so at a time when he was under the influence of alcohol. He said he never had any intention of paying any money to an officer of the DPP or any other public official.

In his telephone conversations with Mr Kelly on 18 April 2008 and 27 April 2008 in which they had discussed the police investigation, Mr Hart had referred to "my bloke" not doing anything about it and "my bloke Gary Corr" not pursuing the matter. When questioned about this he said that he had discussed Miss X's sexual assault complaint with a Crown Prosecutor in the DPP's Wagga Wagga office around February 2008. He was unsure if the discussion was with Gary Corr or Max Pincott.

Mr Hart said the Crown Prosecutor told him that Miss X's matter was not going to go anywhere. He did not take this as an expression of an official view, merely a comment or an observation on the part of that Crown Prosecutor.

Mr Hart's evidence of a conversation with a Crown Prosecutor is not inconsistent with Mr Corr's evidence that it was possible he had a conversation with Mr Hart in which he may have commented on his views as to the strength of Miss X's case, although he would not have said anything definitive about the prospects of the matter proceeding to prosecution. The Commission accepts that this is highly likely, as at the time the police investigation was not complete and the brief had not been provided to the DPP.

Mr Hart eventually accepted that he had intended Mr Kelly to believe that he had not only spoken to a Crown Prosecutor or someone in the prosecution process, but that money had been provided to that person to ensure no prosecution commenced and in the event that a prosecution did commence, the money would be refunded. He maintained that he would have been under the influence of alcohol at the time and again offered this as a reason for having said these things to Mr Kelly.

In relation to his telephone conversation with Mr Kelly on 27 April 2008, Mr Hart said his reference to "It's got to go through him. He said he won't pursue it" was a reference to the file on the investigation of Miss X's complaint. He claimed however that he had no idea whether this was true or not. He said he made this up and told Mr Kelly "just to shut him up".

As for the reference to the term "insurance" he used in telephone conversations with Mr Kelly, Mr Hart said he meant the exculpatory evidence in Mr Kelly's possession. He again stressed that "It didn't mean anything at all about any money going to Mr Corr or Mr Pincott or anyone at the DPP. That never happened." He accepted, however, that the proper inference to be drawn from the telephone conversations was that he was intending to convey to Mr Kelly that money had been paid to Mr Corr. He conceded that this was a scheme for collecting more money for himself. When asked whether this was something that he did in other matters, Mr Hart replied:

> *I may have, sir ….I use the term, big noting myself, trying to tell people I had contacts and trying to tell people I was probably better than I, I was ….*

Although Mr Hart accepted that he had received from Mr Kelly the $7,000 deposited into his TAB account on 8 March 2008, he did not agree that he received a further $5,000 as part of this scheme.

Given Mr Hart's overall lack of credibility and frequent inability to recall details, the Commission prefers Mr Kelly's evidence to that of Mr Hart and is satisfied that Mr Kelly made total payments to Mr Hart of $12,000, of which he understood $10,000 would be used to pay an officer of the DPP to ensure that no prosecution arose from the investigation of Miss X's allegations, and the balance retained by Mr Hart as his payment for organising the arrangement.

Gary Corr

Mr Corr is a Crown Prosecutor with the Wagga Wagga office of the DPP. He had known Mr Hart for at least 10 years.

Mr Corr said he was aware of the sexual assault allegation against Mr Kelly made by Miss X and had examined the evidence during the course of preparing an advice on another matter. He prepared an internal memo in which he concluded that Miss X's statement did not reveal any material which would result in a conviction.

Mr Corr said he did not have a specific recollection of discussing with Mr Hart any potential for a prosecution in relation to Miss X's complaint, but believed it was possible that he may have mentioned Miss X's sexual assault matter to Mr Hart and commented on his views as to the strength or weakness of the case.

He was shown the transcripts of the two telephone conversations between Mr Hart and Mr Kelly on 27 April 2008 and on 30 April 2008. When asked whether he discussed Miss X's matter with Mr Hart in April 2008, Mr Corr replied that he had no memory of such discussions but acknowledged it was possible, although he would have had no reason whatsoever to discuss the matter with Mr Hart after Mr Kelly's trial was over.

He went on to say that it would not necessarily be the case that any brief on the allegations made by Miss X would go through him. Any brief could go to the other Crown Prosecutor at Wagga Wagga, Mr Pincott, or to the trial advocate.

Mr Corr told the Commission that he had never been offered or received from Mr Hart or anyone else money for the purpose of influencing his decisions as a Crown Prosecutor.

The Commission regards Mr Corr as a credible witness who gave truthful and reliable evidence at the public inquiry. The Commission is satisfied that at no stage was Mr Corr a party to the offer or receipt of money from Mr Hart for the purpose of influencing any role he might play in considering whether Mr Kelly or others should be prosecuted as a result of Miss X's complaint of sexual assault.

Max Pincott

Mr Pincott is the other Crown Prosecutor stationed at the Wagga Wagga office of the DPP. He also knew Mr Hart.

Mr Pincott said that as far as he was aware, he had no involvement in either of the two sexual assault matters involving Mr Kelly. He could not recall any conversations with Mr Hart on whether Miss X's allegations would result in a prosecution of Mr Kelly.

He said that although it was possible that he had become aware of Miss X's allegations, it was not his practice to discuss with fellow practitioners the likelihood of a matter proceeding to a prosecution prior to any charges having been laid. He added that it was also highly unlikely that he would make a comment about a case he knew nothing about.

He denied ever receiving money directly or indirectly from Mr Hart or anyone else with the object of causing him to do something other than his duty as a Crown Prosecutor.

The Commission regards Mr Pincott as a credible witness who gave truthful and reliable evidence at the public inquiry and accepts his evidence.

What happened to the money?

There is no evidence that Mr Hart either intended to make any payment to any public official or in fact did so. The Commission is satisfied that he kept the $12,000 he received from Mr Kelly for his own use and that it was always his intention to do so. It is not clear whether his motive was simply to obtain additional money from Mr Kelly, or whether the charade was concocted by him to impress Mr Kelly and others with his professed ability to improperly influence the justice system for his clients' benefit.

Evan O'Rourke's matter

Evan O'Rourke was charged by NSW Police on 22 June 2008 for two offences arising from an altercation at a nightclub. These matters were listed at Sutherland Local Court on 24 July 2008. His father Neil O'Rourke engaged Mr Hart to represent his son.

Evidence from lawfully intercepted telephone conversations between Mr Hart and Neil O'Rourke revealed that Mr Hart told him that upon payment of what he called "show money" of $1,000 he could arrange for someone to help his son with his court matter.

Evan O'Rourke appeared before a magistrate on 26 February 2009 when he was sentenced to a good behaviour bond for two years without having a conviction recorded in respect of the assault charge. The other offence of failing to quit premises was withdrawn.

Evan O'Rourke told the Commission that his father was the person who dealt with Mr Hart and paid Mr Hart. He said that he was not party to many of the conversations which took place between Mr Hart and his father and accordingly, he had no knowledge of any alleged solicitation by Mr Hart of money from his father to bring about favourable results for his court matter.

The Commission accepts Evan O'Rourke's evidence as being truthful and reliable and is satisfied that he did not engage in any corrupt conduct.

Neil O'Rourke told the Commission that Mr Hart had suggested to him, after his son was charged, that Mr Hart could approach the police in respect of the original charge and that a change of a few words could have an impact on the outcome of the case. Mr Hart indicated that the arresting officer would have to be involved. Neil O'Rourke said that he thought this was a "fanciful type of idea".

Mr Hart asked for $1,000 to pay his contact, as evidenced by the following lawfully intercepted telephone conversation between him and Neil O'Rourke on 6 August 2008.

Hart:	*Yeah I can talk to the right bloke but mate, I'm going to need some, as I said, some, something to show him.*
N. O'Rourke:	*What ? For him ?*
Hart:	*Yeah.*
N. O'Rourke:	*Or for you ?*
Hart:	*Not for me. I'm sweet.*
N. O'Rourke:	*Oh you — for him, is it ?*
Hart:	*Yeah.*
N. O'Rourke:	*Yeah and you reckon it might do the trick ?*
Hart:	*Well it has before.*
	....
N. O'Rourke:	*How much do you reckon we'll need ? $300 ?*
Hart:	*Ah you're kiddin' me. Nah one, no, no a big one.*
N. O'Rourke:	*Oh fuck that much !*
Hart:	*A grand. Oh shit yeah.*

Neil O'Rourke understood the person Mr Hart referred to in the conversation was someone Mr Hart would approach to have "the charge sheet, some word .... changed".

