



# Report 2024/01: Review of the investigation and prosecution of Mr Trent Rusby

29 April 2024



OFFICE OF  
THE INSPECTOR



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29 April 2024

The Hon Terry Stephens  
President  
Legislative Council  
Parliament House  
North Terrace  
ADELAIDE SA 5000

The Hon Leon Bignell  
Speaker  
House of Assembly  
Parliament House  
North Terrace  
ADELAIDE SA 5000

**By hand**

Dear President and Speaker

In accordance with clause 9(10) of Schedule 4 of the *Independent Commission Against Corruption Act 2012 (ICAC Act)*, I provide to each of you my Report 2024/01: Review of the investigation and prosecution of Mr Trent Rusby.

Pursuant to clause 9(11) of Schedule 4 of the ICAC Act, I ask that you lay this Report before your respective Houses on the next possible sitting day.

Yours faithfully

Philip Strickland SC  
Inspector



OFFICE OF  
THE INSPECTOR

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## Introduction

1. On 19 February 2023, Mr Trent Rusby made a complaint to me in relation to the conduct of the Independent Commissioner Against Corruption (**ICAC**) and its employees.
2. On 19 March 2023, Mr Rusby advised me that he wished for his complaint to be treated as a submission in respect of my first annual review pursuant to clause 75 of Schedule 1 of the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021*.<sup>1</sup>
3. On reviewing Mr Rusby's submission for my first annual review, I considered whether undue prejudice to the reputation of any person was caused by ICAC or its employees. I decided that Mr Rusby's matter raised issues that included but went beyond the issue of undue prejudice to reputation and warranted a detailed review.<sup>2</sup>
4. On 24 August 2023, I determined to conduct a review on my own motion pursuant to clause 2(1)(c) of Schedule 4 of the *Independent Commission Against Corruption Act 2012 (ICAC Act)*<sup>3</sup> in relation to the investigation and prosecution of Mr Rusby.
5. My review has examined the exercises of power and performance of functions by ICAC, the Office for Public Integrity (**OPI**) and their respective employees.
6. The following Terms of Reference have guided my review:<sup>4</sup>
  - (a) Whether there was any evidence of:
    - (i) corruption, misconduct or maladministration on the part of ICAC the OPI or employees of ICAC or the OPI;<sup>5</sup>

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<sup>1</sup> Exhibit 6 – Email from Mr Rusby to the Inspector, 19 March 2023.

<sup>2</sup> See *Annual Report of the Inspector of the Independent Commission Against Corruption, the Office for Public Integrity, and Ombudsman SA for 1 July 2022 to 30 June 2023* (Report, 27 September 2023) at p 21.

<sup>3</sup> The Act's previous title (until 7 October 2021) was the *Independent Commissioner Against Corruption Act 2012* (SA). For the sake of clarity in this Report, I have referred to the Independent Commissioner Against Corruption Act 2012 that was in force at the time of the investigation into Mr Rusby as the ICAC Act. Relevant portions of the ICAC Act that were in force at the time of the investigation into Mr Rusby are contained in **Appendix A** of this Report.

<sup>4</sup> The Terms of Reference were drafted by me and are contained in **Appendix B – Terms of Reference** of this Report.

<sup>5</sup> When making findings as to whether I have found any evidence of corruption, misconduct or maladministration in public administration on the part of the OPI or ICAC, I have applied the definitions of these terms (as set out in **Appendix A**) being the definitions that applied at the time of the relevant events and conduct. I consider this to be an orthodox legal approach to analysing past events (particularly when those events have the potential to give rise to criminal charges or disciplinary action) and to be consistent with section 32 of the *Legislation Interpretation Act 2021* (SA) and the law with respect to retrospective operation of legislation.

- (ii) unreasonable delay in the conduct of investigations undertaken by ICAC;
    - (iii) unreasonable invasions of privacy by ICAC, the OPI or employees of ICAC or the OPI.
  - (b) whether undue prejudice to the reputation of Mr Rusby was caused.
  - (c) Whether the practices and procedures of ICAC and the OPI were effective and efficient.
  - (d) Whether ICAC and the OPI carried out functions in a manner that was likely to assist in preventing or minimising corruption in public administration.
7. Mr Rusby has made submissions to me about a number of aspects of the investigation and ICAC's practices that he considers caused him "*psychological harm, reputational damage and loss of earnings*".<sup>6</sup> Mr Rusby's submissions have been addressed in various places through this Report. Mr Rusby has also stated to me that he wants a written public apology from ICAC.<sup>7</sup> I do not have the power to order or recommend ICAC to make such an apology nor do I have the power to make a written public apology on ICAC's behalf.
8. In this Report I have reviewed, analysed, and made findings about decisions that were made by the former Independent Commissioner Against Corruption, the Hon. Bruce Lander KC (**Mr Lander**) as well as OPI and ICAC employees during the investigation of Mr Rusby.
9. The most significant decisions during the investigation of Mr Rusby were Mr Lander's decision to investigate Mr Rusby and his decision to refer Mr Rusby to the Director of Public Prosecutions (**DPP**). My analysis and findings about these decisions are contained in this Report.
10. I have also reviewed, analysed, and made findings about Mr Lander's decision to publish a public statement about the investigation and prosecution of Mr Rusby and others as well as Mr Lander's decision to authorise a journalist to publish information about the investigation of Mr Rusby and others. I have analysed and made findings about these decisions in this Report because they formed part of Mr Rusby's submissions, and I considered it appropriate that they be addressed in this Report.
11. I am satisfied that this Report will have no effect on any complaint, report, assessment, investigation, or referral under the ICAC Act pursuant to clause 9(9)(a) of Schedule 4.

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<sup>6</sup> Exhibit 4 – Mr Rusby, Complaint to the Inspector, 19 February 2023.

<sup>7</sup> Exhibit 4 – Mr Rusby, Complaint to the Inspector, 19 February 2023 at p 3.

12. In writing this Report, I have considered carefully the primary objects of the ICAC Act, in particular section 3(1)(c) which seeks to balance the public interest in investigating corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to any person's reputation.<sup>8</sup> I consider that it is necessary and appropriate to include some details of the evidence obtained during the investigation into Mr Rusby and others. I also consider it necessary and appropriate to include some of the evidence that was relied upon by ICAC employees and Mr Lander when Mr Lander performed his function to refer Mr Rusby and others for prosecution. This Report anonymises certain names either because I am not permitted to name the person pursuant to the authorisations I have received or because I have taken the view that it is unnecessary to name the person for the purpose of performing my functions and having regard to the obligation placed on me to ensure no undue prejudice is caused to any individual's reputation.
13. I must not include information in a report if publication of the information would constitute an offence against section 54 of the ICAC Act. On 29 August 2023, the current Commissioner of the Independent Commission Against Corruption (**Commission**), the Hon. Ann Vanstone KC (**Commissioner Vanstone**), approved me as a person who may give authorisations to disclose information which would otherwise be prohibited by section 54(3) of the ICAC Act and as a person who may give authorisations to publish information which would otherwise be prohibited by section 54(5) of the ICAC Act. Both approvals were subject to the condition that I consider the disclosure or publication is necessary in order for me to perform my functions as the Inspector. The publication approval was also subject to the condition that I do not include information from which a complainant or reporter or an employee or former employee of the Commission could be identified. On 15 March 2024, I sought an authorisation from Commissioner Vanstone to publish the name of a former employee of the Commission. Commissioner Vanstone refused that request on 18 March 2024.
14. I have had access to internal ICAC documents and the evidence that ICAC gathered during the investigation of Mr Rusby. I have had access to the internal documents of the DPP that were created following Mr Lander's referral of Mr Rusby and others for prosecution. I have also had access to the court file relating to the prosecution of Mr Rusby.
15. For the purpose of my review, I have taken evidence and conducted examinations in private.<sup>9</sup> I have also requested written responses to questions from those directly involved in the investigation and prosecution of Mr Rusby. The witnesses who appeared before me and the persons who provided written

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<sup>8</sup> *Independent Commission Against Corruption Act 2012 (SA)* s 3(1)(c).

