Report to Parliament | October 2012

Operation Winjana

NSW Police Integrity Commission

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The Hon Don Harwin MLC
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The Hon Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Madam Speaker

In accordance with section 96(2) of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Operation Winjana, being a Report in relation to a matter as to which the Commission has conducted a public hearing.

I draw your attention to section 103(2) of the *Police Integrity Commission Act 1996*, pursuant to which I recommend that this Report be made public forthwith.

Yours faithfully

The Hon Jerrold Cripps QC
Assistant Commissioner

October 2012

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1 OVERVIEW

1. In September 2008 the Police Integrity Commission ("the PIC") received a written complaint from a member of the public, Ms Bei Zhang. The complaint concerned Ms Zhang's husband, Guo Xiong Chen, who at the time was in custody awaiting trial on serious drug supply charges. It was in relation to those charges that the New South Wales Crime Commission ("the NSWCC") had commenced confiscation proceedings against Mr Chen under the provisions of the *Criminal Assets Recovery Act 1990 ("CAR Act")*.

2. The crux of Ms Zhang's complaint was that her husband's legal representative, Ms Salina Sadiq, had a "boyfriend" named Lou who worked at the NSWCC. Ms Zhang alleged that Ms Sadiq "advised" her clients to agree to CAR Act consent orders written by "Lou" and that the both of them would keep some of the money forfeited under those orders.

3. Subsequent enquiries by the PIC confirmed "Lou" to be Lou Novakovic, a financial investigator with the NSWCC.

4. On 20 September 2008 the PIC commenced an investigation into the conduct of an officer of the NSWCC, Mr Lou Novakovic, and others associated with him as to whether he had engaged in criminal activities or serious misconduct (as defined in the *Police Integrity Commission Act* 1996) ("Limb One").

5. Later and upon receipt of information derived from the investigation into the conduct of Lou Novakovic and others it was widened to examine practices and procedures of the NSWCC when discharging its functions and duties under the CAR Act ("Limb Two").

6. For the purposes of the Operation Winjana investigation the PIC held a number of private hearings over the dates of 25-28 October 2010 and 14-17 December 2010. The general scope and purpose of the initial segment of those private hearings was:

   To investigate whether Lou Novakovic, a member of staff of the New South Wales Crime Commission, and/or any other person associated with him is or has been involved in criminal activity or serious misconduct.

7. On the basis of the evidence heard during the initial segment of private hearings, the scope and purpose of the second segment of hearings was expanded to add an additional "limb", *viz*.:

   To examine the practices and procedures of the New South Wales Crime Commission in the conduct of actions under the Criminal Assets Recovery Act 1990.

8. Following the completion of the private hearings it was determined that the PIC would hold a public hearing for the purpose of the Operation Winjana investigation. Due to factors which delayed its commencement for a number of months (as will be detailed below), the public hearing was ultimately held between 5 September and 6 October 2011. Evidence was heard from a total of seven witnesses over seven hearing days.

9. The general scope and purpose of the public hearing was as follows:

   i) *To investigate whether Lou Novakovic, a member of staff of the New South Wales Crime Commission, and/or any other person associated with him is or has been involved in criminal activity or serious misconduct, and in connection therewith;*

   ii) *To examine the practices and procedures of the New South Wales Crime Commission in the conduct of actions under the Criminal Assets Recovery Act 1990.*

10. Mr Novakovic was a senior officer of the NSWCC. At all relevant times he was in an intimate relationship with Ms Sadiq, a solicitor of the Supreme Court of NSW who acted for a number of people being investigated by the NSWCC. It was alleged that Mr Novakovic misconducted himself in and about his relationship with Ms Sadiq. It was also alleged there were shortcomings and failures in the management by the NSWCC in the way it dealt with the relationship.

11. Under the second limb there were two practices of long standing that attracted the attention of PIC. The first was the historical practice of the NSWCC of appropriating out of funds restrained pursuant to the CAR Act sums of money to reimburse it for its legal/ administrative costs so that in any given year it would recoup approximately 15% of its budget from restrained funds where the NSWCC and the defendant had consented to such orders being made, even where the restrained funds consisted of money the defendant claimed not to be his/hers.

12. The second practice examined in limb two was the NSWCC's failure to comply with the requirements of s.16A of the CAR Act when implementing arrangements between the NSWCC and defendants which provided for payments from restrained property, ostensibly pursuant to s10(5)(b)[1] of the CAR Act, to defendants for "reasonable legal expenses" incurred in connection with the CAR Act proceedings, or incurred in defending a criminal charge.

13. Both practices had been followed for many years. The first was discontinued in 2008 although the NSWCC, to this day, does not concede the unlawfulness of the practice. The second was discontinued in late 2011 after a decision by the Supreme Court in *New South Wales Crime Commission v Cook*[2] (hereafter, *NSWCC v Cook*).

14. In each of the CAR Act matters considered by the PIC the provision of reasonable legal expenses for defendants was made after an agreement between the NSWCC and the defendants. In each case the amount was not properly assessed and grossly exceeded the expenses actually incurred for the legal work undertaken.

15. Moreover, in each of the CAR Act matters examined by the PIC, had the restrictions referred to in s.16A of the CAR Act been properly applied *none* of the defendants would have been entitled to legal expenses at all, if only by operation of 16A(1)(b) (i.e., there

[1] Following amendments to the CAR Act in 2009, s.10(5)(b) was re-numbered, in identical form, as s.10B(3)(b).
[2] [2011] NSWSC 1348

could be little doubt that in each case the cash in question was illegally acquired).

16. The justification of the NSWCC for the first practice referred to above derived from the claimed (but flawed) understanding by the officers of the NSWCC of the scope of s12 of the CAR Act. Its justification for the second practice was their belief that the provisions of the CAR Act requiring Supreme Court approval for reasonable legal expenses had application to contested proceedings only and had no application to what it described as "uncontested" proceedings; that is, proceedings settled by consent orders.

17. The PIC takes no issue with officers of the NSWCC entering into settlement discussions with defendants, but does not share the NSWCC's view that it could properly fund its own activities out of restrained property, or that it was entitled to ignore the provisions of the CAR Act (and in particular s.16A) with respect to applications for reasonable legal expenses.

18. Hence the issue became a rule of law issue. The circumstance that, as officers of the NSWCC maintained, their practices increased the amount of money for the State greater than would have been the case had it acted according to law is, in the opinion of the PIC, irrelevant – even if true. The duty of the NSWCC is to act in accordance with the legislation as enacted by the Parliament and not to ignore the law and conduct itself in accordance with what it believes the Executive might like. This observation applies, of course, to all statutory authorities but it is particularly apposite when directed to the actions of a government agency which has been itself given extraordinary powers.

19. In the course of the Operation Winjana hearings allegations of serious misconduct were made against Mr Lou Novakovic, a senior officer of the NSWCC, Mr Phillip Bradley, the Commissioner of the NSWCC, Mr Jonathan Spark, Assistant Director, Financial Investigations and Mr John Giorgiutti, Director and Solicitor to the NSWCC. It was also alleged that Ms Sadiq's conduct was in breach of her professional obligations as a solicitor of the Supreme Court.

LIMB ONE

Mr Novakovic

20. It is the opinion of the PIC that Mr Novakovic engaged in misconduct of a Crime Commission officer in his relationship with Ms Sadiq and his failure to distance himself from the work undertaken by her on behalf of clients being investigated by the NSWCC. Details of that misconduct are set out later in this report.

21. Mr Novakovic also gave evidence at a private hearing of the PIC which, by his own subsequent concession, was false or misleading, and hence, in the opinion of the PIC, warrants consideration as to whether Mr Novakovic contravened of s.107 of the *Police Integrity Commission Act 1996.*

22. On 26 August 2011, prior to the commencement of the public hearing, Mr Moses SC, counsel for the NSWCC, advised the NSWCC that, having reviewed the evidence given by Mr Novakovic at the private hearings, the NSWCC should not attempt to defend his conduct and that the NSWCC should "at the very least" immediately suspend his employment. On 30 August 2011 a letter was drafted by the NSWCC Assistant Commissioner, Mr Peter Singleton, addressed to Mr Novakovic informing him that "there were issues" that required explanation and that he was suspended pending the finalisation of the PIC investigation. Mr Novakovic became aware of the draft letter and resigned before it was served on him.

The Shanghai Matter

23. There was one matter investigated by PIC but not referred to in Mr Moses' opinion. It became known as "the Shanghai matter". It was alleged that Mr Novakovic had abused his public office by his conduct in Shanghai in February 2007.

24. In February 2007 Ms Sadiq was acting for a client, Mr Richard Che, who had been charged with kidnapping. For reasons not presently relevant Ms Sadiq believed she needed a statement from a Mr Wei Kai Su, and his continuing cooperation, for the defence of her client, Mr Che. Mr Su claimed to be the owner of a motor vehicle then in the possession of a Mr Zhe Feng who, Mr Su believed, was about to sell the car and decamp with the proceeds. Mr Su was in Shanghai. Mr Feng and the vehicle were in Sydney.

25. Ms Sadiq travelled to Shanghai accompanied by Mr Novakovic and, in the course of meeting with Mr Su, Mr Novakovic represented himself as an officer of the NSWCC who could arrange for the restraint Mr Su's car by the NSWCC and ultimately return it to him if he maintained his cooperation with Ms Sadiq. On Mr Novakovic's subsequent recommendation to his superiors at the NSWCC, the car was made the subject of a restraining order under the provisions of the CAR Act. The Shanghai matter will be dealt with in detail later.

26. More than a year after the Shanghai incident a solicitor, Mr Stewart, acting on behalf of Mr Feng, made an oral complaint to a senior officer of NSWCC, Mr O'Connor, about Mr Novakovic's conduct in Shanghai. The complaint was registered, and Mr Novakovic was "spoken to' about keeping his work separate from Ms Sadiq.

27. It was alleged that the response of management was inadequate and that there should have been a fuller investigation before accepting Mr Novakovic's recommendation and, later, after receiving the complaint from Mr Stewart. It was submitted by Counsel Assisting that Mr Bradley and Mr Spark were compromised as a result of accepting Mr Novakovic's recommendation to restrain the car and for that reason failed to take appropriate action about the improper conduct of Mr Novakovic in Shanghai.

28. Accepting that the emails sent by Mr Novakovic to Mr Spark made it clear that information being forwarded was derived from Ms Sadiq and/or Mr Su and accepting that the emails should have alerted them to the possibility of a conflict of interest, the relevant officers did

not get the whole story *viz*., that Mr Novakovic's motive in recommending a restraining order was to assist Ms Sadiq and/or Mr Su.

29. In the opinion of the PIC it has not been established that Mr Bradley or Mr Spark engaged in misconduct of a Crime Commission officer within the meaning of the legislation. The PIC is of the opinion that, notwithstanding the breadth of the definition of misconduct in s5B of the PIC Act, a finding of misconduct should not be made in the absence of a relevant degree of wilful intent. It must also be borne in mind in this respect that Mr Feng was, in any event, a potentially legitimate "candidate" for a restraining order.

30. Moreover the PIC is not of the opinion that members of the NSWCC engaged in misconduct with respect to Mr Stewart's complaint. Mr Stewart made an oral complaint to Mr O'Connor and said that a written complaint would follow, but none was ever received by the NSWCC. After the oral complaint Mr Novakovic was spoken to about keeping his affairs separate from his duties as an officer of the NSWCC. Mr Novakovic was a senior NSWCC officer. He was already aware that he should not participate in any NSWCC work involving Ms Sadiq's clients. This is something he would have known, and thus is one explanation as to why he failed to tell Mr Spark the whole story.

31. On the basis of the evidence before it, the PIC is of the opinion that Mr Novakovic misconducted himself in Shanghai. The PIC is of the opinion that misconduct has not been established against Mr Bradley or Mr Spark with respect to "the Shanghai matter".

Mr Giorgiutti

32. During the investigation the PIC heard that there were three occasions when Mr Giorgiutti sought Ms Sadiq's legal and migration services. In respect of two of those occasions, Ms Sadiq was paid appropriate legal fees and in respect of the other matter she undertook to do some pro bono work for the benefit of a member of Mr Giorgiutti's family. The PIC accepts that Mr Giorgiutti was not directly involved in any of the matters Ms Sadiq had with the NSWCC, albeit he was the solicitor on the record for the NSWCC who signed the consent orders. The most that could be said about Mr Giorgiutti's conduct is that it was imprudent for him to seek the retention of Ms Sadiq's services. The PIC is not of the opinion that Mr Giorgiutti engaged in misconduct in seeking Ms Sadiq's assistance. However, to avoid the perception of conflict of interest, the PIC is of the opinion that a preferable course for members of the NSWCC would be not to seek legal advice and opinions in private matters from lawyers who are also acting for persons who are being investigated by the NSWCC.

LIMB TWO

33. There is little factual dispute about the NSWCC's CAR Act practices as examined in Operation Winjana. For reasons which will appear later, the PIC is of the opinion that s12 of the CAR Act did not authorise the NSWCC to reimburse itself out of restrained monies for its legal/administrative costs. It is also of the opinion that the NSWCC was not authorised by law to ignore s.16A of the CAR Act (and hence the scrutiny of the Supreme

Court) and to make provision out of restrained funds for legal expenses of the defendants simply because the proceedings were not contested. This view has since been endorsed by the Supreme Court.

34. The NSWCC justified its practices by reason, in part, of an opinion given by Mr Ian Temby QC in 2000. This will be dealt with in detail later but for present purposes the PIC considers that the opinion of Mr Temby did not authorise, nor did it purport to authorise, the practices of the NSWCC which had the effect of avoiding the scrutiny of the Supreme Court. His opinion, in essence, was directed to whether, in the event the provisions of the CAR Act had not been complied with (and he thought at least one had not), the orders of the Supreme Court were relevantly valid orders. He pointed out that there was at least one mandatory requirement which had not been implemented viz. s.16A(1)(c) which provided that no provision could be made unless the defendant's interest in property and liabilities was verified on oath and filed with the Supreme Court.

35. In the opinion of the PIC the provisions of the CAR Act were clear. Applications for the provision of reasonable legal expenses to defendants were subject to s.16A of the CAR Act and provision could not be made unless the Supreme Court was satisfied of the matters set out in that section. That is to say, s.16A was not confined to contested applications only. It applied to all applications – as is made plain in the legislation and in the NSWCC's own Confiscation Manual. The practice of failing to observe the legal requirements of s.16A for what were described as "uncontested" applications for reasonable legal expenses extended over many years.

36. The CAR Act matters investigated by the PIC in which allowances were made for the defendants' reasonable legal expenses had two features in common. First, no attempt was made by officers of the NSWCC to assess what amounts, if any, were "reasonable" in the circumstances. Second, in each case the amount that was made available for legal expenses grossly exceeded the amount that could reasonably have been charged for the actual work performed by the defendants' lawyers. The difference between the amounts that were provided for legal expenses and the expenses actually incurred meant that amounts of tainted money (i.e., the balance) was either returned to the person from whom it was seized, or else retained by the lawyers. The essential purpose of the legislation is to deprive criminals of unlawfully obtained money. To unjustifiably return that money to defendants, or their lawyers, under the guise of providing for the defendants' reasonable legal expenses is to frustrate the intention of Parliament.

37. The PIC accepts the clear and unambiguous opinion obtained from Mr Bret Walker SC that the provisions of the CAR Act could not lawfully be ignored or avoided if the proceedings were uncontested (as was contended by officers of the NSWCC). That opinion has since been vindicated by the decision of the Supreme Court in *NSWCC v Cook*, referred to above. The PIC also accepts Mr Walker's opinion (which was also shared by the Crown Solicitor) that s12 of the CAR Act did not authorise officers appropriating money from restrained funds for legal/administrative expenses of the NSWCC. The question still remains, however, whether the conduct of relevant officers

of the NSWCC in relation to those practices amounts to "misconduct of a Crime Commission officer" as defined in the PIC legislation.

38. Mr Bradley, Mr Spark and Mr Giorgiutti were persons against whom serious allegations were made in relation to the practices of the NSWCC. However, as will be detailed later in this report, the PIC is not of the opinion that Mr Bradley, Mr Spark or Mr Giorgiutti have engaged in "misconduct of a Crime Commission officer" as defined in s.5B of the PIC Act.

39. For reasons appearing hereafter the PIC is of the opinion that, notwithstanding the breadth of the statutory definition of "misconduct of a Crime Commission officer", it is necessary, for a finding of misconduct to be made, that it be established that the conduct in issue is attended by a relevant degree of wilful intent. Legal ignorance does not, of itself, amount to misconduct as defined.

40. The officers of the NSWCC relied, in part at least, on the opinion of Mr Temby obtained in 2000 and referred to earlier. As mentioned above, Mr Temby did not opine the practices were lawful. There were, however, observations and statements in the opinion which may have buttressed a belief by officers of the NSWCC that the practices were not unlawful. As will be seen the PIC does not agree with this interpretation of Mr Temby's opinion but does acknowledge that there are aspects of it (and the way in which it was presented) that may have given comfort to some people looking for support for their view that the established practices were not unlawful.

41. It was not put to Mr Bradley, Mr Spark or Mr Giorgiutti that their stated belief in the correctness of their understanding of the NSWCC's powers was a sham or not held bona fide.

42. Mr Spark is not a lawyer. Mr Bradley is, but he was the head of an organisation whose functions extended well beyond administration of the CAR Act. Mr Giorgiutti was the senior lawyer and although his evidence demonstrated a somewhat erratic understanding of the CAR Act (as for example his suggestion in evidence that other "devices" were available to the NSWCC) he played no active part in any of the particular CAR Act matters examined by the PIC. But although Mr Giorgiutti was not directly concerned with these particular matters (albeit that he was the solicitor on the record for the NSWCC in all of those matters), he was the senior lawyer in the organisation and must take some responsibility for the gross misapplication of the law over many years.

43. Moreover, the PIC has also had regard to the circumstance that the practices were not hidden and continued over a long period of time and although there was no evidence directly touching this matter it is clear, as a matter of inference, that the practices of the NSWCC must have been known to a number of people in government and the failure of anybody to call a halt to them may have given officers confidence that what they were doing was not unlawful.

44. Throughout the hearings the PIC was denied the opportunity of seeking advice from the Crown Solicitor on matters arising in the investigation. That was because the

Crown Solicitor had agreed to act on behalf of the NSWCC in the hearings before the Commission, as well as in proceedings commenced in the Supreme Court by the NSWCC seeking to prevent the public hearings being held. Being denied this facility, the PIC sought the opinion of Mr Walker who expressed the opinion in clear and confident terms that it was not lawful for the NSWCC to reimburse itself out of restrained funds pursuant to s12 and that it was not entitled to bypass the scrutiny of the Supreme Court simply because the applications for reasonable legal expenses were not contested. He also expressed the view (about which there could scarcely be any dispute) that the *"Supreme Court's inherent jurisdiction could not somehow permit to be done by consent that which the statutory provisions creating the very power hedge about with restrictions".*

45. Notwithstanding its receipt of the opinion of Mr Walker (a copy of which was provided to the NSWCC by the PIC in September 2011), the NSWCC continued its established practice of not putting settled matters before a Judge of the Supreme Court in compliance with s.16A. The NSWCC had also received internal advice from the Crown Solicitor during the course of the PIC's hearings to the effect that legal expenses could not be awarded pursuant to s.10(5)(b) unless a sworn statement of liabilities and interests was verified on oath and filed in the Supreme Court, in compliance with s16A(1)(c). That advice confirmed the opinion of Mr Temby in 2000. Nonetheless, the NSWCC's past practice continued, albeit with one modification: sworn statements were obtained, but merely filed along with the relevant consent orders in the Supreme Court Registry, unseen by a judicial officer. Mr Walker's opinion was not accepted by the NSWCC, although no reason was advanced as to why it was not.

46. Later, in November 2011, the Supreme Court ruled authoritatively in *NSWCC v Cook*[3] that the practice engaged in by the NSWCC was unlawful and not authorised by legislation and that it was required to comply with the requirements of s.16A of the CAR Act in *all* CAR Act proceedings where costs were allowed for defendants whether uncontested or otherwise. In its final submissions to PIC, the NSWCC acknowledged that it accepts that it is required to abide by the decision.

47. The NSWCC ceased the practice of reimbursing itself out of restrained monies in July 2008. Accordingly, that practice is now history. However, its lack of entitlement to do so is, to this day, not accepted by the NSWCC. Notwithstanding contrary advice from the Crown Solicitor, the NSWCC continues to maintain that at all relevant times it was entitled to reimburse itself out of restrained funds, ostensibly under the "ancillary orders" provisions set out in s.12 of the CAR Act.

48. At the time of preparation of this report, Parliament had recently passed the *Crime Commission Act 2012*, the provisions of which commenced on 5 October 2012. In re-enacting the NSWCC's governing legislation in an updated form, the amending legislation effects a number of amendments of relevance to the conduct of CAR Act proceedings, and includes relevant amendments to the CAR Act itself. The nature of these amendments is further discussed in the final chapter of this report.

[3] ibid

The Hearings

49. For the purpose of the Operation Winjana investigation the PIC held private and public hearings. The private hearings commenced in 2010. The public hearing did not commence until after the middle of 2011. After hearing submissions from the NSWCC that it should not do so, the PIC determined to hold a public hearing for the purpose of the investigation. The general scope and purpose of the public hearing was the same as the general scope and purpose of the hearings in private in respect of limbs one and two.

50. The public hearing was delayed, because of an unsuccessful attempt by the NSWCC and two officers of the NSWCC to obtain orders from the Supreme Court that the practices and procedures arising under the second limb could not, as a matter of jurisdiction, be the subject of a PIC investigation. The application was unsuccessful, as was the further submission that the decision of the PIC to hold public hearings was unlawful.

51. Thereafter and for some time the PIC was unable to pursue its public hearing because of the trial of a senior officer of the NSWCC, Mark Standen, who was subsequently found guilty of serious criminal conduct and who was sentenced to a lengthy period of imprisonment. The PIC had been requested to avoid if at all possible, any aspect of its inquiry that might jeopardise the Standen trial. The PIC was unaware of anything in its inquiry that might prejudice the trial, but because some NSWCC officers would be witnesses in the Standen trial as well as in the PIC hearing, and because it was impossible to determine in advance what might emerge in the PIC hearing, the PIC delayed holding its public hearing until the jury returned its verdict in the Standen trial.

52. The NSWCC was given leave to appear at the public hearing and to be represented by the Crown Solicitor on the clear understanding that it acknowledged that the investigation was not relevantly a curial proceeding and that the NSWCC was obliged to cooperate with the PIC. Shortly after the PIC decided upon a public hearing the NSWCC commenced action in the Supreme Court seeking, in effect, to shut down the investigation.

53. When the proceedings in the Supreme Court were commenced Acting Commissioner Cripps sought to obtain advice and support from the Solicitor General in respect of the challenge to the PIC's jurisdiction. He was told it would not be proper for the Solicitor General to act for the PIC because there could be an appearance, if not an actual, conflict of interest, given that the Crown Solicitor was already acting for the NSWCC. The PIC can understand why this view was taken. Being denied the services of the Crown Solicitor, from whom the PIC would ordinarily have sought advice, PIC was thus obliged to get its own independent legal advice The PIC obtained an opinion from Mr Walker and was subsequently represented in the Supreme Court proceedings by Mr Sullivan QC.

54. A consequence was that PIC was required to incur significant expense in obtaining independent advice and defending the proceedings in the Supreme Court. It was also denied advice that ordinarily would have been given by the Crown Solicitor when questions of law arose in the proceedings. Throughout the hearing the NSWCC raised a number of legal challenges which, if successful, would have limited the PIC's investigation. However, aside from one minor matter, all of these challenges were unsuccessful.

55. In the PIC's 2011 Annual Report Acting Commissioner Cripps noted he could not recall any occasion when the Crown Solicitor had acted for a government authority as plaintiff in litigation against another government authority and, in particular, where, as in the present case, the defendant in the proceedings (the PIC) was a government authority empowered and directed by Parliament to oversee the conduct and activities of the plaintiff authority.

56. As was additionally noted in that Annual Report, it is difficult to envisage circumstances where advice from the Crown Solicitor's Office, in its independent capacity, would not have been followed by the PIC (had that independent advice been available), whether or not that advice was agreed with by the PIC, thereby avoiding expensive, unnecessary and undignified litigation in the Supreme Court.

57. In its submissions following the Winjana hearings the NSWCC maintained that at all relevant times it had cooperated with PIC in the investigation. That it vigorously pursued what it claimed to be its own interests could not be denied but it could hardly be said to have cooperated with the PIC. Notwithstanding the undertaking referred to above concerning acceptance by the NSWCC that the proceedings were investigative and not curial, the submissions of the NSWCC, made on behalf of officers of the NSWCC, repeatedly asserted that the PIC was precluded from making adverse findings because of the authority of *Browne v Dunn* (1893) 6 R 67. That authority, however, is a doctrine of curial proceedings and has no application to administrative inquiries or investigations.

58. There is no doubt that the doctrine of procedural fairness applies to the PIC. What appears to be misunderstood by the NSWCC, however, is the content of that doctrine in its application to investigations undertaken by the PIC in the nature of Operation Winjana. Persons against whom allegations have been made in the course of Operation Winjana were notified of those allegations, and provided with full opportunity to respond to the allegations prior to the PIC's publication, in this report, of any opinion, assessment or recommendation in relation to the allegations. The recent amendment to the *Police Integrity Commission Act 1996* relating to its procedural fairness obligations – that is, the insertion of section 137A - merely puts in statutory form the practice that the PIC observed throughout the course of the Operation Winjana investigation.

59. The PIC acknowledges that material of assistance to the investigation was provided to it by the NSWCC. But the NSWCC's conduct was far from that of full cooperation with the investigation, as was maintained in its submissions. As has been mentioned, Supreme Court proceedings were taken by the NSWCC in an attempt to shut down the inquiry into the practices arising under the second limb of Operation Winjana. It argued that the PIC lacked jurisdiction to pursue the investigation. It also made submissions to the Court that the PIC was not legally entitled to hold a public hearing for the purpose of the investigation. Throughout the inquiry, the NSWCC regularly made claims of legal professional privilege notwithstanding the *Police Integrity Commission Act 1996* clearly removed that, and any other, privilege when claimed by a public authority or official. Additionally, the NSWCC's compliance with notices to produce issued for the purposes of the investigation was generally marked by resistance and delay.

2 THIS REPORT

60. In this report, which is prepared and furnished pursuant to s. 96(2) of the PIC Act, the PIC examines the evidence received during the public hearing. It contains the PIC's assessments and opinions as to whether or not misconduct of a Crime Commission officer has occurred in relation to the matters examined. The report also contains the PIC's recommendations in respect of those individuals who, in its opinion, come within the definition of *"affected person"* pursuant to s.97(3) of the PIC Act.

61. In formulating its assessments and opinions the PIC has had regard to the final submissions of Counsel Assisting and to the submissions furnished in reply to those of Counsel Assisting on behalf of relevant witnesses and the NSWCC. Where relevant in the context of this report, those submissions will be directly referred to.

62. For the avoidance of confusion, all references to the NSW Crime Commission in this report (other than any which appear in quotations) are in the form "NSWCC". All references to the Police Integrity Commission are in the form "PIC".

3 THE WITNESSES

63. In the course of the Operation Winjana public hearing, the PIC heard evidence from the following witnsses:

- Mr Lou NOVAKOVIC
- Ms Salina SADIQ
- Mr Jonathan Lee SPARK
- Mr Timothy James O'CONNOR
- Mr John Michael GIORGIUTTI
- Mr Phillip Alexander BRADLEY
- Mr Peter Francis SINGLETON.

Mr Lou NOVAKOVIC

64. As at the date of commencement of the public hearing, Mr Novakovic was an officer of the NSWCC of some fifteen years standing. He was employed as a forensic accountant attached to the financial investigation unit. Mr Novakovic commenced employment with the NSWCC in 1997 and resigned from that position on 2 September 2011.

Ms Salina SADIQ

65. Ms Sadiq is a solicitor in private practice based in Sydney having been admitted as a solicitor in December 1999. She is also a registered migration agent. Ms Sadiq is the sole member of the firm Lloyd Truman Sadiq, Solicitors.

Mr Jonathan Lee SPARK

66. Mr Spark is a senior officer of the NSWCC, having held the position of Assistant Director, Financial Investigations since October 2005. He commenced employment with the NSWCC in 1997 as a senior financial investigator. Mr Spark is a member of the senior management team of the NSWCC.

Mr Timothy James O'CONNOR

67. Mr O'Connor is the Assistant Director, Criminal Investigations for the NSWCC having held that position since October 2000. A former NSW Police officer, Mr O'Connor commenced employment with the NSWCC in 1996. He subsequently resigned his position with the NSWCC in October 1999 to take up a position in the private sector. He resumed employment with the NSWCC in October 2000. He is a member of the senior management team of the NSWCC.

Mr John Michael GIORGIUTTI

68. Mr Giorgiutti is the Solicitor to the NSWCC and Director Operation Support of the NSWCC. He commenced employment with the NSWCC in June 1990 as a solicitor in the confiscation division and was subsequently elevated to the positions of Deputy Director (January 1991), and later, Director (December 1993), of the NSWCC's confiscation division.

Mr Giorgiutti took up the role of Solicitor to the NSWCC during the 1996/1997 financial year. He is presently the solicitor on the record for the NSWCC and a member of its senior management team.

Mr Phillip Alexander BRADLEY

69. As at the date of the Operation Winjana public hearing Mr Bradley was the Commissioner for the NSWCC. Under the statutory regime which then governed the constitution of the NSWCC[4], Mr Bradley was appointed to the NSWCC as a full-time member in July 1989. He subsequently became acting Chairman of the NSWCC in May 1993 and was appointed full-time chairman in August 1993. Following amendments to the *New South Wales Crime Commission Act* which commenced in December 1996 Mr Bradley became the sole Commissioner for the NSWCC. He occupied this position until his retirement in November 2011.

Mr Peter Francis SINGLETON

70. As at the date of the Operation Winjana public hearing Mr Singleton was an Assistant Commissioner for the NSWCC, having been appointed to that position on a part-time basis in July 2010. In July 2011, Mr Singleton became full-time Assistant Commissioner. Prior to his appointment as Assistant Commissioner, Mr Singleton, as a member of the NSW Bar, had acted as counsel for the NSWCC in matters commenced under the provisions of the CAR Act and in other matters. Upon the retirement of Commissioner Phillip Bradley in November 2011 Mr Singleton was appointed as Commissioner of the NSWCC. On 5 November 2012 his term as Commissioner ceased and he commenced a new appointment as Assistant Commissioner.

[4] Namely the *State Drug Crime Commission Act 1985*, under which the NSWCC, as it later became, was known as the State Drug Crime Commission. Following relevant legislative amendments it formally became the New South Wales Crime Commission as of April 1991

4 PRELIMINARY MATTERS

The *Police Integrity Commission Act 1996* ("PIC Act")

71. As the result of amendments to the *Police Integrity Commission Act 1996* which commenced on 1 July 2008, the PIC was given the additional function of investigating allegations of misconduct against officers of the NSWCC. Those additional functions were originally set out in s.13B of the PIC Act under the heading *"Other functions of PIC in relation to Crime Commission officers".*

72. As the result of a further amendment to the PIC Act which commenced on 8 May 2012, all of the PIC's principle functions, including those in relation to Crime Commission officers, were consolidated into s.13(1) of the PIC Act, which reads:

> ***13 Principal functions***
>
> *(1) The principal functions of the Commission are as follows:*
>
> *(a) to prevent officer misconduct,*
>
> *(b) to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct,*
>
> *(c) …*

73. Section 4 of the PIC Act provides that "officer misconduct" means:

> *police misconduct, corrupt conduct of an administrative officer or misconduct of a Crime Commission officer.*

74. "Misconduct of a Crime Commission officer" is defined in s.5B of the PIC Act, as follows:

> ***5B Misconduct of Crime Commission officers***
>
> *(1)* ***Definition***
>
> *For the purposes of this Act, misconduct of a Crime Commission officer means any misconduct (by way of action or inaction or alleged action or inaction) of a Crime Commission officer:*
>
> *(a) whether or not it also involves participants who are not Crime Commission officers, and*
>
> *(b) whether or not it occurs while the Crime Commission officer is officially on duty, and*
>
> *(c) whether or not it occurred before the commencement of this subsection, and*
>
> *(d) whether or not it occurred outside the State or outside Australia.*
>
> *(2)* ***Examples***
>
> *Misconduct of a Crime Commission officer can involve (but is not limited to) any of the following:*
>
> *(a) the commission of a criminal offence by a Crime Commission officer,*
>
> *(b) any misconduct, irregularity, neglect of duty, breach of discipline or other*

matter that constitutes or may constitute grounds for disciplinary action under any law,

(c) corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a Crime Commission officer.