Neil O'Rourke paid Mr Hart $1,000, but claimed this was "on account of fees". He claimed not to know whether any of the money was going to be paid to anyone. Ultimately he paid Mr Hart between $2,500 and $2,800.

When later asked whether it was his understanding the $1,000 was for Mr Hart's fees as he had earlier claimed, he replied "No". He then went on to say that it was for fees because he knew he owed Mr Hart $1,000, but that the payment of the $1,000 took place at the same time that Mr Hart suggested somebody could "do things".

In relation to Mr Hart's suggestion that he could get someone to "do things", Neil O'Rourke said "I wasn't sure if it was improper or not. Yeah, I think it was improper." However, when he was cross examined by Mr Hart's legal representative, he agreed that he had spoken to Mr Hart, who had indicated he might make some representations or speak to someone about a disputed fact concerning Evan O'Rourke's charges, and that he did not think that was wrong, but rather believed it to be the sensible thing to do.

Mr Hart admitted that he represented to Neil O'Rourke he would use the money he sought from him to pay someone in relation to Evan O'Rourke's prosecution. However, he claimed that he never intended to pay the money to anyone and did not pay anyone. He agreed that the purpose of asking Neil O'Rourke for the payment was so he could get more money for his own use.

Neil O'Rourke's evidence at the public inquiry was unsatisfactory in that he often prevaricated and gave answers which were unclear or contradictory.

It is clear from the telephone conversation of 6 August 2008 that Mr Hart did represent to Neil O'Rourke that he was in a position to influence the outcome of Evan O'Rourke's court matter and solicited $1,000 from him for this purpose. The Commission is satisfied that Neil O'Rourke was agreeable to the proposition and understood that the money would be used to pay someone, most probably a police officer, in return for

his son's charge sheet being amended to benefit his son. However the Commission is not satisfied that there is sufficient evidence to indicate that he in fact paid the money requested by Mr Hart for this purpose.

Todd Donohue's matter

Todd Donohue was charged with the offences of affray and common assault on 27 June 2008. Todd Donohue's father Chris Donohue engaged Mr Hart to represent his son.

Evidence from a lawfully intercepted telephone call between Mr Hart and Chris Donohue on 10 November 2008 indicated that Mr Hart claimed to be able to arrange for his prosecutor "mate" to have the charges against Todd Donohue withdrawn in return for payment of $5,000 or $6,000.

Hart:	*As I was saying my mate's just been appointed the Prosecutor there so we'll, I think we can do something. But he might need some show money on, on Thursday alright ?*
C. Donohue:	*Well what sort of [unintelligible] are we looking at ?*
Hart:	*Oh only five or six, fuck all.*
C. Donohue:	*Five or six thousand ?*
	....
Hart:	*Yeah. Well, mate, I'll, I'll, I'll probably, you know I'll want one for doing it and I'll need five show money and what we organise with my mate, bloke, will then make representations to have the matter withdrawn.*
C. Donohue:	*Alright I'll ring you, I'll ring you tomorrow and we'll sort something out.*
Hart:	*Yeah because matey I'm sure I can dead set fix it.*
C Donohue:	*Alright, no worries.*

At the public inquiry, Chris Donohue admitted he understood Mr Hart to mean that the money was to go to Mr Hart's "mate" to assist in having the prosecution withdrawn and that he knew what Mr Hart was suggesting to him was wrong. He said he agreed to pay Mr Hart the money because he wanted representation for his son, but he never in fact paid Mr Hart the money. He went on to say he did not believe what Mr Hart was proposing would happen and thought that Mr Hart was just trying to get more money out of him for himself.

Chris Donohue told the Commission that he paid Mr Hart a total of $2,000 for legal fees. This evidence is in conflict with the evidence given by Todd Donohue at his compulsory examination on 18 August 2009. On that occasion, Todd Donohue told the Commission that he had given his father about $3,000 in payment of Mr Hart's legal fees and in addition his father had paid Mr Hart about $6,000 or $7,000, although he was not certain about the amounts. At the public inquiry, he departed from his earlier evidence and said he had no idea how much his father paid Mr Hart. He said that when he told the Commission at his compulsory examination that his father had paid Mr Hart $6,000 or $7,000, he just said the first thing that came into his head.

Mr Hart claimed he had no recollection of the telephone conversation of 10 November 2008. However, he accepted he was representing that he could influence the prosecution process in relation to Todd Donohue's court matter upon payment by Chris Donohue of "show money", in addition to his legal fees. He said, however, that he never received any "show money". If he had, he would have kept the money for himself.

In the Commission's opinion, Todd Donohue's explanation for his change of evidence in respect of how much money was paid by his father to Mr Hart is not convincing, and raises some doubt as to whether Chris Donohue's claim that he never paid Mr Hart the "show money" he had agreed to pay him is genuine. However, in all the circumstances, the Commission takes the view that there is insufficient evidence that Chris Donohue made any improper payment to Mr Hart in addition to legitimate legal fees.

Dean McShane's matter

The Commission lawfully intercepted a telephone conversation between Mr Hart and his client Dean McShane on 10 December 2008. In this conversation, Mr Hart made a proposition to Mr McShane similar to the proposition he made to Neil O'Rourke and Chris Donohue, namely that upon payment of money to a public official employed in the administration of justice

system, he could influence that public official to act in Mr McShane's interests. The following exchange took place.

Hart:	*I'm meeting my bloke this afternoon.*
McShane:	*Yep.*
Hart:	*He's in town, having dinner with him. Um but we need him –*
McShane:	*Yup.*
Hart:	*– to say he doesn't oppose a non-custodial sentence.*
	….
	Oh mate if the Crown says he can't do it he can't so we're going to have to do the same deal, alright ?
	….
	Alright mate, well mate I could – just to shore it up if you organised that today you could put it into my TAB account and I – I can give it to him tonight.

Mr Hart admitted that during this telephone conversation, he proposed that Mr McShane pay him extra money so that he could pay some of it to the Crown Prosecutor in order to favourably affect the outcome of Mr McShane's prosecution. He said the proposal was all "rubbish" and admitted that he intended Mr McShane to believe he was going to exert some influence on the outcome of Mr McShane's court case, when it was not true that he had any such influence.

Mr McShane was not called to give evidence at the public inquiry. There is no evidence that he has engaged in corrupt conduct in relation to this matter.

Mr Hart's evidence

Mr Hart told the Commission that he did not recall seeking money from Mr Kelly, Neil O'Rourke, Chris Donohue or Mr McShane to pay public officials to act improperly in relation to prosecution matters. In the face of the telephone intercept evidence presented at the public inquiry, he accepted that he did so. He maintained, however, that he never approached or paid any public officials and never had any intention of doing so.

When asked to explain why he represented he could pay public officials to act improperly with regard to prosecution matters, he answered as follows:

> *I don't know why. It's madness for me in my position. …. Why would I do that?…. I can only assume it's self-aggrandising, I'm trying to make myself out to be better than I am, I'm really well-connected, aren't I smart. I'm not.*

He accepted that in making such representations as a barrister, he was creating the clear impression that he could influence judicial outcomes, which was completely inconsistent with his responsibilities as an officer of the court, thereby bringing into disrepute the wider criminal justice system. He also agreed that by making these representations, he placed his clients in a difficult position.

Findings of fact

Based on the evidence referred to above, the Commission is satisfied that the following facts have been established to the requisite standard of proof.

1. In 2008, the Wagga Wagga police were investigating an allegation of sexual assault made by "Miss X" against Jason Kelly, Christopher Trinder and Jeffrey Nankivell.
2. In early 2008 John Hart represented to Mr Kelly that upon payment of $15,000 to him, of which he would pass on $10,000 to an officer of the Wagga Wagga office of the DPP, that officer would, in return for the payment, ensure that the investigation into Miss X's complaint of sexual assault would not result in commencement of prosecution proceedings.
3. When Mr Kelly told Mr Hart that he did not have $15,000, Mr Hart suggested that Mr Kelly ask Mr Trinder and Mr Nankivell to contribute and later agreed to reduce the amount to be paid to $12,000, of which he would retain $2,000 and pay the balance to the DPP officer.
4. Mr Kelly subsequently approached Mr Trinder and Mr Nankivell and all three men agreed to take up Mr Hart's proposition to arrange for a DPP officer to be paid money in return for that officer improperly exercising his public official functions in such a way as to ensure that the police

investigation into Miss X's complaint of sexual assault would not result in the commencement of prosecution proceedings. In pursuance of their agreement, Mr Trinder and Mr Nankivell each paid Mr Kelly $5,000 with the intention he would pay that money to Mr Hart, who would use the money to pay an officer of the DPP to improperly exercise his public official functions.