<sup>9</sup> Pursuant to *Independent Commission Against Corruption Act 2012 (SA)* Sch 2, Sch 4 cl 5, 6 respectively.

responses to me did their best to answer questions and assist me with events that occurred almost ten years ago. I acknowledge the difficulties in giving an accurate recollection of events which occurred such a long time ago.

16. I thank Commissioner Vanstone, her office, and the DPP, Mr Martin Hinton KC, for their considerable assistance to me and my office during my review. I also thank the following witnesses who attended before me to give evidence: Mr Lander, the Hon. Justice Adam Kimber SC (**Mr Kimber**) the former DPP, Investigator P, Mr Rusby, Mrs Leah Rusby (née Clarke), and Mr Michael Deegan. I also thank Mr Nigel Hunt and former ICAC Director of Operations, GM, for their assistance in providing written responses to questions I have asked of them.
17. As a result of my review into the investigation and prosecution of Mr Rusby, I have found no evidence of corruption, misconduct, or maladministration in public administration by Mr Lander or any employee of the OPI or ICAC.
18. I have found that, based on the report received by the OPI, it was appropriate for Mr Lander to decide to conduct an investigation into the allegations raised about Mr Rusby and others in the report.
19. I have found that there was no or insufficient evidence gathered by ICAC during the investigation to prove that Mr Rusby committed any corruption offence. As a result, I consider that Mr Lander made an error when he performed his function to refer Mr Rusby for prosecution under section 7(1)(a)(i) of the ICAC Act. Despite this finding, I am not satisfied that the referral of Mr Rusby for prosecution caused undue prejudice to Mr Rusby's reputation.
20. I am also not satisfied that Mr Lander's decision to include details about Mr Rusby in a public statement that he made about the investigation and prosecution of Mr Rusby caused undue prejudice to Mr Rusby's reputation.
21. I am required to afford procedural fairness to anyone whom I have included adverse information or made an adverse finding about in this Report.<sup>10</sup> I have provided relevant portions of my draft report to those persons and have invited them to make submissions to me if they choose. I have received submissions about what findings I should make in this Report. I have considered carefully all

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<sup>10</sup> In *Kioa v West* (1985) 159 CLR 550 per Brennan J at 629: that "*in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made*" as such information "*creates a real risk of prejudice ... and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information*". See also the discussion of "*adverse information that is credible, relevant and significant*" in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [16]–[17] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

submissions made to me. Where I considered it appropriate, those submissions have resulted in amendments to this Report.

22. The findings of fact in this Report are made on the civil standard of proof, namely the balance of probabilities, based on the principles set out in *Briginshaw v Briginshaw*.<sup>11</sup>

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<sup>11</sup> (1938) 60 CLR 336 at 361-2 (per Dixon J).



## Legislative framework

23. The ICAC Act was given assent on 6 December 2012. The Office of the Independent Commissioner Against Corruption commenced operation on 1 September 2013.<sup>12</sup>
24. The ICAC Act has been significantly amended since the investigation into Mr Rusby which commenced in 2014.
25. At the time of the investigation into Mr Rusby, section 5 of the ICAC Act provided definitions for corruption, misconduct and maladministration in public administration (see **Appendix A**).<sup>13</sup> Section 5(5) of the ICAC Act operated retrospectively in that it enabled ICAC to investigate matters before the ICAC Act was assented to.<sup>14</sup>
26. Relevant to my review, under section 7(1)(a) of the ICAC Act, the Commissioner's functions at the time of the investigation of Mr Rusby included the identification of corruption in public administration and the power to either investigate and refer a person for prosecution<sup>15</sup> or refer a person to a law enforcement agency for investigation and prosecution.<sup>16</sup>
27. I observe that under the current Act, the Commissioner no longer has the function of referring a matter for prosecution.<sup>17</sup> Instead, the Commissioner may investigate corruption in public administration and refer it to a law enforcement agency for further investigation and prosecution.<sup>18</sup>

## Background

28. On 20 January 2014, Reporter M, an Assets and Procurement Manager for Compliance at Marine Operations and Response Section (**MORS**) and Reporter T, his manager (the **reporters**) made a report to the OPI which alleged misuse of government issued credit cards and the misappropriation of government property for personal use by employees within MORS.<sup>19</sup> MORS was a business unit within the Transport Safety Regulation directorate of the then-Department of Planning, Transport and Infrastructure (**DPTI**).
29. On 7 February 2014, the OPI assessed the report as raising a potential issue of corruption in public administration that could be the subject of a prosecution

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<sup>12</sup> *South Australian Gazette*, No 31, 23 May 2013 at p 2006.

<sup>13</sup> Section 5 was first amended on 16 December 2016 when the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2016* (SA) inserted section 5(6) (later repealed).

<sup>14</sup> ICAC Act s 5(5)(a) as in force from 1 September 2013 to 6 October 2021.

<sup>15</sup> ICAC Act s 7(1)(a)(i).

<sup>16</sup> ICAC Act s 7(1)(a)(ii).

<sup>17</sup> ICAC Act s 7(1) as amended 7 October 2021.

<sup>18</sup> ICAC Act s 7(1)(a) as amended 7 October 2021.

<sup>19</sup> Exhibit 32 – Letter from Reporter M and Reporter T to the OPI, 17 January 2014.

and recommended that the matter be investigated by ICAC.<sup>20</sup> On 10 February 2014, Mr Lander decided that he would conduct an investigation into the allegations raised in the report.<sup>21</sup>

30. At the time of the investigation, Mr Rusby was the Director of Transport Safety Regulation.<sup>22</sup> As Director, Mr Rusby was responsible for approximately 184 staff across the five business units that comprised the Transport Safety Regulation section, which included MORS.<sup>23</sup>
31. The investigation took approximately 17 months.<sup>24</sup> At the conclusion of the investigation, Mr Lander referred the investigation of Mr Rusby and four others who had been employed in various roles within MORS<sup>25</sup> to the DPP for prosecution.<sup>26</sup>
32. The DPP determined to charge Mr Rusby and four other MORS employees with criminal offences<sup>27</sup> he considered arose from the evidence gathered during the investigation.<sup>28</sup>
33. On 24 February 2016, Mr Rusby was charged with one count of failing to act honestly in the performance of his duties, contrary to section 26 of the *Public Sector (Honesty and Accountability) Act 1995* (SA) (**PSHA Act**).<sup>29</sup> He was charged jointly with MORS Officer 1, 2 and 4 for this offence.<sup>30</sup> Mr Rusby was also charged with three counts of theft, contrary to section 134(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**).<sup>31</sup> He was charged jointly with MORS Officer 1 for these offences.<sup>32</sup>

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<sup>20</sup> Pursuant to ICAC Act ss 23(1)(a), 24(1)(a). See Exhibit 333 – OPI & ICAC, Resolve case file summary re 2014/000076, 10 February 2014 (**Resolve case file summary**); Exhibit 91 – OPI and ICAC, Resolve Running Sheet at p 83 (**Running Sheet**).