(3) ***Former Crime Commission officers***

Conduct may be dealt with, or continue to be dealt with, under this Act even though any Crime Commission officer involved has ceased to be a Crime Commission officer. Accordingly, references in this Act to a Crime Commission officer extend, where appropriate, to include a former Crime Commission officer.

The *Criminal Assets Recovery Act 1990* ("CAR Act")

75. Some part of the first limb of the scope and purpose of Operation Winjana and most of the second limb concerns the exercise by the NSWCC of functions and powers under the *Criminal Assets Recovery Act 1990*. A short review of some of the relevant aspects of the Act is outlined below.

76. The *Criminal Assets Recovery Act 1990*, which was formerly known as the *Drug Trafficking (Civil Proceedings) Act 1990*, has the following long title:

An Act to provide for the confiscation of interests in property that are interests of a person engaged in serious crime related activities; to enable proceeds of serious crime related activity to be recovered as a debt due to the Crown; and for other purposes.

77. The principal objects of the CAR Act set out in s.3 of the Act are as follows

3 Principal objects

(a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and

(a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and

(b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and

(b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and

(c) to enable law enforcement authorities effectively to identify and recover property.

78. The Act establishes a regime of civil action[5]. It operates in part, by exercise of coercive powers of restraint[6] and confiscation[7]. The general scheme of the Act is to deprive those who have benefited from criminal activity of their ill-gotten wealth and to provide that it be paid to the Crown for public purposes[8]. The scheme of the Act does not require proof of conviction[9].

79. Neither the objects, nor any other aspect of, the CAR Act enables restraint, confiscation or recovery of property for any purpose other than receipt by the Crown. In particular, neither the objects, the powers under the Act, nor any other aspect of the Act provide for the adjustment of property or interests in property between alleged wrongdoer and alleged victim.

80. The statutory scheme was amended following a constitutional challenge in 2009[10]. Previously, restraining orders could be applied for, and made by the Court, *ex parte*, that is, without any prior notice to the defendant. The CAR Act now provides the Supreme Court with a discretion to require notice to be given to a party prior to its determination of the application, so as to provide that party an opportunity to be heard as to the making of the proposed restraining order.

81. In respect of restraining orders made by the Supreme Court, under the provisions of the CAR Act[11] an order authorising payment as a deduction from the restrained monies for reasonable legal expenses, may be allowed "*subject to s.16A*"[12].

82. While the proceedings for recovery are civil in nature,[13] Part 2 of the CAR Act headed *"Restraining Orders"* enacts recognitions and protections of a type that could be expected in respect of coercive powers. For example, subject to the filing of an application for final orders, a restraining order has duration of only two working days[14]. A restraining order may be reviewed (in the sense that it may be amended), by the Supreme Court[15] after it is made. A restraining order can be refused in the absence of undertakings by the applicant as to damages and costs[16]. An application for a restraining order may be made *ex-parte*, but as described above, the Court may now, if it thinks fit, adjourn such an application and require notice to be given prior to determination. And, as noted above, the CAR Act provides some recognition of the potential problem caused by a restraining order which has the effect of depriving its subject of a means of funding a defence of the proceedings: it allows, per s10B(3)(b)[17], for the release, in appropriate circumstances, of restrained

[5] s.5. CAR Act 1990.
[6] Per s.10. A restraining order is effectively an interlocutory (ie temporary) "freezing order" order which maintains the status quo pending the Court's determination of an application for a confiscation order (see note 4, below)
[7] Under the provisions of the Act "confiscation" may entail forfeiture of interests in property (per s22), and/or payment to the Crown of a sum of money pursuant to a 'proceeds assessment order' (per s27) or 'unexplained wealth order' per s.28A
[8] s.3(a)(1) and s.32 *CAR Act 1990*.
[9] s.3(a) *CAR Act 1990*.
[10] See *International Finance Trust Company Limited v NSWCC* [2009] HCA 49 (12 November 2009), as a result of which the terms in s.10(5)(b) now appear in s.10B(3)(b) by amendment effective 26 November 2009. The terms of the legal expenses provision in each are identical, but it was s.10(5)(b) in the earlier form that was operative in respect of all of the matters examined in Operation Winjana. For that reason, reference hereafter will usually be s.10(5)(b). Where relevant, all such references should be read as references to the newer s10B(3)(b) also.
[11] S.10(5) *CAR Act* 1990. Under the scheme of the Act, a restraining is effectively an interlocutory, or temporary, 'freezing order' pending the Court's determination of the related application for final confiscation orders.
[12] s.10B(3)(b) is the current state of the section. Its terms are identical with the former s.10(5)(b).
[13] s.5 *CAR Act 1990*.
[14] s.10D *CAR Act 1990*.
[15] s.10C *CAR Act 1990*.
[16] s.10A(7) *CAR Act 1990*.
[17] i.e., what was, prior to the 2009 amendments, s.10(5)(b).

property for the purpose of funding the defendant's legal expenses. The "appropriate circumstances" referred to here are, essentially, those matters set out in s.16A(1) *("Restrictions on Payment of Legal Expenses from Restrained Property")* in respect of which the making of an order under s10B(3)(b) is stated to be *"subject to"*.

Deduction of Reasonable Legal Expenses from Restrained Property: s.10(5)(b)

83. Section 10(5)(b) of the CAR Act provided that a person whose interests in property are affected by a restraining order may make application to the Court for the payment, out of the restrained property, of the reasonable legal expenses incurred in respect of the CAR Act proceedings, or incurred in defending a criminal charge.[18]

84. As a result of the 2009 amendments to the CAR Act, s.10(5)(b) was renumbered 10B(3)(b). The terms of both sections, however, remained identical and read as follows:

A restraining order may, at the time it is made or a later time, provide for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:

(a) …

(b) subject to section 16A, the reasonable legal expenses of any person whose interests in property are subject to the restraining order, being expenses incurred in connection with the application for the restraining order or an application for a confiscation order, or incurred in defending a criminal charge.

85. One of the central areas of examination in Limb Two of the Operation Winjana investigation was the operation of the "reasonable legal expenses" provisions of the CAR Act and corresponding issues relating to the NSWCC's compliance with those provisions in its conduct of CAR Act matters, especially in relation to the settlement of such matters by the entry of consent orders.

Restrictions on Reasonable Legal Expenses Applications: s.16A

86. Section 10(5)(b) made provision, subject to s.16A, for grant of an order restraining interests in property to make provision for reasonable legal expenses in respect of the restraining order, confiscation or the defence of legal charges.

87. Section 16A(1) sets out *"restrictions"* which *"apply to a restraining order making provision for the payment of any legal expenses of a person"*. It reads as follows:

16A Restrictions on payment of legal expenses from restrained property

(1) The following restrictions apply to a restraining order making provision for the payment of any legal expenses of a person:

[18] Similarly, orders may be made for the payment from restrained funds for the "reasonable living expenses" of a person whose interests in property are affected by a restraining order (or their dependants), pursuant to s10(5)(a) (now10B(3)(a)). That section, however, is of no relevance in the context of Operation Winjana and is not further discussed in the Report.

(a) no provision is to be made except to the extent (if any) that the Supreme Court is satisfied that the person cannot meet the expenses concerned out of the person's unrestrained property,

(b) no provision is to be made in relation to any particular interest in property if the Supreme Court is satisfied that the interest is illegally acquired property,

(c) no provision is to be made unless a Statement of Affairs disclosing all the person's interests in property and liabilities and verified on oath by the person has been filed with the Supreme Court,

(d) no provision is to be made unless the Supreme Court is satisfied that the person has taken all reasonable steps to bring all of the person's interests in property within the jurisdiction of the Court,

(e) any such provision must specify the particular interest in property out of which the expenses concerned may be met

(2) …

88. The expression *"unrestrained property"* which is used in s.16A(1)(a) is defined in s.16A(2) to mean, essentially, property not the subject of a restraining order, or property which is outside the jurisdiction of the Court (and therefore the subject of s.16A(1)(d).

89. From the text of s.16A(1), there appears no boundary on the application of the restrictions set out therein. Accordingly, s.16A applies to any order made under s.10(5)(b)[19] for the deduction of legal expenses, whether those orders are sought from the Court by consent of the parties, or by determination by the Court.

Regulation of Reasonable Legal Expenses

90. In addition to s.16A, the Act demonstrates an intent that s.10(5)(b) (now, s10B(3)(b)) legal expenses are to be regulated or moderated in a number of ways:

i. section 10(5)(b) requires that the expenses be *"reasonable"*. A standard of "reasonable legal expenses" was first established in the NSW Court of Appeal decision of *NSWCC v Fleming and Heal (1991) 24 NSWLR 116*

ii. by any regulation passed under s.16B of the Act. No such regulation has been passed, but the existence of the power demonstrates an intention that the amount of s.10(5)(b) legal expenses would be subject to control

iii. by an order for taxation of the legal expenses made on application by the NSWCC or, as appropriate, by New South Wales Guardian and Trustee upon application to the Supreme Court, pursuant to s17 of the Act.

[19] Or its present equivalent, s10B(3)(b)

The Ancillary Orders Provision: s.12

91. Section 12 is a detailed provision giving the Supreme Court powers to make ancillary orders when making a restraining order, or at any later time. The provision identifies a series of possible ancillary orders *"but without limiting the generality"*[20] of the ancillary power. Section 12 was cited in evidence given by NSWCC officers, including Mr Bradley, as the statutory foundation for deductions from restrained funds for the NSWCC's funding purposes. This issue became a subject of examination during the enquiry, as discussed later in this report.

92. There is a further power in s.23(4) which entitles the Supreme Court to make an ancillary order in relation an asset forfeiture order. The Act provides, as an example, that the Court may make ancillary orders facilitating the transfer to the Crown of the forfeited property. Neither s.12 nor s.23(4) provides an express or implied power authorizing the deduction from restrained monies of funds payable to the NSWCC for any purpose.

The Criminal Assets Recovery Act Matters Examined In Operation Winjana

93. For the purposes of Operation Winjana the PIC examined a number of proceedings commenced by the NSWCC in the Supreme Court of New South Wales under the provisions of the CAR Act. These matters were initially selected on the basis of their relevance to what subsequently became referred to as "Limb One" of the scope and purpose.

94. Largely on the basis of the PIC's initial examination of these matters, and on the basis of evidence heard in the first segment of private hearings, the scope and purpose of the subsequent hearings was expanded to add "Limb Two" of the investigation. Each of the matters outlined below typifies the manner in which CAR Act proceedings were settled between the NSWCC and the respective defendants by way of consent orders which also provided for the payment of legal expenses, deducted from the restrained monies the subject of the proceedings, to both the defendants' lawyers and to the NSWCC.

95. It is thus useful for the purposes of this report to set out the following brief background to those matters, each of which is examined in greater detail later in this report.

96. Each of the matters set out below is referred to by the name by which it became known in the hearings.

[20] s.12(1) *CAR Act 1990*.

The Wui Feng Chen Matter

97. Mr Wui Feng Chen was arrested by NSW Police on 8 July 2007 and charged with a money laundering offence under s193B(1) of the *Crimes Act 1900*. This charge was in relation to $1,330,000 in cash seized during the search of a storage unit that Mr Chen was attending at the time of his arrest.

98. The following day, 9 July 2007, the NSWCC commenced CAR Act proceedings in relation to the seized cash. Mr Lou Novakovic swore the affidavit of suspicion in these proceedings. Ms Sadiq acted for Mr Chen in both the CAR Act and criminal proceedings.

99. On 27 July 2007 the CAR Act proceedings were settled by consent. The seized cash was forfeited to the Crown. Ms Sadiq received $80,000 for legal costs and the NSWCC received $40,000 for its costs.

100. On 31 October 2007, the first (indictable) charge against Mr Chen was withdrawn. Mr Chen entered a plea of guilty to a lesser (summary) offence under s193C(1) of the *Crimes Act 1900* ("deal with property suspected of being proceeds of crime"). He was convicted and sentenced to four months imprisonment dating from 8 July 2007.

The Bei Zhang Matter

101. This matter was referred to as the Bei Zhang matter because Ms Bei Zhang was the complainant to the PIC, as noted in the Overview to this report. The defendant in the CAR Act proceedings was her husband, Mr Guo Xiong Chen.

102. On 23 August 2005 NSW Police arrested Mr Chen on various drug related offences. Two days later on 25 August 2005 the NSWCC initiated proceedings in the Supreme Court under the CAR Act in respect of a number of bank accounts, shares, an interest in real estate at Canterbury, and cash in the amount of $7,400.

103. In February 2008 Ms Sadiq took over Mr Chen's representation in the criminal proceedings, shortly before the commencement of his trial. Prior to then, Mr Chen had been represented by a different legal practitioner and counsel. Around the same time Ms Sadiq also commenced negotiations with the NSWCC in respect of the separate CAR Act proceedings that had been commenced by the NSWCC shortly after Mr Chen's arrest in August 2005.

104. It appears that an agreement arose out of those negotiations in late March or early April 2008. Draft consent orders were prepared by the NSWCC which reflected the terms of the settlement that had been negotiated by Ms Sadiq with NSWCC[21]. Those terms included a deduction from the restrained property, pursuant to s.10(5)(b), for the payment of $14,000 to Ms Sadiq for legal expenses in respect of the CAR Act proceedings.

105. The draft consent orders also made provision for the reimbursement of a grant of Legal Aid ($36,000) in respect of the criminal proceedings against Mr Chen, which pre-dated Ms Sadiq's involvement in the matter. At the time the consent orders were drafted, a second application for Legal Aid (in respect of Ms Sadiq's representation) was also pending. The draft consent orders provided for the payment of costs to Ms Sadiq, and counsel engaged by her, in the event that second Legal Aid application was not granted.

106. The draft consent orders also provided for the payment of $50,000 to the NSWCC for its purported legal expenses in respect of the CAR Act proceedings.

107. The rest of the value of the restrained property was to be applied to the payment of a proceeds assessment order against Mr Chen, ostensibly pursuant to s27 of the CAR Act, in the amount $450,000.

108. The draft consent orders were, however, never entered. Indeed, the CAR Act proceedings against Mr Chen remain on foot in the Supreme Court as at the time of writing of this report.

109. Oral evidence from Ms Sadiq indicated that following his signing of the consent orders, Mr Chen wished his partner, Ms Bei Zhang, to inspect the document. Ms Zhang raised objections to the proposed settlement and Ms Sadiq's instructions were subsequently withdrawn.

110. Ms Zhang thereafter made various complaints, including that to the PIC, about both Ms Sadiq and Mr Novakovic. It was Ms Zhang's complaint to the PIC which led to the commencement of the Operation Winjana investigation.

111. Notwithstanding that they were never entered in the CAR Act proceedings, the draft consent orders prepared by the NSWCC for the "Bei Zhang matter" were, in their terms, comparable with the consent orders entered in the other CAR Act settlement matters examined in Operation Winjana.

[21] Exhibit 53.

The Benjamin Yun Matter

112. Benjamin Yun was arrested by NSW Police officers on 1 February 2008 and charged with the summary offence of "deal with property suspected of being proceeds of crime" pursuant to section 193C(1) of the *Crimes Act 1900*. The charge was in relation to $1,569,830 in cash which was discovered in the boot of Mr Yun's vehicle by the arresting officers.

113. Although he was initially represented by another legal practitioner, within 5 days of his arrest Salina Sadiq had taken over Mr Yun's representation and briefed a barrister, Mr Stephen Wilkinson.

114. On 10 February 2008 Mr Wilkinson attended the NSWCC offices for discussions in relation to the intended confiscation of the seized cash under the provisions of the CAR Act. As at that date, no proceedings had yet been commenced by the NSWCC.

115. At that meeting, terms of settlement were reached whereby orders would be sought by consent, the terms of which "awarded" Ms Sadiq $70,000 from the seized monies for "reasonable legal expenses", ostensibly pursuant to (then) subsection 10(5)(b) of the CAR Act. The NSWCC received $20,000 from the seized monies for its "costs", ostensibly pursuant to sub section 12(1) of the CAR Act.

116. The following day, 11 February 2008, the NSWCC commenced CAR Act proceedings in relation to the seized cash, orders reflecting the settlement of a day earlier were filed at the same time. No statement of affairs regarding Mr Yun's interests in property as required by s.16A was filed in court.

117. On 18 March 2008, Mr Yun entered a plea of guilty in the local court. He was subsequently sentenced to 7 months' imprisonment with a non-parole period of 4 months.

The Shan Chan Matters

118. Mr Shan Chan, Ms Mandy Ng, Ms Sally Lam, and Mr Joe Liu were arrested in an Australian Crime Commission investigation on 5 March 2008. Each was in possession of large amounts of cash, totalling about $526,878 and was charged with an offence under s193C(1) of the *Crimes Act 1900*. Following further investigations another $1,000,000 was seized.

119. On 18 June 2008, NSWCC commenced CAR Act proceedings against all four persons in relation to the cash. Those proceedings were settled by consent on the same day. The settlement agreement awarded $150,000 Ms Sadiq (for three defendants) and $50,000

to solicitor Maggie Sten (to whom Sadiq had referred one of the defendants, Ms Lam) for "reasonable legal expenses." The terms of the settlement also awarded the NSWCC $100,000 for its legal costs. No statements of affairs were filed as required by s.16A(1)(c).

120. On 16 December 2008, the charges against Ng, Lam, and Liu were withdrawn. On 25 June 2008, the charge against Mr Chan was withdrawn; he entered a plea of guilty, however, to a new charge under s193C(1) of the *Crimes Act 1900* in relation to a significantly greater amount of money, some $10 million.

The Shanghai Matter

121. In January 2007 Mr Novakovic accompanied Ms Sadiq on a business trip to China. Ms Sadiq was in Shanghai to obtain a statement from Mr Su for the purposes of assisting her client, a Mr Che in respect of court proceedings then on foot. Mr Novakovic was present for the taking of that statement. In his statement Mr Su claimed that a motor vehicle of his, valued at $80 000, had been in some way misappropriated or fraudulently transferred by a Mr Feng who was now in possession of the vehicle. Mr Novakovic subsequently contacted Mr Spark recommending that CAR Act proceedings might be commenced by the NSWCC against Mr Feng.

122. Those proceedings were commenced by application by the NSWCC for a restraining order in respect of the vehicle, and indeed all interests in property of Mr Feng (albeit the extent of those interests was at the time unknown). From the text of the emails between Mr Novakovic and Mr Spark, it appears that this order was sought with the knowledge that Mr Su sought the return of the vehicle to his possession.

123. Sometime later, after negotiation with Fengs's solicitor, Mr Phillip Stewart, these proceedings were withdrawn by the NSWCC with each side to pay its own costs. Mr Stewart later made a complaint to the NSWCC about Lou Novakovic being overseas with his partner when she took an affidavit relating to a confiscation action.

5 THE EVIDENCE

LIMB ONE – ALLEGATIONS OF MISCONDUCT AGAINST MR LOU NOVAKOVIC

124. Limb one of the scope and purpose examined conduct issues relating to the conduct of Mr Novakovic in four main areas:

(i) Conflict and disclosure issues arising from his relationship with the solicitor Ms Salina Sadiq;

(ii) Mr Novakovic's actions assisting Ms Sadiq in January 2007 in Shanghai (referred to as "the Shanghai matter");

(iii) Mr Novakovic's role in the matter of Wui Feng Chen;

(iv) Aspects of Mr Novakovic's oral evidence.

Mr Lou Novakovic and the NSWCC

125. Mr Novakovic commenced employment with the NSWCC in 1997 as a Forensic Accountant. Prior to joining the NSWCC he had worked for extensive periods in the New South Wales Office of State Revenue and for the Commonwealth Commissioner of Taxation. Apart from a period of one month, Mr Novakovic worked continuously with NSWCC until his resignation on 2 September 2011.

126. Mr Novakovic's formal qualifications were limited but his seniority and the value of his work at the NSWCC was considered to be high. His principal field of work at the NSWCC concerned matters under the CAR Act. He reported to the Assistant Director, Financial Investigations, Mr Jon Spark. Mr Spark was, and remains, a member of the NSWCC's internal management team which was headed by the Commissioner, Mr Phillip Bradley. Mr Spark led the team of which Mr Novakovic was a member in CAR Act matters. The team consisted of researchers, accountants, lawyers and others. The team managed CAR Act matters from an initial receipt until completion.

127. In carrying out his duties, Mr Novakovic dealt with matters that were allocated to him. Whilst he may have been aware of other matters being dealt by members of his team, he was not exposed to all NSWCC matters arising under the CAR Act.

128. From 2003 Mr Novakovic was in an intimate relationship with the solicitor Ms Salina Sadiq. As at the date of the public hearings, that relationship was ongoing. Evidence was heard that the introduction of Mr Novakovic and Ms Sadiq was brought about by Mr Giorgiutti, the solicitor to the NSWCC and who was then (and currently remains) a senior member of the management team of the NSWCC.

Ms Salina Sadiq

129. During the period of the events examined in Operation Winjana, Ms Sadiq was a solicitor in private practice, and the sole member of the legal firm Lloyd Truman Sadiq. At the time of the public hearings, she remained so. There was evidence that Ms Sadiq practices primarily in the areas of migration, crime, probate, and conveyancing.

130. Ms Sadiq is also a registered migration agent. She is multilingual and speaks Mandarin, Cantonese, Japanese and some French and as well as English. Prior to her becoming the principal of Lloyd Truman Sadiq she worked as an employed solicitor for another firm, Roach and Halligan, where she was first exposed to matters under the CAR Act.

131. There was evidence that Ms Sadiq was known by at least some senior NSWCC officers through her work and association with the NSWCC prior to the commencement of her relationship with Mr Novakovic.

The Relationship Between Mr Novakovic and Ms Sadiq

132. Ms Sadiq and Mr Novakovic met in August 2003 and by December 2003 were in a romantic relationship. In that month (December 2003) they travelled together to China.

133. Sometime after their return from China, Mr Novakovic commenced to live with Ms Sadiq at her home and did so for about 14 or 15 months. After that period Mr Novakovic moved out for various reasons but continued in an intimate relationship with Ms Sadiq to the time of hearing.

134. During the course of their relationship Mr Novakovic assisted Ms Sadiq:

- With the accounting of her professional practice
- By describing himself as her accountant in loan documents
- By witnessing her signature on legal documents
- By doing her tax returns and GST
- By giving investment advice
- With loans of money
- With payment of bills
- With payment of tax bills
- With superannuation advice
- With the holding of cash on her behalf, to assist her to avoid tax and Law Society "problems".

135. Ms Sadiq and Mr Novakovic had a safety deposit box together and still hold a joint banking account intended for travel purposes but which was also used for payment of Ms Sadiq's tax obligations. Each paid amounts weekly into the travel account, although Mr Novakovic paid more.

136. The two settled into living arrangements whereby Mr Novakovic spent some nights with Ms Sadiq at her home. They regularly travelled together on Ms Sadiq's business trips. The relationship was ongoing at the time of the public hearing.

137. Both Mr Novakovic and Ms Sadiq gave evidence to the effect that Mr Novakovic encouraged Ms Sadiq to do CAR Act work because it was lucrative, and that on occasion he had proffered advice as to how much she should seek for legal expenses. Mr Novakovic was less forthcoming about that in public than he was in private.

138. When asked whether she would enquire of Mr Novakovic how much she could seek in legal fees (ie. by way s.10(5)(b) allowance) for individual matters Ms Sadiq said[22]:

I think I would ask him "what is your view? What is your view about that? What would be the reasonable legal fee in that matter like that?" I would certainly have that sort of conversation with him, but if you ask me in which matter, Sir, I wouldn't know.

139. When Ms Sadiq was asked whether Mr Novakovic would answer her questions about how much she might claim for legal fees in a s.10(5)(b) application she said[23]:

No. He would just give me an estimate. He wouldn't go into the specific legislation and tell me that under this legislation you can – no. It would just be a general talk, "perhaps you could get this amount", or "perhaps you could achieve this amount", and I think – I haven't asked him that much. I've only asked him in one or two matters. I can't even remember, or one – or once or twice only.

140. Mr Novakovic said he knew that settlement of CAR Act matters could often generate *"a reasonable amount of legal fees"*.[24] He said he knew that because he was aware of the amounts paid, under s.10(5)(b), to other lawyers for that work.

141. He agreed that he had on occasion provided assistance in assessing the amount of s.10(5)(b) fees Ms Sadiq might seek. He said that he suggested the calculation of fees on a daily basis for a fully defended matter on a worst case scenario.

NSWCC Knowledge of the Relationship

142. Ms Sadiq was known to Mr O'Connor and Mr Giorgiutti prior to commencing her relationship with Mr Novakovic. She met Mr Spark on several occasions over the years both in a work context and at social functions.

[22] PIC Transcript, Salina Sadiq, 19 September 2011, p.149
[23] ibid
[24] Exhibit 120 (transcript of private hearing AXY, Lou Novakovic, 25 October 2010), p.44

143. Mr Bradley, Mr Giorgiutti, Mr Spark and Mr O'Connor were aware of the romantic relationship between Ms Sadiq and Mr Novakovic but were not aware of the full details of the relationship as have been set out herein.

144. Each of Mr Bradley, Mr O'Connor, Mr Giorgiutti and Mr Spark agreed that they were aware of the development of the romantic relationship between Ms Sadiq and Mr Novakovic.

Non–Disclosure by Mr Novakovic to NSWCC

145. The evidence showed that during the course of the relationship Mr Novakovic appears to have taken no steps to hide the existence of his relationship with Ms Sadiq from NSWCC management. On the contrary, he took her to NSWCC functions and disclosed the nature of the relationship to senior officers of the NSWCC.

146. Mr Novakovic had an involvement in the professional, financial, taxation and investment affairs of Ms Sadiq. It included her personal affairs, her superannuation and her legal practice. He lent money, gave advice about NSWCC work, advised on s.10(5)(b) fees that could be negotiated from his employer, and advised Ms Sadiq on her financial matters at a time when he was also encouraging her to act for defendants in CAR Act matters commenced by the NSWCC.

147. Mr Novakovic did not disclose to the NSWCC the detail of his involvement in Ms Sadiq's business and financial affairs. In particular, he kept undisclosed his loans to her, her cash repayments, his reasons for holding cash on her behalf and his advice and encouragement about taking on CAR Act work.

Management of Potential Conflict Arising from Mr Novakovic's Relationship with Ms Sadiq

148. The management of Mr Novakovic, or, at least, the limited amount of management, was the subject of evidence given by Mr Novakovic. He said he had not been provided with any guidance or literature about conflicts of interest, although he thought that there had been an internal seminar on the issue some time in three months prior to the Operation Winjana public hearings. It must be borne in mind that whether Mr Novakovic was truthful or not, and whether the management may be regarded as less than ideal, there is no doubt in the PIC's opinion that Mr Novakovic was perfectly aware that his conduct was quite improper and that he did not need extensive training to recognise the conflict of interest, whether actual or perceived.

149. The existence and nature of the relationship between Mr Novakovic and Ms Sadiq, and the knowledge of senior NSWCC Management of that relationship, has been discussed

above under the heading *"NSWCC Knowledge of the Relationship".*

150. As to measures taken by NSWCC management to manage the potential conflict of interests that might arise from that relationship, Mr Novakovic gave evidence in private hearing that there had never been discussion about the relationship from a conflict point of view with his superiors. He gave evidence that he was not counselled or advised by any person at any time in respect of his relationship.

151. Mr Bradley gave evidence that he felt he would have said something to Mr Novakovic about the relationship but could not identify circumstances. When it was put to him in private hearing, Mr Bradley was prepared to accept Mr Novakovic's assertion that there had been nothing said to him (Novakovic) about his relationship with Ms Sadiq. Mr Bradley adopted a somewhat different view in public hearing and instead stated that one or other of them was mistaken. Mr O'Connor and Mr Bradley both gave evidence that the potential conflict may have been raised at management team meetings.

152. Mr Giorgiutti did not consider that there was any necessity to counsel Mr Novakovic. He said that the NSWCC was conscious of the relationship, and that all that was able to be done in the circumstances was to exclude Mr Novakovic from working on matters that Ms Sadiq was involved in (although he was not aware of who it was that organised that). He said that in any event the practicalities of Mr Novakovic's work prevented full separation of Mr Novakovic from Ms Sadiq.

153. Mr Spark said in his evidence that in order to avoid potential conflict he allocated work involving Ms Sadiq to officers other than Mr Novakovic, but that he had not discussed with Mr Novakovic the obvious potential issues that could arise from Mr Novakovic discussing with Ms Sadiq NSWCC matters in which she was involved.

154. Mr Spark said, however, that after a complaint was made in June 2008 concerning the Shanghai matter (discussed further below) he spoke to Mr Novakovic about keeping his work separate from Ms Sadiq. Mr Novakovic did not recall any such discussion though he agreed that he was informed by Mr Spark of Mr Stewart's complaint and reminded of the need to keep his relationship with Ms Sadiq separate from his duties as a NSWCC officer. Mr Novakovic suggested that if counselling occurred there would be *"some sort of report and some sort of signature"*[25]. No such "report or signatures" were produced or made available to the PIC or any party.

155. During the course of the public hearings the NSWCC tendered copies of Codes of Conduct by which Mr Novakovic was bound. The earliest provided by NSWCC is marked *"updated July 2007"*[26]. It contains information on conflicts of interest, gifts, disclosure of private particulars, personal conduct and use of information.

[25] Exhibit 121 (transcript of private hearing AXY, Lou Novakovic, 26 October 2010), p.160
[26] Exhibit 10B, Tab 10

156. The only documentary evidence relating to the management of Mr Novakovic's relationship with Ms Sadiq was that tendered by the NSWCC which became Exhibit 36C. It consisted of extracts of the minutes of NSWCC Management Team meetings of 11 June 2008 and 17 June 2008. That of 11 June notes the receipt of a complaint ("the Stewart complaint') regarding Mr Novakovic being overseas with his partner when she took an affidavit from a person about a confiscation matter (this relates to the events in Shanghai in January 2007, the details of which are discussed below). The minute notes that[27]:

"Mr Spark is to speak with Mr Novakovic about separating his personal relationship from [h]is partner's business interests". The subsequent minutes of 17 June note that "Mr Spark said he had spoken with Mr Novakovic about keeping himself distant from his partner's business dealings. He said that Mr Novakovic had responded that he is very conscious of this."

The Shanghai Matter

157. Four years into the relationship between Ms Sadiq and Mr Novakovic, Ms Sadiq acted for a client named Mr Richard Che in a matter unrelated to any NSWCC investigation. Mr Che had been charged with a kidnapping offence. It was later said that the kidnapping was part of a sham to extract money from another person. It became important for Mr Che's defence to prove the sham.

158. Mr Che's instructions to Ms Sadiq were that a witness Mr Su (normally a student in Australia, but then in Shanghai), could give evidence which would assist Mr Che's case.