5. Mr Kelly paid Mr Hart a total of $12,000, being the $10,000 contributed by Messrs Trinder and Nankivell and $2,000 of his own money, with the intention that Mr Hart would use this money to pay $10,000 to a DPP officer to improperly exercise his public official functions in such a way as to ensure that the police investigation into Miss X's complaint of sexual assault would not result in the commencement of prosecution proceedings.

6. Mr Hart solicited and received $12,000 from Mr Kelly on the pretence that he was going to use it to pay $10,000 to a DPP officer to improperly exercise his public official functions so as to ensure that the police investigation into Miss X's complaint of sexual assault would not result in the commencement of prosecution proceedings, when in fact he had no intention of doing so and did not do so.

7. In 2008, Mr Hart represented to Neil O'Rourke that, upon payment of $1,000 which he would pass on to a public official employed in the administration of justice system, that officer would, in return for the payment, act in the interests of Neil O'Rourke's son Evan O'Rourke in relation to Evan O'Rourke's court matter. The evidence does not establish that Neil O'Rourke acted on this request.

8. In 2008, Mr Hart represented to Chris Donohue that upon payment of $5,000 or $6,000 which he would pass on to a public official employed in the administration of justice system, that officer would, in return for the payment, act in the interests of Chris Donohue's son Todd Donohue in relation to Todd Donohue's court matter. The evidence does not establish that Chris Donohue acted on this request.

9. In 2008, Mr Hart represented to Dean McShane that upon payment of money in addition to his legitimate legal fees, which he would pass on to a public official employed in the administration of justice system, that officer would, in return for the payment, act in the interests of Dean McShane in relation to his court matter. There is no evidence that Dean McShane acted on this request.

Corrupt conduct

In determining findings of corrupt conduct the Commission has applied the approach set out in Appendix 2 to this report.

Mr Hart

Mr Hart sought payments of money from Messrs Kelly, Trinder, Nankivell, Neil O'Rourke, Chris Donohue and Dean McShane on the basis that he would use these payments to pay public officials in return for those public officials exercising their public official functions in such a way as to favour the interests of his clients. He actually received payments from Messrs Kelly, Trinder and Nankivell for this purpose. At no time, however, did Mr Hart actually intend to make any such payment to a public official and no such payment was ever made by him.

Given that Mr Hart never intended that his actions would affect the exercise of official functions and that nothing that he did in this regard affected the exercise of official functions, the Commission does not consider that his conduct comes within section 8 of the ICAC Act. In these circumstances Mr Hart's conduct is not corrupt conduct within the meaning of that term in the ICAC Act.

Mr Corr and Mr Pincott

The Commission finds that Mr Corr did not engage in corrupt conduct, being satisfied that he was never offered or received money from Mr Hart for the purpose of influencing his exercise of his official duties as a Crown Prosecutor.

The Commission finds that Mr Pincott did not engage in corrupt conduct, being satisfied that he was never offered or received money from Mr Hart for the purpose of influencing his exercise of his official duties as a Crown Prosecutor.

Neil O'Rourke

The Commission does not find that Neil O'Rourke engaged in corrupt conduct, as there is no evidence that he acted on Mr Hart's proposition to pay a public official in order to induce that public official to act in the interests of Evan O'Rourke in relation to Evan O'Rourke's court

matter in return for the payment, by making the payment sought to Mr Hart.

Chris Donohue

The Commission does not find that Chris Donohue engaged in corrupt conduct, as there is no evidence that he acted on Mr Hart's proposition to pay a public official in order to induce that public official to act in the interests of Todd Donohue in relation to Todd Donohue's court matter in return for the payment, by making the payment sought to Mr Hart.

Dean McShane

The Commission does not find that Dean McShane engaged in corrupt conduct, as there is no evidence that he acted on Mr Hart's proposition to pay a public official in order to induce that public official to act in the interests of Dean McShane in relation to his court matter in return for the payment, by making the payment sought to Mr Hart.

Messrs Kelly, Trinder and Nankivell

Messrs Kelly, Trinder and Nankivell provided money to Mr Hart with the intention that he would use that money to pay an officer of the DPP to improperly exercise his public official functions in such a way as to ensure that the police investigation into Miss X's complaint of sexual assault would not result in the commencement of prosecution proceedings against them. However, given that Mr Hart's proposition was pretence on his part and that he never intended to make such a payment to a public official and did not in fact make such a payment, the issue arises as to whether their conduct can come within section 8 of the ICAC Act.

For their conduct to come within section 8 of the ICAC Act it would be necessary to demonstrate that their conduct adversely affected or could have adversely affected either directly or indirectly the honest or impartial exercise of official functions by a public official (section 8(1)(a) of the ICAC Act) or their conduct could adversely affect either directly or indirectly the exercise of official functions by any public official and could involve any of the matters set out in section 8(2) paragraphs (a) to (y). The use of the word "could" in sections 8(1)(a) and 8(2) clearly indicates that conduct may come within section 8 even if it does not succeed in actually affecting the exercise of official functions. As it was never intended by Mr Hart to pass any money on to any public official, it was impossible that any public official could or would be adversely affected in the exercise of their official functions. However, in determining whether conduct comes within the terms of section 8 of the ICAC Act, it is necessary to consider the intention of the person whose conduct is in question.

The question of whether particular conduct "could" adversely affect the exercise of official functions involves issues of remoteness and causation and matters of fact and degree. A direct attempt to bribe a public official may fail because the public official is honest. That does not mean that the conduct of the person who offered the bribe with the intent to affect the exercise of official functions is not corrupt. In the present case a further step is involved. The payment was made through an agent, Mr Hart. Mr Hart professed that he could and would make a payment to an officer of the DPP to ensure prosecution proceedings were not commenced. The fact that Mr Hart did not intend to make such a payment and did not do so does not make the conduct of Messrs Kelly, Trinder and Nankivell too remote to come within sections 8(1)(a) and 8(2) of the ICAC Act.

In the present case it was the intention of Messrs Kelly, Trinder and Nankivell that, based on the knowledge they had, the money they provided to Mr Hart would be used by him to pay a public official to affect the exercise of that public official's functions. The Commission is satisfied that Messrs Kelly, Trinder and Nankivell had a clear appreciation that what they were doing was wrong.

The Commission is satisfied that Messrs Kelly, Trinder and Nankivell intended that the money they provided to Mr Hart would be used by him for the purpose of paying money to an officer of the DPP to adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by that public official within the meaning of section 8(1)(a) of the ICAC Act.

Such conduct was also intended by them to adversely affect either directly or indirectly the exercise of official functions by a public official. Their conduct could, for the purposes of section 8(2) of the ICAC Act, involve offering secret commissions (see section 249B(2) of the Crimes Act referred to below) and perverting the course of justice or matters of the same or similar nature.

In each case their intention that official functions would be affected, coupled with their acts in providing money to Mr Hart for that purpose, is sufficient to bring their conduct within sections 8(1)(a) and 8(2) of the ICAC Act.

Conduct is not corrupt unless it also comes within the terms of section 9(1) of the ICAC Act. For present purposes this means that the conduct must be capable of constituting or involving a criminal offence.

Section 249B(2) of the Crimes Act provides:

> *If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit*
>
> *(a) as an inducement or reward for or otherwise on account of the agent's:*
>
> *i. doing or not doing something, or having done or not having done something, or*
>
> *ii. showing or not showing, or having shown or not having shown, favour or disfavour to any person, in relation to the affairs or business of the agent's principal, or*
>
> *(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal, the first mentioned person is liable to imprisonment for seven years.*

The term "agent" is defined in section 249A of the Crimes Act and includes "any person purporting to be, or intending to become, an agent of any other person (who in this case is referred to in this Part as the person's principal)". Although Mr Hart was never in fact the agent of the DPP or any officer of the DPP, he purported to be so by claiming he could make a payment of money to an officer of the DPP to influence that officer's discharge of his official duties. Messrs Kelly, Trinder and Nankivell understood the money they provided to Mr Hart would be used by him to pay an officer of the DPP (Mr Hart's principal) in order to influence that officer's discharge of his official functions. The Commission is accordingly satisfied that their conduct is capable of constituting or involving an offence under section 249B(2) of the Crimes Act.