<sup>21</sup> Exhibit 91 – Running Sheet at p 78 (entry marked '10 Feb 2014').

<sup>22</sup> Exhibit 363 – Transcript of Evidence before the Inspector (Mr Rusby) at p 26 L-46 (**Transcript**).

<sup>23</sup> Transport Safety Regulation was comprised of five business units: Compliance Support Section, Commercial Marine Section, Vehicle Operations, Vehicle Engineering, and relevantly, Marine Operation and Response Section: Exhibit 229 – Statement of DPTI Employee 5, 3 September 2014 at [2].

<sup>24</sup> This is calculated from the date the decision was made to investigate the allegations raised about MORS employees (10 February 2014) to the date when Mr Lander referred Mr Rusby to the DPP (19 August 2015).

<sup>25</sup> MORS Officer 1, MORS Officer 3, MORS Officer 2, and MORS Officer 5.

<sup>26</sup> Exhibit 96 – Letter from Mr Lander to Mr Kimber, 18 August 2015 at p 1 (**Referral Letter**).

<sup>27</sup> The offences charged were "corruption offences" within the definition of s 5(1) of the ICAC Act.

<sup>28</sup> Exhibit 98 – Letter from Mr Kimber to Mr Lander, 11 February 2016.

<sup>29</sup> Exhibit 99 – Magistrates Court Information in *R v Rusby & ors*, 24 February 2016 at p 2 (**Magistrates Court Information**).

<sup>30</sup> Exhibit 99 – Magistrates Court Information at p 2.

<sup>31</sup> Exhibit 99 – Magistrates Court Information at p 4.

<sup>32</sup> Exhibit 99 – Magistrates Court Information at p 4.

34. On 28 July 2016, the DPP withdrew all four charges against Mr Rusby.<sup>33</sup> No criminal charges against Mr Rusby were pursued again in relation to the investigation.

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<sup>33</sup> Exhibit 197 – *R v Rusby* (Magistrates Court of South Australia, AMC-16-2483, commenced 26 February 2016) at p 3.

## Report to the OPI

35. In November 2013, the reporters commenced an asset review of all items that all MORS employees had purchased using departmental credit cards from December 2011 to December 2013 (**asset review**).<sup>34</sup> The asset review involved compiling a list of assets purchased, physically locating those assets, and analysing the justification for each purchase recorded by the employee.<sup>35</sup> In the course of conducting the asset review, the reporters considered they may have uncovered evidence of criminal behaviour and determined to cease the asset review and make a report to the OPI.<sup>36</sup>
36. On 17 January 2014, the reporters made a report to the OPI.<sup>37</sup> The report attached 39 pages of invoices and business records.<sup>38</sup> The report alleged that eight or nine MORS employees had spent approximately \$900,000 on DPTI credit cards over a two-year period. The reporters considered that the purchases by these employees were for personal use rather than work use and were excessive.<sup>39</sup> The reporters also alleged that Mr Rusby:<sup>40</sup>

*Decided to take two marine operations guys to Kangaroo Island on a trip. He said that he took former director BH but that BH travelled under the name of MORS Officer 6 ... The trip was an all expenses paid holiday for Rusby and the former director.*

37. On 29 January 2014, the OPI assessed the report.<sup>41</sup> The OPI considered there were four public officers who were key persons of interest in the matter, one of whom was Mr Rusby. MORS Officer 1, MORS Officer 2, and MORS Officer 5 were also persons of interest.
38. The OPI considered that the key issue raised by the report was that government issued credit cards and government property had been misused.<sup>42</sup>
39. Pursuant to section 23(1)(a) of the ICAC Act, the OPI considered that the report raised a potential issue of corruption in public administration that could be the subject of a prosecution.<sup>43</sup> The OPI also considered that the matter raised potential issues of misconduct and maladministration in public administration.<sup>44</sup>

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<sup>34</sup> Exhibit 65 – Statement of Reporter M (DPTI), 6 June 2015 at p 1.

<sup>35</sup> Exhibit 65 – Statement of Reporter M (DPTI), 6 June 2015 at p 1.

<sup>36</sup> Exhibit 65 – Statement of Reporter M (DPTI), 6 June 2015 at p 2.

<sup>37</sup> Exhibit 32 – Letter from Reporter M and Reporter T to the OPI, 17 January 2014; Exhibit 91 – Running Sheet at p 84 (entry marked ‘20 Jan 2014’).

<sup>38</sup> Exhibit 33 – Attachments to letter, various dates.

<sup>39</sup> Exhibit 91 – Running Sheet, at p 80-3 (entry marked ‘29 Jan 2014’).

<sup>40</sup> Exhibit 333 – Resolve case file summary at p 2-4.

<sup>41</sup> Exhibit 91 – Running Sheet, at p 81-3 (entry marked ‘29 January 2014’).

<sup>42</sup> Exhibit 91 – Running Sheet at p 80-3 (entry marked ‘29 Jan 2014’).

<sup>43</sup> Exhibit 91 – Running Sheet at p 82 (entry marked ‘29 Jan 2014’).

<sup>44</sup> Exhibit 91 – Running Sheet at p 83 (entry marked ‘29 Jan 2014’).

40. The OPI recommended that the matter be investigated by ICAC.<sup>45</sup>
41. On 10 February 2014, Mr Lander accepted the OPI's assessment and determined to investigate the matter pursuant to section 24(1)(a) of the ICAC Act.<sup>46</sup>

## Was the OPI's assessment appropriate?

42. The OPI's role was to assess whether the report raised a potential issue of corruption in public administration that could be the subject of a prosecution,<sup>47</sup> or a potential issue of misconduct or maladministration in public administration.<sup>48</sup> The OPI's role was not to undertake an investigation, but rather to assess the information provided by the reporters and make a recommendation to Mr Lander as Commissioner.<sup>49</sup>
43. The Resolve Running Sheet<sup>50</sup> also demonstrates that an OPI employee had telephone contact with at least one of the reporters<sup>51</sup> on 23 January 2014,<sup>52</sup> 3 February 2014,<sup>53</sup> 4 February 2014<sup>54</sup> and 7 February 2014.<sup>55</sup>
44. Mr Rusby has submitted to me that ICAC failed to scrutinise the reporters' accuracy and failed to assess the reporters' intentions in making their report.<sup>56</sup>
45. Mr Rusby submitted that ICAC *"should have recognised that the [reporters] were intent on discrediting their supervisors and managers for their own gain and self-satisfaction"*.<sup>57</sup> He further submitted that had ICAC *"properly assessed the [reporters'] information at what was an early stage, they would have been better equipped to understand why [the reporters] were making complaints and*

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<sup>45</sup> Exhibit 91 – Running Sheet at p 83 (entry marked '29 Jan 2014'). Section 24(5) of the ICAC Act permitted the Commissioner to deal with matters of misconduct and maladministration contemporaneously with a corruption matter.