159. Ms Sadiq flew to Shanghai, arriving there on 9 January 2007. Mr Novakovic accompanied her. It is possible that a trip to China was planned by them at that time in any event. In evidence, Mr Novakovic"s version of events in Shanghai was substantially consistent with that of Ms Sadiq.

160. Both Ms Sadiq and Mr Novakovic gave evidence that Mr Novakovic was present during the taking of a statement from Mr Su. Ms Sadiq took the statement from Mr Su in a Chinese language, but typed the statement in English on the spot.

161. Ms Sadiq asked Mr Novakovic to read the statement to *"check the grammar"*. Mr Novakovic agrees that he read the statement for its meaning and content. He appears to have had a discussion with Mr Su at the time, or shortly after, he read the statement. Mr Su spoke reasonable English. Mr Novakovic noted in the statement reference to a Lexus motor vehicle said to have been fraudulently misappropriated. He discussed it with Mr Su.

162. The statement of Mr Su dated 9 January 2007 was tendered in evidence.[28] It reported a story by Mr Su that Mr Su's Lexus motor vehicle (worth approximately $80,000) had been

[27] Exhibit 36C
[28] Exhibit 1

in some way transferred by another person into Mr Feng's name. Mr Su said that Mr Feng was someone to whom he had given a signed, but otherwise blank, motor vehicle transfer document to enable Mr Feng to sell the vehicle on his behalf and that the vehicle should not have ended up in Mr Feng's name.

163. At some point in the conversation Mr Novakovic told Mr Su that he was an officer of the NSWCC. There was a discussion with Mr Su in which Mr Novakovic indicated that he could use NSWCC powers to arrange restraint of the vehicle by NSWCC. Whether it was held out as an inducement or a threat, as Mr Su later suggested, is unclear, but for present purposes that question is largely irrelevant. What appears from the evidence is that Mr Novakovic's role as a NSWCC officer, and the powers of the NSWCC under the CAR Act, were utilised in the conversation to either encourage Mr Su's execution of the statement taken, or else his ongoing support in the case for Ms Sadiq's client, Mr Che, or possibly both.

164. Mr Novakovic said that he had in mind seizure of the vehicle from an alleged wrongdoer (Mr Feng) for the purpose of returning it to its alleged true owner (Mr Su). Mr Novakovic said that the inappropriateness of offering an incentive to a witness from whom a statement was being sought did not occur to him at the time.

165. Mr Novakovic agreed that any restraint of the vehicle was unlikely to be of benefit to the Crown or the State of New South Wales. Rather, he said he saw the use of the CAR Act powers as a law enforcement opportunity to return wrongfully acquired property to its rightful owner. This has been referred to as the "victim argument" and is further considered later in this report.

166. Mr Novakovic accepted that he was relying on Mr Su's version of the alleged wrongdoing by Mr Feng but said that if NSWCC were to take action they would carry out checks to verify Mr Su's story.

167. Mr Novakovic agreed that he knew nothing of Mr Feng and that all of his knowledge came from Mr Su. He said that Mr Su informed him that Mr Feng had a criminal background of some kind which the NSWCC would have to check if they wished to act on the story. Mr Novakovic acknowledged that he was aware that Mr Su wanted to have his car returned to him.

168. Following the taking of the statement from Mr Su, Mr Novakovic telephoned Mr Jonathan Spark at the NSWCC in Sydney and informed him of some, but not all, of the circumstances of Mr Feng's allegedly fraudulent acquisition of Mr Su's car. It appears that he probably made the call to Mr Spark on Ms Sadiq's mobile phone as hers had global roaming and his did not. He agreed to send Mr Spark an email and subsequently did so that same day[29].

[29] Exhibits 3C (public version: Exhibit 16) and 4

169. Mr Novakovic emailed his recommendation to Mr Spark as follows:

Hi Jon,
Greetings from China!!
I refer to our telephone conversation of this afternoon re a possible restraining order.
The info is sourced from a client of Salina's and in particular. SU Wei Kai DOB: 27/08/1988 (who is a overseas student who left Australia in November 2006 but will return to Australia shortly to resume his studies).
The Person of Interest for the restraining order is Zhe FENG DOB: 10/05/1987 who I am told already has a serious offence within the last 6 years. A COPS search should settle it (one way or the other). It is also likely that FENG will be charged in the future with another offence relating to a "sham" kidnapping/extortion (in which he was the alleged victim). Persons already charged re the "sham" are Zhichang CHE DOB: 20/02/1986 and Bing XIA DOB 20/02/1987. They were charged in late December 2006. I'm not sure the cops are up to speed yet that the kidnapping/extortion was a sham.
In respect of FENG, he is the registered owner of a red Lexus 430 rego AXP43T which is unencumbered (estimated value $60-$80,000) and is being offered for sale (on consignment) in a Sydney car yard.
It is the Lexus that is of interest for the possible restraining order.
SU, who purchased the Lexus . about 6 months ago (from the same car yard where it is now on consignment) asserts that the Lexus was transferred to FENG without proper authorisation or payment being made after he left it with CHE to sell for him after he returned to China in November 2006. SU said he was never paid and the car was transferred to another person then FENG to make the transfers look real. SU thinks that FENG is unlikely to have paid anything for the car.

As far as the' current location of the car, you'll need to do an RTA search to identify the owner prior to SU which should be the car yard currently holding the car SU is aware that he may never receive payment for the car.
By the way, it appears that SU is not involved in any badness!!
I guess a restraining order for a $60-$80,000 car pales into insignificance for you in the light of the recent $4 million matter John Egan was working on.
Anyway, it's worth a look
Anyway, if you need more info etc, please call me. on Salina's (temporary) mobile in China [xxxxxxxxxx] but you will need to dial international codes first.
Regards, Lou

170. As is apparent, the email purported to recite the information given in the earlier telephone conversation and to add some further details. The email made clear that Mr Novakovic was in China, involved in Ms Sadiq's legal work and that Mr Su was someone with whom she was professionally involved. It is apparent from the email to Mr Spark that Mr Novakovic had access both to the statement of Mr Su and Ms Sadiq's file. Ms Sadiq agreed in evidence before the PIC that Mr Novakovic had access to her file. Mr Novakovic was reluctant to concede his access to Ms Sadiq's file but there is detailed information in the email which is not in the statement and which appears more likely to have come from Ms Sadiq's file rather than from Mr Su's memory.

171. Mr Spark received and read the email from Mr Novakovic. It appears that he had little difficulty understanding the implications of the matter so far as NSWCC was concerned. He could see that restraint was possible but forfeiture unlikely because Mr Su would want his car back. When preparing a report and recommendation to Mr Bradley at 4:41pm on 10 January 2007, Mr Spark forwarded Mr Novakovic's email of the previous day and wrote to Mr Bradley *"only thing is that from the info from Lou it appears that the vehicle has been stolen from the informant Su who is likely to want the money/car back"*.[30] Mr Spark recommended in his email to Mr Bradley the commencement of action by way of an "all interests" restraining order against Mr Feng and the seeking of a s27 Proceeds Assessment Order (rather than a s.22 Assets Forfeiture Order) against him, with an additional order that the sale of the car proceed and the funds from that sale be held by the Public Trustee.

172. It is likely that Mr Bradley could not have interpreted the implications of the situation from Mr Spark's email alone. He did, however, read Mr Novakovic's email to Mr Spark which

[30] Exhibit 17

Mr Spark had forwarded to him. Indeed, in his evidence, Mr Bradley agreed that he did so. It would therefore have been apparent to Mr Bradley that Mr Novakovic was in China with Ms Sadiq, involved in her business, had access to her files and was suggesting a CAR Act restraining order which would favour Mr Su. Such an order would have been of benefit to Mr Su, Mr Che and Ms Sadiq, but of little, if any, benefit to the Crown in right of New South Wales. Ms Sadiq had obtained from Mr Su a signed authority to act for Mr Su[31] in respect of all matters relating to the vehicle, although that information was not in Mr Novakovic's email to Mr Spark.

173. Mr Spark wrote in his email to Mr Bradley:[32]

"he [Feng] has a relevant offence within the necessary six year period (conviction for use false instrument and current charges which include making false statements to obtain money $5,000) – he altered a cheque to buy a car from $10,000 to $49,000".

174. Little else appears to have been known about Mr Feng by the NSWCC at that stage.

175. Mr Bradley approved commencement of CAR Act proceedings. The restraining order sought was not solely in relation to the car[33]. It was, as recommended in Mr Spark's email to Mr Bradley, over all of Mr Feng's interests in property, the nature and extent of which (apart from the two vehicles which were identified from a database search) was then unknown to NSWCC.

176. Mr Spark swore the requisite affidavit asserting reasonable suspicion on 11 January 2007[34]. Application was made for the restraining order that same day. On the basis of Mr Spark's affidavit, the order was made by the Court.[35]

177. In the meantime Mr Spark allocated the investigation of the Su/Feng matter to a financial analyst in his team. The analyst carried out investigations into transfers of the vehicle in question. He does not appear to have found anything in his inquiries inconsistent with the instructions provided by Mr Spark.

178. Subsequently, by letter dated 26 February 2008 (just over twelve months later), a solicitor, Mr Phillip Stewart of Nyman Gibson Stewart, who was then acting on behalf of Mr Feng, intervened[36]. Mr Stewart's letter advised that he had received information from Mr Su to the effect that Mr Su had regained possession of his car. That letter also enclosed a second statement of Mr Su, dated 7 February 2008, in which, amongst other matters, Mr Su made reference to Mr Novakovic's role in relation to the taking of his first statement in Shanghai on 9 January 2007.

[31] Exhibit 2
[32] Exhibit 17
[33] Exhibit 19
[34] Exhibit 20
[35] Exhibit 19
[36] Exhibit 25 AC, Tab. 5

179. In the meantime, the NSWCC analyst with conduct of the investigation into Mr Feng had already assessed that the matter would be unproductive and recommended, in an email to Mr Spark dated 18 July 2007, the discontinuance of the CAR Act proceedings[37]. The email noted that *"Lou advised that Su got his car back"*. The email also noted that the analyst had come to the view that *"Su was not 100% frank in relation to "fraud"*.

180. Ultimately, Mr Bradley confirmed his approval of the discontinuance of the CAR Act proceedings against Mr Feng by email dated 27 February 2008, although this appears to have been more by reason of the letter received from Mr Stewart the previous day, than the recommendation of the NSWCC analyst some 5 months earlier.[38]

181. Consent orders were filed on 5 March 2008 dismissing the NSWCC application for a proceeds assessment order on the basis that each party pay its own costs. Accordingly, the restraining order also ceased to have force. The orders also effectively "declared' Mr Su to be the true beneficial owner of the vehicle in question. The effect of orders, therefore, was to facilitate the transfer of the registration from Mr Feng back to Mr Su (the latter having already re-gained possession of the vehicle, as advised by the Stewart letter[39]).

182. In their evidence before the PIC, neither Mr Novakovic nor Ms Sadiq disagreed with the suggestion that Mr Novakovic's actions in recommending CAR Act action which would ultimately benefit Ms Sadiq's client (Mr Su) were inappropriate and/or improper.

183. Ms Sadiq, in her evidence, conceded that the use of NSWCC CAR Act powers for the purpose of benefiting her client would have been *"improper"*[40]. She agreed that she saw Mr Novakovic's email to Mr Spark. She agreed that she should have stopped Mr Novakovic after seeing his email to Mr Spark. Ms Sadiq said that she saw the exercise as one to keep her client, Mr Che, out of prison. She saw the restraint as a means of *"protecting"* the car so that it was available for Mr Su upon whose evidence she relied to assist Mr Che. She said that it was Mr Novakovic's idea to restrain the car. She agreed that *"what was good for Eric (Mr Su) was good for her client Mr Che"*[41].

184. Mr Novakovic said he could see how the exercise appeared to be an inappropriate use of NSWCC's power. He agreed, that there was very little role for NSWCC in the whole matter. He accepted that the exercise benefitted Ms Sadiq and her client Mr Che. Mr Novakovic said that, in hindsight, his instigation of CAR Act proceedings was, in the circumstances, *"not the smartest thing [he] had ever done"*[42]. He could not explain how it was only with the benefit of hindsight that he could reach that conclusion.

185. The "victims argument" as it came to be referred in the course of the PIC's investigation is, of itself, a discrete issue relating to the NSWCC's use of the CAR Act powers. In respect of that issue, the PIC accepts evidence from other officers of the NSWCC that it does not

[37] Exhibit 25 AC, Tab. 3
[38] Exhibit 25 AC doc. 6
[39] Exhibit 25 AC doc. 5
[40] Exhibit 122 (transcript of private hearing AXZ, Salina Sadiq, 26 October 2010), p.35-38
[41] ibid, p.27
[42] ibid

commence CAR Act proceedings for the primary purpose of returning property to alleged "victims", even though that may be a collateral outcome in some cases.

186. Around June 2008, some 18 months after Mr Novakovic's email from Shanghai to Mr Spark, (and 4 months after the formal discontinuance of the CAR Act proceedings against Mr Feng), an oral complaint regarding the Shanghai incident was made by Mr Feng's solicitor, Mr Stewart, to Mr O'Connor.

187. That complaint related to Mr Novakovic's involvement in the taking of Mr Su's statement by Ms Sadiq in January 2007 and the apparent conflict of interest that involvement appeared to present. The "Stewart complaint" and, in particular, the NSWCC's response to it is dealt with separately below.

Management Response to the Shanghai Matter

188. The facts concerning Mr Novakovic's involvement with Ms Sadiq in one of her matters in Shanghai on 9 and 10 January 2007 have been outlined above under the heading "The Shanghai Matter 2007". The facts relevant to that matter are not in dispute.

189. In the course of the Operation Winjana hearings, there was, however, some dispute as to whether a response was required from NSWCC management following the receipt of the email from Mr Novakovic to Mr Spark of 9 January 2007, and, if so, what that response might have entailed. Counsel Assisting the Commission questioned several witnesses as to whether the contents of Mr Novakovic's email to Mr Spark revealed, or should have revealed, a conflict of interests on the part of Mr Novakovic and/or a misuse of his authority as a NSWCC officer sufficient to warrant further investigation and, if it did, what that further investigation should entail.

190. Both Mr Bradley and Mr Spark asserted that at the time there was nothing in Mr Novakovic's email which caused them any concern. The email did not result in any expression of concern, investigation or counselling either immediately or when Mr Novakovic returned from China to Sydney. Neither Mr Bradley nor Mr Spark took the view that Mr Novakovic's actions amounted to a perceivable conflict of interests, or might have potentially compromised any CAR Act proceedings taken by the NSWCC against Mr Feng.

191. Mr Spark, the immediate superior of Mr Novakovic and a member of the management team, gave evidence in private to the effect that at the time he did not consider that Mr Novakovic may have acted in a way that brought about an exercise of the NSWCC confiscation jurisdiction for the purpose of assisting Mr Novakovic's partner, Ms Sadiq.

192. In public (corroborative of his evidence in private), Mr Spark said that he and Mr Bradley had no discussion about whether there was a problem with Mr Novakovic being involved in the Su matter. Mr Spark said that he took the view that the email was a form of disclosure. Mr Spark saw nothing arising out of the mail that caused him to want to counsel Mr Novakovic.

193. When asked[43]:

Q: …as the supervisor of Mr Novakovic, mere declaration (of the relationship) is not sufficient; there needs to be a management response, do you agree with that?

A: In respect of Mr Novakovic?

Q: Yes.

A: Mr Novakovic had very – had no involvement in any matter that Ms Sadiq was involved in.

194. Mr Spark was asked whether he had put in place at any time any procedure which would ensure that Mr Novakovic was not involved in a matter that Ms Sadiq was involved in, he responded[44]:

A: Absolutely. I allocated matters to Forensic Accountants for carriage of those matters. I would not allocate a matter to Mr Novakovic in which Ms Sadiq had an involvement.

195. Mr Novakovic gave evidence that he was not aware any such procedures having been put in place, nor was he managed, given guidance or counselling in any way.

196. When Mr Spark was asked whether he had discussed with Mr Novakovic the problems that could arise for NSWCC if there was any discussion between him and his partner about matters in which he was involved, he responded[45]:

A: I have not had that discussion with him. In fact I only had one discussion with him in relation to him keeping his affairs separate from Ms Sadiq's.

197. Mr Bradley's evidence concerning the events of 9 and 10 January 2007 was similar to Mr Spark's. In his evidence in private, Mr Bradley said that he did not think that the Novakovic email caused him concern as to any conflict issues. He did, however, agree that the matter *"might have"* raised in his mind the question of whether the NSWCC should be involved in the matter at all.[46] Subsequently, Counsel Assisting put to Mr Bradley whether the email, when it came to his attention, should have raised a real concern about the issue of conflict between a NSWCC officer (ie Mr Novakovic) and Ms Sadiq. Mr Bradley responded: "I think I would accept that"[47].

[43] PIC Transcript, Jon Spark, 20 September 2011, p.278
[44] ibid
[45] ibid, pp.278-279
[46] Exhibit 130 (transcript of private hearing AYD, Phillip Bradley, 17 December 2010, p.79
[47] ibid, p.80

198. Mr Bradley believed he may have spoken at some stage with Mr Novakovic about his relationship with Ms Sadiq but could not identify any occasion or content of the conversation and, in private hearing, accepted that he may be wrong about that. In public hearing, however, he was no longer prepared to accept that it was he who had been wrong. Despite not having made any record of any such conversations with Mr Novakovic, Mr Bradley suggested that it was perhaps Mr Novakovic who had been wrong about their having been no such conversations.

199. The only evidence of a conversation about the Shanghai matter between Mr Novakovic and either Mr Bradley or Mr Spark following Mr Novakovic's return to Australia was that Mr Spark informed Mr Novakovic that the NSWCC had commenced CAR Act proceedings against Mr Feng. Mr Novakovic said in evidence that he was surprised by that, adding that he thought the information that he had sourced from Mr Su (and passed on to Mr Spark) would be either inaccurate or there would be some aspect of it that didn't check out.

The Stewart Complaint

200. Some eighteen months after the taking of the Su statement in the Shanghai matter, the solicitor who had acted for Mr Feng, Mr Phillip Stewart, made an oral complaint to Mr O'Connor about Mr Novakovic's involvement as a NSWCC officer in a matter in which his partner Ms Sadiq was acting. Mr O'Connor reported it to the management team of NSWCC, as was noted in the minutes of the management team meeting of 11 June 2008.[48]

201. Mr O'Connor's evidence was that when he reported the complaint to the management team he knew nothing about the matter. According to Mr O'Connor, Mr Bradley and Mr Spark appeared to be already aware of the matter to which the complaint related. Mr Spark said that he did not know what the complaint was about. Mr Bradley, Mr Spark and O'Connor all said that the matter received some discussion at the management team meeting. None of those three, however, remembered any of the details of that discussion.

202. Mr Spark said that, *"on instruction"*, he spoke with Mr Novakovic.[49] The management team meeting minutes of the following week (17 June 2008) record that Mr Spark informed the meeting that he had spoken with Mr Novakovic about keeping himself distant from Ms Sadiq's business affairs.[50] Mr Novakovic said that Mr Spark told him about the complaint from Mr Stewart but he did not receive any counselling about the issue.

203. Although the Shanghai matter occurred in January 2007 its consequences appear to have been ongoing a year later. On 26 February 2008, about 4 months before Mr Stewart made his complaint to Mr O'Connor, Mr Stewart wrote to Mr Spark seeking final orders in a form that would declare Mr Su to be the true owner of the motor vehicle[51]. It is clear from the letter that Mr Stewart, who was then still acting for Mr Feng, was in active contact with Mr Su.

[48] Exhibit 36C (Document 1)
[49] Exhibit 125 (transcript of private hearing AYB, Jonathon Spark, 27 October 2010), p.81
[50] Exhibit 36C (Document 2)
[51] Exhibit 95

204. According to that letter, Mr Feng agreed that the car should be transferred back to Mr Su but the NSWCC "s current orders were preventing that occurring. Mr Stewart enclosed a fresh statement from Mr Su dated 7 January 2008[52]. Mr Su's second statement sets out a story different in a number of respects from the story that Mr Su had given in the first statement taken by Ms Sadiq in January 2007. The second statement also describes the presence, during the taking of that initial statement, of *"Salina's husband"* and said that he was *"a high ranking officer at the NSWCC"*.

205. In that second (January 2008) statement, Mr Su said:

Salina's husband told me that according to Crime Commission procedure the car would be held in custody so that cat [sic] could not sell the car. Salina said words to the effect that if they win the case for Richard I should get my car back. I never saw any paperwork from the Crime Commission, but Salina's husband identified himself as a member of the NSWCC and asked me to sign a piece of paper authorising the Crime Commission to deal with my car".

206. No such document authorising the NSWCC to deal with Mr Su's car came to light in the evidence. However, there was in evidence a document signed by Mr Su dated 9 January 2007 (the same date as the first Su statement) authorising Ms Sadiq to *"handle all matters relating to the transfer of [the motor vehicle]"*[53]. It appears more likely that this was the "piece of paper" that Mr Su was referring to, albeit mistakenly, in his January 2008 statement.

207. The content of the paragraphs from Ms Su's second statement (ie that dated January 2008) were read by Mr Spark in the course of his giving evidence. He was asked[54]:

Q: When you read paragraph 16 of the statement, did it occur to you that Mr Novakovic may well have been using the jurisdiction of the Crime Commission – that is, using you to use the jurisdiction of the Crime Commission – to achieve an end of benefit to Salina.

A: No.

Q: …and Mr Su that was of no benefit whatever, as it turns out, to the Crime Commission?

A: No, I don't think so, because he fully disclosed those things, those details, in his email.

Q: So there was nothing in the statement that caused you any concern?

A: Of course it caused me concern – it does cause me concern, yes.

Q: Well, did you counsel Mr…

A: I did go speak to him on instructions – I went and spoke to Mr Novakovic.

Q: What do you mean "on instructions"?

A: As a result of those notes in the complaint.

[52] Exhibit 25C (document 5)
[53] Exhibit 2
[54] Exhibit 125 (transcript of private hearing AYB, Jonathon Spark, 27 October 2010), p.81

208. The letter which enclosed the second Su statement was dated 26 February 2008. Mr O'Connor's report of the verbal complaint by Mr Stewart and the subsequent action taken by Mr Spark was, however, not until June 2008. It appears therefore quite likely that in his evidence (above) Mr Spark is confusing the outcome of the response to the Stewart complaint in June (ie Mr Novakovic being "spoken to").

209. Aside from Mr Spark's somewhat asynchronous account, there was no evidence before the Commission of any immediate response to the issues raised in Mr Su's statement of January 2008.

The Wui Feng Chen Conflict Issue

210. Mr Wui Feng Chen was a client of Ms Sadiq. He had been arrested and charged on 8 July 2007 with a money laundering offence under s193B(1) of the *Crimes Act 1900* after having been found by police in possession of some $1.3 million in cash. The police referred the matter to the NSWCC for the commencement of CAR Act confiscation action. Settlement of those proceedings was achieved almost immediately in circumstances which are examined in more detail in the "Limb Two" section of this report[55].

211. In the context of "Limb One", the issue that arises from this matter concerns Mr Novakovic's role in a matter in which his partner, Ms Sadiq, was acting and from which she derived a financial benefit substantially in excess of what would have been "reasonable' legal expenses in the circumstances.

212. On 9 July 2007, the day following Mr Chen's arrest, Mr Novakovic swore the affidavit of suspicion on behalf of the NSWCC in support of an application for the restraint of the monies which had been in Mr Chen's possession at the time of his arrest.[56]

213. In private hearings Mr Novakovic gave evidence that he was unaware of the fact that his partner, Ms Sadiq, was acting in the matter until sometime after he had sworn that affidavit on 9 July 2007. Other documentary evidence obtained from Ms Sadiq in the course of the investigation indicated that this was most likely the case.

214. It was put to Mr Novakovic that it appeared possible that Ms Sadiq may have come to represent Mr Chen on the basis of NSWCC information that he may have improperly supplied to her. Mr Novakovic denied that this was the case, as did Ms Sadiq. Despite the possible inference otherwise, there was no evidence before the PIC which contradicted those denials.

215. As previously noted, the final consent orders in the CAR proceedings provided for the payment to Ms Sadiq of $80,000 for "reasonable legal expenses' pursuant to s.10(5)(b)

[55] Briefly, as a result of that settlement Ms Sadiq received an allowance under s. 10(5)(b) CAR Act of $80,000 for legal expenses. The NSWCC received an amount of $40,000, ostensibly pursuant to s12(1), for its "costs". The balance was forfeited to the Crown.
[56] Exhibit 6

of the CAR Act[57]. Mr Novakovic gave evidence that he was repaid a $10,000 loan to Ms Sadiq from the s.10(5)(b) funds of $80,000 she received from the Chen matter.

216. Mr Novakovic gave evidence that he kept himself separate from matters in which Ms Sadiq acted in order to avoid any conflict or perception of conflict. In respect of the Wui Feng Chen matter, he gave evidence that, aside from swearing the affidavit in support of the initial restraining order application, he had no further role in the matter.

217. In contradiction to that assertion, however, there was evidence before the PIC that Mr Novakovic handled enquiries from the Department of Immigration (DIMIA) in respect of Mr Chen at a time that Mr Chen was still being represented by Ms Sadiq, albeit that those actions took place well after the CAR Act proceedings had been completed[58]. Indeed, those enquiries were made by DIMIA in respect of Mr Chen's pending release from prison and deportation from Australia. DIMIA requested from the NSWCC copies of Mr Chen's passport (which was then still in the possession of the NSWCC)[59]. The DIMIA request was handled by Mr Novakovic, notwithstanding that the DIMIA correspondence noted that its request was prompted by its liaison with Mr Chen's legal representative, Ms Sadiq.

218. The PIC is of the view that, on its face, that evidence does not establish that Mr Novakovic had misconducted himself in relation to the Chen matter. Given that Mr Novakovic appears to have made no attempt to conceal the actions he had taken in response to the DIMIA request, the evidence does indicate Mr Novakovic's apparent obliviousness to the potential for a conflict of interests, or at the very least, the appearance of such a conflict. It also suggests a failure on the part of NSWCC management to adequately manage the potential for that conflict to arise.

Mr Novakovic's False Evidence on Loans and Cash

219. Mr Novakovic gave evidence in private concerning the financial relationship he had with Ms Sadiq. He asserted that he had made gifts of money to her in relation to her purchase of property.

220. When he was recalled the following day, Mr Novakovic altered his evidence and conceded that he considered his evidence of the previous day to have been deliberately misleading and that he had given that evidence in order to protect Ms Sadiq[60]. His corrected evidence was that the gifts of money to Ms Sadiq to which he had referred the previous day were in fact loans, and not gifts. He further stated that repayments of those loans had been in cash amounts and that he held onto the cash, without ever banking it, in order to assist Ms Sadiq to prevent Law Society and Taxation Office *"implications"*[61].

[57] Exhibit 14
[58] Exhibit 29(a) and (b).
[59] The faxes were contained in NSWCC's file relating to Mr Chen.
[60] Ex 121 T131-137
[61] Exhibit 121 T130-136

Use Of Sadiq's Legal Services By NSWCC Officers

221. It emerged during the evidence relating to Ms Sadiq's dealings with the NSWCC that there had been occasions on which Ms Sadiq had done private legal work at the request of Mr Giorgiutti. There was also evidence that other NSWCC staff had engaged Ms Sadiq's legal services.

222. Three occasions were identified on which Mr Giorgiutti had made use of Ms Sadiq's legal and/or migration services. On two of those occasions it was for legal services provided to members of Mr Giorgiutti's family, at his request. That work appears to have been paid for and there is no evidence that it was other than at appropriate rates.

223. On the third occasion Mr Giorgiutti wished to use Ms Sadiq's experience and qualification as a migration agent without charge, or *"pro bono"* as he suggested it to her. Whilst the term *"pro bono"* has a variety of meanings, Mr Giorgiutti meant on this occasion that Ms Sadiq would do the work without payment. He wanted Ms Sadiq to assist a Dutch national who had been in a relationship with a member of his family to remain in Australia.

224. The legal services provided by Ms Sadiq to other NSWCC officers related to real estate conveyancing.

225. In and of themselves, none of the individual incidents were untoward. None involved the use of NSWCC property. All parties appeared to have acted willingly. There was no evidence that the work done by Ms Sadiq at Mr Giorgiutti's request, and that done for the other NSWCC officers, was other than bona fide legal work.

226. In both his private and public hearing evidence Mr Giorgiutti said that, in terms of a perception of conflict of interests, he saw nothing wrong with engaging Ms Sadiq to do legal work for members of his family .

227. Counsel Assisting the Commission, Mr Gormly SC, has submitted that if Mr Giorgiutti truly holds that view then it is indicative of a lack of understanding, on Mr Giorgiutti's part, of the nature of conflicts of interests, or the perception of such conflicts. Counsel Assisting submitted that Mr Giorgiutti should not have used the services of a solicitor or migration agent (especially if it was unpaid), when that person was in professional and adversarial dealings with his employer. In Counsel's submission, the perception that Mr Giorgiutti might derive a benefit to himself by using the relationship Ms Sadiq had with the NSWCC through the CAR Act matters was both inevitable and damaging to NSWCC. It may well have given rise to a perception of special relationships and favour aggravated by the relationship between Ms Sadiq and Mr Novakovic.

228. It was submitted on behalf of Mr Giorgiutti that no conflict issues arose in the circumstances because Ms Sadiq had ceased doing any CAR Act matters prior to her being engaged by Mr Giorgiutti or, at least, at his request. In the PIC's view that observation is not to the point (and in any event is somewhat inaccurate – the evidence suggests that the first occasion on which Ms Sadiq acted for Mr Giorgiutti was whilst she was still involved in appearing for defendants in CAR Act proceedings commenced by the NSWCC).

229. Whilst the PIC is of the opinion no misconduct arises from the circumstances (and there is no evidence before it to the contrary) it considers there to be merit in Counsel Assisting's submission. In the PIC's opinion, Mr Giorgiutti's engagement of Ms Sadiq clearly gave rise to the potential for a perceived, if not actual, conflict of interests.

The NSWCC Review of Mr Novakovic's Conduct – Response to the PIC Investigation

230. It is apt that mention be made of the NSWCC's response to the allegations against Mr Novakovic which were raised in the course of Operation Winjana.

231. Shortly after the completion of the Operation Winjana private hearings, Assistant Commissioner Cripps QC requested Counsel Assisting the Commission Mr Gormly, to prepare interim submissions which would provide a brief analysis of the evidence and issues that had arisen during the private hearings, including as to possible questions of misconduct by Mr Novakovic (or any other NSWCC officer). The interim submissions were sought by the Assistant Commissioner to assist in his determination as to whether further hearings should be held in public for the purposes of Operation Winjana.

232. Following his receipt of those interim submissions, the Assistant Commissioner also invited submissions from all witnesses who had given evidence in private as to the holding of further hearings in public. By letter dated 21 January 2011, the PIC furnished each of those witnesses with a copy of Counsel Assisting's interim submissions to assist in the preparation of their submissions. Each witness was also subsequently furnished with copies of the transcripts of the private hearings and the exhibits tendered.

233. By letter dated 24 January 2011 NSWCC Assistant Commissioner, Mr Peter Singleton, wrote to the PIC to request that he be also granted, on behalf of the NSWCC, access to a copy of the interim submissions of Counsel Assisting.

234. The PIC considered it appropriate that Assistant Commissioner Singleton's request be granted. Assistant Commissioner Singleton was also subsequently furnished (through the Crown Solicitor's Office) with copies of the private hearings transcripts and exhibits.

235. Subsequently on 26 August 2011, after the PIC had determined to hold public hearings,

the Crown Solicitor (on behalf of the NSWCC), wrote to the PIC seeking a variation of non-publication orders made during the private hearings in order to permit the NSWCC to rely on private hearing evidence in considering action to be taken in respect of Mr Novakovic's employment with the NSWCC. The relevant orders were varied by the PIC, as requested, on 30 August 2011.