The Commission is also satisfied that their conduct could constitute or involve an offence of perverting the course of justice contrary to section 319 of the Crimes Act. That section provides that:

> *A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.*

Section 312 of the Crimes Act defines the phrase "pervert the course of justice" in the following terms:

> *A reference in this Part to perverting the course of justice is a reference to obstructing, preventing, perverting, or defeating the course of justice or the administration of the law.*

In *R v Rogerson* ((1992) 174 CLR 269) the High Court considered the common law offence of conspiracy to pervert the course of justice. In doing so the Court noted that it is well established that the offence can be committed when no curial offences are on foot (per Mason CJ at 277). It was further held that an act which has a tendency to deflect the institution of criminal or disciplinary proceedings, or prevent the true facts from being adduced is an act that tends to pervert the course of justice (per Mason CJ at 278; Brennan and Toohey JJ at 280).

The scope of the statutory offence has been considered in *Gillies: Criminal Law, Fourth Edition* at 837, where it is stated:

> *The offence then, is clearly broad in scope. It does not in all its literal terms require the intentional doing of an act which actually perverts justice or one having this tendency. Rather, it requires simply that the conduct of the accused be accompanied by the intent to pervert justice. It therefore embraces (as does the common law offence) acts which fall short of actually perverting justice, and which merely have this potential.*

In these circumstances the Commission finds that the conduct of Messrs Kelly, Trinder and Nankivell, in providing money to Mr Hart with the intention that he would use the money to pay $10,000 to a DPP officer to improperly exercise that officer's official functions in such a way as to ensure that the police investigation into Miss X's complaint of sexual assault would not result in the commencement of prosecution proceedings against them, is corrupt conduct.

Section 74A(2) statement

For the purposes of this report relevant to this chapter, John Hart, Jason Kelly, Christopher Trinder, Jeffrey Nankivell, Gary Corr, Neil O'Rourke, Chris Donohue and Dean McShane are "affected" persons.

John Hart

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hart for four offences of false pretences contrary to section 179 of the Crimes Act, namely by making false representations to:

i. Jason Kelly

ii. Neil O'Rourke

iii. Chris Donohue; and

iv. Dean McShane

in 2008 that by payment of money to a public official, he could arrange for that public official to act in their interests and soliciting money from them for that purported purpose, when in fact he had no intention to pass the money on to any public official and did not do so.

Mr Hart gave his evidence before the Commission under objection and therefore, pursuant to section 37(3) of the ICAC Act, his evidence is not admissible against him in any criminal proceedings except for the prosecution of offences under the ICAC Act.

The DPP, in determining whether to prosecute Mr Hart for the above offences, will have available the testimony of Mr Corr and Mr Pincott (both of whom did not give evidence under objection) as well as the evidence of the telephone intercepts and would also potentially have available the evidence of Messrs Kelly, Neil O'Rourke, Chris Donohue and Dean McShane.

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action under the *Legal Profession Act 2004* against Mr Hart for unsatisfactory professional conduct or professional misconduct. In stating this opinion, the Commission is cognisant of the fact that Mr Hart has surrendered his practising certificate and he is no longer practising as a barrister. However, absent any formal finding of unsatisfactory professional conduct or professional misconduct, he may be entitled to seek the re-issuing of a practising certificate.

Messrs Kelly, Trinder and Nankivell

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of each of Messrs Kelly, Trinder and Nankivell for an offence under section 249B(2) of the Crimes Act (corruptly giving a benefit to an agent) and an offence under section 319 of the Crimes Act (intending to pervert the course of justice).

Each of Messrs Kelly, Trinder and Nankivell gave their evidence before the Commission under objection and therefore, pursuant to section 37(3) of the ICAC Act, their evidence is not admissible against them in any criminal proceedings except for the prosecution of offences under the ICAC Act.

The DPP, in determining whether to prosecute Messrs Kelly, Trinder and Nankivell for the above offences, will have available the evidence of the telephone intercepts.

Other affected persons

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Gary Corr, Neil O'Rourke, Chris Donohue or Dean McShane.

Chapter 4: Inflation of costs claim

This chapter examines whether Mr Hart, together with his instructing solicitor Mr Paul and their client Jason Kelly, sought to obtain money improperly from the Attorney General's Department ("the AGD") by submitting to the AGD a deliberately inflated claim for legal costs. The costs claim arose from an application made on Mr Kelly's behalf for the payment of his legal costs arising from a sexual assault trial in which he was acquitted of all charges in February 2008.

Background

Mr Kelly engaged Mr Paul as his solicitor for the trial. Mr Paul in turn instructed Mr Hart to act as Mr Kelly's counsel.

The *Legal Profession Act 2004* ("the Legal Profession Act") provides for the regulation of legal practice in NSW. It includes a requirement that a legal practice or sole practitioner must disclose to a client the basis on which legal costs will be calculated and an estimate of the total legal costs if reasonably practicable. If it is not reasonably practicable to provide such an estimate, then a range of estimates must be provided together with an explanation of the major variables that will affect the calculation of those costs.

If a legal practice intends to retain a barrister on behalf of a client, then it must disclose to the client the basis on which the barrister's costs will be calculated and provide an estimate of the barrister's total legal costs or, if that is not practicable, a range of estimates together with an explanation of the major variables that will affect the calculation of those costs. The Legal Profession Act provides that the barrister is required to provide the necessary details to the legal practice.

The Legal Profession Act requires these disclosures to be made in writing before, or as soon as practicable after, the legal practice is retained in the matter. The intervals at which the client will be billed must also be disclosed.

Importantly for the present matter, the Legal Profession Act also requires the legal practice and barrister to make written disclosure of any substantial change to anything previously disclosed. This must be done as soon as is reasonably practicable after the change becomes known.

Failure to comply with these requirements may amount to disciplinary offences of unsatisfactory professional conduct or professional misconduct.

Before the trial commenced on 18 February 2008, Mr Kelly received a letter dated 9 January 2008 from Mr Paul's firm Creaghe Lisle, which estimated the legal costs payable by Mr Kelly at $26,371. This estimate was based on a five-day trial (the trial ended up going for seven days). Mr Hart's fees were calculated at $14,700, being $2,500 per day and a conference fee of $2,200. Mr Paul calculated his fee based on an hourly rate of $260. Mr Kelly paid the $26,371.

On 26 February 2008, Mr Kelly and his co-accused were acquitted of all charges. An application made on behalf of Mr Kelly to the court for payment of his legal costs associated with the trial was successful.

At no stage between 9 January 2008 and the completion of the trial was Mr Kelly given written notification of any changes to the fees previously disclosed to him.

On or about 18 July 2008, a claim for costs was submitted on Mr Kelly's behalf to the AGD. The claim included a letter dated 15 July 2008 and two tax invoices both dated 14 July 2008. The tax invoices itemised the costs said to be paid or due for both Mr Paul's firm and Mr Hart in the total amount of $76,008.80. This is almost three times greater than the original estimate. One invoice claimed $43,890 as Mr Hart's fee. This was calculated on the basis of a fee of $3,000 per day plus a country loading of $550 per day, neither of which amounts included GST. Mr Paul's fee had risen from the $260 per hour applied in the original estimate to $320 per hour. Numerous items of work said to have been performed by Mr Paul and Mr Hart on behalf of Mr

Kelly which were not referred to in the original estimate were also included.

Given that the trial had gone for longer than the original estimate of five days, it would be reasonable to expect that the final bill would exceed the original estimate. What was surprising was that the rates charged by Mr Hart and Mr Paul had increased significantly.

Valentino Musico had the task of assessing the costs claim on behalf of the AGD. He said he acted on the basis that the invoices he received were genuine. The AGD guidelines required claims to be assessed by reference to a scale. The relevant scale provided for assessment of solicitor's fees at $220 per hour and counsel's fees at $1,650 per day. Neither Mr Paul nor Mr Hart was aware that irrespective of the total amount claimed, the claim would be moderated according to a scale rate.