<sup>46</sup> It was also open to Mr Lander to refer the matter to SAPOL, the Police Commissioner or another law enforcement agency for investigation under ICAC Act s 24(1)(b). However, the reporters had indicated they did not want the matter reported to SAPOL because one of the persons reported was a relation of a high-ranking police officer: Exhibit 91 – Running Sheet at p 83.

<sup>47</sup> ICAC Act s 23(1)(a).

<sup>48</sup> ICAC Act s 23(1)(b).

<sup>49</sup> Noting that the OPI did have powers to require a public officer to produce a written statement or answer specified questions: ICAC Act s 23(3).

<sup>50</sup> The Resolve Running Sheet was used by ICAC to document events that occurred through the life cycle of a matter from a complaint or report being received by the OPI to the matter being finalised.

<sup>51</sup> The Running Sheet does not identify which of the two reporters the OPI employee had telephone contact with.

<sup>52</sup> Exhibit 91 – Running Sheet at p 81 (entry marked '20 Jan 2014').

<sup>53</sup> Exhibit 91 – Running Sheet at p 80 (entry marked '2 Feb 2014').

<sup>54</sup> Exhibit 91 – Running Sheet at p 79 (entry marked '4 Feb 2014').

<sup>55</sup> Exhibit 91 – Running Sheet at p 79 (entry marked '7 Feb 2014').

<sup>56</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3. Although Mr Rusby has complained about ICAC, I understand his submission to be referring to the conduct of the OPI employees who assessed the report.

<sup>57</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3.

*that they were doing so as they had been disciplined previously for poor performance and/or behaviour”.*<sup>58</sup>

46. In his evidence before me, Mr Lander was asked about whether the OPI or ICAC considered the motivation of complainants or reporters when they were conducting their assessment. Mr Lander said that OPI and ICAC employees would have considered the motivation of reporters because they *“had to ensure [they] didn’t give vexatious complaints any air”*.<sup>59</sup> Mr Lander further said that when he made a decision to investigate a matter pursuant to section 24(1)(a) of the ICAC Act, he considered whether the complainant or reporter was motivated to make their complaint or report to the OPI because of malice or ill-will towards the subject of the complaint. Mr Lander said *“if there was any evidence of it, yes, of course. If I thought a complaint was actuated by malice, I wouldn’t investigate it”*.<sup>60</sup>
47. There is nothing in the OPI’s assessment to indicate that the motivation of the reporters for making their report was specifically considered. However, there was nothing about the content of the report that should have caused the OPI employee assessing the matter or Mr Lander himself to be suspicious about the accuracy of the information provided by the reporters or their motivation for making their report.
48. In the absence of any material or indicia that that the information provided by the reporters was inaccurate or that the reporters were motivated to make their report out of ill-will towards Mr Rusby, I do not consider that it was necessary for the OPI assessment to have specifically addressed these matters.
49. The reporters provided departmental records and receipts for purchases that the reporters alleged were for an illegitimate purpose. On the face of the documents provided by the reporters, many of the purchases (for example, barbeques, a trailer (converted to a jet ski trailer), camping equipment, clothing, a television, and a Blu-Ray DVD player) were made by the persons of interest using government credit cards. The provision of these materials was some documentary evidence that supported the reporters’ allegations.
50. The reporters also identified other MORS employees who they considered could provide further information about their allegations.<sup>61</sup>
51. In his evidence before me, Mr Lander also made the point that, in relation to assessing the reporters’ motivation, there had to be material before the OPI which suggested the reporters were motivated to make their report by ill-will

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<sup>58</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3.

<sup>59</sup> Exhibit 363 – Transcript (Mr Lander) at p 174 L-12-13.

<sup>60</sup> Exhibit 363 – Transcript (Mr Lander) at p 174 L-18-19.

<sup>61</sup> Exhibit 333 – Resolve case file summary at p 4-5.

before the OPI could consider the reporters' motivation.<sup>62</sup> I appreciate that it would not have been possible for Mr Rusby to have complained about the reporters' motivation at the time the report was being assessed by the OPI (or during the subsequent investigation) because he was unaware of the reporters' identity and that a report had been made about him. However, I agree with Mr Lander that in the absence of any material or complaint about the reporters' motivation, it was unnecessary for the OPI to have specifically assessed the reporters' motivation in their assessment.

52. I am satisfied that the OPI's assessment of the report (see paragraph [39] above) was appropriate.

### Was the decision by Mr Lander to investigate appropriate?

53. In deciding whether to investigate the reporters' allegations, Mr Lander was not bound by the recommendation of the OPI.<sup>63</sup> Pursuant to section 24(7) of the ICAC Act, the making of an assessment, whether action was taken, and what action was taken in respect of a report was at Mr Lander's absolute discretion.<sup>64</sup>
54. Once Mr Lander accepted the OPI's assessment that the report raised a potential issue of corruption that could be the subject of prosecution,<sup>65</sup> Mr Lander was required to either conduct his own investigation or refer the matter to South Australia Police (**SAPOL**) or another law enforcement agency.<sup>66</sup>
55. I consider that it was appropriate for Mr Lander to commence an investigation into the allegations raised in the report.

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<sup>62</sup> Exhibit 363 – Transcript (Mr Lander) at p 175 L-11-14.

<sup>63</sup> ICAC Act s 18(2).

<sup>64</sup> ICAC Act s 24(7).

<sup>65</sup> Pursuant to ICAC Act s 23(1)(a).

<sup>66</sup> ICAC Act s 24(1).

## Investigation

56. On 17 February 2014, Investigator P was allocated the matter as the primary investigator.<sup>67</sup> The investigation into Mr Rusby (and other MORS employees) was completed on 18 August 2015 when the matter was referred for prosecution. In short, the investigation occurred over approximately 17 months.
57. The allegations against Mr Rusby were not the sole focus of the investigation. The main aspects of the investigation that related to Mr Rusby were described by Investigator P in his final investigation report as allegation 6, 7 and 8. For convenience, I have adopted the same terminology in this Report.
58. **Allegation 6** was that Mr Rusby was complicit in the purchase of clothing for a non-work related purpose from a store named Paddy Pallin on 2 July 2013 using a MORS employee's government credit card.<sup>68</sup> It was suspected that the clothing items purchased were used by Mr Rusby on a family holiday to the snow in July 2013.<sup>69</sup>
59. **Allegation 7** concerned a trip that Mr Rusby took to Kangaroo Island between 15 and 17 November 2012 with three MORS employees (MORS Officers 1, 2 and 4) and BH. BH was Mr Rusby's predecessor in the position of Director of Transport Safety Regulation until his retirement in April 2012.<sup>70</sup> It was alleged that the trip to Kangaroo Island was a "boys fishing trip". Specifically, it was alleged that Mr Rusby conspired with others to permit BH to travel to Kangaroo Island on a ferry ticket that had been purchased using government funds in the name of another MORS employee who did not attend.<sup>71</sup>
60. **Allegation 8** was that Mr Rusby had directed a MORS employee to deliver a discarded bus shelter to Mr Rusby's home address after-hours using a government vehicle.<sup>72</sup>
61. On 21 February 2014, an investigation strategy meeting was held between Investigator P, GM (Director of Operations), ME (Investigator P's line manager), and another ICAC investigator.<sup>73</sup> It was noted that:

*Discussions had over audit process, who would complete it, would it be covert V overt, what information we require to progress and further assess next lines of enquiry.*

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<sup>67</sup> Exhibit 91 – Running Sheet at p 78 (entry marked '17 Feb 2014').