236. As was later established in evidence, two days after the variation of the relevant non-publication orders by Acting Commissioner Cripps[62], a NSWCC management meeting occurred at which was discussed advice that had been sought from Mr Moses concerning the conduct of Mr Novakovic.

237. A letter to Mr Novakovic advising him that he was to be suspended from his NSWCC duties was prepared[63]. The letter, which was signed by Mr Singleton as Assistant Commissioner, contained the following passage:

I have determined that there are issues arising from your evidence (in the PIC) that may require explanation. Given that further hearings are pending before the PIC, however, I have also determined that it is not appropriate to [sic] me to require you to provide any such explanation at this stage.

I have decided, on behalf of this Commission, that until further notice you are suspended (on full pay) from your employment with the Commission.

Please note that I have not formed or pre-determined any view about any aspect about your conduct or about your continued employment with the Commission.

238. Ultimately, the letter was not given to Mr Novakovic. As is indicated by a notation on the draft document itself, Mr Novakovic was informed of his pending suspension, and instead tendered his resignation prior to the letter being delivered to him.

239. Mr Singleton was called to give evidence on 6 October 2011, the purpose of which was primarily to assist the PIC in establishing the reason for Mr Novakovic's proposed suspension.

240. Mr Singleton gave evidence that following his reading of Counsel Assisting's interim submissions, he had directed that internal inquiries be undertaken into the allegations arising from the PIC's investigation. Mr Singleton objected, however, to the use of the word "investigation". For reasons not readily apparent to the PIC, he preferred to refer instead to *"inquiries"*.[64]

241. As regards the Shanghai matter, Mr Singleton said *"I was satisfied, on the material available to me, that misconduct was not established in respect of the Shanghai matter"*[65].

[62] Assistant Commissioner Cripps QC was appointed Acting Commissioner for the PIC in January 2011
[63] Exhibit 55
[64] PIC Transcript, Peter Singleton, 6 October 2011, pp.719-720
[65] ibid, p.725

242. As to how it came to be that the decision was, nonetheless, subsequently taken to suspend Mr Novakovic, Mr Singleton was asked[66]:

Q: Well, did you subsequently, after coming to that conclusion, come to the view that he should be suspended?

A: There was a point at which I came to the view that he should be suspended.

Q: For what?

A: I made the decision to suspend him because I had received certain legal advice which compelled me or directed me in that direction.

243. Subsequent to his appearance at the public hearing, the PIC sought from Mr Singleton a statement of information pursuant to s25 of the PIC Act which identified the specific reasons underlying Mr Singleton's decision to suspend Mr Novakovic.[67] Mr Singleton's statement in response provided that the decision to suspend Mr Novakovic was acceptance of Mr Moses' opinion that the evidence given by Mr Novakovic to the PIC:

(a) was capable of establishing serious breaches of Mr Novakovic's contractual obligations to the NSWCC; and

(b) was capable of establishing that Mr Novakovic had or potentially had compromised his ability faithfully to discharge his duties as an employee of the Commission.

244. Ultimately, the written advice of Mr Moses in relation to Mr Novakovic was also produced to the PIC pursuant to a notice to produce issued under s26 of the PIC Act.[68] That advice identified three primary grounds arising from the evidence given by Mr Novakovic before the PIC upon which it was recommended that Mr Novakovic be suspended from his duties as a NSWCC officer. As to those three grounds, the PIC agrees with the assessment and opinions of Mr Moses. Those grounds were as follows:

(a) **The Dishonesty/Integrity Ground:** Mr Novakovic admitted to the PIC that he had deliberately provided misleading evidence to the PIC

(b) **The Failure to Disclose Ground:** First, Mr Novakovic failed to disclose to the NSWCC that he was holding a substantial sum of money on behalf of Ms Sadiq, knowing that this money had been provided to her by a person whom he knew to be an associate of persons held in custody. Secondly, Mr Novakovic failed to disclose that he had loaned monies to Ms Sadiq for the purpose of, amongst other things, purchasing apartments in Sydney. Although Mr Novakovic subsequently said that these loans had been repaid, there was at least a period of time during which they were outstanding.

(c) **The Complicity Ground:** Mr Novakovic admitted that he held various amounts of cash on behalf of Ms Sadiq by storing them at his mother's house. There is a strong inference which can be drawn that Mr Novakovic held cash payments on behalf of Ms Sadiq knowing that these sums would not be banked or receipted

[66] ibid, p.726
[67] Exhibit 134
[68] Exhibit 133

and/or disclosed to the Australian Taxation Office and/or would result in Ms Sadiq failing to properly account for those sums in accordance with her obligations as a legal practitioner: Although there is some ambiguity as to whether Mr Novakovic admitted that he had this knowledge at the time that he held the cash payments, an inference may be available that Mr Novakovic was aware that the cash payments made to Ms Sadiq, by various clients were not being receipted and banked or reported to the Australian Taxation Office. In this respect, it is noteworthy that when asked by Counsel Assisting *" ... paid in cash, so not declared for tax purposes?"*, Mr Novakovic answered, *"Most certainly, yes, yes"*... He also agreed with the proposition that he was *"assisting her [Ms Sadiq] to avoid those [money handling problems that might concern the Law Society]"*:... Indeed, on Mr Novakovic's own account, it was his alleged desire to protect Ms Sadiq from difficulties with the Australian Taxation Office and the Law Society of New South Wales, which caused him to give false evidence to the PIC.

245. Mr Moses' advice to the NSWCC did not refer in an way to the Shanghai matter which had been raised during the PIC hearings. Nor, in respect of Mr Novakovic's actions, did the final submissions of the NSWCC. Neither, however, sought to exclude or negate, in Mr Novakovic's favour, the allegations against him which had been raised in the PIC hearings.

ASSESSEMENT OF THE EVIDENCE RELATING TO LIMB ONE

246. Leaving to one side for the moment Mr Novakovic's conduct in Shanghai in respect of which Mr Novakovic initially denied any impropriety but later conceded that *"with the benefit of hindsight it was probably not the smartest thing I have ever done"*[69], Mr Novakovic admitted:

- He encouraged Ms Sadiq to undertake work representing people who were being investigated by the NSWCC because, as he told her, he believed the fees would be extremely generous.
- He assisted her in managing her expenses and in how to negotiate with the NSWCC with respect to applications for legal expenses that could be the subject of agreement with the NSWCC.
- He was deeply involved in Ms Sadiq's professional and tax accounting affairs including, on occasion, imparting to her his knowledge of clients being investigated by the NSWCC and for whom she was acting and assisting her in concealing relevant information from the Australian Taxation Office or the Law Society.
- He told untruths during the private hearing, although he denied he had "knowingly" done so.

247. Reference has been made above to the opinion of Mr Moses sought by the NSWCC during the course of Operation Winjana (and subsequently produced to the PIC[70]) in which, based on his understanding of the transcript of evidence given by Mr Novakovic to the PIC, he opined that the NSWCC should not make submissions to the PIC which defended Mr Novakovic's conduct, or suggest there were no grounds for disciplinary action to be taken against him in respect of some of those matters. The PIC shares the views expressed by Mr Moses in that advice.

248. The PIC is of the opinion that Mr Novakovic knowingly provided misleading evidence to the PIC for the purpose of protecting Ms Sadiq. He, in terms, admitted that it was his desire to protect Ms Sadiq from difficulties with the Australian Taxation Office and the Law Society of NSW with respect to sums of money she received in cash. Those arrangements with Ms Sadiq were kept from the NSWCC. They included Mr Novakovic holding cash on behalf of Ms Sadiq in an effort to conceal the existence and/or source of that cash. In doing so, he was in breach of the NSWCC's Code of Conduct which in terms required him to disclose in writing any significant changes in "financial interests of officers or their spouse/partner".

249. The PIC is satisfied that the efforts by Mr Novakovic to assist Ms Sadiq to avoid taxation liability and/or the scrutiny of the Law Society amounts to misconduct.

250. It was submitted on behalf of Mr Novakovic that he had not "knowingly" given false evidence concerning gifts and/or loans of money to Ms Sadiq because the next day

[69] Exhibit 120 (transcript of private hearing AXY, Lou Novakovic, 25 October 2010), p.83
[70] Exhibit 133

he gave evidence that he had deliberately mislead the PIC and had done so in order to protect Ms Sadiq. In these circumstances it can be hardly argued, in the opinion of PIC, that his initial evidence was not a breach of the relevant provisions of the PIC Act. Indeed it was Mr Novakovic's own evidence that he had been untruthful, and intentionally so. The prudence of his subsequent concession as to that untruthfulness, and correction of his evidence accordingly, is noted by the PIC. Nonetheless, his subsequent actions do not derogate from the fact that he chose to give knowingly untruthful evidence in the first instance.

251. As Mr Moses also opined, a person in Mr Novakovic's position with the NSWCC is required to behave with the utmost integrity. Mr Moses' advice referred to the NSWCC Code of Conduct, its conditions of employment, and its Staff Handbook all of which observe that lack of integrity of the kind demonstrated by Mr Novakovic would seriously affect the NSWCC's work by virtue of its potential to cause damage to the reputation of the NSWCC.

252. The position of the NSWCC, as Mr Moses also notes in his submissions, is that no employee of the NSWCC should be assisting a legal practitioner with any matter which is the subject of negotiations with his or her employer, the NSWCC. This, in the PIC's view, is self-evident.

253. In short, the PIC's assessment of the evidence is consonant with that of Mr Moses, namely that Mr Novakovic had engaged in serious misconduct arising out of his relationship and dealings with Ms Sadiq.

254. Mr Moses's advice to the NSWCC did not, however, touch upon what has been referred to herein as the "Shanghai matter" and the evidence heard by the PIC in relation to that matter. The details of the Shanghai matter, and the evidence heard in relation to that matter, have been set out above.

255. During the hearings Mr Novakovic initially disclaimed any impropriety in relation to his actions in Shanghai. Later, however, he conceded that with hindsight he should not have acted as he did, although he did not identify what it was that caused him to change his opinion. He said it was not the smartest thing he has ever done and that he could now see that he was in a conflict situation in Shanghai.

256. Mr Novakovic must have been aware that he was acting improperly in assisting Ms Sadiq in the manner he did. During the hearings Ms Sadiq said that it was Mr Novakovic's idea to restrain the car and accepted the impropriety of her conduct in allowing or encouraging him to act as he did. She said she thought she should have stopped him from sending the email to Mr Spark.

257. In his evidence, Mr Novakovic sought to justify his conduct on the grounds that in recommending to Mr Spark that action be taken by the NSWCC that he was acting, in effect, on behalf of the "victim", Mr Su. As has been pointed out in submissions on behalf of the NSWCC, and in the evidence of some of its senior officers (most notably Mr Bradley and Mr Spark, although Mr Giorgiutti seemed somewhat less definite on the issue) the NSWCC should not, and does not, commence CAR Act proceedings for the purpose of returning property to its rightful owner, albeit that may be a collateral outcome in some cases.

258. Even if Mr Novakovic felt compelled by that reason to make the recommendation, that was no excuse for his failure to completely disclose to Mr Spark all the relevant circumstances which contributed to the making of that recommendation.

259. Mr Spark gave evidence that had he been fully aware of those circumstances he would not have recommended to Mr Bradley the commencement of the CAR Act proceedings as in fact happened. The PIC accepts the evidence of Mr Spark on that point.

260. In respect of the Wui Feng Cheng matter, Counsel Assisting has submitted that it may be inferred that Mr Novakovic told Ms Sadiq how much the NSWCC would be prepared to allow for reasonable legal expenses prior to her application seeking that amount (i.e. the $80,000 she ultimately did receive).

261. However, the PIC is of the opinion that, bearing in mind the gravity of this allegation, the evidence does not permit that conclusion to be otherwise than a reasonable suspicion, and hence insufficient to make a positive assessment that that is what happened. It is of the opinion, however, that Mr Novakovic's conduct gave rise to that reasonable suspicion and to that extent his conduct was harmful to the NSWCC.

262. Upon its assessment of the evidence before it, the overall conclusion of the PIC is that the conduct of Mr Novakovic arising out of his efforts to help Ms Sadiq conceal financial matters, in telling untruths to the PIC, in failing to fully disclose the nature of his relationship with Ms Sadiq in compliance with the Code of Conduct and his general employment conditions (due, no doubt, to the fact of that nature also being in non-compliance) and, especially, his conduct in respect of the Shanghai matter make it plain that he engaged in misconduct of a Crime Commission officer within the meaning of s5B of the PIC Act. Apart from anything else, the conduct involved a breach of public trust and would have been reasonable grounds for dismissal or otherwise terminating his services.

263. The PIC is also of the opinion that, in respect of the Shanghai matter in particular, the evidence before it is such that a recommendation should be made that consideration be given to the prosecution of Mr Novakovic for the common law offence of "misconduct in public office".

264. A question arises as to whether officers of the NSWCC had themselves engaged in misconduct by reason of the way they dealt with the Shanghai matter.

265. Submissions have been made by Counsel Assisting to the effect that both Mr Spark and Mr Bradley had misconducted themselves when accepting Mr Novakovic's email recommendation, without more, in the first instance and, subsequently, in inadequately responding to the complaint by Mr Stewart regarding Mr Novakovic's conduct in Shanghai.

266. Although the definition of "misconduct of a Crime Commission officer" which appears in s5B of the PIC Act is broad, the PIC is of the opinion that a finding of misconduct of a Crime Commission officer should not be made in the absence of proved intent or, at the very least, reckless indifference to propriety.

267. The PIC is not, therefore, of the opinion that either Mr Spark or Mr Bradley engaged in misconduct in respect of the receipt of Mr Novakovic's email from Shanghai, in the first instance, nor in respect of the subsequent alleged inaction taken in relation to the complaint later made by Mr Stewart.

268. The PIC accepts the evidence of Mr Spark, and the submission made by Counsel for the NSWCC to the same effect, viz., that had Mr Spark been aware that the recommendation by Mr Novakovic was motivated by a desire to assist Ms Sadiq he would not have acted in the manner he did by recommending to Mr Bradley the commencement of the CAR Act proceeding against Mr Feng.

269. Similarly, given the gravity of the allegation as against the nature of the evidence before it, the PIC does not make a finding of misconduct against Mr Bradley in respect of his role in relation to the Shanghai matter.

270. However, notwithstanding its having reached these conclusions in respect of Mr Spark and Mr Bradley, the PIC is of the opinion that, particularly in light of the awareness of both Mr Spark and Mr Bradley of the potential conflicts of interest that might have arisen from Mr Novakovic's relationship with Ms Sadiq, the content of the email from Mr Novakovic should have raised some concerns as to the propriety of Mr Novakovic's actions in the circumstances.

271. Given the evidence of both as to the awareness amongst NSWCC management of the need to manage the potential conflicts of interest which might have arisen from the relationship between Mr Novakovic and Ms Sadiq (and, indeed, of the measures taken in that respect), the PIC is of the opinion that the response to Mr Novakovic's email from Shanghai was unsatisfactory. At the very least, in the PIC's view, the recommendation of Mr Novakovic should not have been acted upon before investigation had been undertaken to ensure that the powers of the NSWCC were not being improperly

employed. Furthermore, on the evidence before it, the PIC is of the opinion that action taken by NSWCC management in response to the Stewart complaint in June 2008 (the substance of which had effectively been foreshadowed in Mr Stewart's letter which enclosed the second statement of Mr Su in February 2008) was, in the circumstances, inadequate. However, the PIC does not hold the view that the conduct of NSWCC officers amounted to "misconduct' as that word should be relevantly understood.

272. The PIC is of the opinion that NSWCC management were not, and could not have been, fully aware of what actually took place in Shanghai, and of the depth of the involvement of Mr Novakovic in the affairs of Ms Sadiq generally. Accordingly, that which was known could not be said to have been handled in a manner that amounted to misconduct. Nonetheless, the PIC is of the opinion that the relevant officers of the NSWCC could, and should, have done more to investigate and take appropriate action in respect of Mr Novakovic's conduct.

273. As to the role of Ms Sadiq in relation to the matters examined in Limb One, the PIC is of the opinion that there is evidence before it which indicates a failure by Ms Sadiq to act in accord with the standards of professional conduct required of her under the *Legal Profession Act 2004*. The PIC is of the opinion that the evidence should be referred to the NSW Legal Services Commissioner for consideration of whatever further action might be deemed appropriate.

LIMB TWO – NSWCC COMPLIANCE WITH THE CAR ACT

Investigation Of Non-Compliance

275. As noted in the Overview to this report, in the course of the initial stages of Operation Winjana it became apparent to the PIC that broader issues relating to the NSWCC's application of the CAR Act, and in particular, its apparent non-compliance with a number of those provisions, warranted closer examination for the purposes of the possible detection and/or prevention of NSWCC officer misconduct.

276. Accordingly, a second "limb" was added to the purpose of Operation Winjana investigation. That second limb involved an examination of the practices and procedures of the NSWCC in its conduct of proceedings commenced in the Supreme Court of NSW under the provisions of the CAR Act.

277. Two principal areas of non-compliance were explored. The first was whether the practices of the NSWCC effectively bypassed the supervision of the Supreme Court in respect of consent orders between the NSWCC and defendants which provided for the deduction of monies from restrained interests in property to be paid to defendants for "reasonable legal expenses", ostensibly pursuant to s.10(5)(b) of the CAR Act (and subject to the restrictions, and requirements for the Court's approval, set out in s.16A).

278. The second area of inquiry was whether the NSWCC's practice of providing, in settlements by consent, for payments to itself from restrained funds for its legal and/or administrative expenses was authorised by the provisions of the CAR Act.

279. During the PIC's hearings, it was put to various officers of the NSWCC that NSWCC had been non-compliant with clear and unambiguous terms of the CAR Act. That suggestion was generally rejected and the NSWCC's practices were defended by the NSWCC officers who gave evidence. It therefore became necessary for the PIC to examine the areas that were considered to be non-compliant, as well as the NSWCC arguments raised as to why there had been compliance.

The Criminal Assets Recovery Act 1990 – Sections 10(5)(b) and 16A

280. The second limb of Operation Winjana was primarily concerned with the operation of two particular sections of the CAR Act: s.10(5)(b) and s.16A. As has been noted previously, as a result of amendments to the CAR Act in 2009 s.10(5)(b) was effectively renumbered as s10B(3)(b). The wording of the sections remained identical.

281. Those sections have been set out earlier in this report in the context of the purpose and general scheme of the CAR Act. For ease of reference, however, those sections are repeated below:

> **10B Contents and effect of restraining orders**
>
> (1) …
>
> (2) …
>
> (3) A restraining order may, at the time it is made or a later time, provide for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:
>
> (a) …
>
> (b) subject to section 16A, the reasonable legal expenses of any person whose interests in property are subject to the restraining order, being expenses incurred in connection with the application for the restraining order or an application for a confiscation order, or incurred in defending a criminal charge.
>
> (4) …
>
> **16A Restrictions on payment of legal expenses from restrained property**
>
> (1) The following restrictions apply to a restraining order making provision for the payment of any legal expenses of a person:
>
> (a) no provision is to be made except to the extent (if any) that the Supreme Court is satisfied that the person cannot meet the expenses concerned out of the person's unrestrained property,
>
> (b) no provision is to be made in relation to any particular interest in property if

the Supreme Court is satisfied that the interest is illegally acquired property,

(c) no provision is to be made unless a Statement of Affairs disclosing all the person's interests in property and liabilities and verified on oath by the person has been filed with the Supreme Court,

(d) no provision is to be made unless the Supreme Court is satisfied that the person has taken all reasonable steps to bring all of the person's interests in property within the jurisdiction of the Court,

(e) any such provision must specify the particular interest in property out of which the expenses concerned may be met.

(2) A person's ***unrestrained property*** is any interest in property of the person:

(a) that is not subject to a restraining order under this Act, or

(b) that the Supreme Court is satisfied is not within the Court's jurisdiction (whether or not it is subject to a restraining order under this Act), or

(c) that the Supreme Court is satisfied would not be available to satisfy a proceeds assessment order or unexplained wealth order against the person (assuming such an order were to be made against the person).

Legal Opinions On the Operation of the CAR Act

282. A number of legal opinions addressing issues relating to the operation of the CAR Act were in evidence before the PIC.

The Opinion of Mr Ian Temby QC

283. A short opinion from Mr Ian Temby in 2000 to the NSWCC was produced during the course of the investigation.[71] That advice addresses some, but not all, of the questions that have arisen in the Operation Winjana investigation.

284. In their respective private hearings, no NSWCC officer could recall the NSWCC ever having sought external legal advice as to the correct interpretation of s.10(5) and s.16A of the CAR Act. Mr Bradley, in the course of his private hearing evidence, was asked by Assistant Commissioner Cripps whether searches could be undertaken to ascertain the existence of any such advice.

285. Subsequently, in January 2011, the NSWCC furnished the PIC with a copy of a memorandum of advice written by Mr Temby in 2000 which was located as a result of those searches. Upon the PIC's further request, documents and other materials relating to the obtaining of that advice were also produced by the NSWCC. A compilation of those materials and related correspondence was subsequently tendered during the public hearing.[72]

[71] Exhibit 39
[72] Exhibit 43

286. The NSWCC documents disclose that the seeking of an opinion from Mr Temby arose from what was said to be an ethical concern of one of the then NSWCC legal officers, Mr John Overall, in relation to possible non-compliance with s.16A in consent orders which made provision for the payment of the defendant's legal expenses, ostensibly pursuant to s.10(5)(b).

287. Mr Overall, who was then working under Mr Giorgiutti, prepared a file note dated 7 August 2000 in a particular matter in which he expressed his view that *"Consent Orders for the payment of legals may not conform with s.16A of CAR Act".*[73] The file note records that Mr Overall was advised to discuss the matter with Mr Giorgiutti and that he did so.

288. A file note by Mr Overall made the following day, 8 August 2000[74], records that he spoke with Mr Giorgiutti and Mr Bradley about his concerns and that he was instructed to, and duly did, draft the consent orders in question (the file note records Mr Overall's view that those orders *"could breach s.16A(b)"* [sic]). Mr Overall noted that he was also instructed by Mr Giorgiutti to prepare a brief to Mr Temby for advice on the issue.

289. The letter to Mr Temby which accompanied the resulting brief to Mr Temby sought his urgent advice on whether:

The Commission can seek to make, and enter in the normal way by filing in the Supreme Court Registry, Consent Orders for the payment of the Defendant's legal costs. In particular we seek your interpretation of the application of s.10(5)(b) and s.16A of the Criminal Assets Recovery Act 1990 and whether or not s.16A would apply in the Johan case detailed below.

Recently some concerns have been expressed about the practice of entering consent orders for the payment of Defendant's legal costs from the restrained assets.

290. Some draft precedent paragraphs from Consent Orders of a type apparently used at the time were set out and then the letter continued:

We are concerned that the making of such Consent Orders for the payment of Defendant legal costs may be inappropriate, and could lead to allegations of deceptive and misleading conduct on the part of a legal practitioner who drafted such consent orders knowing that s.16A provides a statutory scheme for such payments.

Would such Consent Orders breach the provisions of the Act and if so would the drafting of them be regarded by the Court as misleading or deceptive?

Mr Giorgiutti has suggested we seek your urgent [sic] so that we may progress the Johan matter.

[73] Exhibit 43, tab 3D
[74] Exhibit 43, tab 3E

291. Although it is clear that Mr Temby expressed an opinion concerning the validity and enforceability of consent orders, it is necessary to set out parts of his advice which were relied on by Mr Giorgiutti and Mr Bradley in support of their interpretation of the legislation viz., that s.16A(1) had no application to consent orders.

292. Mr Temby provided his advice on 14 August 2000, the first paragraph of which distilled the issue in respect of which advice was sought, viz.:

Advice is sought as to whether and if so in what circumstances and to what extent s.16A of the Criminal Assets Recovery Act 1990 constrains the NSWCC in negotiating Consent Orders for the payment of legal expenses out of the property the subject of a restraining order made under s.10 of the Act.

293. Under the heading *"Present Practice"* he wrote:

Having obtained restraining orders, which it invariably does by means of ex-parte application to the Supreme Court, the Commission seeks to reach final settlement. That will often be facilitated if provision is made for the payment of a sum of money to the solicitors for the person whose property has been restrained in relation to the work they have done or are doing. Typically consent orders will be negotiated by way of amendment to the original restraining order so that it makes provision for meeting reasonable legal expenses of the defendant in an agreed amount out of some part of the restrained property, and if an order for sale is made, that any monies arising therefrom shall be first applied in satisfaction of those legal expenses, secondly in satisfaction of a cost order in favour of the Commission and thirdly in payment to the Public Trustee with a view to forfeiture.

294. Mr Temby described the lodgement of Consent Orders noting that, often but not always:

…a Commission solicitor would wait upon a Registrar to have the order formalised by a stamp signature and a seal of the Court …. the extent to which the Consent Orders are scrutinised before formalisation is somewhat variable".

295. Mr Temby was drawing attention to the fact that the applications require scrutiny and were not necessarily receiving it, though at that point in the opinion he did not detail how it should be achieved.

296. Later in the opinion Mr Temby said *"I repeat my view that a consent order which has been formalised in accordance with the present practice is a good order of the Court and enforceable as such"* and later in his opinion *"my view is that s.16A does not constrain the Crime Commission in negotiating consent orders for the payment of legal expenses out of property subject of a restraining order made under s10 of the Act".*

297. Under the heading "Does s.16A Constrain?" Mr Temby opined *"… it is clear to me that s.16A contemplates an order being made after a defended hearing, but it cannot be said with any degree of confidence that it is limited to such circumstances"* (emphasis added).

298. Mr Temby referred to the requirements of clauses (a) and (d) of s.16A(1) and, specifically, noted that both of those clauses required (by way of evidence) the Court's satisfaction as to the matters set out in each.

299. As concerned clause (b) of s.16A(1), he indicated his view that it would not present difficulties *"because it is only if the Court is affirmatively satisfied that an interest is illegally acquired property that no provision can be made in relation to it."*[75]

300. As to clause (c) of 16A(1), Mr Temby pointed out that it:

gives rise to its own possible difficulty, because by its terms no provision is to be made unless a Statement of Affairs disclosing property and liabilities and verified on oath by the person seeking the costs order has been filed with the Court".[76]

301. Mr Temby then addressed the question of validity and enforceability of orders obtained by consent in accordance with the NSWCC's (then) practice. He expressed the view that orders entered by the Court, even if non-compliant with the requirements of s.16A(1)(a) and (d) and even (c), would generally be valid, but added that:

Having expressed this view I should and do add that if, notwithstanding consent, application was made to set aside such an order, and there had been no Statement of Affairs filed as required by s.16A(1)(c), such an application would, depending upon other circumstances, have fair prospects of success[77]*.*

302. In respect of such a challenge, Mr Temby noted that, if one is examining the question of validity of the order:

It is however desirable, in order to reduce the prospect of a successful application to set aside such an order, that a Statement of Affairs be filed[78]*.*

303. Mr Temby's opinion raised some doubt as to whether the practices of the NSWCC were strictly compliant with s16A, however his opinion seemed primarily directed to providing reassurance about the validity and enforceability of consent orders which had been entered by the Court, rather than the practices of the NSWCC by which such orders came to be entered. He said *"in my opinion a consent order made and formalised in accordance with the present practice is a good and valid order of the Court and enforceable in its terms. I say this even if there is no affidavit which has been filed which relates to the requirements in s.16A(1)(a) and (d) and even if no statement of affairs has been filed pursuant to clause (c)".*

[75] Exhibit 39, p. 5
[76] ibid, pp. 5-6
[77] Exhibit 39 p.6
[78] ibid

304. Mr Temby concluded that s.16A of the Act did not constrain the NSWCC in negotiating orders for s.10(5)(b) legal expenses. Clearly, this left room for interpretation as to whether *"negotiating consent orders for reasonable legal expenses"* was a reference to only that stage of the discussions between the NSWCC and a defendant prior to the subsequent approval of the settlement by a Judge of the Supreme Court, or a reference to the entire process of negotiating and finalising settlement.

305. The final sentences of Mr Temby's opinion seem to imply that s.16A(1) should be observed:

Of course in expressing these views I assume that the Commission always negotiates in good faith and has regard to the matters contained in s.16A(1). That is a comment as to how Commission solicitors should conduct themselves. It does not relate to the validity of a consent order made under s.10(5)(b)[79].

306. Rather than being taken to endorse the NSWCC's practices at the time, Mr Temby's opinion should have given the NSWCC cause for concern. Essentially, he confirmed that:

- Whilst the restrictions in s.16A clearly apply in cases of a contested hearing, *"it cannot be said with any degree of confidence that it is limited to such circumstances"*
- Section 16A does not necessarily constrain the NSWCC in negotiating consent orders, but its provisions nonetheless require compliance so as to ensure that the orders ultimately entered by the Court are beyond challenge
- s.16A(1)(c) required specific compliance by the filing of a sworn Statement of Affairs
- In accordance with the general principle that, once entered, an order of the Supreme Court remains a valid and enforceable order unless and until it is set aside, CAR Act orders made by consent and entered by a Registrar (even if non-compliant) would still be valid and enforceable, albeit, by virtue of that non-compliance, they remained susceptible to challenge
- Where there is non-compliance in respect of such an order any application by a defendant to have the order set aside would, depending on the circumstances, *"have fair prospects of success"*
- NSWCC officers had an obligation to act in good faith in relation to the legislation (which presumably meant they were obliged to comply with its terms), including having regard to the matters set out in s.16A.

307. Following receipt of Mr Temby's advice, the practices of the NSWCC in finalising settlements without complying with s16A continued unaltered.

[79] ibid

The Opinion of the Crown Solicitor

308. Following the completion of the private hearings in December 2010 the Solicitor to the NSWCC (Mr John Giorgiutti) sought an opinion from the Crown Solicitor for NSW regarding issues that had been raised in the hearings as to the operation of the CAR Act.[80] Notwithstanding the NSWCC's resistance in doing so (which included a claim of privilege despite the abrogation of that privilege by the provisions of the PIC Act), a copy of the Crown Solicitor's advice and the instructions by which that advice was sought was eventually produced by the NSWCC to the PIC.

309. It is apparent from the Crown Solicitor's opinion that issues relating to the validity of orders made by consent and without compliance with s.16A(1) loomed large in the minds of those briefing the Crown Solicitor. The issue receives particular emphasis in the Crown Solicitor's Advice.

310. The Crown Solicitor was also asked to advise in relation to the NSWCC's past practice of deducting amounts from restrained funds for its own legal and/or administrative expenses, ostensibly pursuant to s12(1) of the CAR Act.

311. The Crown Solicitor's view on compliance with s.16A(1) can be summarised as follows:

- It is likely that the Court (by which the Crown Solicitor plainly means a Judge sitting in Court), would be able to make orders by consent under s.10(5)(b) for legal expenses without having to turn its mind to the facts which satisfy the pre-conditions of the s.16A(1), with the exception of s.16A(1)(c). In the Crown Solicitor's view, the statutory requirement for a Statement of Affairs could not be overridden by consent
- The Court has no inherent jurisdiction to overcome the requirement of s.16A(1)(c) by consent of the parties (a view largely consistent with the views of Mr Temby QC on the issue)
- If a Court made an order for legal expenses under s.10B(3)(b) (the successor to s.10(5)(b)) without s.16A(1)(c) having been fulfilled, the Court would fall into jurisdictional error.

312. As to the question of whether s.12 enables NSWCC costs orders, the Crown Solicitor was of the following opinion:

- No costs orders in favour of the NSWCC were available under s.12
- The NSWCC was entitled to a costs order in the ordinary course as a successful party using the powers of the Court under the *Civil Procedure Act 2005*. It was not advised, however, that such costs would be payable from the *restrained* funds.