The costs claim was duly assessed by Mr Musico. In undertaking the assessment, he allowed costs for extra days for preparation for the trial that had not been claimed by Mr Paul or Mr Hart. He assessed the total amount due to Mr Kelly as $45,552. A cheque for this amount was subsequently sent to Mr Kelly by the AGD.

Mr Kelly had paid a total of $26,943 by the end of his trial. He reimbursed himself for this amount from the $45,552 he received from the AGD. The balance left over was $18,609. This amount was in turn split between Mr Hart ($5,000), Mr Paul ($8,000 paid to his firm) and Mr Kelly ($5,609).

Mr Kelly's evidence

Mr Kelly said that he believed the amount of $26,371 quoted in the letter from Creaghe Lisle of 9 January 2008 was an estimate, and therefore accepted that it did not account for the fact that his trial went longer than expected nor for the additional disbursements payable. He expected the final bill for Mr Hart and Mr Paul to be more but could not recall any discussions before or during the trial with either Mr Hart or Mr Paul regarding how much extra he would owe or at what rate he would be charged for any extra work.

Mr Kelly said he did not recall signing any fee agreements and that apart from being provided with the original costs estimate, he had not received a written fee agreement from Mr Paul.

Mr Kelly and Mr Hart had a telephone conversation on 27 April 2008 which was lawfully intercepted. The conversation was some two months after the trial and almost three months before the costs claim was submitted to the AGD. During their conversation Mr Hart told Mr Kelly that he would bill him "four a day". Mr Kelly told the Commission he understood this to mean that Mr Hart was going to charge him $4,000 a day for the trial.

He was asked whether he thought it strange that he was originally quoted $2,500 per day but after the costs order was made the amount became $4,000 per day. Mr Kelly said that he did not regard the increase in Mr Hart's bill as improper or wrong, but rather considered it as being a fair and reasonable charge for the work done by Mr Hart.

He said he accepted that he would be liable for whatever amount Mr Hart and Mr Paul decided that they should bill him for, but he "hoped that I wouldn't be pushed too much". However, he said, he had told Mr Paul that he did not want the costs award to be seen as an opportunity for Mr Paul and Mr Hart to make money from him.

He agreed with the suggestion that it was of little consequence to him whether Mr Hart or Mr Paul inflated their bills for the purposes of getting paid more by the AGD. When asked whether it crossed his mind that there might be some dishonesty involved in that being done, he replied:

> *Oh perhaps, but as I said, I knew they were inflating their bills – as to whether they were inflating them more – more than what they should have when they*

> *went back and recalculated, I really didn't worry too much about that problem .... it was like they provided me with a bill. If they said that that's the bill and that's what the accurate amount is and that's what's owing, then as far as I was concerned that's [what] the accurate amount was and that's what was owing.*

He was asked why, if he accepted that he owed Mr Hart and Mr Paul more money, he believed he was entitled to keep any of the money received from the AGD. He claimed he would "technically still be liable for the rest" until a further bill was sent to him, but "whether I had the capacity to pay it at the time would be a different story". He was reasonably confident that there would be no further liability or risk of any enforcement of this debt. He said he never raised this issue of his continuing liability and neither did Mr Paul or Mr Hart.

Mr Kelly conceded that he had resources (including $30,000 which he had put in a term deposit) to pay more money to Mr Paul's firm, if he had received a bill from Mr Paul before he received the cheque from the AGD.

Mr Kelly said that apart from questioning one item on the bill provided to the AGD, being a charge for a conference on 17 February 2008 which he believed did not take place, he did not recall any discussions with Mr Paul about the size of the new bill.

This evidence is in conflict with the evidence he previously gave at his compulsory examination on 28 May 2009. On that occasion, he told the Commission that after receiving the new invoices, he "hit the roof" and complained to Mr Paul about the difference from the original estimate. His explanation for this inconsistency was that whilst he initially expressed his discomfort about the increased bill, when Mr Paul explained that he had given him an estimate and the bills had now been recalculated reflecting the actual costs incurred, he felt powerless to do anything about it. He said he did not appreciate his legal position under the Legal Profession Act that he would not have been obliged to pay the new bill unless there had been written disclosure and he thought that the end result was out of his hands.

In a lawfully intercepted telephone conversation between Mr Kelly and a friend on 7 August 2008, Mr Kelly told his friend that he had spoken to Mr Hart and believed that he would make at least $5,000 to $10,000 out of the costs claim. Mr Kelly told the Commission that this was just bravado on his part as at that stage he did not even know how much money he was going to get back from the AGD and he was not the one determining how the money should be split. After the cheque from the AGD was received, he said he discussed with Mr Hart what the split would be. It was determined that Mr Hart would receive an extra $5,000 and he hoped this would acquit everything he owed Mr Hart. He also said that Mr Paul told him to pay $8,000 to his firm and to "Pay $5,000 to Harty" and to keep what was left over.

Another intercepted telephone conversation between Mr Kelly and his then girlfriend on 11 November 2008 was also played to him. During this call Mr Kelly said that he would "walk away with five grand profit". Mr Kelly sought to explain his reference to "five grand profit" by saying that it meant profit up to that point, but he could have got a bill for the rest of the money that was outstanding to Mr Hart and Mr Paul any day.

In a lawfully intercepted message Mr Hart left in Mr Kelly's voicemail on 12 November 2008, Mr Hart referred to seeing "if there's anything we can do about it to try to rip some, a bit more out of it ...." Mr Kelly said he understood this to be a reference to his discussions with Mr Hart about going back to the AGD and asking to have the amount of the payment reviewed (which was not pursued) because he (Mr Kelly) did not consider the amount of $45,552 allowed by the AGD to be reasonable.

The Commission rejects Mr Kelly's claim that he accepted liability for the amount of $76,008.80 claimed in the 14 July 2008 invoices. This amount was almost three times the original estimate. Although it included some additional work, the majority of the increase was attributable to the higher rates charged by Mr Paul and Mr Hart. The Commission is satisfied that Mr Kelly's evidence in his compulsory examination that he "hit the roof" when he received the new bill is correct and demonstrates his understandable concern. Unfortunately, there is no reliable evidence about what Mr Paul told him when he complained about the new bill. What is clear, however, is that at least after that conversation, if not before, Mr Kelly had no real apprehension that he would be required to pay the full amount of the bill. Indeed, the opposite was the case as he clearly understood, as evidenced from his telephone conversations on 7 August 2008 and 11 November 2008, that he would get to keep part of the money from any payment made by the AGD.

Mr Paul's evidence

At the time of Mr Kelly's trial in 2008, Mr Paul was a solicitor employed by Creaghe Lisle as a consultant. He said his retainer was about $90,000 per year but in addition he was entitled to half of every $1 over $300,000 which he earned for the firm.

Mr Paul told the Commission that in hindsight the costs estimate letter from Creaghe Lisle dated 9 January 2008 did not cover all of the costs of Mr Kelly's matter. He said

at that stage he had not done a full accounting of the file as he should have done, which was partly due to his tardiness. He explained that the letter was done because the trial was coming up in February 2008 and he had to get something out to Mr Kelly to give him an idea of what his costs might be and to get in money for the trial. He agreed that the costs estimate "wasn't of much assistance" having regard to what was later claimed in invoices of 14 July 2008. In order to prepare those invoices he had to reconstruct the file, since he had not recorded all the work done in relation to the matter except for occasional telephone calls or attendances.

Mr Paul agreed that if Mr Hart wanted to charge the amount claimed in the 14 July 2008 invoice, then the estimate he had originally given Mr Kelly was at the very least grossly unfair to Mr Kelly.

Mr Paul accepted that he was responsible, with Mr Hart's assistance, for the preparation of the information which ultimately appeared on each of Mr Hart's bills, the last of which was submitted to the AGD with Mr Kelly's costs claim. He said Mr Hart never sent him any written estimate of his fees. He said Mr Hart told him he was entitled to charge $3,000 per day.

He said he believed that what he reconstructed was correct except for a couple of errors which later came to his notice. One of these errors was a charge for a conference said to have occurred on Sunday 17 February 2008 (the day before Mr Kelly's trial was due to commence) with himself, Mr Hart and Mr Kelly. He said that Mr Kelly queried that item as Mr Kelly believed he had never taken part in such a conference. Mr Paul agreed Mr Kelly was correct, however he left the fee for the conference in the bill because he thought the conference took place between himself and Mr Hart. He conceded that Mr Hart had not arrived in Wagga Wagga until Monday 18 February 2008 and therefore the two of them could not have had a conference on 17 February 2008. He also admitted that he did not have any file notes of the conference and claimed to be confused as to what happened on 17 February 2008. He claimed that in these circumstances, the presence of the charge on his firm's invoice for $960 and on Mr Hart's invoice for $3,000 was an error on his part.