<sup>68</sup> Exhibit 64 – Investigation Report re 2014/000076, 7 July 2015 at p 25-7(**Investigation Report**).

<sup>69</sup> Exhibit 64 – Investigation Report at p 26.

<sup>70</sup> Exhibit 89 – Statement of BH, 20 April 2015 at p 1.

<sup>71</sup> Exhibit 64 – Investigation Report at pp 32- 33.

<sup>72</sup> Exhibit 64 – Investigation Report at p 4 under 'Allegation 8', p 33 under 'Other'.

<sup>73</sup> Exhibit 91 – Running Sheet at p 77 (entry marked '21 Feb 2014').



*Complainant contacted investigator via email informing that he was in the process of gathering the audit report of expenditure for persons named and that it would be available next week.*

*Once this is completed they will be in contact with investigator and a meeting will take place to hand over documents and to also discuss the information contained within these documents.*

62. On 3 March 2014, Investigator P met with the reporters. The reporters provided Investigator P with additional *“relevant documents”*.<sup>74</sup>
63. On 6 March 2014, Investigator P held a further investigation strategy meeting with GM and ME.<sup>75</sup> Relevant to allegation 6, those present at the meeting decided<sup>76</sup> that the first phase of the investigation was to have the reporters continue the asset review (see paragraph [35] above) and produce a report for ICAC that included a list of assets located by the reporters, a list of assets purchased by each MORS employee, and the business records for each purchase (the **audit report**).<sup>77</sup> During the meeting it was also decided that enquiries relating to allegation 7 would not be examined until the matter had progressed further.<sup>78</sup>
64. In his evidence before me, Investigator P was asked about why he, ME and GM decided to have the reporters produce the audit report. Investigator P said, *“they were best suited and seated in the department and the agency to identify the items that were purchased and if they were actually for business purposes or they were not for business purposes”*.<sup>79</sup>
65. On 6 and 19 March 2014, Investigator P informed the reporters of ICAC’s decision to have the reporters continue the asset review that had informed their original report to the OPI and produce an audit report for ICAC.<sup>80</sup>
66. ICAC’s internal records demonstrate that Investigator P expected that the reporters’ audit report would *“clearly identify lines of enquiry”*<sup>81</sup> related to alleged improper purchases made by MORS employees. He intended to use the reporters’ audit report to inform his investigation plan.<sup>82</sup>
67. Investigator P’s notes also indicate that, in the initial stages of the investigation, ICAC was reticent to both notify the chief executive of DPTI about the

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<sup>74</sup> Exhibit 91 – Running Sheet at p 76 (entries marked ‘01 Mar 2014’ and ‘04 Mar 2014’). It is not clear from ICAC’s records what documents the reporters provided.

<sup>75</sup> Exhibit 91 – Running Sheet at p 76 (entry marked ‘6 Mar 2014’).

<sup>76</sup> Exhibit 363 – Transcript (Investigator P) at p 86 L-11-13.

<sup>77</sup> Exhibit 91 – Running Sheet at p 76 (entry marked ‘6 Mar 2014’).

<sup>78</sup> Exhibit 91 – Running Sheet at p 76 (entry marked ‘6 Mar 2014’).

<sup>79</sup> Exhibit 363 – Transcript (Investigator P) at p 86 L-20-23.

<sup>80</sup> Exhibit 91 – Running Sheet at p 75-6 (entries marked ‘6 Mar 2014’).

<sup>81</sup> Exhibit 91 – Running Sheet at p 72-4 (entries marked ‘01 Apr 2014’, ‘01 May 2014’, ‘09 May 2014’ and ‘01 Aug 2014’).

<sup>82</sup> Exhibit 91 – Running Sheet at p 73-4 (entries marked ‘01 May 2014’ and ‘09 May 2014’).

investigation<sup>83</sup> and to request further assistance from DPTI until ICAC had received the reporters' audit report.<sup>84</sup>

68. According to Investigator P's notes, the reporters' audit report was originally due to be provided to ICAC in approximately mid-April 2014.<sup>85</sup> However, its completion was continually delayed.<sup>86</sup> ICAC internal records show the reporters identified several reasons for the delay. These reasons included "*complexity*",<sup>87</sup> frustration related to a mismatch of expectations between ICAC and the reporters,<sup>88</sup> and the requirement for the reporters to complete the asset review and audit report without the support of their own department because they were required to keep the fact that they were compiling the report confidential.<sup>89</sup>
69. On or around 17 June 2014,<sup>90</sup> GM met with the Deputy Chief Executive of DPTI, Mr Andrew Milazzo, to outline the fact of the investigation and the issues with having the reporters' audit report finalised.<sup>91</sup> On 23 June 2014, Mr Milazzo and the two reporters were provided with authorisations pursuant to section 56 of the ICAC Act to "*publish information [between themselves] for investigation purposes*".<sup>92</sup>
70. Investigator P's decision to wait for the reporters to produce the audit report meant that he did not begin taking statements from witnesses about the allegations until approximately five months after the investigation commenced.<sup>93</sup>
71. In July 2014, with the reporters' audit report still outstanding, Investigator P interviewed four MORS employees in relation to allegation 7 and about their

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<sup>83</sup> Exhibit 91 – Running Sheet at p 74-5 (entries marked '01 Apr 2014' and '01 May 2014').

<sup>84</sup> Exhibit 91 – Running Sheet at p 74-5 (entries marked '01 Apr 2014' and '01 May 2014');

Exhibit 393 – Email from Reporter T to Investigator P, 16 April 2014 at p 1.

<sup>85</sup> Exhibit 91 – Running Sheet at p 74 (entry marked '01 Apr 2014').

<sup>86</sup> Exhibit 392 – ICAC, Fortnightly Investigation Report, entries dated 12 March 2014, 9 April 2014, 7 May 2014, 21 May 2014, 18 June 2014, 2 July 2014, and 16 July 2014; Exhibit 354 – ICAC, Fortnightly Investigation Report, entries dated 30 July 2014 and 13 August 2014.

<sup>87</sup> Exhibit 91 – Running Sheet at p 73 (entry marked '09 May 2014').

<sup>88</sup> Exhibit 91 – Running Sheet at p 73-4 (entries marked '1 Apr 2014', '9 May 2014', '28 May 2014', and '1 June 2014').

<sup>89</sup> Exhibit 393 – Email from Reporter T to Investigator P, 16 April 2014 at p 1.