[80] Exhibit 41

313. The Crown Solicitor did not (and, it seems, was not asked to) give an opinion as to:

- Whether a settled consent matter could be submitted to a Registrar in chambers to obtain orders rather than to the Court in satisfaction of the requirements under s.16A(1)
- Whether there was power under any other legislation which would enable payment to the NSWCC of monies from restrained property for its legal (or any other) costs, whether with or without the Court's sanction.

The Opinion of Mr Bret Walker SC

314. In response to submissions made on behalf of the NSWCC that the PIC's construction of the CAR Act was *"fundamentally flawed"*, an independent and authoritative opinion was sought by the PIC. As noted in the Overview to this report, the PIC would ordinarily have sought that opinion from the Crown Solicitor. In the circumstances, however, that avenue was not available to the PIC.

315. In the alternative, Mr Bret Walker was briefed with all relevant materials[81] and asked to provide an opinion on the various aspects of the operation of the CAR Act under examination in Operation Winjana.[82]

316. As to whether the terms of subsection 10B(3)[83] and section 16A impose pre-requisites on the making by the Supreme Court of orders, by consent, for the payment of reasonable legal expenses from restrained funds for the defendant's benefit, Mr Walker concluded:

"The short answer to that question is that of course they do, because that is precisely what they say."[84]

317. Mr Walker further observed that the permissible scope of a s10B(3) order is that the expenses for which deduction is made must be legal expenses, and they must be reasonable in amount. He considered that evidence of reasonableness by way of explanation or demonstration (that is, by evidence) is required under subsection 10B(3) for a number of reasons, not the least of which being that the defendant and the defendant's lawyers have *"a personal interest in the expenses being larger rather than smaller"*.[85] In Mr Walker's view *"reliance on the statement of a self-interested legal practitioner that a particular sum is "reasonable" says nothing to bring the claim within power to grant.*[86]

318. In Mr Walker's view, the NSWCC and the defendant can come to an agreement signified by consent orders and the consent can be a material fact upon which the Court could act, but such an approach:

"places a premium on the conscientious consideration by the Commission officers of all necessary issues as to the character and amount of the Defendant's claim. It would

[81] Exhibit 118AC (public version: Exhibit 118B)
[82] Exhibit 40
[83] ie what was formerly s.10(5)(b). As at the date of Mr Walker's advice the section had been renumbered in its current form. Accordingly, all references to s10(3)B in Mr Walker's advice should be taken also as references to the former s.10(5)(b).
[84] Exhibit 40 p.3
[85] ibid, p.4
[86] ibid

be a perversion of justice, of course, for spurious admissions to be uttered on behalf of the Commission such as that amounts believed to be excessive are reasonable so as to corruptly benefit the Defendant or his or her lawyers"[87].

319. As to the operation of s.16A, Mr Walker noted that:

"The power granted by subsec. 10B(3) is expressly subject to sec. 16A, the terms of which unmistakably impose restrictions. Those restrictions are expressed so as to apply whenever the Supreme Court is asked to exercise those powers, and no words provide any footing for the suggestion that they apply only to contested or fully contested proceedings. Nor is there any legal merit in the suggestion that the Court's "inherent" jurisdiction somehow permits to be done by consent that which the statutory provisions creating the very power hedge about with restrictions. There is no principle and no authority for such a nebulous idea.[88]

"Each of the other restrictions must be observed by the Supreme Court whenever asked to make such an order: "no provision is to be made…". The Commission, as an agency of the State and with its statutory functions and standing and proceedings under CARA must assist the Court to do so. It must not mislead the Court as to the availability of the Courts power to make the orders sought."[89]

320. As to each of the restrictions set out in s.16A, Mr Walker opined:

"The restriction in para (a) limits the "extent" to which an order may be made by reference to the Court's satisfaction that the Defendant cannot otherwise meet the expenses out of unrestrained property. Therefore, in the absence of appropriate materials supporting that state of affairs being true, there can be no order, by consent or not"[90].

"The restriction in para (b) should be observed similarly as to modes of presentation and proof as discussed above. The Commission cannot leave it, by reason of the onus as it were, for the Court to wonder and therefore not be "satisfied". The Commission must assist the Court with all elements of the mandatory checklist constituted by these restrictions"[91].

"The restriction in para (c) is very easy to observe and cannot possibly be construed not to apply to consent orders. It would be a large shortcoming in the Commission's duty to the Court for it to be discarded by agreement with the Defendant, whose oath Parliament has clearly required as a condition of obtaining such an order."[92]

"The restriction in para (d) positively requires material capable of producing the Court's satisfaction. Like the case for para (a), a range of kinds of material could fit the bill, depending as always on the particular circumstances"[93].

[87] Exhibit 40 p.5. This view is similar to that expressed by Mr Temby (Exhibit 39 p. 6)
[88] ibid
[89] ibid, p. 6
[90] ibid
[91] ibid
[92] ibid, p. 6-7
[93] ibid, p. 7

321. As to the question of a deduction of monies from restrained property for NSWCC's purposes, whether costs or otherwise, the opinion of Mr Walker was as follows[94]:

"At the outset it is clear to me that sec. 12 of CARA simply cannot provide statutory authority for the Commission to act and receive portions of restrained money as some kind of contribution to the running costs, so to speak, of the Commission's functions to do with confiscations. Section 12 certainly does not expressly so provide. Nor can it sensibly be read to provide such a remarkable facility by implication, let alone a reasonable or necessary one"

"…as to the suggested power or authority of the Commission or the Supreme Court respectively to seek or to order payment from restrained money with respect to costs, litigious or administrative, in favour of the Commission, I note the complete absence of any warrant for this in any of these provisions. In particular, as to the supposed administrative costs, it is bizarre to contemplate the evident provision by sec. 10(b)(3) of CARA of possible resort to restrained money for the benefit of the Defendant as also extending to resort to supplement the Commission's revenue. I find it had to believe that anyone has ever thought this a seriously arguable reading of subsec. 10B(3)"

"…the Defendant's consent to such resort to restrained money could never supply the authority not available by statute: see Thomson Australian Holdings v Trade Practices Commission (1981) 148 CLR 153 at [163]"

"The fact that proceedings under CARA are expressly civil in nature has a number of important consequences, but they do not include the deeply distasteful proposition that the Commission may lawfully behave as if it were just another private personal corporation generally capable of making any agreement it likes with the person interested in property falling into the Commission's hands or at its behest. It is rudimentary that the Commission's powers in relation to restrained property are limited to those granted expressly or by proper implications. …there has been no such grant. Contract cannot grant what statute denies".

The Decision in *NSW Crime Commission v Cook*

322. By coincidence, shortly after conclusion of the Operation Winjana public hearing the specific question of whether consent orders making provision for s.10B(3)(b)[95] "reasonable legal expenses" could be entered without compliance with the requirements of s.16A(1) was judicially determined by Justice Hall on 10 November 2011 in NSW Crime Commission v Cook[96].

323. In the course of those proceedings the NSWCC made submissions which echoed the view advanced in the PIC hearings, namely, that where there is consent between the NSWCC and a defendant as to orders which provide for a s10B(3)(b) allowance, such orders may be entered without requiring compliance with the restrictions set out in s.16A(1). The defendant in the proceedings supported those submissions.

[94] Exhibit 40 pp. 2-3
[95] The successor to s.10(5)(b), identical in terms
[96] [2011] NSWSC 1348

324. In his determination of the question in the negative, Justice Hall concluded that:

.. unlike the position with Proceeds Assessment Orders under s.27, an order under s.10B(3)(b) of the Act is not one that can be made by consent of the Commission and another. It requires the Court itself, on a proper basis, to determine that an order under s.16A(1) of the Act meets the exemptions from the legislative requirements.[97]

325. In reaching that conclusion Justice Hall observed:

Section 16A is structured in terms of the restrictions specified in sub- paragraphs (a) to (e) therein. Each of the sub-paragraphs (a) to (d) commence with the phrase "no provision" is to be made… in relation to sub-paragraphs (a), (b) and (c), the Court is required to consider these specified matters as indicated by the phrase "is satisfied". The Court must, in other words, act on evidence or the other material that makes it possible for the Court to reach the required state of satisfaction in relation to the matters to which sub-paragraphs (a), (b), (c) and (d) refer. Given the possible effect of any exemptions upon the achievement of the purposes of the Act, which include restraint on the disposal of property to abide orders under the Act, the Court has a designated role to be performed in that respect. It must have a proper basis upon which it can be satisfied of those matters. That is, in my opinion, consistent with the underlying rationale underpinning s.16A.[98]

326. His Honour additionally observed that:

…as a matter of statutory construction, the mere fact that the Commission may reach agreement with a person referred to in s.10B(3)(b) as to legal expenses and consent to an order to give effect to such an agreement, cannot provide the required basis for the Court to reach the necessary state of satisfaction of the matters specified in s.16A or otherwise conclude that that section has been complied with in other respects.[99]

327. Hence, His Honour ultimately concluded that:

An agreement between the Commission and a relevant person cannot operate to overcome or set at nought the intractable terms of s.16A(1).

The NSWCC Confiscation Manual

328. The NSWCC has a long-standing, periodically amended, internal policy and procedures document in place: the "Confiscation Manual".[100] The current version of that Manual was in evidence before the PIC as a confidential exhibit. It describes the scheme and operation of the CAR Act and the relevant policies and procedures of the NSWCC relating to proceedings commenced by it under the Act.

[97] ibid at [70]
[98] ibid at [49]
[99] ibid at [53]
[100] Exhibit 30C

329. Section 13 of the Confiscation Manual is headed "Settlements" and relates to the settlement of CAR Act proceedings, and in particular, to the terms of such settlements and to the terms and effect of consent orders. It sets out the NSWCC's general policies and practices in relation to settlement of CAR Act proceedings by consent between the NSWCC and the relevant defendants. The Manual observes that the vast majority of CAR Act matters settle following negotiations between the parties and the entry of orders by consent.

330. In observing that *"occasionally the Defendant or their lawyers approach the Commission to discuss settlement, or to discuss such things as legal expenses or living expenses applications (which should also provide an opportunity to discuss settlement)"*[101], the Manual encourages such settlement discussions. Section 13 stipulates that the Commissioner's approval as to the settlement terms should be obtained prior to any settlement being agreed. Verbal approval may be obtained initially, but written approval must be obtained as soon as possible.

331. The Manual advises the Forensic Accountant assigned to a particular matter to:

…prepare a brief overview of the issues and the estimated realizable value of the interest in property to enable the Assistant Director, solicitor to the Commission and Commissioner to consider the merits of any settlement proposal. The overview should also outline the Forensic Accountant's view of the adequacy of the settlement proposal.

332. Section 18 of the Manual is headed *"Applications for Legal Expenses under s.10(5)(b) of the Criminal Assets Recovery Act"*[102]. It is noted therein that the release of restrained property for legal expenses reduces the amount receivable by the Crown. It is also noted that:

Confiscation orders ultimately result in the payment of monies to the public purse. The release of restrained property must therefore be subject to proper controls to prevent unjustified dissipation of the restrained assets, which would otherwise be available to satisfy the confiscation orders.[103]

333. As to the operation of s.16A of the CAR Act as it applies to deductions from restrained monies for the payment of the defendants "reasonable legal expenses', the Manual observes:

Section 16A places five specific restrictions on the payment of legal expenses from restrained property. Unless the Applicant meets all five restrictions contained in s.16A the Court would not vary the restraining orders to allow for the payment of legal expenses.[104]

[101] ibid, p. 120
[102] As has been noted earlier in this report, following amendments made to the CAR Act in 2009 section 10(5)(b) was, effectively, renumbered (with identical wording) as section 10B(3)(b). It is nonetheless referred to throughout this report as s.10(5)(b) on the basis that that the pre-amendment provision applied at all relevant times examined during the course of Operation Winjana. The NSWCC Confiscation Manual also still appears to refer to the provision by this number.
[103] Exhibit 30C p. 137
[104] ibid, p. 138

334. The Manual considers the question of onus in a s.10(5)(b) application. It notes that the onus is on a defendant (the Applicant) to prove that the restrained assets are legally acquired. Section 18 of the Manual refers to past Court decisions including those which established that the onus to prove facts justifying the making of a s.10(5)(b) order rests on the Applicant. It notes that an Applicant must establish that he/she will incur legal expenses in connection with the application for the restraining order or an application for confiscation order or in defending a criminal charge.

335. As to the capacity of a defendant (Applicant) to meet reasonable legal expenses the Manual provides as follows:

Pursuant to s.16A(1)(a) of the Act, the Applicant must show on the balance of probabilities that he is not able to meet his reasonable legal expenses without resort to property the subject of the restraining orders. It is not sufficient for the Applicant merely to assert the restraining order applies to all his property in order to satisfy that onus. Pursuant to s.16A(1)(c) of the Act the Applicant is obligated to disclose to the Court all of his interests in property in the form of a Statement of Affairs and an order should not be made unless the Court is satisfied that it is fully apprised of what property exists.[105]

336. After an extensive discussion about appropriate controls over provision for legal expenses and what amounts to "reasonable legal expenses" the Manual provides:

The Commission's policy is to agree to the release of restrained property pursuant to s.10(5)(b) for the purposes of enabling the Defendant to fund an application under that section, provided that the Commission is satisfied that: the Applicant has fully disclosed the nature and extent in his interests in property; and all the Applicant's interests in property are subject to the restraining order i.e. the Applicant does not have access to any other property.[106]

337. The following passages of the Confiscation Manual go to the heart of the issues concerning s.10(5)(b) applications by consent. It provides:

Uncontested Applications

Where the Commission and the Applicant have reached agreement on the terms of the s.10(5) orders to be made, the matter will be dealt with very quickly on the return dates specified in the Notice of Motion. You will hand up to the Supreme Court Judge a copy of the orders for his signature. He will sign and date these orders and place them with the Court papers. You will need to prepare orders in the same terms as those made by the Judge, in the format suitable for sealing by the Chief Clerk of the Criminal Registry of the Supreme Court, arrange for the Legal Clerk to photocopy sufficient copies and to file these orders and collect them from the Court[107]*.*

[105] ibid, p. 139
[106] ibid, p. 515
[107] ibid

338. The Manual then deals with contested applications and makes the following observations among the final words of the Manual[108]:

THE OBJECTS OF THE ACT

SS. 10(5)(a) [sic] and s.12 of the Act ought not to be interpreted in a manner which is inconsistent with the objects of the Act which are set out in s.3 and include the following:

1. *To provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it more probable than not that the person has engaged in drug related activities; and*
2. *To enable the proceeds of drug related activities to be recovered as a debt due to the Crown.*

339. The NSWCC's Confiscation Manual, therefore, identifies and analyses the requirements of an application under s.10(5)(b) and considers a number of issues relating to evidentiary matters and onus of proof. It identifies that any proposed orders under s 10(5)(b), including those sought by consent, should be considered by a Judge of the Supreme Court. The Manual also identifies the restrictions set out s.16A(1) pursuant to which the making of order under s.10(5)(b) is subject. It observes that evidence is required in respect of each of those restrictions.

340. Significantly, there is no reference whatsoever in the Manual to any provision of the CAR Act, express or implied, which exempts the operation of the restrictions in s.16A from uncontested applications for s.10(5)(b) orders (i.e., orders made by consent).

COMPLIANCE ISSUES IN THE CAR ACT MATTERS EXAMINED IN OPERATION WINJANA

341. Over and above issues relating to the conduct of Mr Novakovic in relation to each of the matters examined in Operation Winjana in which Ms Sadiq acted, each of those matters also served as a case study in relation to the NSWCC's compliance, or otherwise, with the provisions of the CAR Act.

The "Bei Zhang" Matter

342. As noted earlier in this report, the "Bei Zhang" matter (more correctly, *NSWCC v Guo Xiong Chen*) involved proceedings commenced by the NSWCC under the provisions of the CAR Act in 2005. Ms Sadiq acted for the defendant in the matter, Mr Chen.

343. Evidence before the PIC showed that settlement negotiations occurred and that agreement appears to have been reached sometime in late March or early April 2008. Draft consent orders were prepared to reflect the terms of settlement that had been negotiated by Ms Sadiq with NSWCC[109].

[108] ibid, p. 152
[109] Exhibit 53

344. The entry of those orders by consent, however, was ultimately abandoned. This occurred as a result Mr Chen withdrawing his instructions to Ms Sadiq and subsequently seeking alternative representation.

345. Nonetheless, for present purposes it remains of some worth to note the terms of the consent orders that were drafted, apparently by the NSWCC, for the purposes of those orders being entered in settlement of the proceedings.

346. Those terms of the consent orders included a deduction from the restrained property, pursuant to s.10(5)(b), for the payment of $14,000 to Ms Sadiq for legal expenses in respect, specifically, of the CAR Act (civil) proceedings.

347. In respect of the criminal proceedings against Mr Chen, the draft consent orders also made provision for the reimbursement of a grant of Legal Aid ($36,000), which pre-dated Ms Sadiq's involvement in the matter.

348. At the time the consent orders were drafted, a second application for Legal Aid (in respect of Ms Sadiq's representation) was also pending. The draft consent orders provided for the payment of costs to Ms Sadiq, and counsel engaged by her, in the event that the second Legal Aid application was not granted in the following amounts:

(a) a lump sum of $5,000 in respect of legal representation by the defendant's solicitor

(b) the sum of $4,000 per day for each sitting day of the defendant's current criminal trial up to a maximum of $60,000 in respect of legal representation by Counsel and Senior Counsel.

349. The draft consent orders also provided for the payment of $50,000 to the NSWCC for its legal expenses in respect of the CAR Act proceedings. Whilst the terms of this order did not explicitly state that the payment was to be deducted from the restrained funds, this is implied by virtue of the fact that the order was expressed as being made *"pursuant to s12(1)"*.

350. The remainder of the value of the restrained property was to be applied to the payment of a proceeds assessment order against Mr Chen, pursuant to s27 of the CAR Act, in the amount $450,000.

351. As has been previously noted, the proposed consent orders were not entered in the proceedings for the reasons identified above. Indeed, as at the time of writing the proceedings remain on foot in the NSW Supreme Court.

The Benjamin Yun Matter

352. On 1 February 2008 Mr Benjamin Yun was stopped by police while driving a vehicle in Haymarket, Sydney. A search of his vehicle revealed Australian currency totalling $1,569,830 in the boot of the vehicle. Mr Yun was arrested and subsequently charged with the summary offence under s 193C of the *Crimes Act 1900* in respect of the cash ("deal with property suspected proceeds of crime").

353. On the following Monday morning (4 February 2008) the matter came to the attention of Mr Spark who by internal email to other NSWCC officers (including Mr O'Connor) noted that the offence with which Mr Yun had been charged was not one which met the threshold for the commencement of confiscation proceedings under the provisions of the CAR Act. This was because the charged offence carried a maximum penalty of less than 5 years, and hence fell below the relevant CAR Act definition of "serious crime related activity"[110]. Mr Spark however, had found that:

On 22 February 2002 (18 days inside the six year period) Yun was stopped and charged with drink driving during which he resisted arrest. It appears that he was charged, convicted and fined $200 under s.58 of the Crimes Act (NSW) for resisting arrest. Seems he violently resisted which (given the offence carries a 5 year penalty) is a relevant offence[111].

354. Some minutes later Mr Spark emailed Mr Bradley forwarding his email set out in the paragraph above, and recommended the commencement of proceedings against Mr Yun by seeking *"an all interests restraining order and a PAO"* (Proceeds Assessment Order per s27 CAR Act)[112]. Within the hour Mr Bradley replied to the email approving Mr Spark's recommendation[113].

355. Mr Yun was originally represented by a solicitor, Mr Gold, but within four days of Mr Yun's arrest, Ms Sadiq had taken over Mr Yun's representation. She briefed a barrister to appear in the Local Court on the criminal charge under s 193C of the *Crimes Act 1900*.

356. Evidence before the PIC indicates that shortly after Ms Sadiq had taken over the Yun matter contact occurred between her and the NSWCC in relation to proposed confiscation of the cash seized by the police from the vehicle Mr Yun was driving. That contact, and negotiations as to the settlement of the CAR Act proceedings (which had not actually yet been commenced), appears to have occurred on Friday 8 February 2008, given that the date *"8 February 2008"* appears on the consent order under "date of execution" by Mr Yun and Ms Sadiq[114]. That date also appears under Mr Giorgiutti's signature but it has been crossed out and the number 11 inserted in its place (so as to read "11 February 2008')[115].

110 per CAR Act, section 6
111 Exhibit 27AC (document 2)
112 ibid
113 ibid
114 Exhibit 77
115 ibid

357. The date of those negotiations therefore appears to have been prior to a meeting held at the NSWCC premises on 11 February 2008. File notes made by both Mr O'Connor and Mr Spark show that Mr Yun was brought to the NSWCC that day.[116]

358. Sometime later the same day (11 February 2008) the NSWCC filed in the Supreme Court:

- A summons seeking[117]:
  - An order pursuant to s.10 of the CAR Act restraining the $1,569,830 cash
  - An order pursuant to s.22 of the CAR Act forfeiting the "restrained' $1,569,830
  - An order *"pursuant to Part 36, rule 36.4(3) of the Uniform Civil Procedure Rules 2005 that order one above (restraint) is to take effect immediately upon the entering of these orders"*
- A Notice of Appearance filed for Mr Yun signed by Ms Sadiq (albeit that this document appears to have been prepared and filed by the NSWCC on her behalf)[118]
- A order *"by consent and without admission"*, effecting the restraint of the $1,569,830 cash, expressed in the following terms[119]

  Pursuant to s.10 of the Criminal Assets Recovery Act 1990 ("The Act"), no person is to dispose of, or attempt to dispose, or otherwise deal with or attempt to otherwise deal with the interest in property within the meaning of "interest in property" as defined in s.7 of the Act of Benjamin Yun ("the Defendant") in property described in the schedule hereto[120]

  Pursuant to s.36, Rule 36.4(3) of the Uniform Civil Procedure Rules 2005 order one above is to take effect immediately upon the entering of these Orders
- A second consent order *"by consent and without admissions"* in final determination of the proceedings, the terms of which included[121]:

  Pursuant to s.10(5)(b) of the Act the restraining order make provision for meeting the reasonable legal expenses of the Defendant agreed at $70,000 out of the property specified in the schedule hereto such sum to be paid to Salina Sadiq, solicitor

  Pursuant to s.12(1) of the Act the legal expenses of the Plaintiff agreed at $20,000 to be paid out of the property specified in the schedule hereto

  Subject to orders 1 and 2 above, pursuant to s.22 of the Act the interest in property of the Defendant in the Property specified in the schedule hereto be forfeited to and vest in, the Crown.

359. The second consent order also notes *"in consideration of these orders being made the Defendant releases the Crown and the Plaintiff from any claim for damages in*

116 Exhibits 27C and 73 respectively
117 Exhibit 74.
118 Exhibit 75.
119 Exhibit 76.
120 The schedule to the orders recites: *The amount of approximately $1,569,830 cash seized by police from the boot of Mitsubishi Pajero motor vehicle, registration number BB88CC, driven by Benjamin Yun at the time of his arrest on 1 February 2008.*
121 Exhibit 77

consequence of the making of the restraining order and agrees not to make applications under either s.25 or s.26 of the Act". This is the form of release which Mr Walker described in his opinion as *"deplorable"* and *"not appropriate conduct by an agency of the State, let alone one vitally engaged in the rule of law"*.[122]

360. It appears from the documents that they were filed by having a NSWCC officer attend the Supreme Court and approach a duty registrar in an office in the Supreme Court Registry.

361. By letter dated 12 February 2008[123] (the following day), the litigation coordinator of NSWCC wrote to the Assistant Manager, Supreme Court Listings, indicating that consent orders had been entered, the proceedings were finalised and there were no future dates to vacate.

362. Neither the summons nor the consent orders were seen by a Judge. The application for a restraining order and the settlement provision for legal expenses (for both Mr Yun and the NSWCC) were not the subject of a notice of motion or affidavit providing evidence in support of either suspicion (in the respect of the restraining order) or any matter identified in s.16A(1).

363. The Supreme Court Registry was not informed that the CAR Act ordinarily required the Court to receive and determine evidence for any restraining order or any s.10(5)(b) provision for legal expenses from restrained monies.

364. There was no information filed in order to assist the Court's satisfaction about the capacity of Mr Yun to meet his legal defence expenses from unrestrained property, as required by s.16A(1)(a).

365. There was no evidence filed by the NSWCC as to whether the cash was illegally acquired property, as required by s.16A(1)(b). No evidence was provided to overcome the inference that a sum of cash of that size in the boot of a car was illegally acquired property and therefore unavailable for s.10(5)(b) legal expenses, this inference being especially powerful given that the cash in question formed the basis of the criminal charge against Mr Yun (ie "deal with property suspected proceeds of crime").

366. A statement of affairs disclosing all of Mr Yun's interest in property and liabilities and verified on oath was not filed with the Supreme Court as required by s.16A(1)(c).

367. No information or evidence was provided to the Court to enable it to be satisfied that all reasonable steps had been taken to bring all of Mr Yun's interest in property within the jurisdiction of the Court as required by s. 16A(1)(d).

[122] Exhibit 40, p. 3
[123] Exhibit 78.

368. In evidence before PIC, it was accepted by both Mr Giorgiutti and Mr Spark that in CAR Act proceedings that are settled by consent orders which also provide for s.10(5)(b) payments the information and evidence required by s.16A(1)(a)-(d) was usually not provided to the Court. Consent orders settling such matters were usually filed in the Court Registry along with the summons which commenced those matters in much the same fashion as they were in the Yun matter.

Calculation of s.10(5)(b) "Reasonable Legal Expenses" in Yun

369. In the course his private hearing evidence, Mr Spark was asked how the s.10(5)(b) allowance for legal expenses was calculated in the Yun matter, and in CAR Act consent matters generally.

370. Mr Spark said that there was a reliance on the defendants' lawyers as officers of the Court to provide a fair and honest estimate of future legal costs. That was an argument also advanced by other NSWCC officers. When asked whether the costs were calculated on the basis of a defended trial, Mr Spark answered *"No, those costs are calculated on the basis of what the relevant legal representative is seeking those expenses for"*[124]. He said that the proceedings were civil, the defendant may be facing criminal charges that were not in an advanced state, and that only an estimation could be arrived at.

371. Mr Yun, on Ms Sadiq's advice, entered a plea of guilty in the Local Court. He received a sentence of seven months with a non-parole period of four months.

372. The only legal costs thus incurred in the matter appear to have been in respect of the negotiations for the settling of the CAR Act matter (and the s.10(5)(b) legal expenses) and a plea of guilty on a single summary charge in the Local Court.

373. Ms Sadiq gave evidence about the calculation of the s.10(5(b) allowance sought in the Yun matter. She agreed that the fees she recovered were *"very generous"*[125]. She also said that she was never required by the NSWCC to have her costs taxed or otherwise assessed in any way.

374. Ms Sadiq produced a record of the legal work concerning Mr Yun on this matter in a document dated 30 June 2008 (some four months after the settlement). The document is under cover of a letter addressed to Mr Yun and in the form of a Memorandum of Fees reciting items of work she had carried out with some indication of times spent on the matter. No amounts of money are identified for the individual items. The letter and the document end with a lump sum of charge described as *"total fees $62,000 plus 10% GST"*.[126]

[124] Exhibit 125 (transcript of private hearing AYB, Jon Spark, 27 October 2010) p. 33
[125] Exhibit 124 (transcript of private hearing AYK, Salina Sadiq, 13 December 2010), pp.19-20
[126] Exhibit 135.

375. Counsel Assisting has submitted that the figure of $70,000 which was ultimately paid to Ms Sadiq in the Benjamin Yun matter had no sound or rational basis for its calculation, and that the amount bore no relation to the actual work likely to be done, or which was done. Certainly, the evidence shows that no basis for that calculation was provided to, or sought by, the NSWCC. In the absence of any evidence to the contrary, the PIC agrees with Counsel's submission on this point.

The Wui Feng Chen Matter

376. Wui Feng Chen arrived in Australia 1 March 2007. He was arrested on 8 July 2007 after having been under NSW Police surveillance for some time prior to that date. A search of a storage unit with which he was connected resulted in the discovery, and subsequent seizure, of Australian currency totalling $1,330,000 along with drug paraphernalia consistent with the distribution of narcotics. He was charged with "knowingly deal with proceeds of crime intending to conceal" contrary to s.193B(1) of the *Crimes Act 1900* (NSW). The matter was referred to the NSWCC for the purposes of commencing CAR Act confiscation proceedings against Mr Chen

377. Mr Chen was initially represented by Legal Aid. Ms Sadiq said in evidence that she came to represent Mr Chen as a result of a telephone call from an inmate at Parklea Prison who was an existing client.

378. In this matter an affidavit of suspicion was prepared by the NSWCC for the purposes of the relevant CAR Act restraining order application.[127] It was dated 9 July 2007 (the day of the arrest). It was sworn by Mr Novakovic probably because Mr Spark (who normally swore affidavits of suspicion) was on leave at the time. Both Ms Sadiq and Mr Novakovic said that they were unaware of the involvement of each in the same matter until after settlement had been achieved. Mr Novakovic and Ms Sadiq denied that Mr Novakovic told Ms Sadiq about the arrest of Mr Chen. A document produced after the event refers to a phone call Ms Sadiq received from Parklea Prison 12 July 2007 which appears to corroborate Ms Sadiq's version concerning instructions.

379. Mr Novakovic's affidavit of suspicion in the matter recites at paragraph 3 a basis for suspicion similar to that in other matters, *viz*.:[128]

I suspect that Wui Feng Chen has engaged in a serious crime related activity or serious crime related activities (within the meaning of "Serious Crime Related Activity" as defined in s. 6 of the Act"), namely knowingly deal with proceeds of crime in contravention of s.193B(1) of the Crimes Act 1900.

The suspicion referred to in paragraph 3 above is held by me having regard to:

> *The contents of a three page facts sheet dated 9 July 2007 prepared by Detective Ross Mitchell…*

[127] Exhibit 6
[128] Exhibit 29B (document 1)

A search of the records of the NSW Police Force COPS system which revealed on 8 July 2007, Chen was charged with the offences.

380. Mr Chen signed instructions to Ms Sadiq on 22 July 2007[129] and on the same day (if the date of the document is correct) signed a Legal Costs Disclosure Agreement with her in which she disclosed costs in a lump sum of $80,000, or an hourly rate of $370 plus 10% GST.[130] That rate was substantially above the rate she normally charged at the time, which she agreed in evidence would have been around $220 per hour inclusive of GST.

381. Ms Sadiq appears to have given advice to Mr Chen concerning CAR Act proceedings. She briefed counsel who negotiated (on instructions she provided) a s.10(5)(b) deduction from the restrained monies on the basis of the cost of a defended trial. It seems that an offer was made at a settlement conference with NSWCC officers on behalf of Mr Chen in the amount of $87,000. Mr O'Connor made a note of aspects of the negotiation.[131] He said in evidence that Commissioner Bradley agreed to a figure of $80,000 but not the additional $7,000 *"contingency"* which had been sought by Ms Sadiq. The negotiations took place at the NSWCC 24 July 2007. On either that day or 26 July 2007 officers of NSWCC prepared a consent order[132] and, on Ms Sadiq's behalf, a Notice of Appearance of the defendant.[133] Those documents were executed and filed in the registry on 27 July 2007. The Consent Orders were signed by Mr Giorgiutti and Mr Chen and witnessed by Ms Sadiq.

382. The Consent Orders prepared by NSWCC included an order that a sum of $40,000 be paid, pursuant to s12(1) of the CAR Act, to the NSWCC for its purposes, described as *"costs"*.

383. Mr Chen pleaded guilty in the Local Court to a single charge and served some months imprisonment. Ms Sadiq appeared on sentencing and made submissions on sentence. The only disbursements incurred in the matter appear to have been the fee charged by the barrister in respect of the settlement conference which totalled $4,950 inclusive of GST.