He said he also referred to the bill of the counsel for Mr Kelly's co-accused in the trial, from which he had taken the item of preparation for a section 293 submission (relating to an application for cross-examination of the complainant as to her sexual history) that appears as one of the charges on Mr Hart's bill. When asked whether he was told by Mr Hart that he had in fact done such preparation or whether he just copied the item across into the bill, he was vague and unclear in his answers, saying that he could not recall the exact conversations about this with Mr Hart.

He also conceded that Mr Hart's bill of 14 July 2008 which was submitted to the AGD included a country loading of $550 per day. This did not take into account the fact that Mr Hart's accommodation costs for staying in Wagga Wagga for the duration of the trial were paid for by Mr Paul's firm and therefore the loading should have been adjusted accordingly.

Mr Paul agreed that Mr Hart was given cheques drawn in his favour in payment of his fees during the course of the trial in amounts consistent with Mr Hart charging $2,200 per day (excluding loading) for the trial. He also agreed that if Mr Hart had been charging a higher amount, for example $4,000 per day, he would have requested a cheque for $4,000 each day, which he did not do.

In relation to his own fees, Mr Paul told the Commission that he could not recall any conversations he had with Mr Kelly about any increase. He said that in the bill to the AGD he applied a higher rate of $320 per hour for each day between 8:30 am to 5 pm, because he was "entitled" to do so. When asked why he did not use this rate in January 2008 when the costs estimate was provided to Mr Kelly, Mr Paul answered that he had applied $260 as being his rate at the time, but he was entitled to charge what he normally charged for this type of matter which was $320 per hour. He later added that after looking at the *Costs in Criminal Cases Act 1967* (NSW), he saw that he could charge "costs incurred" which meant that he could charge his hourly rate. He said payment of his fees by Mr Kelly was not contingent on a successful outcome.

Mr Paul said that he asserted to Mr Kelly that his bill was a proper and legitimate bill, that all the work had been done by him and at no time did he convey to Mr Kelly that there was anything improper or wrong in his bill. He resisted the suggestion that the bill was deliberately inflated from the original estimate to a much higher figure because it was known or hoped that a greater part of that amount would be paid by the government.

When asked why Mr Kelly was allowed to keep any money from the AGD when he still owed a significant amount to the firm as per the final bill, he said it should have been paid to the firm but when he received $8,000 from Mr Kelly after the costs claim was paid by the AGD, he wrote off the balance of the fees outstanding and did not pursue Mr Kelly for its payment. He was happy to get rid of the matter and move on to the next matter and also took into account his belief that Mr Kelly did not have any money, as

he believed Mr Kelly had borrowed money to pay for the trial and was paying it back.

Mr Paul claimed he did not agree to split the funds received from the AGD with Mr Kelly.

The Commission lawfully intercepted a telephone conversation between Mr Paul and Mr Hart on 11 November 2008 which suggested otherwise:

Hart: *…. what I was gonna, just to, gotta be careful, just to quieten him up I was gonna say give him a five and you and I will go halves.*

Paul: *Hmm.*

Hart: *We'll have five each.*

Paul: *Hmm.*

Hart: *And just give him five. We've gotta give him something.*

Paul: *Yeah.*

Mr Paul agreed the conversation suggested that he agreed to the proposition that the balance over and above what Mr Kelly had previously paid would be divided between the three of them. He explained, however, that he was "just going with the flow" and insisted that he did not agree to Mr Kelly getting more money. He could not explain why he did not say so to Mr Hart during their conversation.

He denied he told Mr Kelly to give him $8,000 and denied that he had accepted what Mr Kelly paid him because he thought it was fair. He said he could not recall what conversations he had with Mr Kelly about his future liability to his firm after the $8,000 was received.

In due course a tax invoice was prepared for $8,521 so that Creaghe Lisle's accounting records could be adjusted. The firm's ledger does not show any reference to the tax invoice which was prepared in support of Mr Kelly's costs application to the AGD.

Mr Paul agreed that he never sent Mr Kelly a fee agreement or cost disclosure as required by the Legal Profession Act because of his "tardiness".

The Commission does not regard Mr Paul as a credible witness. His testimony was often vague and contradictory and characterised by an alleged inability to recall details.

The Commission is satisfied that Mr Paul did not intend that Mr Kelly would be required to pay the invoices of 14 July 2008. If he had so intended he would have included the Creaghe Lisle invoices on that firm's records. He also would not have agreed to Mr Kelly retaining any of the money paid by the AGD, nor would he have written off the balance owed and decided not to pursue Mr Kelly for at least some part of that balance.

Mr Hart's evidence

Mr Hart claimed that he did not know in advance how much he was to receive for his work in Mr Kelly's trial since that depended on how long the trial went.

When asked what his daily rate was for the matter, Mr Hart said it would have depended on how long the case lasted although it was always going to be a minimum of $2,000 a day plus GST and expenses. He said he had an "elastic" arrangement with Mr Paul but could not recall any specific discussion about his fees. He added that he did not think there was any hard and fast agreement as to how much he would charge.

Mr Hart said he was not aware of the original costs estimate provided to Mr Kelly by Mr Paul. He said he could not recall whether he had ever discussed a specific fee with Mr Kelly. He acknowledged that he had made no written disclosure of his fees to Mr Kelly but said his understanding was that he was not required to do so as he was briefed through a solicitor. He accepted that one of the problems in this matter was that he never rendered a bill and there was never any documentation relating to what was owing to him, other than the bill created by Mr Paul on his behalf. He agreed that as a result of him not having a costs agreement with Mr Paul and, as it turned out Mr Paul not having such an agreement with Mr Kelly, it was difficult to determine objectively what fees were properly payable.

It was Mr Hart's position that there was nothing improper in him increasing his fees for inclusion in the costs claim submitted to the AGD, because "you could put in a costs application for what the trial would be worth".

A hypothetical situation was put to Mr Hart of a barrister making an arrangement to charge $4,000 a day and then later on, after a successful costs application, telling the client, "Look, we can get this out of the government so why don't we agree that it's $5,000 a day". Mr Hart was asked if he would regard this as professional misconduct. He replied "Yes, it would have to be." When asked whether he saw any relevant difference between the hypothetical example and what he himself did, his response was that he did see a difference. He said at the time the costs claim was submitted to the AGD, he did not know whether he was entitled to charge what he would have billed or what he was actually paid, and cited a scenario where he could do a

job for a friend at no charge and then upon receiving costs, be entitled to claim what he would have charged.

Mr Hart accepted that the conference for Sunday 17 February 2008 did not take place and accepted that he should not have been paid for the conference.

The invoice of 14 July 2008 prepared by Mr Paul also included an amount of $1,350 for preparation for a section 293 submission. Mr Hart said he was unaware of this particular charge and accepted that he did not prepare any written submissions. He claimed that at some stage he would have made some enquiries and done some reading on this issue.

Mr Hart was asked what he meant in his telephone conversation with Mr Kelly on 27 April 2008 when he said to Mr Kelly "there'll be a quid in it for everyone at the end of the day". He said he meant only that Mr Kelly would get his money back. He did not accept the proposition that he and Mr Paul were seeking to profit and share that profit with Mr Kelly.

Mr Hart initially told the Commission that he could not recall how much he had been paid by the end of the trial. He later said that he believed he was paid "fifteen odd grand", which he received in the form of cheques from Mr Paul. This is corroborated by Mr Paul's evidence that his firm paid Mr Hart about $16,000 prior to payment of costs by the AGD.

In relation to the division of the surplus funds from the AGD's payment, Mr Hart said he was happy to settle for the extra $5,000 for himself even though Mr Kelly may have owed him much more. He said he was not aware that the bill for his own fees submitted to the AGD in support of Mr Kelly's costs claim was over $43,000.

He said he may well have suggested that Mr Kelly keep $5,000 from the money received from the AGD although he could not remember if he in fact did.