<sup>90</sup> Meeting occurred on or between 17 and 19 June 2014: Exhibit 91 – Running Sheet at p 72 (entry marked '17 Jun 2014'); Exhibit 332 – ICAC, 'Forwarding minute re section 56 authorisations', 19 June 2014.

<sup>91</sup> Exhibit 91 – Running Sheet at p 72 (entries marked '04 Jun 2014' and '17 Jun 2014').

<sup>92</sup> Exhibit 186 – ICAC, Authorisation under ICAC Act s 56 to Reporter M (DPTI), 19 June 2014; Exhibit 187 – ICAC, Authorisation under ICAC Act s 56 to Mr Milazzo (DPTI), 19 June 2014; Exhibit 188 – ICAC, Authorisation under ICAC Act s 56 to Reporter T (DPTI), 19 June 2014. The purpose was also described as an "*authority to discuss investigation points*": Exhibit 91 – Running Sheet at p 72 (entry marked '23 Jun 2014').

<sup>93</sup> Exhibit 91 – Running Sheet at p 72 (entry marked '21 Aug 2014').

knowledge of impropriety within MORS generally.<sup>94</sup> Investigator P was also provided with the contact details of BH and a manager within DPTI's human resources section to assist him with his investigation.<sup>95</sup> A MORS employee who was interviewed by Investigator P also provided information concerning allegation 8, stating that they were aware that Mr Rusby had "recently" used a DPTI vehicle to take a bus shelter to his property.<sup>96</sup>

72. ICAC's records indicate that the reporters advised ICAC that the audit report was completed in early August 2014.<sup>97</sup> However, it is not clear whether the complete audit report was ever provided to ICAC.<sup>98</sup> I have been unable to find a complete version of the reporters' audit report in the Commission's holdings, in the DPP's files or on the court file.<sup>99</sup>
73. On 20 August 2014, an investigation plan prepared by Investigator P was approved by GM.<sup>100</sup> The investigation plan stated that "*the allegations received are that Trent Rusby, Director Transport Safety Regulation, MORS Officer 1, MORS Officer 3 and MORS Officer 2, have used their positions to purchase goods that have been taken and used for their own private use*".<sup>101</sup>
74. In late August and early September 2014, Investigator P interviewed a manager from another section within Mr Rusby's directorate about allegation 7

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<sup>94</sup> Exhibit 368 – Transcript of Interview of DPTI Employee 2, 8 July 2014; Exhibit 72 – Statement of DPTI Employee 2, 27 August 2014; Exhibit 362 – Transcript of Interview of MORS Officer 6, 14 July 2014; Exhibit 88 – Statement of MORS Officer 6 (DPTI), 29 April 2015; Exhibit 369 – Transcript of Interview of DPTI Employee 1, 14 July 2014; Exhibit 78 – Statement of DPTI Employee 1, 2 September 2014; Exhibit 370 – Transcript of Interview of MORS Officer 7, 16 July 2014; Exhibit 83 – Statement of MORS Officer 7, 1 September 2014.

<sup>95</sup> Exhibit 335 – Emails between Investigator P and Mr Milazzo, 16 July 2014.

<sup>96</sup> Exhibit 368 – Transcript of Interview of DPTI Employee 2 (ICAC, 8 July 2014) at p 30 L-27-31.

<sup>97</sup> On 1 August 2014, Investigator P noted that "*the audit report is to be completed and handed to investigators this week*" which was the last note of this type in the running sheet: Exhibit 91 – Running Sheet and p 72 (entry marked '01 Aug 2014'). On 12 August 2014, Reporter T emailed various MORS employees detailing their allocated assets as extracted from a 'comprehensive MORS asset document': Exhibit 67 – Statement of Reporter M (DPTI), 4 June 2015 at pp 10-52. Investigator P's fortnightly investigation meeting report for 13 August 2014 states "*Audit report has been completed by Reporter M*": Exhibit 354 – ICAC, Fortnightly Investigation Report at p 2 (entry marked '13/8/14').

<sup>98</sup> The Commission indicated that parts of the audit report were annexed to the 4 June 2015 statement of Reporter T: Exhibit 412 – Letter from Commissioner Vanstone to the Inspector, 8 November 2023 at p 2 [2]. Those annexures were emails sent to individual MORS employees which attached spreadsheet listing assets and uniform items that had been allocated to the employee. The employee was asked to review the spreadsheet and provide additional information (such as serial numbers) so that a global "*Asset Document*" could be finalised.

<sup>99</sup> Extensive searches were undertaken by the Commission of their hardcopy files, and at my request, of Investigator P's archived emails. The reporters' audit report was not located. See also Exhibit 363 – Transcript (Investigator P) at p 87.

<sup>100</sup> Exhibit 91 – Running Sheet at p 77 (entry marked '21 Feb 2014'); Exhibit 37 – Investigation Plan re 2014/000076, 20 August 2014 (**Investigation Plan**).

<sup>101</sup> Exhibit 37 – Investigation Plan at p 1.

and practices regarding government credit card use within Mr Rusby's directorate.<sup>102</sup>

75. On 19 September 2014, ICAC investigators conducted a search of MORS Officer 1's residence.<sup>103</sup> Amongst the 70 items seized during the search was a jacket and two camping chairs that correlated with purchases made from Paddy Pallin on 2 July 2013 (see paragraph [58] above).<sup>104</sup> On the same day, ICAC investigators also searched the residence of MORS Officer 3, but did not seize any items.<sup>105</sup>
76. On 19 September 2014, following the searches of MORS Officer 1's and MORS Officer 3's residences, GM contacted Mr Michael Deegan, the Chief Executive of DPTI, to inform him that ICAC had conducted the searches. GM's notes of the conversation between Mr Deegan and himself state that he told Mr Deegan "*it is up to him what internal disciplinary action he wants to take*".<sup>106</sup> The notes also state that GM told Mr Deegan that he could not reveal the fact of the ICAC investigation to his human resources staff when they were contemplating disciplinary action.<sup>107</sup>
77. On 24 September 2014, ICAC provided the reporters and Mr Deegan, with further authorisations pursuant to section 56 of the ICAC Act to publish "*the fact that an investigation is being undertaken by [ICAC] into allegations of corruption*" within MORS.<sup>108</sup>
78. On 28 September 2014, Investigator P interviewed the MORS employee whose credit card had been used to affect the transactions that were the subject of allegation 6.<sup>109</sup>
79. On 2 October 2014, Investigator P interviewed MORS Officer 2 and MORS Officer 3, who had been named as persons of interest in the investigation plan.<sup>110</sup> MORS Officer 3's interview largely concerned aspects of the investigation unconnected to Mr Rusby. MORS Officer 2's interview concerned, in part, his attendance on the Kangaroo Island trip that was the subject of

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<sup>102</sup> Exhibit 371 – Transcript of Interview of DPTI Employee 5, 29 August 2014; Exhibit 229 – Statement of DPTI Employee 5, 3 September 2014.

<sup>103</sup> Exhibit 43 – Mr Lander, ICAC Act s 31(1) search warrant (18 September 2014).

<sup>104</sup> Exhibit 214 – ICAC, Table of exhibits, undated at p 1 (marked 'SM/49' and 'SM/67').

<sup>105</sup> I note that ICAC did not conduct a search of Mr Rusby's residence.