384. On 6 November 2007 after Mr Chen had served his sentence and was being deported, Ms Sadiq provided Mr Chen with some clothes and some US currency ($1,500). She agreed in evidence that neither could be classified as legal expenses within the meaning of s.10(5)(b).

385. Ms Sadiq was not required by the NSWCC to put on an affidavit of the amount required for Mr Chen's legal expenses. She was not required to provide a Statement of Affairs verified on oath by Mr Chen as required by s.16A(1)(c) – in fact Ms Sadiq said that the NSWCC had never required a statement of affairs in any CAR Act consent matter in which she had been involved.

[129] Exhibit 63
[130] Exhibit 13
[131] Exhibit 29C (document 3)
[132] Exhibit 14
[133] Exhibit 29C (document 5)

386. Ms Sadiq gave evidence about the actual costs of representing Mr Chen. She estimated total costs to the date of settlement initially at a little more than $1,000 but agreed that they could not have exceeded $2,000 inclusive of GST. After settlement Ms Sadiq said that she visited the gaol about five times and appeared in court on two occasions as well as having had to read and digest the brief. The barrister's fees on settlement totalled $4,950 inclusive of GST. Ms Sadiq frankly agreed in evidence that the work done, even including the $1,500.00 currency and the clothes given to Mr Chen upon his release from gaol, could not have amounted to anything like $80,000.

387. On the basis of Ms Sadiq's time estimates and her hourly rates, and including the barrister's fee, the total actually incurred for the amount of work done could not have exceeded $11,000. Nevertheless, she retained the whole $80,000 in the Wui Feng Chen matter just as she had retained the whole of the $70,000 in the Benjamin Yun matter.

388. When the same ground (ie. the actual work done in this matter) was traversed in the course of the public hearing[134] Ms Sadiq endeavoured to suggest that the fees would have been higher than she had conceded in private hearing. She suggested, at that stage, a higher figure of $30,000. She provided, however, no basis for a different calculation from the one she had agreed to in private. She did not produce any form of itemisation, narrative or bill of costs justifying high levels of work. No prior notice of a change in her evidence was given to the PIC. It would seem that all records of the work she had done had been made available and none could be said to provide information different from that she had conceded at private hearings.

389. Counsel Assisting submitted that Ms Sadiq's fees in the Wui Feng Chen matter, including the barrister's fee, could not have exceeded $11,000 in work done and would not have amounted to anywhere near $30,000. Even if they were closer to the larger figure, they still did not approach the $80,000 which was ultimately paid to Ms Sadiq from the restrained property. The PIC's view of the evidence yields the same conclusion.

390. When giving private evidence generally about s.10(5)(b) costs recovery in the two matters of Chen and Yun Ms Sadiq was asked:[135]

Q: In the settlement for legal costs that you achieved with the Crime Commission… would you agree with me that, as a general proposition, firstly, the amounts that you were able to negotiate from the Crime Commission were very generous?

A: Do I agree with you that it was very generous?

Q: Yes. The amounts that they allowed you to have were very generous.

A: I can't disagree, but I can't agree because all other lawyers – some lawyers go there every week for such a settlement. I don't know amounts they get. I only have these few matters.

[134] Albeit in a private session during the public hearing.
[135] Exhibit 122 (transcript of private hearing AXZ, Salina Sadiq, 26 October 2010), p.18

Q: I am not so much asking you to compare it with other Crime Commission matters but $80,000 for a plea of guilty in the Local Court sounds like a lot of money.

A: Yes I agree with you.

Q: It sounds to me as though, if you are not in the Crime Commission, it's a figure massively above what anybody else would have to pay to have a plea done in the Local Court?

A: I agree with you.

Q: Were you ever asked to tax your costs or have your costs assessed in any way?

A: No.

Q: By the Crime Commission I mean?

A: No.

391. As in the Benjamin Yun matter, none of the requirements of s.16A(1) were the subject of evidence in the Wui Feng Chen matter. The final consent orders were not submitted to a Judge, but simply filed in the registry. The Supreme Court was not informed that its approval of the proposal would be required. However, when documents were ultimately filed through a Registrar in the Supreme Court on 27 July 2007, the Consent Order at paragraph 2 did contain a warranty in the following form[136]:

The Defendant [Chen] warrants to the Plaintiff [NSWCC] that the Defendant's only interest in property as at the date of signing of these orders are the Defendant's interest in the property specified in the schedule hereto (" the seized cash").

392. Although it may always have been open to a defendant to lie about his other assets, a false warranty in a consent order lacks the same consequence as a filed and sworn statement of affairs. In any event, whilst such a warranty may have implications in respect of the operation of final confiscation orders,[137] the giving of a warranty is not the procedure required by s.16A(1)(c) and, hence, is not a substitute for compliance with that subsection.

393. Mr Chen was of Canadian nationality. Ms Sadiq confirmed in her evidence that Mr Chen had assets which he had moved from Canada to China where he wished to establish his family. There was no evidence before the PIC which indicated that there had been any exploration or enquiry by the NSWCC of Mr Chen's overseas assets, as would be relevant to the operation of both s.16A(1)(a) and s.16A(1)(d). Those subsections were not considered by the NSWCC at all in the settlement discussions.

394. Ms Sadiq prepared a document titled *"Tax Invoice & Receipt"* in respect of which she gave evidence.[138] The document, as in the Benjamin Yun matter, contains no itemised figures. Ms Sadiq agreed that it is not in fact a tax invoice. It does set out detail of the work said to have been done in an attempt, the PIC infers, to justify the figure of $80,000.

[136] Exhibit 14

[137] Specifically, pursuant to sections 31A *('Assets Forfeiture Orders After Interest In Property Not Disclosed')* and 31B *('Proceeds Assessment Orders After Interest In Property Not Disclosed')*

[138] Exhibit 68

Ms Sadiq was asked about that. It was put to her[139]:

Q: …as I read this document, it does not look as though there could be any like $80,000?

A: Yes I agree – I cannot possibly not agree with you. Yes, yes.

Q: Yes its clear there's not $80,000 worth of work there.

A: Yes, yes.

The Shan Chan Matters

395. On 5 March 2008 as the result of an operation entirely conducted by the Australian Crime Commission ("ACC"), four persons - Mr Shan Chan, Ms Mandy Ng, Ms Sally Lam, and Mr Joe Liu - were arrested and charged with the summary offence under s193C of the *Crimes Act 1900*, namely, deal with property suspected of being proceeds of crime. That charge related to cash in the total amount of $1,571,608 which was seized by the arresting officers.

396. For reasons not clear from the evidence (but, in any event, not immediately relevant), a short time after those arrests an ACC officer responsible for the investigation approached the NSWCC with a view to having the NSWCC commence CAR Act confiscation proceedings in respect of the seized cash on the basis that there would be a 50/50 split of the confiscated cash, after deductions, between the Commonwealth and the State of New South Wales. Those proceedings were subsequently commenced by the NSWCC in the Supreme Court of NSW.

397. Ms Sadiq acted for three of the four defendants in the proceedings (Mr Chan, Ms Ng and Mr Liu). Another solicitor, Ms Sten, acted for the fourth person (Ms Lam), that person having being referred to Ms Sten by Ms Sadiq.

398. On 18 June 2008 (there having been prior contact since 24 April 2008 between lawyers for the arrested persons and the NSWCC and ACC), there was a meeting at the NSWCC. The meeting was attended by Ms Sten, Ms Sadiq, the ACC officer, Mr Spark and Mr O'Connor. The purpose of the meeting was to negotiate a settlement of the CAR Act proceedings, including s.10(5)(b) legal expense deductions and other expenses.

399. Ms Sadiq asserted that the money seized from her clients was not owned by her clients. That was a matter of relevance to the associated criminal proceedings, but it did not appear to be an obstacle to CAR Act settlement.

400. Ms Sadiq, on behalf of her three clients, offered settlement of the CAR Act proceedings (ie, forfeiture of the seized cash) subject to an allowance for legal costs, pursuant to s.10(5)(b), of $50,000 for each of the three clients, being a total of $150,000.

[139] Exhibit 122 (transcript of private hearing AXZ, Salina Sadiq, 26 October 2012), p. 84

Ms Sten sought a larger figure in relation to the representation of her client.

401. As at the date of that conference only a single criminal charge had been laid against each of the four persons, although there was some evidence that the ACC may have sought to lay additional charges. As previously noted, that single charge was the summary offence under s193C of the *Crimes Act 1900* (NSW), namely, "deal with property suspected of being proceeds of crime". Whether or not there was to be a defended hearing of the criminal charge was unknown to the NSWCC at the time of the conference.

402. In the course of the meeting, Mr Spark and Mr O'Connor left the room and spoke with Mr Bradley in his office. After a short discussion, Mr Bradley authorised settlement of the "reasonable legal expenses" (per s.10(5)(b)) at $50,000 for each of the four defendants (he did not agree to the larger amount sought by Ms Sten) as well as the sum of $100,000 to be deducted from the restrained cash, being for the NSWCC's "costs".

403. As to the $50,000 expenses per defendant, it was not suggested by any NSWCC officer present that there was any particularised basis for the calculation of those legal expenses. Rather, that was simply the amount sought by the lawyers (or Ms Sadiq, as least). No basis of calculation was provided to Mr Bradley. None was sought from either Ms Sadiq or Ms Sten by any NSWCC officer.

404. The NSWCC officers and the ACC officer returned to the settlement room after their discussion with Mr Bradley where agreement was reached to settle all four matters with a s.10(5)(b) allowance of $50,000 for each client. At that point no proceedings had commenced in the Supreme Court. No restraining order existed.

405. There appears to have been no discussion about the $100,000 allowed for the NSWCC. All that is known to the PIC is that it was the figure authorised by Mr Bradley.

406. On the same day as the settlement meeting (18 June 2008) there was prepared within the offices of NSWCC a summons initiating the CAR Act proceedings against the four defendants, as well as consent orders which simultaneously settled all four of those matters[140].

407. The summons sought an order restraining the seized sums of cash as well as final orders for forfeiture of those monies. Notices of Appearance for each of the two solicitors, Ms Sadiq and Ms Sten, were prepared by NSWCC officers and must have been signed by each at the time of the meeting (although that signed by Ms Sadiq was undated).[141]

408. One set of consent orders was prepared in respect of all four defendants.[142] It authorised payments to each of the solicitors in the amount of the agreed $50,000 per client for

[140] Exhibit 86
[141] Exhibits 87 and 88
[142] Exhibit 90.

s.10(5)(b) legal costs payable to the solicitors in question. The payment to NSWCC of $100,000 for its "legal expenses" was expressed in the same terms as in the other matters examined (Benjamin Yun and Wui Feng Chen), *viz*.,:

Pursuant to s.12(1) of the Act, the legal expenses of the Plaintiff agreed at $100,000 to be paid out of the property specified in Schedule 2 hereto (" the Costs Order").

409. All of the documents were filed simultaneously that day, by presentation to a Registrar in the Registry of the Supreme Court. There was no Motion nor Affidavit to trigger a judicial hearing process. No information appears to have been given to the Registrars informing them of the need for the Court's approval per the restrictions in s.16A(1).

410. The monies agreed in the consent order were paid out to the solicitors and to the NSWCC. The balance was split between Commonwealth and State and the proportion for the State was forfeited to the Crown in right of New South Wales. The total in deductions was as follows:

Ms Sten	$50,000
Ms Sadiq	$150,000
NSWCC	$100,000
Total Deduction	$300,000

411. Subsequently, the criminal charges against Ms Sten's client and two of Ms Sadiq's clients were withdrawn altogether. The charge against Mr Shan Chan, the third of Ms Sadiq's clients, proceeded (although it was amended by the time it came before the court an a result of further investigation by the ACC officer). Mr Chan was convicted and served 11 months in prison with time in custody taken into account.

Access to Private Funds in Shan Chan Matters

412. A feature of the Shan Chan matters was that Ms Sadiq had also received funds from other sources connected with her clients for the purposes of meeting their legal costs. In the course of Ms Sadiq's evidence a document tabulating payments received by her from private sources in China was shown to her[143]. Ms Sadiq acknowledged that document as demonstrating her prior receipt of $41,933.38 from those private sources. However, it appears that $5,170.00 of that money had to be paid out to others for other purposes. Ms Sadiq also indicated that some other portion of the money was for purposes unrelated to the legal services in respect of which she received s.10(5)(b) payments. Nevertheless, the bulk of the monies received from China were private receipts for the same purpose as the s.10(5)(b) expenses, namely acting for Mr Chan and/or his associates.

413. During the course of his giving evidence in private Mr O'Connor was asked whether he was aware that the solicitors were receiving monies for the legal expenses of the

[143] Exhibit 94

defendants from other sources. He said he did not know. Neither did he know what legal services were proposed to be provided to the defendant. He agreed he did not know because neither he nor Mr Spark asked. He thought that if he had been informed that there was money for legal costs from other sources, it would have had a bearing on settlement negotiations. He said the solicitors were not asked because it was implied that there was no other money.

414. In addition to NSWCC's apparent inadvertence to the operation of s.16A(1)(a), no statement of affairs of the type required by s.16A(1)(c) was requested of, or suggested to, Ms Sadiq or Ms Sten. As to the fact that the four persons were foreign nationals presumed to be involved in drugs or money laundering, no evidence was explored or presented or filed in the Supreme Court, as to whether they had other assets out of the jurisdiction which could or should be brought into the jurisdiction before a s.10(5)(b) allowance could be made, as required by s.16A(1)(d).

415. The question of whether the seized monies were illegally obtained, thereby precluding a s10(5)(b) allowance for reasonable legal expenses by operation of s16A(1)(b) was not considered, as was also the case in the other cash matters of Benjamin Yun and Wui Feng Chen. In all three cases the cash in question formed the basis of the criminal charges against the respective defendants (i.e., each of the charges related to the possession of proceeds of crime, that being the restrained cash the subject of the CAR Act proceedings).

416. When Mr O'Connor was asked if he would agree that it had not been the practice of the NSWCC to make an enquiry about the capacity of a defendant to meet legal costs from other sources, he referred to the warranty that he said was *"in all the Commissions settlements"*[144]. He suggested that the obtaining of such warranties from defendants was tantamount to the making of such enquiries. In any event, evidence before the PIC indicates that such warranties were not, in fact, always sought in settlement matters (or, at least, were not recorded in all consent orders reflecting such settlements. Indeed, the Shan Chan matter is one such example[145]).

Basis of Calculation of s.10(5)(b) Deductions in the Shan Chan matters

417. The view of the NSWCC officers in attendance at the settlement meeting was that the basis of calculation the s.10(5)(b) payments to Ms Sadiq and Ms Sten (totalling $200,000) was merely that they were the amounts that had been sought by the lawyers. No officer of the NSWCC suggested in evidence that there was any form of testing, evidence or accountability imposed as a pre-condition for the NSWCC's agreement as to those amounts.

418. Ms Sadiq did incur expenses in acting for the Shan Chan clients. She paid out $37,010 to the three barristers briefed to appear for each of her clients. The largest portion was

[144] Exhibit 129 (transcript of private hearing AYF, Tim O'Connor, 16 December 2010), p. 21
[145] Exhibit 90

paid for a barrister in respect of Mr Shan Chan whose matter proceeded to a brief hearing and sentencing.

419. The consent orders did not in any way provide for the "refund" of unexpended s.10(5)(b) monies. Nor was there any mechanism for checking the quantum of monies actually expended.

420. The following exchange with Ms Sadiq occurred during her private evidence as to the quantum of the s.10(5)(b) payments:[146]

Q: What you've received is $150,000 from the Crime Commission in respect of one charge for each of the three clients in the Local Court?

A: Yes.

Q: That sounds like a figure well above anything you would need; do you agree?

A: Yes, yes I agree.

Q: And it doesn't bear any relation to calculating out legal costs.

A: Yes, I agree.

421. Ms Sadiq's Cost Agreement with each of her clients provided for a lump sum of $50,000 which was the amount negotiated at the settlement conference. The date of the costs agreements with her clients is 7 June 2008, that is, 11 days earlier than the settlement conference. Ms Sadiq denied in evidence that she already knew before the settlement that she would recover $50,000 per client. Ms Sadiq was, however, unable to explain how she arrived at the figure of $50,000.

422. Mr O'Connor, who has legal qualifications and was familiar with the CAR Act, was asked about the negotiations of 18 June 2008 which resulted in the payments of $50,000 per client. Mr O'Connor considered that Ms Sten agreed to $50,000 too easily. He said that he had felt that her claim may have been an ambit claim, but that in any event she did not argue it at all. He said he thought that $50,000 was *"a bit low, but that was their problem"*. He considered it was a bit low because the ACC officer *"was saying he was going to charge them with additional matters"*[147]. The question of what legal services the defendant should receive was not identified or considered.

423. When asked upon what basis $50,000 was calculated by Ms Sadiq, Mr O'Connor said he did not ask. When asked whether Ms Sadiq gave an indication of the defendant's general financial position, he said[148]:

I thought they were all foreign nationals and I got the impression – again, this is only just from memory – that they were underlings in some sort of drug or money laundering network. From that, I would assume they wouldn't have any substantial assets".

[146] Exhibit 122 (transcript of private hearing AXZ, Salina Sadiq, 26 October 2010), p.45
[147] Exhibit 129 (transcript of private hearing AYF, Tim O'Connor, 16 December 2010), p.15
[148] ibid, p.19

424. When asked why $50,000 was considered reasonable, Mr O'Connor said it was a matter for the lawyers and his Commissioner (Mr Bradley) but that $50,000 for a trial was probably inadequate and $50,000 for a plea was probably more than adequate. As previously noted, the charge against each of the four defendants was a mere summary matter to be heard by a magistrate in the local court.

425. When asked whether such considerations were irrelevant as to what should be taken out of the fund Mr O'Connor said *"well, it was a position where we wanted to settle the matter and there was a likelihood of further charges. For instance, if we had deferred this settlement for a number of months and they were charged with other substantial matters, the legals could have vastly increased"*[149].

426. Mr O'Connor and Mr Bradley both referred to excessive claims for legal expenses by ***"greedy"*** lawyers. They referred to lawyers in the past using up the whole of restrained monies in legal costs. These references were in the context of proof of the need to *"contain"* or *"fix"* once and for all, the claims for costs under s.10(5)(b) in the settlement. They claimed that a settlement, even if generous, was more efficient and better value than litigating claims in the Court. It was not accepted by NSWCC officers that approvals of settlement by a Judge would be short and efficient, despite this very proposition being stated in the NSWCC's Confiscation Manual.[150]

Application of s.16A to Consent Orders Which Provide for Reasonable Legal Expenses

427. As to the effect of the provisions of s.16A in relation to consent orders which included s.10(5)(b) deductions, each of the senior NSWCC officers who gave evidence expressed the view that s.16A applied only to contested CAR Act matters. Accordingly, in such matters, it was considered that compliance with the terms of s.16A was not necessary in settled matters in which orders pursuant to section 10(5)(b) were sought by consent of the parties.

428. Mr Spark, who is not a lawyer, gave evidence that it was his understanding that s.16A did not apply to consent orders. Not unreasonably perhaps, Mr Spark was unable to offer any basis for this view beyond his assumption that it was based on legal advice, and that, in any event, it had been the practice since well before the time he joined the NSWCC in 1997.

429. Mr O'Connor, who has legal qualifications, expressed the view that because, at the time of settlement discussions, no restraining order had yet been made, s.16A did not restrict resolution of the proceedings by consent. Mr O'Connor could not, however, explain the basis upon which the NSWCC had any jurisdiction over the monies before s.10(5)(b) and s.16A(1) could operate.

430. In his evidence, Mr Giorgiutti said s.16A did not apply because, in his view, settlements

[149] ibid, p.22
[150] Exhibit 30C, p.149

were excluded from the operation of s.16A. He agreed, however, there was no express provision to be found in the CAR Act which had that effect.

431. Whilst the basis of Mr Giorgiutti's assumption that s.16A had no application to consent orders varied on the several occasions he gave evidence, his primary reason for this appears implicit in in the following response[151]:

Q. I don't see anything in section 10B or section 16A which draws a distinction between a contested matter and a matter that is dealt with by settlement, Mr Giorgiutti. Is there anything you can point to which draws that distinction?

A. No, no, it is just that the proceedings are civil proceedings and are capable of being settled, and the position of the Commission, and the mandate, I suppose, is that the confiscation be run on commercial terms.

432. When Mr Giorgiutti gave evidence in the public hearing he confirmed his, and (he said) the NSWCC's, view that s.16A only applied to contested matters, and not to settlements by consent. On that occasion he offered, as an additional (or alternative) basis for that view, the observation that there exists inconsistency amongst the provisions of the CAR Act, as follows:[152]

Q. Mr Giorgiutti, what is your understanding of the Crime Commission's interpretation of whether or not section 16A applies to an allowance for reasonable legal expenses, where there is a consent settlement?

A. It doesn't apply in a consent settlement.

Q. And why doesn't it apply?

A. Because if you look at section 10, the legal expenses order can be made at the time the restraining order is made or at a later time. If it is made at the time of the restraining order, you cannot have compliance with 16A. And so there is an inconsistency between the two sections and so you have to look to resolve that inconsistency. That's my belief. And it was first raised in that case of McDonnell.

Q. When you say that is your belief, is that a reasoning that has been used by the Crime Commission up until now, or is that a belief that you hold yourself as of now?

A. I've always held a belief about 16A, but so has the Commission.

Q. Do you accept that there is nothing in section 16A or section 10 which would distinguish between consent settlements and contested matters for the purposes of the application of section 16A?

A. Well, except that there is an inconsistency between the two sections.

Q. Can you just identify that inconsistency for us, Mr Giorgiutti? I must say I am unable to see it myself. Could you just take us to that?

A. If I were to make an application to a judge today for a restraining order and at the same time ask for a reasonable legal expenses order, I couldn't comply with section 16A(1)(c) or any of the other sections, because we're applying for that order now.

[151] Exhibit 126 (transcript of private hearing AYC, John Giorgiutti, 28 October 2010), p.49
[152] PIC Transcript, John Giorgiutti, 4 October 2011, pp 496-497

433. The PIC has considerable difficulty understanding Mr Giorgiutti's opinion on this "inconsistency" point. But however generously it is looked at, it could not possibly support the proposition that s16A applied only to contested matters, and not to consent matters.

434. Mr Bradley, in his evidence, also shared the view that s.16A applied only to contested CAR Act matters, and not "reasonable legal expense deductions' settled by consent. He did not, however, explicitly share, nor endorse, Mr Giorgiutti's explanation(s) for this view. Rather, Mr Bradley explained his view that compliance with s.16A was not necessary in consent matters as follows:[153]

Q. Mr Bradley, in the course of a litigated Criminal Assets Recovery Act matter, do you accept the proposition that section 16A still applies, even if it is settled, or not?

A. Do I accept the proposition or not? No. …..The position I take is that if the proceedings are compromised by evidence on consent orders then 16A doesn't apply.

Q. Could you tell us, please, what do you regard as the basis for that opinion?

A. That in consent proceedings, it is possible to settle the matter on terms agreed to by the parties and without regard to the need for evidence as required by section 16A.

Q. Do you accept that there is no provision in the Criminal Assets Recovery Act which supports that view?

A. This is an interpretation of the provisions and my view is as I have stated.

Filing Of Consent Orders in the Supreme Court Registry

435. With regard to the filing of consent orders in the Supreme Court registry (as opposed to being put before a Judge for approval), the NSWCC sought the tender of a bundle of documents[154] which included:

- A copy of the delegations of the then Chief Justice to Registrars of the Supreme Court under s.13 *Civil Procedure Act 2005*
- A copy of Rule 36.1A (Consent Orders) from *UCPR 2005*
- A copy of ss.119-121 *Supreme Court Act 1970* being division 2 "Registrars and Other Officers".

436. It is presumed that the tender of these documents sought to establish that orders submitted to a Registrar in chambers or in the Registry were valid orders of the Court. Whether or not that is indeed the case is not relevant (although the PIC notes that the terms of the Chief Justice's delegation confine the Registrar's powers to make consent orders only to those "matters a Registrar may deal with" – this, presumably would not extend to matters in which an evidentiary pre-requisite must first be met (ie, s.16A)). The real question at issue is whether in submitting consent orders to a Registrar without

[153] PIC Transcript, Phillip Bradley, 5 October 2011, pp 632-633
[154] Exhibit 30C

moving the Court with evidence to meet the demands of s.16A(1), there was non-compliance with the CAR Act.

Response of NSWCC Officers to Claims of Non-Compliance with s.10 and s.16A

437. It is a feature of the various s.10(5)(b) and s.16A matters examined in evidence that there was little factual dispute as to the following matters:

- Consent Orders were not submitted to a Judge of the Supreme Court for s.16A(1) approval in settled consent matters
- Notices of Motion and Affidavit were not filed in settled consent matters to bring an agreement about s.10(5)(b) legal expenses before the Court
- Statements of Affairs pursuant to s.16A(1)(c) were not prepared in settled consent matters, even after August 2000 when Mr Temby pointed to their necessity
- Affidavits of Suspicion were not prepared in consent matters where negotiations occurred before proceedings commenced
- Apart from the opinion on limited questions provided by Mr Temby in the year 2000, no other opinion had been sought by NSWCC on the operation of s.10(5)(b) and s.16A (before the commencement of the PIC hearings)
- No attempt was made to evaluate any claim for reasonable legal expenses, let alone to identify the services proposed to be made available to the defendant:
  - in each case the sum made available greatly exceeded the expenses actually incurred
  - the NSWCC claimed to be uninterested in what happened to the excess monies that were not spent on obtaining legal services
- Enquiries were not made by NSWCC of defendants as to:
  - whether there were assets outside the jurisdiction which should be brought within the jurisdiction
  - whether the cash the subject of the proceedings was "illegally acquired" thereby disentitling a claim under s.10(5)(b) by operation of s.16A(1)(b)
  - what means other than the restrained property a defendant had to meet his or her own legal expenses.

438. Despite the absence of dispute regarding each of these issues, there was a general non-acceptance by the NSWCC officers who gave evidence of any non-compliance with the CAR Act by the NSWCC.

Mr Giorguitti's Evidence as to the NSWCC's CAR Act Practices

439. In the course of his evidence before the PIC, Mr Giorgiutti raised the following points in support of the NSWCC's CAR Act practices:

- He was of the view that s.16A(1) does not apply in respect of s.10(5)(b) deductions in CAR Act matters which are settled by consent between the NSWCC and the defendant. He conceded, however, that there is no express provision to that effect, and was unable to point to any aspect of the legislation that supported his view
- He said that the Act provides that the proceedings are civil and, accordingly, they can be compromised and settled between parties without requiring any intervention of the Court
- Mr Giorgiutti responded to suggestions that the NSWCC was non-compliant by references to the efficiency of the NSWCC's practices which demonstrated a preference for somewhat more pragmatic approach than that required by the CAR Act. For example, he was asked:

Q: Generally speaking, the Court seems to have some form of supervisory role; subject to the precise terms of the Act, the framework seems to –

A: Yes, sure, but just to let you know, though, in practice, probably only one percent of our matters. If we commence 150 matters a year, we litigate about 1.5. The balance is resolved on settled terms between the parties.[155]

…

Q: You have directed our attention to s.12?

A: Yes.

Q: As I read the whole of that section myself – correct me if I am wrong – as being one that really involves the Supreme Court in almost every step of the way.

A: That's right, except that we have used that section to ground Consent Orders.

Q: Can you tell me what part and in what way that has been done? I don't see that myself.

A: Well, if we make an order by consent varying something, and the other side consents to it, then we normally ground the order under s.12.

Q: Any particular part of s.12?

A: Depending on what the order is. But we can also take the view that, by consent, essentially you, you can – unless the Court couldn't make the order, we can make the order as if the Court made it.

Q: How does that happen?

A: What do you mean, how does it happen?

[155] Exhibit 126 (transcript of private hearing AYC, John Giorgiutti, 28 October 2010), p.39.

Q: How does the Commission make an order – when you say "we" do you mean the Commission?

A: The Commission, yes.

Q: How does the Commission make an order that substitutes for the Supreme Court order? Do you mean by consent?

A: By consent, yes.

Q: I see.

A: Generally when a Consent Order is made it ought to be grounded, and it is generally grounded, in some section of the Act. Some lawyers object to that, so some orders are ungrounded. We say that the Supreme Court has power to make, in effect, any order in the Supreme Court, so therefore if the parties consent, the Registrar will generally sign that order, whether it is grounded or not. If it is not properly grounded, well, it is probably still a valid order.[156]

440. As to the operation of s.16A(1), Mr Giorgiutti was questioned as to his view that the section applied only to contested proceedings, but not to matters settled by consent. Mr Giorgiutti's attention was directed to s.16A(1)(c) (Statement of Affairs) and he was asked, in relation to the words *"no provision is to be made unless a Statement of Affairs…"*, the following[157]:

Q: That seems to be a pretty clear statement; would you agree?

A: Absolutely, yes.

Q: And it is pretty easy to see the policy reason behind that.

A: Yes.

Q: Would you agree with me that doesn't really seem to be any qualification to that provision?...

A: Well, again, that applies in practice only to the matters that litigated, whether they are part of the 1.5 or whether there is litigation in respect of the legal expenses. If the matter is settled, then that section is not…

Q: You say that doesn't apply?

A: Well, in practice, in doesn't come into play, because the Commission's view is that it is aware of the answers to those questions.

Q: But whether the Commission is or is not, this seems to be talking about whether the Supreme Court is aware. The Supreme Court seems to be the arbiter required by Parliament rather than the Commission.

A: Yes, sure, but if a matter resolves and it doesn't go the Supreme Court, if it is settled by consent, then it doesn't go to the Supreme Court, so we deal with it in the Commission.

[156] Exhibit 126 (transcript of private hearing AYC, John Giorgiutti, 28 October 2010), p.43-45
[157] ibid, p.48

Q: Do I understand you to be saying that where there is a settlement, the Commission can, in effect, step into the shoes of the Supreme Court and if the Commission is satisfied, then that's enough?

A: Well, otherwise you would have to litigate every matter.

Q: Well, either that or you would simply put up enough affidavit evidence for the Court to be satisfied to allow the settlement?

A: That's not the way we operate in practice. The Commission's view is that if it settles, it has power to settle regardless of what the section says. That section there was introduced later; it is 16A and it applies to matters where there can't be consent and the matter is litigated. (emphasis added).

441. Subsequently, Mr Giorgiutti was asked what he meant by *"the Commission's view"* that s.16A(1) didn't apply to settlements[158]:

Q: Can you tell us when you say "it's the Commission's view that", what the source of that view is? Do you mean it is your view, or your view as solicitor to the Commission or Mr Bradley's view?

A: Well, I have never been asked to advise on it. I don't think we have ever advised counsel to opine on it. I think, if you look at our manuals, and so forth and our annual reports, I'm not sure, but it is very clear that, leaving aside the legislation, what the, at least, management committee – and I presume the government – expect that we do this confiscation work as commercially actively as we can. I think the thing is that you get in as quick as you can; you get out as quick as you, and you make a judgment as to what should stay in and come out. Then you move to the next one. If we were to litigate every matter, this legislation…

Q: Would be unworkable?

A: ….would be unworkable. The legal fees would be too much.

442. Mr Giorgiutti would not agree with the suggestion put by Counsel Assisting that to put on a motion and affidavit with terms of settlement and providing evidence sought by s.16A, would be relatively short and simple procedure.

443. When directed to the proposition that the onus was on the defendant to make an application for s.10(5)(b) expenses and to prove that they had an entitlement Mr Giorgiutti answered[159]:

When we get a restraining order, we can make the provision for the legals, and if we don't do it at that point, we can also make an application for legals under s.10. It's not limited to the party.