Mr Hart was referred to the telephone conversation between himself and Mr Paul on 11 November 2008 and asked what he meant when he said to Mr Paul, ".... just to quieten him up I was gonna give him a five and you and I will go halves." Mr Hart said he could not recall the conversation and did not know what he meant. He resisted the proposition that he thought he could be in trouble if Mr Kelly was not kept quiet. He could not explain why Mr Kelly was entitled to $5,000 when, on the basis of the invoices submitted to the AGD, he apparently owed a substantial amount of fees to Mr Paul and Mr Hart.

Mr Hart was also played the message he left Mr Kelly on 12 November 2008 in which he said "if there's anything we can do about it to try to rip some, a bit more out of ...." It was suggested to Mr Hart this indicated that he regarded the AGD as a pot into which he could dip to try and get more money. He claimed that he was referring to ascertaining whether there was an avenue of appeal against the amount paid by the AGD, which he thought was "a ludicrous figure" and about which he had already spoken to Mr Paul and Mr Kelly. This evidence is basically consistent with that given by Mr Kelly on this issue.

The Commission does not regard Mr Hart as a credible witness. His testimony was not frank or convincing, was often vague and was characterised by an alleged inability to recall details. As a matter of common sense, his claim that he did not know how much he was to be paid for his legal fees when he started acting for Mr Kelly, is not believable. The fact that he was prepared to not only settle for much less than he claimed from Mr Kelly but was content for Mr Kelly to retain a substantial amount of the money from the AGD tends to indicate that he never had any expectation that he would be paid at the rate claimed in the invoice of 14 July 2008. The fact that he allowed Mr Kelly to retain money received from the AGD and took no steps to obtain any money outstanding to him indicates that he did not intend that Mr Kelly would be liable for the full amount claimed in the invoice.

Mr Paul's cheque cashing

Mr Paul admitted that he cashed four cheques totalling $7,330, including one trust cheque, issued by Creaghe Lisle and made payable to Mr Hart and kept the proceeds. He did not agree that he was cheating the partners of his firm by this means because, he said, some of the money would have been due to him as per the cost sharing arrangement he had with Creaghe Lisle and would have been brought to notice and dealt with in due course when the firm's full accounting was done. He accepted, however, that what he was doing had the potential of defrauding his firm and conceded that it was something he should not have done. He eventually admitted that the only reason for employing this mechanism was to conceal from Creaghe Lisle the fact that he was taking the money.

He said Mr Hart was aware that he was cashing cheques that were made payable to Mr Hart and keeping the money. This is corroborated by Mr Hart's evidence.

A telephone intercept on 15 July 2008 during which Mr Paul and Mr Hart discussed Mr Paul cashing a trust cheque was played. Mr Paul agreed that they jested to each other about what Mr Paul had done and that the call suggested that Mr Hart was familiar with this practice.

He also accepted that he was telling Mr Hart "what was going on" so that Mr Hart could confirm he received the money represented in the cheque in the event of some query being raised by the Creaghe Lisle accountant.

Mr Paul could not recall whether he had ever told Mr Hart how much money he had obtained by cashing cheques in Mr Hart's name.

Mr Paul recalled one other matter in which he obtained money by cashing a cheque made payable to another person.

Mr Hart's initial evidence in relation to Mr Paul's cashing of cheques made payable to him was that he could not remember if it happened or whether or not he had an arrangement with Mr Paul that he could do this, but if Mr Paul did so, it would not have concerned him. He said he was unable to explain what circumstances might have made it appropriate for Mr Paul to cash cheques drawn in his favour during the course of Mr Kelly's trial.

Later in his evidence, Mr Hart departed from his earlier position and said that he had a recollection of "one or two occasions where that happened". He went on to say that he had no problem with this as Mr Paul "could cash them in my name and fix us up later". He agreed with the suggestion that he believed it was just a mechanism by which Mr Paul could get money that he needed using Mr Hart's name on the cheques. He added that he did not realise at the time that the total amount of the cheques in his name cashed by Mr Paul during Mr Kelly's trial came to as much as $7,000 or $8,000. He accepted, in hindsight, that what was being done amounted to a fraud on Mr Paul's firm but suggested that at the time he believed that Mr Paul would repay the money.

The Commission takes the view that the evidence of Mr Paul and Mr Hart shows they participated together in the concealment of the cheque-cashing from Mr Paul's firm.

Analysis

One issue for consideration by the Commission is whether Mr Paul, Mr Hart and Mr Kelly agreed to artificially inflate the costs claim made to the AGD with the intention of obtaining money to which they would not otherwise be entitled.

The Commission is satisfied, for the reasons set out above, that Mr Paul, Mr Hart and Mr Kelly did not expect that Mr Kelly would have to pay the full amounts claimed in the invoices of 14 July 2008. These were prepared for the costs claim to the AGD. Neither Mr Paul nor Mr Hart was aware that the AGD assessed costs against a scale. They would therefore not have had in mind that there would be any limits to the rates they claimed, provided the amounts were not obviously excessive.

The Commission is satisfied that in preparing the original costs estimate of 9 January 2008, although he might not have appreciated the full extent of the work required for the trial, Mr Paul would have been careful to ensure that he at least provided Mr Kelly with accurate information as to the rates which he and Mr Hart would charge. Although Mr Paul may have been in a hurry to complete the costs estimate, it is simply not believable that he was in such haste that he quoted Mr Kelly the incorrect rates.

The costs order represented a potential windfall for Mr Paul and Mr Hart. The Commission is satisfied they took advantage of this by agreeing to increase their fees beyond what they had intended to charge Mr Kelly. Indeed, Mr Paul was so anxious to enlarge the final bill that he included a charge for a conference that did not occur. Mr Kelly had to be made a party to this deception so that he would not object to the large increase in the bill and would agree to submit the inflated invoices to the AGD. In return for his cooperation he was promised a share in the proceeds that would be obtained.

If the invoices of 14 July 2008 had represented a legitimate and honest claim then it would be expected that neither Mr Paul nor Mr Hart would have been prepared to allow Mr Kelly to retain any of the money paid by the AGD. That is, if necessary, action would have been taken against Mr Kelly to recover the balance owed. If Mr Paul regarded the invoice he prepared for his own work as a legitimate invoice, it is difficult to understand why he did not process it though the Creaghe Lisle accounts. Taking into account the evidence as a whole, and the lack of credit of Messrs Paul, Hart and Kelly on this issue, the Commission is satisfied that they participated in a scheme designed to extract money from the AGD knowing that the invoices submitted in pursuance of that scheme were a deliberately inflated account of what Mr Paul and Mr Hart expected and required Mr Kelly to pay them. The Commission is satisfied that each of Mr Paul, Mr Hart and Mr Kelly knew that the submission of the costs claim in these circumstances was dishonest and improper.

Findings of fact

Based on the evidence referred to above, the Commission is satisfied that the following facts have been established to the requisite standard of proof :

1. Jason Kelly was an accused in a sexual assault trial which took place in February 2008. He was represented by Anthony Paul as his instructing solicitor and by John Hart as his counsel.
2. Mr Kelly was provided with a costs estimate for the trial in a letter dated 9 January 2008 prepared by Mr Paul. The costs estimate was in the total amount of $26,371 (including counsel's fees) based on a five-day trial. Mr Hart's rate for his professional fees was quoted as $2,500 per day and his total fees payable were estimated as $14,700. Mr Paul's fees were calculated at $11,671 on the basis of an hourly rate of $260.
3. At no time between 9 January 2008 and the end of the trial on 26 February 2008 was Mr Kelly provided with any written notification of any change to the fees previously disclosed to him.
4. Mr Kelly was acquitted of all charges and subsequently made a successful costs application, followed by a costs claim lodged in July 2008 with the Attorney General's Department ("the AGD") pursuant to the *Costs in Criminal Cases Act 1967*.
5. For the purposes of the costs claim Mr Paul prepared two invoices both dated 14 July 2008 which itemised the costs said to be paid or due for both Mr Paul's firm and Mr Hart in the total amount of $76,008.80, comprising fees of $32,118.80 for the firm and counsel fees of $43,890.00. Mr Hart's daily rate was specified as $3,000 with an additional country loading of $550 per day. Mr Paul's fee had risen from the $260 per hour applied in the original estimate to $320 per hour. Numerous items of work said to have been performed by Mr Paul and Mr Hart on behalf of Mr Kelly which were not referred to in the original estimate were also added to these two invoices.
6. The invoice for Mr Paul's firm contained an amount of $960 for a conference on 17 February 2008 which never took place.
7. The invoice for Mr Hart contained an amount of $3,000 for a conference on 17 February 2008 which never took place.
8. Mr Hart was aware of and either agreed to or suggested the increased rate for his services nominated by Mr Paul in the invoice for Mr Hart's services.
9. The invoices were provided to Mr Kelly who in turn provided them to the AGD as part of his application for costs, intending that the AGD would rely on the invoices as accurately representing the costs he had incurred.
10. Mr Paul and Mr Hart sought to take advantage of the costs order by agreeing to increase their fees beyond what they had intended to charge Mr Kelly, so that they could obtain money at the expense of the AGD. In order to secure Mr Kelly's cooperation they agreed with him that he would receive a share of any proceeds obtained from the AGD. Each of Mr Paul, Mr Hart and Mr Kelly knew that the provision of the invoices containing inflated amounts was dishonest and improper.
11. Mr Kelly's costs claim was duly assessed by the AGD according to a scale rate and a cheque in the amount of $45,552 was later sent to Mr Kelly in payment of the costs claim.
12. Of the amount of $45,552 received by Mr Kelly, he retained $32,552 representing the amount of $26,943 he had previously paid to Creaghe Lisle and an additional amount of $5,609 which he retained with the knowledge and agreement of Mr Paul and Mr Hart. Of the remaining balance he paid Mr Paul $8,000 and Mr Hart $5,000 which they accepted as full discharge of any remaining liability on Mr Kelly's behalf.