<sup>106</sup> Exhibit 364 – GM, Handwritten notes re 2014/000076 at p 5 (entry dated 19/9/14 at 1600).

<sup>107</sup> Exhibit 364 – GM, Handwritten notes re 2014/000076 at p 5 (entry dated 19/9/14 at 1600).

<sup>108</sup> Exhibit 189 – ICAC, Authorisation under ICAC Act s 56 to Mr Deegan (DPTI), 24 September 2014;

Exhibit 190 – ICAC, Authorisation under ICAC Act s 56 to Reporter M (DPTI), 24 September 2014;

Exhibit 191 – ICAC, Authorisation under ICAC Act s 56 to Reporter T (DPTI), 24 September 2014.

<sup>109</sup> Exhibit 73 – Transcript of Interview of MORS Employee 5, 28 September 2014. See especially p 42 L-21, p 42 L-24, p 43 L-12, p 44 L-2, p 44 L-23.

<sup>110</sup> Exhibit 80 – Transcript of Interview of MORS Officer 3, 2 October 2014; Exhibit 82 – Transcript of Interview of MORS Officer 2, 2 October 2014.

allegation 7. During the interview, MORS Officer 2 produced unsigned 'Operational Orders' that he said he prepared for the Kangaroo Island trip.<sup>111</sup>

80. On 14 October 2014, Investigator P was provided with email data retrieved from Mr Rusby's DPTI email account.<sup>112</sup>
81. Relevant to allegation 6, Investigator P located an email that Mr Rusby sent to himself on 19 June 2013. The email attached a document which indicated that Mr Rusby would not need to hire any ski apparel for himself during an upcoming ski holiday with his family in July 2013 (**equipment booking form**).<sup>113</sup> The relevance of this email is discussed later in this report.
82. Relevant to allegation 7, Investigator P located three emails:
- (a) an email chain dated 19 March 2012 between Mr Rusby, MORS Officers 4, 2, 1, BH and another DPTI employee with a subject of 'Kangaroo Island visit' (**19 March 2012 email chain**);<sup>114</sup>
  - (b) an email chain dated 31 October 2012 between Mr Rusby, MORS Officers 1, 4 and 2 with a subject of 'KI FERRY TIMINGS' (**31 October 2012 email chain**);<sup>115</sup> and
  - (c) an email from Mr Rusby to his children dated 16 November 2012 which attached a 51 second video titled 'Dad doing work on Ki'. The video depicted Mr Rusby driving a boat wearing a uniform.<sup>116</sup>
83. On 15 October 2014, GM's notes indicate he spoke with Mr Deegan again:<sup>117</sup>
- |                               |                       |
|-------------------------------|-----------------------|
| <i>1800</i>                   | <i>Deegan meeting</i> |
| <i>Rusby likely to go ...</i> |                       |
84. On 16 October 2014, Mr Rusby was "informally" placed on forced leave with pay by Mr Deegan.<sup>118</sup>
85. On 22 October 2014, Investigator P's notes indicate he was preparing to interview Mr Rusby.<sup>119</sup> A further note on 29 October 2014 states that Mr Rusby was "yet to be interviewed as further information/documentation is being collected".<sup>120</sup>

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<sup>111</sup> Exhibit 82 – Transcript of Interview of MORS Officer 2, 2 October 2014 at p 64 L-28, p 65 L-24.

<sup>112</sup> Exhibit 254 – Statement of Investigator P, 19 August 2015 at p 15.

<sup>113</sup> Exhibit 264 – Email from Mr Rusby to himself attaching 'Hoys hire Trent.xls', 19 June 2013.

<sup>114</sup> Exhibit 254 – Statement of Investigator P, 19 August 2015 at p 15-6, p 616-8 'MP18A'.

<sup>115</sup> Exhibit 254 – Statement of Investigator P, 19 August 2015 at p 15-6, p 619-20 'MP18B'.

<sup>116</sup> Exhibit 254 – Statement of Investigator P, 19 August 2015 at p 16; Exhibit 395 – Email from Mr Rusby to his children with video attached, 16 November 2012.

<sup>117</sup> Exhibit 364 – GM, Handwritten notes re 2014/000074 at p 7 (entry dated 15/10/14 at 1800).

<sup>118</sup> Exhibit 10 – Mr Rusby, Chronology at p 1 (entry marked '16 October 2014'); Exhibit 347 – Mr Rusby, Written responses to questions on notice, undated at p 5.

<sup>119</sup> Exhibit 354 – ICAC, Fortnightly Investigation Report at p 2 (entry marked '22/10/14').

<sup>120</sup> Exhibit 91 – Running Sheet at p 64 (entry marked 'Monthly Progress Report ... 29 Oct 2014').

86. Throughout November and December 2014, Investigator P progressed aspects of the investigation mostly unconnected to Mr Rusby. Investigator P undertook the “*perusal of nearly 2000 invoices*” in relation to other persons of interest (but not Mr Rusby)<sup>121</sup> and began preparing for a second search of MORS Officer 1’s premises.<sup>122</sup>
87. On 20 April 2015, Investigator P interviewed BH in relation to allegation 7.<sup>123</sup>
88. On 21 April 2015, Investigator P spoke with Mr Rusby over the phone regarding the investigation. Investigator P made the following notes:<sup>124</sup>

*Contact made with Trent – ID myself + explained that allegation of abuse of public office were being investigated by me + that I wished to offer him the opportunity to be interviewed in relation to the allegations.*

*Email sent to SA Gov email address with my email details.*

*Informed Trent that I would not discuss the allegations over the phone + that if he would like to seek legal advice + be interviewed the allegations would be discussed at that time.*

89. On 24 April 2015, Investigator P noted a telephone conversation he had with Mr Rusby’s lawyer. The note reads, “*informed me that Trent will be attending, but will not be answering any questions*”.<sup>125</sup>
90. On 27 April 2015, Mr Rusby’s lawyer sent an email to Investigator P advising that:<sup>126</sup>

*Mr Rusby is willing to participate in the voluntary interview the subject of your telephone correspondence with him on 21 April 2015. However, he declines the invitation to respond to any questions during the course of that interview.*

*Please confirm a date and time convenient for you and we will advise Mr Rusby.*

91. As a result the email from Mr Rusby’s lawyer, Investigator P decided not to interview Mr Rusby.<sup>127</sup> In his evidence before me, Investigator P said that he decided not to interview Mr Rusby because “*if he wasn’t going to answer questions then there was no use in meeting*”.<sup>128</sup>

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<sup>121</sup> Exhibit 91 – Running Sheet at p 63 (entry marked ‘Monthly Progress Report ... 03/12/2014’).

<sup>122</sup> Exhibit 91 – Running Sheet at p 63 (entry marked ‘Monthly Progress Report ... 05 Jan 2014’). On 21 January 2015, ICAC investigators conducted a second search of MORS Officer 1’s premises and seized over 40 items.

<sup>123</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015; Exhibit 89 – Statement of BH, 20 April 2015.

<sup>124</sup> Exhibit 328 – Investigator P, handwritten notes at p 64.

<sup>125</sup> Exhibit 328 – Investigator P, handwritten notes at p 65.

<sup>126</sup> Exhibit 221 – Email from TGB to Investigator P, 27 April 2015.