444. When discussing the way in which applications under s.10 arose Mr Giorgiutti said[160];

[158] ibid, p.48
[159] ibid, p.50
[160] ibid, p.52

…the approach that is adopted is not illegal or unlawful, but it is not one that necessary I would follow in all cases… in practice, it doesn't happen, because we take a commercial conveyor-belt approach and we don't look necessarily at each case by case.

445. Additionally, Mr Giorgiutti volunteered the following observation on litigating s.10 matters[161].

A: If we were to apply the Act strictly, one, we would probably go broke if we litigated every matter, and, two, persons would be far worse off, because the Act is quite strict. So we try to accommodate – the words I use are that it has to be something they can live with and we can live with that we can defend.

446. As to the NSWCC Confiscation Manual which sets out the procedures for settlement applications, Mr Giorgiutti was of the view that the Confiscation Manual was generally complied with. He did however, say that he had not read the current Manual himself and that he was not responsible for it. He considered that the Manual was *"there for the people who worked in the team, who are generally sort of junior"*[162]

447. Mr Giorgiutti did not reject the proposition that the Supreme Court received thousands of applications, and was reliant on practitioners and public authorities to inform the Court when its jurisdiction needed to be invoked. It was put to him as follows[163]

Q: The Supreme Court receives thousands of applications.

A: Yes.

Q: And it is reliant on the practitioners and the public authorities that make use of it to let it know…

A: Yes.

Q: When its jurisdiction, in one way or another, needs to be invoked.

A: Yes.

Q: If you file Consent Orders in the registry, the Court is not being told that s.16A might apply?

A: No. But a number of consent orders are filed before a Judge as well.

Q: Say that again.

A: A number of consent orders are in fact filed with a Judge. In those cases, to my knowledge, there has never been a Judge who has said, "what's going on here? Why have we got a 16A?", whatever, and in those cases we would be represented there by Counsel.

Q: So what does that mean? Do you mean that because some Judges haven't followed it through, as it were, therefore there is no need to put it before Judges?

A: No. Look, until you mentioned it today, I had never thought that there has been

[161] ibid, p. 59
[162] ibid, p. 63
[163] ibid, p.63-64

anything wrong with our practice in the way we do consent orders in relation to confiscation. What I'm saying is that there has been opportunity along the way for Courts to become aware of our practice and therefore make comment.

448. Mr Giorgiutti's evidence on this point appeared to suggest the view that it is the responsibility of the Court to enquire as to matters that should be brought to its attention, rather than for the NSWCC to bring such matters to the Court's attention.

Mr Bradley's Evidence as to the NSWCC's CAR Act Practices

449. Mr Bradley agreed that there was nothing in the Act which makes an allowance of s.10(5)(b) legal expenses done by agreement any different from one imposed by the Court. He agreed that s.16A(1)(a), (b) and (c) all appeared to call for provision of evidence, concessions or Statements of Affairs.

450. He also agreed that the intention underlying s.16A(1) is that it is the Supreme Court (only) that is the body that approves whether or not there would be any deduction from restrained funds for legal expenses.

451. With regard to the effect of s.16A, Mr Bradley was asked[164]:

Q: What it seems to imply is that the procedure to be adopted is that the matter is listed before the Supreme Court with the appropriate evidence so that they can carry out an approval process? Do you accept that?

A: No.

Q: What is your view about that?

A: Well I think that in other litigation, if a matter is capable of being compromised , then it can be on terms between the parties, and filed in Court.

Q: That's certainly true where the issue is entirely inter partes; I agree with you, Mr Bradley. But in a case where there is coercive power being used, would you agree that the intent would be for a supervision by the Court of the property that is the subject of the coercive power?

A: Which coercive power?

Q: Well, the restraining order, for a start.

A: How does that differ from an injunction?

452. The difference, of course, is that any orders obtained in CAR Act proceedings (including restraining orders) are made in accordance with the statutory regime which governs the conduct of those proceedings, and which the parties and the Court are bound to observe. An injunction (be it sought for *ex parte* or otherwise) is a discretionary remedy granted in accordance with equitable principles and not subject to any statutory regime nor hence to any statutory restrictions of the type imposed by the CAR Act.

[164] Exhibit 130 (transcript of private hearing AYD, Phillip Bradley, 17 December 2010), p.42

453. In private hearing, Mr Bradley was asked about his understanding of the role of the Supreme Court[165]:

Q: Mr Bradley, looking at this provision now, do you accept that it seems to require that the Supreme Court, rather than the Crime Commission be satisfied that the various elements before legal costs can be allowed?

A: That's a literal interpretation of s.16A, I agree.

Q: Isn't that the only possible interpretation?

A: Once again, you are asking me for an opinion of the interpretation of s.16A.

Q: I am, yes, I am.

A: I rely very heavily on a number of lawyers in my organisation to meet the requirements of the legislation and I think –

Q: You have relied on the advice that you have received internally; is that what you are saying?

A: Yes, and the practices that have been adopted over the years.

Q: Has there ever been an advice sought externally, either from the Bar or from the Crown solicitor or from someone else, as to the correct interpretation of sections 10B and 16A…

A: Look I don't think so, but it is conceivable that there has been[166].

454. Mr Bradley subsequently gave evidence in public hearing in October 2011. By that time Mr Temby's advice of August 2000 had been located and brought to his attention. He had also seen the opinion of Mr Walker, a copy of which had been furnished to the NSWCC by the PIC, and he had read the advice of the Crown Solicitor which the NSWCC had sought in December 2010.

455. On that occasion, Mr Bradley gave evidence that there had been a change of NSWCC procedure since its receipt of the Crown Solicitor's advice. He said that, in accordance with that advice, matters are now *"settled with a Statement of Affairs"* (pursuant to s.16A(1)(c))[167]. He confirmed, however, that such matters were still otherwise being conducted in the same way as they had been; namely, in that final consent orders were still being filed through a Duty Registrar. He said that the decision concerning maintaining that procedure was made by NSWCC Assistant Commissioner, Mr Singleton.

456. Mr Bradley agreed that the Crown Solicitor's advice did not expressly authorise submission of consent orders through a Duty Registrar, but he noted that nor did the advice say that to do so was inappropriate.

457. Mr Bradley said that he did not think Mr Temby's advice touched the question of whether consent matters could be filed through the Registrar rather than in Court. Mr Moses was

[165] ibid, p.46
[166] This evidence was given prior to Mr Temby's opinion having been located.
[167] PIC Transcript, Phillip Bradley, 5 October 2011, p.635.

said to have given advice on the issue but not formal written advice; no evidence of it was produced. The following exchange then occurred[168]:

Q: So as I understand the position, we agree that Mr Temby's advice doesn't touch the matters; the Crown solicitor's advice doesn't deal directly with the matter, and you say that Mr Moses advice is not written; is that correct?

A: I think that's the position, yes.

Q: So on what basis have you rejected Mr Walker's position?

A: Well, I haven't rejected Mr Walker's position, but I understand that there are competing advices on the subject..

….

Q: This is a matter which has been publicly called into question and the subject of an enquiry here in the Police Integrity Commission, that seems to throw in doubt the validity of the practices used by the NSWCC in connection with confiscated monies. Would you not make the final decision about whether or not settlement should be filed through a Registrar or submitted to a Judge.

A: No, we have always taken the view that the legislation authorises the approval of the Consent Orders by the Registrar.

Q: Yes, but following that been thrown into doubt, do you say that the decision is made not by you but by someone else?

A: No, it is consistent with my views.

Q: So are we right then, in forming a view that you reject Mr Walker's advice? Or is that wrong?

A: I don't adopt Mr Walker's advice.

458. When asked whether he accepted the proposition that s.16A still applies, even if a matter is settled, Mr Bradley said[169]:

A: The position I take is that if the proceedings are compromised by evidence on consent orders, then 16A doesn't apply.

Q: Could you tell us, please, what you regard as the basis of that opinion?

A: That in consent proceedings it is possible to settle the matter on terms agreed to by the parties and without regard to the need for evidence as required by s.16A.

Q: Do you accept that there are no provisions in the Criminal Assets Recovery Act which support that view?

A: This is an interpretation of the provisions and my view is as I have stated.

459. When asked if there was any provision in the CAR Act upon which he would rely for the view that the operation of s.16A is excluded in consent matters, Mr Bradley responded[170]:

[168] ibid, pp.637-638
[169] ibid, p.643.
[170] ibid

Firstly, the Act describes them as civil proceedings and there are other rules applying to civil proceedings, and that it is common in civil proceedings for litigation to be settled by consent, indeed, there is an obligation on the parties and indeed the legal practitioners to get to that result if possible, and we have endeavoured to do that, consistently with them being civil proceedings and we don't think that s.16A is called into play subject to the change that has been made since we have received the advice from the Crown Solicitor recently as a consequence of this matter.

460. When Mr Bradley was asked whether the recent change to ensure filing the statement of affairs pursuant to s.16A(1)(c) implied a need comply with the other provisions of s.16A he responded that he did not consider that to be necessary, except in contested proceedings. That is, Mr Bradley appeared to maintain the view that compliance with those other provisions of s.16A was still not necessary in circumstances where s.10(5)(b) "reasonable legal expenses" deductions are provided for in consent orders. His evidence was as follows[171]:

Q: Was this the case: your compliance with s.16A turns on what the Crown Solicitor has said in respect of s.16A(1)(c) rather than on a reading of the section?

A: I'm following the Crown Solicitor's advice, yes.

Q: Have you sought to resolve the question of whether, if s.16A(1)(c) is applicable, the balance of the section must also be applicable?

A: Well, the resolution of the moment is that they are not, except in contested proceedings.

Q: Have you sought advice from the Crown solicitor on that outstanding question?

A: No further advice has been sought other than the one you saw…

Q: And you consider that s.16A does not apply to settlement matters; correct?

A: Consent settlement?

Q: Yes. You do not consider it not in compliance of the Act to submit consent orders to the Registrar and not for judicial determination.

A: You mean before a judge.

Q: Yes.

A: No I don't consider it a non-compliance to do that.

Other Justifications for the NSWCC's CAR Act Practices

461. Evidence heard from NSWCC officers who appeared before the PIC, and submissions made on behalf of the NSWCC following the completion of the hearings, made reference to other factors that were said to justify the NSWCC's CAR Act practices.

462. It was asserted for the NSWCC that some Judges of the Supreme Court had entered consent orders where the requirements of s.16A had not been satisfied. The material

[171] ibid

provided in support of the NSWCC argument is to be found in Exhibits 32 and 34. Those exhibits consist of a collection of consent orders and in one case a Judge's Associate's notes in matters where entry of the consent orders was done by a Judge. That seems to have been the point of the tender by NSWCC. There is some doubt (in the absence of a fuller record of each matter) as to what occurred in each case. Accepting the documents on their face they evidence the entry of Consent Orders by a Judge of the Supreme Court.

463. It is not known to what degree in each matter the requirements of the section were deemed by the Judge, to be satisfied by other documents in evidence or sworn oral evidence. It is not known whether s.16A(1) was drawn to their attention, or the degree to which an individual Judge may have relied upon individual counsel or the integrity of a government instrumentality, as Mr Walker adverts to[172], as to the state of the evidence. It is not known whether an individual Judge took the view that waiving powers available to the court under other procedural legislation, enabled a Judge to waive s.16A(1)(c) for example.

464. The various matters in Exhibits 32 and 34 had commenced as defended matters. Whatever the position in each case, the question at issue was not the way in which a Supreme Court Judge approaches s.16A(1). The scope and purpose of the hearings, indeed the powers of the PIC, do not relate to such an exercise. Rather, they relate to the conduct of the NSWCC in its management of powers under the CAR Act.

465. In a similar vein, a further matter raised by the NSWCC was an assertion that the PIC had conducted CAR Act proceedings in exactly the same manner as the NSWCC. The NSWCC sought to have evidence tendered which, it was contended, would show this. The substance of that assertion was, however, ruled as irrelevant by Assistant Commissioner Cripps and, accordingly, that material was not accepted into evidence.

466. Nonetheless, a submission to the same effect was subsequently made on behalf of the NSWCC (in apparent disregard of the Assistant Commissioner's earlier ruling on the issue). Accordingly, the PIC considers it appropriate that the matter be referred to in this report.

467. The NSWCC submission asserts that (as the only other body which may commence CAR Act proceedings) the PIC's own practices are relevant, by way of a benchmark, to assessing whether Mr Bradley and Mr Giorgiutti acted reasonably in interpreting the CAR Act as they did. Having apparently undertaken its own searches of NSW Supreme Court files, the NSWCC identified a single matter on the basis of which it was asserted that the PIC conducted its CAR Act proceedings in the same manner as the NSWCC.

468. It was submitted by the NSWCC that in the matter of *PIC v Samuel Foster*[173] *("the Foster matter")*, consent orders were made in the Supreme Court by Hislop J on 9 February

[172] Exhibit 40, p.6
[173] NSW Supreme Court proceedings number 15166/05

2009 which provided for a s.10(5)(b) deduction for the defendant's reasonable legal expenses, but in respect of which s.16A had not been fully complied with.

469. The submission not only demonstrates a lack of observance by the NSWCC of rulings made by Assistant Commissioner Cripps during the public hearing, but it is also an illustration of the NSWCC's misconception as to the primary issue in this limb of the investigation.

470. That primary issue concerned the adherence (or otherwise) to the rule of law by a Crown agency and, in so far, whether the NSWCC's practices of filing consent orders in uncontested matters bypassed the supervision of the Supreme Court in a manner contrary to that mandated by the CAR Act.

471. Aside from the erroneousness of the NSWCC's submission (in the Foster matter the necessity of compliance with s.16A had, in fact, been an issue raised between the parties and, as the record of proceedings shows, before the Court), the Foster matter was not a case where the PIC failed to put all relevant matters before a Judge of the Supreme Court, much less bypassed judicial consideration of those matters altogether by merely filing the relevant consent orders in the Supreme Court registry.

472. Accordingly, as was ruled by Assistant Commissioner Cripps in the course of the public hearings, the Foster matter is of no relevance to the primary focus of limb two of Operation Winjana. Hence, the matter is of no assistance to the NSWCC in seeking to justify its CAR Act practices by way of comparison to a single CAR Act proceeding commenced by the PIC.

DEDUCTIONS OF NSWCC "COSTS" FROM RESTRAINED PROPERTY

473. As noted previously in this report, the second of the issues arising in the context of the NSWCC's compliance, or otherwise, with the provisions of the CAR Act relates to the historical practice of the NSWCC of making provision in consent orders for the recoupment of its legal/administrative expenses from restrained monies.

474. In each of the settled CAR Act matters examined in Operation Winjana the relevant consent orders provided for amounts to be deducted from restrained monies to be paid to the NSWCC in respect of its "costs" incurred. A general summary of those matters is as follows:

- In the matter of Guo Xiong Chen of April 2008 the NSWCC drafted consent orders[174] which read:

  14.14. Pursuant to s.12(1) of the Act the Defendant pay the legal expenses of the Plaintiff agreed at $50,000 ("the cost order").

[174] Exhibit 53 p.3. As noted previously, these consent orders were not ultimately entered in this matter.

Clause 17 of the Consent Order provided that the $50,000 was to be funded from the proceeds of the sale of the restrained property.

- In the matter of Wui Feng Chen (where $1.33 million dollars in cash had been seized) Consent Orders[175] were filed 27 July 2007. Clause 8 of those orders reads:

  Pursuant to s.12(1) of the Act the legal expenses of the Plaintiff (NSWCC) agreed at $40,000 to be paid out of the seized cash ("the costs order").

- In the matter of Benjamin Yun ($1.569 million dollars seized from the boot a car) a Consent Order[176] filed 11 February 2008 contained Clause 2 as follows:

  Pursuant to s.12(1) of the Act the legal expenses of the Plaintiff agreed at $20,000 to be paid out of the properties specified in the Schedule hereto

The Schedule nominates the seized $1.569 million dollars cash.

- In the matter of *NSWCC v Lam Sally Lam & 3 Ors* (i.e., what is referred to herein as the "Shan Chan" matters) the proceedings were settled by way of consent orders dated 18 July 2008. Clause 5 of the Consent Order[177] reads as follows:

  Pursuant to s.12(1) of the Act of the legal expenses of the Plaintiff agreed at $100,000 to paid out of properties specified in Schedule hereto ("the costs order").

  The $100,000 referred to in the Lam Consent Order was an amount in respect of all four defendants, $25,000 for each defendant on average.

475. As a successful party to civil proceedings, the NSWCC may well be ordinarily entitled to a costs order against a personal defendant under the provisions of the *Civil Procedure Act 2005.*

476. The distinction to be made in respect of CAR Act proceedings, however, is that the monies deducted by the NSWCC for its legal/administrative "costs" were deducted from the restrained monies, as opposed to being paid by the defendant personally. Any entitlement of the NSWCC to take its "costs" from restrained property would require clear statutory authority within the provision of the Act. There is no power of that type evident in the CAR Act.

477. The evidence before the PIC was that the NSWCC purported to rely on s.12(1) to ground the deduction of its costs from restrained monies. Section 12 provides for the making of "ancillary orders" in respect of a restraining order made under s10 (now, s10A). It was submitted by Counsel Assisting that "costs" is not a matter ancillary to the making or operation of a restraining order, and hence does not provide any statutory authority for the NSWCC to deduct its legal, much less administrative, costs from restrained funds.

478. This a view shared by Mr Walker in his Opinion on the operation of the CAR Act.

[175] Exhibit 14
[176] Exhibit 77
[177] Exhibit 89

In that Opinion, Mr Walker made plain his view that the ancillary powers in s.12 could not justify a costs order let alone a deduction from restrained monies, *viz*.:

At the outset, it is clear to me that sec. 12 of CARA simply cannot provide statutory authority for the Commission to seek and receive portions of restrained money as some kind of contribution to the running costs, so to speak, of the Commission's functions to do with confiscation. Sec. 12 certainly does not expressly so provide. Nor can it be sensibly be read to provide such a remarkable facility by implication, let alone a reasonable or necessary one.[178]

479. The advice of the Crown Solicitor prepared on instructions from the NSWCC is of a similar view. That advice did not directly address the question of whether s.12 justified a deduction of costs from restrained monies. It was not asked to do so - the question asked was whether s12 could ground an order that the defendant pay the NSWCC's costs of the confiscation proceedings. Such costs were described in the advice as "litigation costs".

480. In any event, the Crown Solicitor advised that s.12(1) had no role to play in respect of costs and thus that s.12(1) could not justify a costs order.

481. The only other formal advice that the NSWCC had ever sought on the operation of the CAR Act – that of Mr Temby in 2000 – was silent on the question of the NSWCC taking costs out of restrained monies.

482. In his evidence before the PIC, Mr Bradley observed that NSWCC's practice of taking costs from restrained monies was ceased as of July 2008. He also conceded that the CAR Act contained *"no explicit provision"* for the taking of its costs from restrained monies.[179] Nonetheless, no NSWCC officer who gave evidence conceded that the NSWCC's taking of costs from restrained monies was unlawful in that it was non-compliant with the terms of the CAR Act and hence without power.

483. A further factor in the NSWCC's costs-taking practices was that the "costs" taken by the NSWCC were not limited to merely the costs of the conduct of the litigation, but also included the NSWCC's costs of administering its CAR Act functions. Such costs, being well outside usual party/party (or even indemnity) litigation costs, could not be legitimately awarded under any provision of the CAR Act or, for that matter, the *Civil Procedure Act 2005.*

484. Moreover, the evidence disclosed that the amounts taken by the NSWCC in any given CAR Act proceedings were arbitrarily calculated and usually bore little correlation to the actual litigation (or, for that matter, administrative) costs of the given proceedings. These two factors combined would explain how the NSWCC came to award itself such a significant amount in, for example, the Benjamin Yun matter – $20,000 for a matter that

[178] Ex 40, p.5
[179] Exhibit 130 (transcript of private hearing AYD, Phillip Bradley, 17 December 2010), p.60

was commenced and completed on the same day by the mere filing of documents in the Supreme Court registry.

485. As far as the "administrative expenses" issue is concerned, evidence before the PIC provided the following background. Toward the end 1997, during which year the NSWCC conducted a particular operation which caused a justifiable shortfall in its funds, an exchange of communications occurred between the Minister for Police and the NSWCC which explored a request by the NSWCC that it commence to pursue CAR Act litigation costs orders as a way of increasing its funding.[180]

486. Approval was subsequently given by Treasury in 1998 for the NSWCC to recover from defendants its "litigation costs" in CAR Act proceedings, in the manner in which a successful party to litigation would ordinarily be entitled. How this broadened into the NSWCC's practice of recouping its legal costs from the restrained funds, much less taking an arbitrary amount for "administrative costs" is simply not clear.

487. Mr Bradley gave evidence that at the time of these discussions he was conscious of the cost of the confiscations function of NSWCC and did not particularly distinguish in his mind between litigation costs (as would be assessed in the usual way) and the costs of administering the confiscation arm of NSWCC.

488. Mr Bradley said that the recovery of the costs of the confiscation function from restrained monies meant securing about 15% of the value of restrained property. The calculation of 15% reflected the NSWCC's purported need to recover what in some years amounted to about $3,000,000 costs of administration from $20,000,000 confiscated or forfeited monies. According to Mr Bradley's evidence, the "costs" awarded to the NSWCC by way of consent orders were paid into the general account of NSWCC, as revenue, and used by it for what he described as "discretionary expenditure"; principally, *"staff-related expenses"*.[181]

489. Because costs recovery was measured not by the costs of individual matters but by the cost of the confiscation function of the NSWCC generally, the deductions made from individual matters bore no relation to the costs of that particular case. Rather, it would relate to discretionary factors taken into account as to what might be appropriate to deduct from individual matters depending on the size of the take and the rate of recovery of costs through a financial year to make up the cost of the NSWCC's confiscation function. Some matters may therefore not have any deduction for the NSWCC's "costs". Other matters may have a deduction which would substantially exceed what might have been legitimately recovered as an assessed party/party litigation cost.

490. The former costs taking practices of the NSWCC was an area also examined by the Special Commission of Inquiry into the NSW Crime Commission ('the Patten Inquiry").

[180] Exhibits 97-108
[181] PIC Transcript, Phillip Bradley, 5 October 2011, p.657

In his Report on that Inquiry (a copy of which was in evidence before the PIC[182]), Commissioner Patten noted the nature of the NSWCC practice of providing for its own costs from restrained monies, as well as the absence of any apparent authority for that practice.

491. Whilst noting that the NSWCC's costs-taking practices did not involve corrupt conduct on the part of any individual NSWCC officer (a view with which the PIC does not disagree), the Patten Report observes (at par. 133):

There was no statutory warrant for this practice, which the [NSW Crime] Commission accepted did not relate to its actual costs in a particular matter, and this practice was possibly unlawful.

492. And further, in relation to the NSWCC's practice involving consent orders generally (at par. 320):

Consistent with what I have said earlier, the Commission had no entitlement to deduct its own costs and expenses from restrained property and the Court in the absence of appropriate evidence should not have made orders by consent. To that extent the involvement of the Commission, in light particularly of recent authority, was wrong and should not recur.

493. What emerges from the evidence before the PIC in relation to the NSWCC's past practice of deducting its own "costs" from restrained monies in settled CAR Act matters is the following:

- The only costs that could have been properly recovered would have been measured against the ordinary party/party or indemnity costs of litigation that could be recovered on an assessment of those litigation costs.
- The costs taken by the NSWCC in any particular CAR Act matter did not bear any relation to the liability of a defendant to meet the NSWCC's party/party or indemnity legal costs.
- There is no basis upon which administration costs could have been recovered as litigation costs (although there may have been some cross over between the two.
- No order of the Court could have authorised the recovery of the NSWCC's "costs" (litigation costs or otherwise) from restrained interests in property.

494. As previously noted, the practice of the NSWCC of taking "costs" from restrained monies by way of consent orders was ceased in July 2008. Nonetheless, as also noted, no NSWCC officer who gave evidence before the PIC conceded the absence of any power under the CAR Act which legitimately entitled the NSWCC to deduct administration costs. Mr Bradley, for example, said in his public hearing evidence that he adhered to the view that there existed the power to recoup NSWCC administration costs from restrained interests in property.

[182] Exhibit 119

ASSESSEMENT OF EVIDENCE RELATING TO THE SECOND LIMB

495. So far as the second limb is concerned, Counsel Assisting has submitted that neither Mr Spark nor Mr O'Connor should have imputed to them responsibility for non-compliance with the CAR Act legislation or any inappropriate defence of the subject practices. The PIC accepts the submission of Counsel Assisting in that regard.

496. It was alleged that Mr Bradley and Mr Giorgiutti had engaged in misconduct arising out of the adoption and continuance of practices that were not authorised by the relevant legislation.

497. Neither the bypassing of the Supreme Court with respect to applications for reasonable legal expenses under the CAR Act nor the recovery by the NSWCC of its "legal/administrative" expenses was authorised by law. In the opinion of the PIC, there is nothing in the legislation that could lead to the legal conclusion that s.16A was directed only to contested applications for reasonable legal expenses, and had no application to uncontested applications. Nor was there any support to be found in s.12 for the view that the NSWCC could recoup its litigation, much less its administrative, expenses out of restrained funds.

498. Counsel Assisting has submitted that the NSWCC's misinterpretation and misunderstanding of the meaning and application of s.10(5), s.16A and s.12 were so gross that those responsible for it could not simply be mistaken. The practices were, it was submitted, *"the product of institutional and cultural behaviour and opinions inconsistent with those of a public officer in senior positions in the government instrumentality"*. The submission was that *"those behaviours and opinions were at least in breach of ordinary obligations of prudence and accountability. They were at least negligent and approximated recklessness. The determination to pursue a goal exceeded clear and obvious obligations of public office by both Mr Bradley and especially Mr Giorgiutti."*

499. Both practices were followed for many years. The practice of the NSWCC recouping its costs from restrained funds ceased in 2008. The practice of not placing matters before the Supreme Court when reasonable legal expenses were claimed ceased after the public hearings had completed, albeit the primary reason for this appears to have been the decision of the Supreme Court as to the operation of s.16A in NSWCC v Cook[183].

500. The practice of the NSWCC of recovering, out of restrained funds, its legal/administrative expenses has received no support from any lawyer who gave an opinion in the matter. The Crown Solicitor, acting for the NSWCC, has opined that the practice was unlawful. Mr Walker in his opinion came to the same conclusion.

[183] [2011] NSWSC 1348

501. Similarly, there are no legal opinions (outside the views of lawyers in the NSWCC) supporting the view that s.16A of the CAR Act has no application to consent orders for reasonable legal expenses. Mr Walker has no doubt about the matter. Mr Temby gave an advice in 2000 which, properly understood, did not support the view that s.16A had no application to consent orders.

502. Both Mr Bradley and Mr Giorgiutti have given sworn evidence to the effect that at all relevant times they believed that the practices the subject of the PIC investigation were authorised by the relevant legislation. As the investigation progressed it became clear that their views stood alone and were legally incorrect. Both had some reluctance in accepting correction. For example, even after receiving both the advice of the Crown Solicitor (acting for the NSWCC) and that of Mr Walker that s.12 did not authorise the practice of the NSWCC recouping its legal/administrative outgoings from restrained funds, both still maintain that the practice was lawful.

503. The opinion of Mr Walker concerning the unlawfulness of the practice of bypassing the Supreme Court when providing reasonable legal expenses from the restrained fund by consent was rejected without any reasons being given. The unlawfulness of the practice was only recognised publicly by the NSWCC after the Supreme Court had come to the same view as Mr Walker in its decision in NSWCC v Cook.

504. As to the amounts of defendant's "reasonable legal expenses" that were consented to by the NSWCC, in none of the matters examined by the PIC was there any attempt by officers of the NSWCC to determine the nature of the legal services to be provided and no attempt to quantify the amount. As was stated in evidence, the NSWCC relied on defendants' lawyers to provide a fair and honest estimate of future legal costs. This, apparently, did not include raising the question of what were the services that were to be provided. When asked, for example, whether the costs were calculated on the basis of a defended trial in one of the matters Mr Spark said *"no, those costs are calculated on the basis of what the relevant legal representative is seeking those expenses for"*.

505. Mr Walker expressed his opinion about the entitlement for reasonable legal expenses pursuant to s.10B(3). He pointed out that the expenses must be for a service that is both legal and reasonable. Further, he said evidence of reasonableness by way of explanation or demonstration is required under s10B(3) for a number of reasons, not the least of which being that the defendant and the defendants lawyers have a personal interest in the expense being larger rather than smaller. In his view *"reliance on the statement of a self-interested legal practitioner that a particular sum is "reasonable" says nothing to bring the claim within power to grant".*

506. In each of the matters investigated by the Commission the "reasonable legal expenses" consented to by the Crime Commission grossly exceeded the amount actually expended on relevant legal services. Moreover, no attempt was made by the Crime Commission to

recover the unexpended portion of the "reasonable legal expenses". This may be because (as the Patten report notes) the Crime Commission believed it had no further interest in the matter other than to make the sum of money available to a defendant and any surplus belonged to that person who was alleged to have had an interest in the property retained. In each of the matters investigated by the PIC, the defendants claimed they had no interest in the property restrained.

507. In each of the CAR Act matters examined by the PIC, had regard been had to s.16A not one of the applications would have been granted because there were no sworn statements of affairs disclosing the defendants' interests in property and liabilities as required by s16A(1)(c). Furthermore, in each matter there was no attempt to enquire whether the applicant could meet expenses out of his/her unrestrained property as required by s16A(1)(a).

508. Most significantly, perhaps, in each case there could be virtually no doubt that the restrained fund out of which the reasonable legal expenses were paid was clearly "illegally acquired property". Telling in this respect is that in each case that very fund was the "proceeds of crime" in respect of the possession of which each of the defendants had been criminally charged. Accordingly, pursuant to s.16A(1)(b), none of those funds could have been made available for s.10(5)(b) reasonable legal expenses. On this point the PIC notes that s.16A(1)(b) suggests an onus upon the NSWCC to in fact object to the release of restrained monies for legal expenses in such circumstances.

509. The NSWCC could hardly have been in any doubt that the restrained monies in each case were the proceeds of crime. Regardless, it chose to overlook that fact, to ignore s.16A(1)(b) (when it should have in fact sought to enforce that subsection), and to return some of those tainted monies back to the respective defendants. The suggested rationale of this procedure was to expedite the finalisation of the proceedings at a minimum of effort and expense to the NSWCC. To have proceeded as it did was not only legally illogical, but it effectively undermined the very objects of the legislation that the NSWCC was purporting to administer.

510. Accordingly, there is much to be said for the criticism made by Counsel Assisting concerning what he described as "the institutional and cultural behaviour" which appeared to preclude acceptance of clear and unambiguous legal advice which ran contrary to the ambitions of members of the NSWCC.

511. Ultimately, however, the question is whether the continued maintenance of the unlawful practice of bypassing the Supreme Court amounted to "misconduct" as that word must be understood in the context of the PIC Act definition of "misconduct of a Crime Commission officer".

512. Both Mr Bradley and Mr Giorgiutti claimed, in essence, that a proper interpretation of the legislation leads to the conclusion that s.16A has no application to uncontested applications for reasonable legal expenses. Mr Bradley referred to receiving advice given by others. Whether that answer was intended to refer to Mr Temby's opinion is unclear, although in the final submission of the NSWCC on behalf of Mr Bradley, Mr Temby "s opinion was relied on.

513. Mr Giorgiutti gave a number of explanations concerning the lawfulness of the practice. His evidence has been set out in some detail above. It suggests a robust, if somewhat erratic, approach to interpretation of the statute in which the wording of the law was less important than ultimate objectives. For example, he stated in evidence that he believed there were other "devices" which could achieve the same result as the present practice. The PIC does not propose to deal with these matters because, although he has posited alternatives to compliance with s.16A, there is no suggestion that these other devices were actually employed.