Corrupt conduct

Neither Mr Paul, Mr Hart nor Mr Kelly is a public official. For their conduct to come within section 8 of the ICAC Act it must be either conduct that adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions under section 8(1)(a) of the ICAC Act, or be conduct that adversely affects or that could adversely affect, either directly or indirectly, the exercise of official functions by a public official under section 8(2) and involve any of the matters in paragraphs (a) to (y) of that section.

There is insufficient evidence to indicate that any exercise of official functions was adversely affected by the actions of Mr Paul, Mr Hart or Mr Kelly. In assessing the inflated costs claim, Mr Musico applied the AGD guidelines which required claims to be assessed according to a scale. The relevant scale provided for assessment of solicitor's fees at $220 per hour and counsel's fees at $1,650 per day. This was not only below the rates sought in the invoices of 14 July 2008 but also less than the rates originally quoted to Mr Kelly in the costs estimate of 9 January 2008. On one view, therefore, it mattered little what rates were claimed in the invoices submitted to the AGD, as the effective cap on rates would ensure that any claim was modified. It would of course be a different matter if the invoices claimed for work that had never been performed. While there was evidence that both invoices claimed for a conference on 17 February 2008 that did not take place, the evidence is not sufficient to conclude that this item was included by Mr Paul knowing it to be a false claim at the time. Negligence, of itself, will not generally constitute corrupt conduct for the purposes of the ICAC Act.

The evidence is clear that Mr Paul, Mr Hart and Mr Kelly were unaware that the AGD would assess the costs claim against a scale. The invoices were prepared and submitted with the intention that the person who assessed them would rely on them as accurately identifying not only the work that had been performed, but the rates actually charged for that work and the actual liability of Mr Kelly to Mr Paul and Mr Hart for their fees. They intended and anticipated that the assessment of the artificially inflated costs claim would result in a windfall for them above and beyond what in reality was Mr Kelly's liability to Mr Paul and Mr Hart. Mr Paul, Mr Hart and Mr Kelly were motivated by a dishonest desire to financially benefit themselves at the expense of the AGD and knew what they were doing was improper.

The Commission is satisfied that Mr Paul, Mr Hart and Mr Kelly agreed to the submission of the artificially inflated costs claim with the intention of adversely affecting the exercise of official functions by the public official responsible for assessing the costs claim. Such conduct could involve fraud (gaining an advantage by unfair means, deception or false representation) or matters of the same or similar nature within the meaning of section 8(2) of the ICAC Act.

For the purposes of section 9(1) of the ICAC Act their conduct could constitute or involve a criminal offence of obtaining money by deception contrary to section 178BA of the Crimes Act or attempting to obtain money by a false representation contrary to section 527A of the Crimes Act. Such conduct on the part of Mr Paul and Mr Hart could also constitute or involve a disciplinary offence.

Mr Paul is a solicitor. The preamble to that part of the Solicitors Rules, the Revised Professional Conduct and Practice Rules 1995 (NSW), which deals with relations with third parties, provides that:

> *Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.*

Rule 34 provides:

> *A practitioner must not, in any communication with another person on behalf of a client:*
>
> *34.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or*
>
> *34.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client; or*
>
> *34.3 threaten the institution of criminal proceedings against the other person in default of the person's satisfying a concurrent civil liability to the practitioner's client; or*
>
> *34.4 demand the payment of any costs to the practitioner in the absence of any existing liability therefor owed by the person to the practitioner's client.*

Mr Paul's provision of the final invoices to Mr Kelly with the intention that they be submitted by Mr Kelly to the AGD is conduct that could involve non-compliance with the preamble to Rules 32-36 and with Rule 34.2, because the invoices were calculated to mislead the assessing officer and grossly exceeded the legitimate assertion of the entitlement of Mr Kelly to receive payment on the basis that the invoices were a true representation of his liability to pay Mr Paul's firm.

It follows that Mr Paul's conduct in rendering those invoices in those circumstances could constitute or involve a disciplinary offence.

There is no Barristers Rule which precisely governs the situation but the Solicitors Rules provide a strong indication of the ethical position. Mr Hart conceded the issue of professional misconduct in answer to the hypothetical question posed to him and his assertion of a lack of knowledge concerning the purpose of the payment of costs does not, in all the circumstances, assist him. Although not falling within the inclusive definitions of unsatisfactory professional conduct or professional misconduct contained in sections 496-498 of the Legal Profession Act, Mr Hart's conduct in participating in the substantial increase in his fees could constitute or involve a disciplinary offence.

The Commission finds that by agreeing to the submission to the AGD of a claim for costs they knew to be improperly and artificially inflated, with the intention of adversely affecting the exercise of official functions by the public official responsible for assessing the costs claim, Messrs Hart, Paul and Kelly engaged in corrupt conduct.

Section 74A(2) statement

For the purposes of this report relevant to this chapter, Jason Kelly, Anthony Paul and John Hart are "affected" persons.

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Paul, Mr Hart or Mr Kelly for any criminal offence.

The admissible evidence that is available to conduct any prosecution is limited. Mr Paul, Mr Hart and Mr Kelly gave their evidence subject to a declaration under section 38 of the ICAC Act and accordingly their evidence is not available to be used against them in any criminal prosecution. There is the documentary evidence of the actual costs claim and some limited telephone interception material, but this would not be sufficient to justify the institution of prosecution proceedings.

The Commission is also of the opinion that consideration should be given to the taking of disciplinary action under the Legal Profession Act against Mr Hart and Mr Paul for unsatisfactory professional conduct or professional misconduct in relation to the submission of the inflated costs claim. This should also include Mr Paul's conduct in cashing the four cheques payable to Mr Hart and keeping the proceeds. In stating this opinion, the Commission is cognisant of the fact that Mr Hart and Mr Paul have surrendered their practising certificates. However, absent any formal finding of unsatisfactory professional conduct or professional misconduct, each may be entitled to seek the re-issuing of a practising certificate.

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 New South Wales, 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 section 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 section 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 co-operating 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: Corrupt conduct defined and the relevant standard of proof

Corrupt conduct is defined in section 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both sections 8(1) or 8(2) and which is not excluded by section 9 of the ICAC Act. An examination of conduct to determine whether or not it is corrupt thus involves a consideration of two separate sections of the ICAC Act.

The first (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 bent 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 section 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.*

Three steps are involved in determining whether or not corrupt conduct has occurred in a particular matter. The first step is to make findings of relevant facts. The second is to determine whether the conduct, which has been found as a matter of fact, comes within the terms of sections 8(1) or 8(2) of the ICAC Act. The third and final step is to determine whether the conduct also satisfies the requirements of section 9 of the ICAC Act.

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 section 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.

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. 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 *Rejfek 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).

As indicated above, the first step towards making a finding of corrupt conduct is to make a finding of fact. Findings of fact and determinations set out in this report have been made applying the principles detailed in this Appendix.

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