514. Mr Bradley and Mr Giorgiutti, in evidence and in submission, placed great reliance on the following matters in support of their arguments that, even if their interpretation was legally incorrect, it did not amount to misconduct:

i. the longevity and consistency of the practice (or practices) without criticism

ii. the opinion of Mr Temby in 2000 which, it was claimed, gave support to the legality of the practices

iii. the attitude and practice of the Supreme Court in contested applications which were ultimately settled, and in matters in which orders were made by the Supreme Court without its own enquiry into the matters the subject of s.16A

iv. that Mr Temby's argument before the Supreme Court in *NSWCC v Cook* to the effect that s.16A did not apply to consent orders (being an argument put to the Court by an esteemed, senior member of the Bar) provided a basis for justifying the NSWCC's views on the issue, even if they were legally incorrect.

515. This report has already identified why, properly understood, Mr Temby's 2000 opinion did not endorse the practices the subject of this investigation. His opinion was predicated upon non-compliance with the statute and, particularly, as to whether orders of the Supreme Court made in those circumstances were nonetheless valid and enforceable.

516. Nonetheless, it was submitted by the NSWCC that there were aspects of the opinion which could lead to the interpretation adopted by it that the practices, particularly the practice with respect to reasonable legal expenses, were not unlawful. This was said to be by virtue of the fact that Mr Temby mentioned, without any adverse comment, both the NSWCC's cost-taking practice and its practice of non-compliance with s.16A.

517. Under the heading *"Present Practice"* (being NSWCC's practice with respect to consent orders providing for reasonable legal expense deductions) it was opined by Mr Temby in his 2000 opinion that orders which had not been presented to a Judge conformably with s.16A were nonetheless good and valid orders and enforceable as such. In the opinion, it was said that s.16A did not constrain the NSWCC from negotiating consent orders for the payment of reasonable legal expenses. Whilst it may have been correct to suggest that s.16A did not necessarily constrain *negotiations* per se, as opposed to the making of an order by the Court pursuant to s.10(5)(b) (which, from the terms of that subsection, s.16A clearly is intended to constrain), the PIC acknowledges that senior NSWCC officers may have interpreted that suggestion as an endorsement of the prevailing NSWCC practices relating to consent orders for reasonable legal expenses.

518. In addition to the advice of Mr Temby, reliance was also placed by Mr Bradley and Mr Giorgiutti on the fact that when matters went before the Supreme Court as contested matters and then settled either shortly before the hearing, or after the hearing had begun, the Supreme Court was not always consistent in its view as to what had to be proved before consent orders could be lawfully made, and that on occasions no information was required to be put to the Court with respect to one or other of the matters referred to in s.16A.

519. The third of the matters listed above misses the point because the issue before the investigation was not how the Supreme Court dealt with applications, but whether the NSWCC's practice of avoiding Supreme Court scrutiny was lawful.

520. As to the fourth matter, in *NSWCC v Cook* Mr Temby was putting an argument to the Court on behalf of the NSWCC and no more. Nonetheless, both Mr Bradley and Mr Giorgiutti relied on these matters in support of their belief as to the lawfulness of the practices. It was put to them that their views were wrong, but it was not put to them that their views were not honestly held by them.

521. Both Mr Bradley and Mr Giorgiutti were examined extensively concerning their understanding of the relevant legislation. It was not put to Mr Bradley or Mr Giorgiutti when giving evidence, or later in submissions, that their opinions were otherwise than genuinely held concerning the lawfulness of the NSWCC's practice of dealing with uncontested applications for reasonable legal expenses and the NSWCC's practice of supplementing its own budget out of restrained funds. Indeed, when Mr Giorgiutti was giving evidence a suggestion that he was not telling the truth when he gave his understanding of the meaning of the legislation was expressly disclaimed by Counsel Assisting.

522. The question remains whether the PIC should be of the opinion that Mr Bradley and/or Mr Giorgiutti had engaged in misconduct because of their erroneous views concerning the lawfulness of the practices undertaken over the years. The PIC is unaware of any binding

authority as to what the term "misconduct" means as defined in the relevant legislation. It is, however, prepared to adopt the view in the *Corpus Juris Secundum*, Vol. 58, 1948 at page 118 where the courts of the United States took the view *"both in law and in ordinary speech the term misconduct usually implies an act wilfully done with the wrong intention and conveys the idea of intentional wrongdoing. The term implies fault beyond error of judgement; a wrongful intention and not merely an error of judgement."* Moreover, that view seems to have been adopted in a number of Australian cases dealing with what amounts to "misconduct" in disputes between employer and employee.

523. The meaning and application of s.10(3)(b) and s16A(1) did not endorse or authorise the NSWCC's "reasonable legal expenses" practice, nor did s.12 endorse or authorise its own "costs"-taking practice. That being unambiguously so, the question arises, then, as to why the implementation of the practices would not amount to "misconduct" by those responsible for those practices, as that word must be relevantly understood in the context of s.5B of the PIC Act.

524. The circumstance that both Mr Bradley and Mr Giorgiutti were ignorant of the law and appeared to be enthusiastic to accept any interpretation which advanced what they saw to be the ultimate purpose of the legislation, i.e., to maximise the amount of tainted money being forfeited to the State would not, of itself, amount to misconduct. In order to form an opinion otherwise, the PIC would need to be satisfied to the requisite degree of proof that both had told untruths under oath and that both had behaved with reckless indifference to legal propriety.

525. Conformably with these tests, in order to conclude that either had engaged in conduct amounting to "misconduct of a Crime Commission officer" there would have to be established something beyond ignorance or mere error of judgement. The PIC would have to be satisfied that Mr Bradley and Mr Giorgiutti understood the requirements of the statute but knowingly and intentionally ignored those requirements.

526. The PIC has already referred to the absence of any direct allegation that either Mr Bradley or Mr Giorgiutti was untruthful in their belief as to the lawfulness of the NSWCC's practices.

527. Similarly, there is no suggestion that either Mr Bradley or Mr Giorgiutti obtained any personal financial gain from the CAR Act practices the subject of complaint.

528. The practices were followed over a long period of time. The PIC has inferred that successive governments were aware of them (although they may not have been aware of the details) and that this was known to relevant officers of the NSWCC. Except for the advice of Mr Temby in 2000 (and opinion recently expressed during Operation Winjana) the NSWCC received no direct legal advice that the practices were not lawful. Mr Temby thought they were non-compliant but that the resulting orders were valid and enforceable nonetheless. As mentioned earlier Mr Temby's advice, in the form it was given, may

have given comfort to people seeking support for the views that the practices were not unlawful.

529. In these circumstances the longevity of the practices is relevant to an assessment as to whether any officer had engaged in misconduct when implementing them.

530. For the reasons set out above, the Commission is of the opinion that it has not been established that Mr Bradley or Mr Giorgiutti had engaged in "misconduct of a Crime Commission officer" within the meaning of s.5B of the *Police Integrity Commission Act 1996.*

6 AFFECTED PERSONS

531. Pursuant to s.96(2) of the *Police Integrity Commission Act 1996 ('the PIC Act")*, the Commission is required to furnish a report to Parliament in relation to matters as to which the Commission has conducted a public hearing.

532. Subsection 97(2) of the PIC Act requires the Commission to include in any such report to Parliament a statement in respect of each "affected" person as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) the prosecution of a person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary offence,

(c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.

534. Subsection 97(3) provides that an "affected" person is 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.

535. Additionally, subsection 16(1)(a) of the PIC Act provides that the Commission may form opinions as to whether misconduct of a Crime Commission officer has, or may have, occurred. These opinions help to inform whether any recommendations should be made or opinions expressed as to whether consideration should or should not be given to the prosecution of a person for criminal or disciplinary offences.

536. The expression *"misconduct of a Crime Commission officer"* is not exhaustively defined by the PIC Act. It nevertheless includes the following types of conduct (per section 5B(2) of the PIC Act):

(2) **Examples**

Misconduct of a Crime Commission officer can involve (but is not limited to) any of the following:

(a) the commission of a criminal offence by a Crime Commission officer,

(b) any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law,

(c) corrupt conduct within the meaning of the Independent *Commission Against Corruption Act 1988* involving a Crime Commission officer.

536. As alluded to earlier in this report, before expressing any opinion that misconduct has, or may have occurred (per section 16(1) of the PIC Act), or that in all the circumstances it is of the opinion that consideration should be given to the prosecution of any person for a specified criminal offence (per 97(2)(a) of the PIC Act), the Commission should be comfortably satisfied of the relevant facts applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour said, at p 361:

"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".

Lou NOVAKOVIC

537. Lou Novakovic is an affected person because he is the subject of the following substantial allegations:

- that he acted improperly, to a degree amounting to an abuse of office, in recommending the commencement by the NSWCC of CAR Act proceedings in order to benefit a client of his partner, Ms Sadiq ("the Shanghai matter")
- that he wilfully failed to disclose the circumstances of his relationship with Ms Sadiq which amounted to a conflict of interests with his position as an officer of the NSWCC, to management of the NSWCC
- that he improperly assisted Ms Sadiq in respect of maximising the "reasonable legal expenses" that she could obtain from the NSWCC in CAR Act matters
- that he assisted Ms Sadiq in concealing of monies for improper purposes
- that he gave sworn evidence before the Commission which was knowingly false or misleading in a material particular.

538. On its assessment of the evidence before it, and for the reasons set out earlier in this report, the Commission is of the opinion that Mr Novakovic has engaged in misconduct of a Crime Commission officer in respect of the matters referred to above.

539. The Commission is of the opinion that consideration **should** be given to the prosecution of Mr Novakovic for the common law offence of "misconduct in public office" in relation to the Shanghai matter and for the offence against s.107 of the PIC Act of "knowingly give evidence before a hearing of the Police Integrity Commission which was false or misleading in a material particular".

540. As Mr Novakovic is no longer an officer of the NSWCC, it is unnecessary for the PIC to express an opinion as to the taking of action against Mr Novakovic for a specified disciplinary offence.

541. As Mr Novakovic is not, and was not at all relevant times, a police officer, it is unnecessary for this report to address the matters set out in s.97(2)(c) and (d) of the PIC Act.

Phillip Alexander BRADLEY

542. Phillip Bradley is an affected person because he is the subject of the following substantial allegations:

- that he failed to act upon apparent issues of conflict and possible issues of abuse of office by Mr Novakovic in relation to "the Shanghai matter"
- that he was aware of, and allowed, systemic non-compliance by the NSWCC with the provisions of the CAR Act relating to the provision of legal expenses to defendants from restrained interest in property
- that he allowed ongoing non-compliance with s.10(5)(b) and s.16A of the CAR Act after receipt of the opinion of Mr Temby in August 2000 which suggested that the NSWCC had been non-compliant
- that he failed to establish by authoritative means, and with the certainty appropriate for a public authority exercising coercive powers, the powers and obligations available to and imposed upon NSWCC under the CAR Act to ensure systemic compliance by the NSWCC
- that he allowed the payment of s10(5)(b) legal expenses to defendants without appropriate mechanisms of control and accountability
- that he caused or allowed deductions of funds from restrained interests in property to be paid to the NSWCC for legal/administrative expenses when it was clear from the provisions of the CAR Act that there existed no power to do so (limb two).

543. On its assessment of the evidence before it, and for the reasons set out earlier in this report, the Commission is **not** of the opinion that Mr Bradley has engaged in misconduct of a Crime Commission officer in respect of the above allegations.

544. Accordingly, the Commission is of the opinion that consideration should not be given to prosecution of Mr Bradley for a specified criminal offence nor to the taking of action for a specified disciplinary offence.

545. As Mr Bradley is not, and was not at any relevant time, a police officer, it is unnecessary for this report to address the matters set out in s.97(2)(c) and (d) of the PIC Act.

Jonathan Lee SPARK

546. Jon Spark is an affected person because he is the subject of the following substantial allegations:

- that he failed to investigate issues of conflict and possible abuse of power in the email of 9 January 2007 from Mr Novakovic and thereafter to counsel or discipline him in an appropriate fashion
- that he failed to respond to Mr Stewart's letter of 26 February 2008 and the accompanying statement[184] by either reporting the matter to Mr Giorgiutti or alternatively, by discussing the matter with Mr Bradley or at a management meeting.

547. On its assessment of the evidence before it, and for the reasons set out earlier in this report, the Commission is **not** of the opinion that Mr Spark has engaged in misconduct of a Crime Commission officer in respect of the above allegations.

548. Accordingly, the Commission is of the opinion that consideration should not be given to prosecution of Mr Spark for a specified criminal offence nor to the taking of action for a specified disciplinary offence.

549. As Mr Spark is not, and was not at any relevant time, a police officer, it is unnecessary for this report to address the matters set out in s.97(2)(c) and (d) of the PIC Act.

John Michael GIORGIUTTI

550. John Giorgiutti is an affected person because he is the subject of the following substantial allegations:

- that he was aware of, and allowed, systemic non-compliance by the NSWCC with the provisions of the CAR Act relating to the provision of legal expenses to defendants from restrained interests in property
- that he allowed the payment of s10(5)(b) legal expenses to defendants without appropriate mechanisms of control and accountability
- that he caused deductions of funds for NSWCC purposes from restrained monies when it was apparent from an examination of the CAR Act that there was no power to do so and when, in any event, it was apparent that the basis of quantum was not permissible litigation costs
- that he failed to establish correctly the parameters of NSWCC powers and obligations under the CAR Act and ensure that they were pursued appropriately and in compliance with the relevant provisions of the CAR Act

[184] Exhibit 5C

- that he allowed ongoing non-compliance with s.10(5)(b) and s.16A of the CAR Act after receipt of the opinion of Mr Temby QC in August 2000 which suggested that the NSWCC had been non-compliant
- that he failed to establish by authoritative means, and with the certainty appropriate for a public authority exercising coercive powers, the powers and obligations available to and imposed upon NSWCC under the CAR Act to ensure systemic compliance by NSWCC.

551. On its assessment of the evidence before it, and for the reasons set out earlier in this report, the Commission is **not** of the opinion that Mr Giorgiutti has engaged in misconduct of a Crime Commission officer.

552. Accordingly, the Commission is of the opinion that consideration should not be given to prosecution of Mr Giorgiutti for a specified criminal offence nor to the taking of action for a specified disciplinary offence.

553. As Mr Giorgiutti is not, and was not at any relevant time, a police officer, it is unnecessary for this report to address the matters set out in s.97(2)(c) and (d) of the PIC Act.

Salina SADIQ

554. Salina Sadiq is an affected person because she is the subject of the following substantial allegations:

- that she over-charged clients for legal services provided by her, in breach of her professional obligations under the provisions of the *Legal Profession Act 2004*
- the she made unjustified and excessive claims for costs and misled clients in relation to those costs
- that she knowingly concealed matters relating to her financial and/or business affairs in order to avoid her taxation and/or professional obligations and/or liabilities
- that she was an accessory to the abuse of office of her partner, Lou Novakovic, in relation to the Shanghai matter.

555. Ms Sadiq is not an officer of the NSWCC. She is, however, a legal practitioner and officer of the Supreme Court of NSW. Accordingly, Ms Sadiq is required to practice in accordance with all applicable professional obligations, and, in particular, those arising under the *Legal Profession Act 2004* and *Legal Profession Regulation 2005*.

556. In all the circumstances, on the evidence before it the Commission is of the opinion that consideration should **not** be given to the prosecution of Ms Sadiq for a specified criminal offence.

557. Whilst it is beyond the scope of the PIC's statutory functions to express an assessment or opinion as to whether Ms Sadiq's practices amounted to conduct short of that required of a legal practitioner, it is of the view that there was evidence before it which warrants further examination in that regard by the relevant disciplinary body.

558. Accordingly, the PIC is of the opinion that consideration **should** be given to the taking of action against Ms Sadiq pursuant to Chapter 4 of the *Legal Profession Act 2004* in relation to possible professional misconduct, or possible unsatisfactory professional conduct. To that end, it is the intention of the PIC to refer the evidence to the Office of the Legal Services Commissioner.

7 MATTERS ARISING

559. Following the Supreme Court decision in *NSWCC v Cook*[183] the NSWCC acknowledged the unlawfulness of its practices with respect to defendants claims for reasonable legal expenses under the CAR Act as it then stood.

560. Although the Crime Commission is yet to publicly acknowledge the unlawfulness of its former practice of recouping its legal/administrative expenses out of restrained funds, the PIC assumes it will have regard to the legal opinions referred to earlier in this report (including that of the Crown Solicitor acting on its behalf) and not seek to revive that practice.

561. At the time of preparation of this report Parliament had recently passed the *Crime Commission Act 2012 ("the Act')*, the provisions of which have now commenced. The Act effects, largely in response to a number of the recommendations contained in the Patten report, a revised re-enactment of the NSWCC's governing legislation, as well a number of miscellaneous amendments to related legislation, including the CAR Act.

562. The Act does not make provision for the NSWCC's recouping of its legal and administrative expenses out of restrained funds, nor does it relieve the NSWCC of a requirement to allow defendants only *reasonable* legal expenses. But the provisions of the Act no longer require the NSWCC to be constrained by s16A with respect to consent orders for reasonable legal expenses under s 10B(3)(b)[184]. That is to say, the effect of the Act will be to allow the making of enforceable orders for reasonable legal expenses without regard to the restrictions set out in s16A where those orders are sought by consent between the NSWCC and the relevant defendant.[185]

563. If, however, the CAR Act matter is contested and the defendant's application for reasonable legal expenses is made to the Supreme Court, the Court will still be precluded from making the relevant order if any of the prohibitions set out in s.16A(1) are made out.

564. It is not easy to understand why the NSWCC, in uncontested matters, should no longer be restricted by the constraints referred to in s.16A while those restrictions will still constrain the Supreme Court in matters which are contested.

565. Moreover, it is not entirely clear what would occur if a contested matter came before the Supreme Court, but before the hearing commenced, or during the hearing, the parties agreed to settle the matter by the entry of orders by consent. The question arises: would the Supreme Court be obliged to enter that order by consent even though by that time it had information before it that would have precluded the Court itself from making the order if the matter remained contested?

566. In relation to orders sought to be entered by consent under the CAR Act, the Act requires the Management Committee of the NSWCC to establish guidelines *"with respect to*

[183] [2011] NSWSC 1348
[184] i.e., the former s.10(5)(b)
[185] See s.16A(1A) and s.62(3) of the CAR Act as amended by the *Crime Commission Act 2012*

the negotiation by the [NSWCC] of the terms of agreements regarding orders made by consent under the Criminal Assets Recovery Act 1990"[186] The Act further requires that those guidelines must be complied with. The Act is, however, silent as to the content of those guidelines.

567. In the opinion of the PIC, the guidelines should explicitly address the matters set out in s.16A. The PIC assumes that the intention underlying the removal of the need for compliance with s.16A in respect of "reasonable legal expenses" orders sought by consent is to facilitate a more expedient and cost-effective approach to uncontested matters, rather than to dispense absolutely with the need to consider the matters addressed by s.16A. Accordingly, the fact that the s.16A(1) matters will now no longer be required to be considered by the Supreme Court when entering orders by consent should not mean that those matters are not to be considered by the NSWCC at all.

568. It would be unfortunate if, by a combination of inadequate guidelines and the additional power given to the NSWCC under the new legislative regime, the practices that were exposed in the Operation Winjana investigation were to continue.

569. The PIC has assumed that it is not the purpose of the revised legislation to permit the NSWCC to behave as it has in the past with respect to applications for reasonable legal expenses, with no attempt being made to identify the services being subsidised, allowing sums greatly in excess of those which were actually spent and having no apparent interest in ensuring that unexpended monies were returned to the restrained fund.

570. In the course of submissions Counsel Assisting pointed to the likely perceptions of impropriety that arise from the NSWCC practices identified in Operation Winjana, even if there be no actual impropriety.

571. For example, it is to be recalled that in one of the cases examined ("the Shan Chan matter') two lawyers (Ms Sadiq and Ms Sten) were allowed a total $200,000 for four clients out of the restrained funds (i.e., $50,000 each). Three of those clients subsequently had the criminal charges against them withdrawn, and the legal services required for the related CAR Act proceedings against each amounted to little more than conference attendances and the signing of documents. The amount of $50,000 per client was grossly excessive in the circumstances.

572. In another of the matters examined ("the Benjamin Yun matter'), the lawyer for the defendant (Ms Sadiq) was allowed $70,000 out of the restrained monies for legal services in relation to a plea of guilty to a summary offence in the Local Court and an uncontested CAR Act application. Again, the amount allowed for "reasonable legal expenses' was thus greatly in excess of the amount of expenses actually incurred.

[186] Per s.57(3)(a) of the *Crime Commission Act 2012*

573. Clearly, circumstances such as those above could lead to a perception that there were additional considerations at play beyond simply making available an amount for reasonable legal expenses. The PIC acknowledges that much of the work of the NSWCC is necessarily done in secret. However, arrangements made between the NSWCC and defendants' lawyers which result in public orders being made by the NSW Supreme Court demand the maximum amount of transparency and accountability in order to avoid perceptions of impropriety.

574. Section 16B of the CAR Act provides for the making of regulations which may fix the maximum amount of legal expenses that can be met out of restrained property. Since the commencement of the CAR Act in 1990, no such regulations have been made. The PIC therefore recommends that regulations be made, in accordance with s.16B, which fix the amount of "reasonable legal expenses' that can be paid out of property the subject of a restraining order and to establish the maximum allowable costs for any identified service.

575. The making of regulations pursuant to s16B of the CAR Act would regulate the maximum amount of legal expenses that may be met out of restrained property, but they would say nothing as to how that allowance is to be expended. Accordingly, the PIC additionally recommends that the guidelines to be established by the NSWCC Management Committee supplement the regulations by identifying with some precision the allowable legal services in any given case in respect of which an allowance may be paid from restrained property (e.g., a plea, a trial, making representation to a prosecuting authority, etc).

576. Moreover, once identified, there should be an assessment of the work proposed to be undertaken in respect of which an allowance from restrained property is sought. In this respect, the Management Committee's guidelines should also remind the NSWCC that the regime permits more than one application for reasonable legal expenses should there be uncertainty about the legal services to be provided in the first instance.

577. The PIC recommends that the guidelines require that full and accurate records be maintained by the NSWCC of applications to it for reasonable legal expenses, as well as the reasons of the NSWCC for its decisions in relation to those applications.

578. The PIC further recommends that the guidelines require the NSWCC to monitor the way allowances are expended. Moreover, the guidelines should also direct attention to the return of unexpended portions of allowable expenditure (as, for example, where a proposed trial subsequently becomes a plea).

579. Finally, the PIC recommends that the NSWCC report annually to the Management Committee in respect of the recommendations contained in this report, and further, that the Inspector of the NSWCC (to be appointed pursuant to Part 4 of the *Crime Commission Act 2012*) undertake annual audits of agreements entered into between the NSWCC and persons whose interests in property are, or have been, subject to an order under the CAR Act.

8 APPENDICES

APPENDIX 1 - THE ROLE AND FUNCTIONS OF THE POLICE INTEGRITY COMMISSION

The Commission was established under the *Police Integrity Commission Act 1996* (the PIC Act) on the recommendation of the Royal Commission into the New South Wales Police Service. The principal functions of the Commission, at the time of its commencement, were set out in section 13 of the PIC Act, as follows:

(a) to prevent police misconduct,

(b) to detect or investigate, or manage other agencies in the detection or investigation of, police misconduct,

(c) (repealed)

(d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.

In January 2007 the PIC Act was amended to provide for a system of investigation, referral and oversight of complaints against certain members of the NSW Police Force who are not police officers. Sections 5A and 13A were inserted into the Act. Section 5A defines corrupt conduct of administrative officers as any conduct of an administrative officer that is corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*.

As far as practicable, the Commission was required to turn its attention principally to serious corrupt conduct of administrative officers (subsection 13A(2)).

In July 2008 the Act was further amended to extend the Commission's jurisdiction to include the detection, investigation and prevention of misconduct of officers of the New South Wales Crime Commission. Sections 5B and 13B were inserted into the Act.

"Misconduct of a Crime Commission officer" is defined in section 5B, which reads as follows:

5B Misconduct of Crime Commission officers

(1) ***Definition***

For the purposes of this Act, ***misconduct*** *of a Crime Commission officer means any misconduct (by way of action or inaction or alleged action or inaction) of a Crime Commission officer:*

(a) whether or not it also involves participants who are not Crime Commission officers, and

(b) whether or not it occurs while the Crime Commission officer is officially on duty, and

(c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

(2) **Examples**

Misconduct of a Crime Commission officer can involve (but is not limited to) any of the following:

(a) the commission of a criminal offence by a Crime Commission officer,

(b) any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law,

(c) corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a Crime Commission officer.

In May 2012 further amendments were made to the PIC Act which included a consolidation of the Commission's various functions under a single heading, and the introduction of the umbrella term *"officer misconduct'*. Accordingly section 13 was amended to read:

13 *Principal functions*

(1) The principal functions of the Commission are as follows:

(a) to prevent officer misconduct,

(b) to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct,

(c) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.

(2) The Commission is, as far as practicable, required to turn its attention principally to serious officer misconduct.

(3) The reference in this section to **managing** *other agencies in the detection or investigation of officer misconduct is a reference to the provision by the Commission of detailed guidance in the planning and execution of such detection or investigation.*

(4) The reference in this section to **overseeing** *other agencies in the detection or investigation of officer misconduct is a reference to the provision by the Commission of a lower level of such guidance, relying rather on a system of guidelines prepared by it and progress reports and final reports furnished to it.*

(5) In managing or overseeing other agencies for the purposes of this section, the Commission does not have a power of control or direction, and any such management or oversight is to be achieved by agreement. However, it is the duty of members of the NSW Police Force and Crime Commission officers to co-operate with the Commission in the exercise of its management and oversight functions and any other functions of the Commission.

(6) However, nothing in subsection (2), (3), (4) or (5):

(a) affects the capacity of the Commission to exercise any of the functions referred to in subsection (1), or

(b) provides a ground for any appeal or other legal or administrative challenge to the exercise by the Commission of any of those functions.

Sections 13A - 13C were repealed.

"Officer misconduct", as that term was inserted into section 13, is defined in the PIC Act as follows:

> **officer misconduct** *means police misconduct, corrupt conduct of an administrative officer or misconduct of a Crime Commission officer.*

INVESTIGATIONS

In matters where the Commission determines to carry out an investigation (whether or not in the nature of a preliminary investigation), it has a wide range of powers at its disposal in order to acquire information. For example, the Commission may:

- require public officials and public authorities to produce statements of information (section 25)
- require any person (whether or not a public official or public authority) to produce documents or other things (section 26)
- enter public premises (section 29)
- obtain search warrants (section 45)
- obtain warrants under the *Telecommunications (Interception and Access) Act 1979*;
- obtain warrants under the *Surveillance Devices Act 2007*
- require persons to attend and give evidence before a hearing of the Commission, either in public or in private (section 38).

REPORTS TO PARLIAMENT

When does the Commission Submit a Report to Parliament Regarding an Investigation?

In circumstances where the Commission has conducted a public hearing for the purposes of an investigation, the Commission must prepare a report to Parliament in respect of the matter as to which the public hearing related (subsection 96(2)). The Commission may also prepare a report to Parliament in relation to any other matter that has been, or is, the subject of an investigation (subsection 96(1)). A report to Parliament must be furnished to the Presiding Officer of each House of Parliament as soon as possible after the Commission has concluded its involvement in the matter, unless it is considered desirable, in the public interest, for the making of the report to be deferred (subsections 96(3), (4) and (5)).

COMPONENTS OF A REPORT TO PARLIAMENT REGARDING AN INVESTIGATION

A report to Parliament in relation to an investigation will generally contain a number of components. Under subsection 97(1) of the PIC Act the Commission is authorised to include statements as to any of its assessments, opinions and recommendations, and the reasons for any of its

assessments, opinions and recommendations. The Commission must then, in respect of each "affected person", make a statement as to whether or not consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences and, in the case of police officers, certain other forms of disciplinary action (subsection 97(2)). An "affected person" is 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" (subsection 97(3)).

THE COMMISSION'S APPROACH TO THE ASSESSMENT OF INFORMATION AND EVIDENCE

In forming the assessments, opinions and recommendations referred to above, the Commission may not make a finding or form an opinion that a specified person is guilty of, or has committed, is committing, or is about to commit a criminal or disciplinary offence (subsection 16(2)(a)). The Commission may form opinions as to whether police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur (subsection 16(1)(a)). However it is important to bear in mind that the Commission is an investigative agency, it is not a court or tribunal in the sense that it may determine whether a person has committed a criminal or disciplinary offence.

Accordingly the PIC Act deems permissible opinions concerning police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer not to be findings or opinions that the person is guilty of or has committed, or is committing or is about to commit a criminal offence (subsection 16(3)). That said, the Commission recognises that such an opinion may in some circumstances take on the appearance of a finding of a court or tribunal. The Commission's approach is, as far as possible, to avoid the expression of opinions that may be characterised as findings by a court.

The standard of proof applied by the Commission to the formation of an opinion as to whether a person has engaged in police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer is the balance of probabilities. Such an opinion will be reached having regard to the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336; that is, the more serious the matters under consideration, the more stringent will be the requisite degree of satisfaction.

RECOMMENDATIONS AND OPINIONS THAT CONSIDERATION BE GIVEN TO THE PROSECUTION OF A PERSON FOR A CRIMINAL OR DISCIPLINARY OFFENCE

If, in the Commission's opinion, the available evidence is sufficient to establish a prima facie case in respect of a criminal or disciplinary offence then, except in one very limited circumstance discussed below, it is the Commission's approach to recommend that consideration should be given to the prosecution of a person for a specified criminal or disciplinary offence. Such a recommendation will be made to the relevant prosecutorial authority, for example, the New South Wales Director

of Public Prosecutions. The Commission will not have regard to considerations, such as whether there is a reasonable prospect of conviction, or public policy considerations when deciding whether to make such a recommendation. These, and other discretionary considerations, are appropriately matters for the relevant prosecutorial authority. That said, the Commission may express opinions as to the veracity of evidence received from individual witnesses.

The circumstances in which the Commission may, in the exercise of its discretion, decline to furnish or defer furnishing a brief of evidence to the relevant prosecutorial authority are:

- where it is considered that to do so is likely to be counterproductive to the Commission's pursuit of its principal statutory functions; or
- where the relevant person has already been considered for or has been prosecuted in relation to the same, or substantially the same, subject matter and evidence, and it would be unnecessary or duplicitous for the Commission to make a recommendation that consideration should be given to additional prosecutions.

STATEMENTS REGARDING "AFFECTED PERSONS"

Subsection 97(2) of the Act requires that:

The report must 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) the prosecution of a person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary offence,

(c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.

OTHER TYPES OF RECOMMENDATIONS AND OPINIONS

If the Commission considers it appropriate in the circumstances, a report to Parliament may also include recommendations for the taking of other action. Such recommendations may, for example, relate to the need for law reform or for changes to policies and procedures affecting the way in which police, Crime Commission officers, or other persons carry out their respective duties and responsibilities.

APPENDIX 2 - LIST OF WITNESSES

(* denotes private hearing)

Witness	Date of Evidence
Stuart BELL	27 October 2010*
Alexandra BISHOP	14 December 2010*
Phillip BRADLEY	17 December 2010* 5 October 2011
Alison BROOK	15 December 2010*
John GIORGIUTTI	28 October 2010* 16 December 2010* 4-5 October 2011
Lou NOVAKOVIC	25-26 October 2010* 19 September 2011 5 October 2011
Tim O'CONNOR	16 December 2010* 21 September 2011
Paul O'NEILL	14 December 2010*
Salina SADIQ	26 October 2010* 29 October 2010* 13 December 2010* 19-20 September 2011
Peter SINGLETON	6 October 2011
Jonathan SPARK	27 October 2010* 13 September 2011* 20-21 September 2011
Jiansong WEN	13 December 2010*

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