<sup>127</sup> Exhibit 363 – Transcript (Investigator P) at p 96.

<sup>128</sup> Exhibit 363 – Transcript (Investigator P) at p 96 L-21-22.

92. On 6 May 2015, relevant to allegation 6, Investigator P contacted the Paddy Pallin store and was provided with expanded descriptions of the items purchased using a government credit card on 2 July 2013.<sup>129</sup>
93. On 7 May 2015, by way of a memorandum to Mr Lander, Investigator P asked Mr Lander to consider examining two people who he considered could provide information about Mr Rusby's involvement in allegations 6 and 7.<sup>130</sup> Investigator P's memorandum detailed his suspicion that Mr Rusby and MORS Officer 1 had jointly committed the offences of abuse of public office<sup>131</sup> and deception<sup>132</sup> in respect of allegation 6 and allegation 7.<sup>133</sup>
94. Relevant to allegation 8, on 11 May 2015, Investigator P received an email from DPTI Employee 1, who stated that he and MORS Officer 7<sup>134</sup> delivered a bus shelter to Mr Rusby's home address on or around 8 January 2014.<sup>135</sup>
95. By way of memorandum on 14 May 2015, Mr Lander advised Investigator P:<sup>136</sup>
- After reflection, I have reached the conclusion that there is insufficient utility in holding the examinations for the purposes mentioned.  
I do not think that I could be satisfied that it is reasonable in all the circumstances to issue the summonses.  
I think the investigation should be brought to a conclusion.*
96. Having received the instruction from Mr Lander to conclude the investigation, ICAC internal records indicate Investigator P began preparing his investigation report.<sup>137</sup>
97. Throughout June 2015, Investigator P continued obtaining statements from DPTI employees, including from the reporters,<sup>138</sup> and from others in relation to the use of government credit cards.<sup>139</sup> Relevant to allegation 7, Investigator P

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<sup>129</sup> Exhibit 268 – Emails between Investigator P and Paddy Pallin store, 6 May 2015.

<sup>130</sup> Exhibit 59 – Memorandum from Investigator P to Mr Lander re MORS Officer 1, 7 May 2015 at pp 3, 5; Exhibit 270 – Memorandum from Investigator P to Mr Lander re MORS Officer 2, 7 May 2015.

<sup>131</sup> Contrary to CLCA s 251.

<sup>132</sup> Contrary to CLCA s 139.

<sup>133</sup> Exhibit 59 – Memorandum from Investigator P to Commissioner, 7 May 2015 at p 3-4.

<sup>134</sup> MORS Officer 7 was interviewed on 17 Jul 2014 and provided sworn statement on 1 Sep 2014. He was not specifically asked about the bus shelter but did not volunteer any information when given the opportunity to raise any other concerns.

<sup>135</sup> Exhibit 373 – Email from DPTI Employee 1 to Investigator P re bus shelter, 11 May 2015. See Exhibit 238 – Statement of DPTI Employee 1, 12 April 2015.

<sup>136</sup> Exhibit 60 – Memorandum from Mr Lander to Investigator P, 14 May 2015.

<sup>137</sup> "Final report being prepared": Exhibit 91 – Running Sheet at p 57 (entry marked 20 May 2015).

<sup>138</sup> Exhibit 65 – Statement of Reporter M (DPTI), 4 June 2015; Exhibit 66 – Statement of Reporter T (DPTI), 4 June 2015.

<sup>139</sup> Exhibit 71 – Statement of DPTI Employee 4, 3 June 2015; Exhibit 233 – Statement of DPTI Employee 7, 22 June 2015.

also obtained a statement from a DPTI employee who was stationed on Kangaroo Island in November 2012.<sup>140</sup>

98. On or around 3 June 2015, Investigator P progressed his investigation report to his line manager, AB.<sup>141</sup>
99. On 4 June 2015, Mr Rusby's lawyer wrote to Investigator P requesting an update about the investigation.<sup>142</sup>

*We note that our client has been stood down from his employment with the Department for Planning, Transport and Infrastructure ("DPTI") since 16 October 2014 pending the outcome of an investigation now the subject of ICAC.*

*In circumstances where our clients (sic) directed absence from employment has been prolonged and devoid of details as to the reasons for being stood down, we would be grateful if you could advise on the current status of the matter and the intended course to be followed.*

100. Investigator P sought his line manager's guidance on how to respond to Mr Rusby's lawyers.<sup>143</sup> AB advised him:<sup>144</sup>

*The fact that Mr Rusby has been stood down is a matter between Mr Rusby, his lawyers and DPTI. We should avoid being involved in any discussions around it. Please see me about the status of the investigation and likely involvement of Mr Rusby in a criminal interview in relation to your investigation.*

101. On 11 June 2015, Investigator P responded to Mr Rusby's lawyer in the following terms:<sup>145</sup>

*In reference to your letter dated 4 June 2015, in which you discuss your client Trent Rusby being stood down by his employer as a result of an ICAC investigation, I advise you that Mr Rusby's employment is a matter between Mr Rusby and his employer and not a matter in which the ICAC will discuss.*

*In regards to the status of the investigation, the investigation is in its final stages and you will be advised as soon as practicable of the outcome.*

102. In a letter dated 10 June 2015, Mr Deegan wrote to Mr Lander to advise him of Mr Rusby's resignation from DPTI.<sup>146</sup>
103. On 6 July 2015, ICAC Legal Officer 1 prepared a memorandum for Mr Lander which considered whether Mr Lander should refer the matter to the DPP "to

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<sup>140</sup> Exhibit 242 – Statement of DPTI Employee 6, 28 June 2015.

<sup>141</sup> Exhibit 91 – Running Sheet at p 56 (entry 'Monthly Progress Report ... 26 May 2015').

<sup>142</sup> Exhibit 62 – Letter from TGB to Investigator P, 4 June 2015.

<sup>143</sup> Exhibit 91 – Running Sheet at p 56 (entry marked '11 Jun 2015 ... Matter Note').

<sup>144</sup> Exhibit 91 – Running Sheet at p 56 (entry marked '11 Jun 2015 ... Matter Note').

<sup>145</sup> Exhibit 63 – Email from Investigator P to TGB, 11 June 2015.

<sup>146</sup> Exhibit 192 – Letter from Mr Deegan to Mr Lander, 10 June 2015.



*adjudicate the matter and for charges to be laid*". ICAC Legal Officer 1 noted that *"the appropriate charges to be laid are a matter for the DPP"*.<sup>147</sup>

104. ICAC's internal records indicate Investigator P's investigation report was completed on 7 July 2015, and forwarded by AB to GM for review.<sup>148</sup>
105. On 9 July 2015, GM forwarded the investigation report and *"supporting documents"*<sup>149</sup> to Mr Lander in the following terms:<sup>150</sup>

*Commissioner, the Investigator's final report and supporting documents are now filed in the documents folder for your consideration. The investigation identified 8 allegations of criminal conduct. Of those all but the last was substantiated. The recommendation of the investigator is that the file should be referred to the DPP for consideration of the prosecution of all those involved in the criminal offending. I support that recommendation. ICAC Legal Officer 1 has also reviewed the file and is of a similar view - she has suggested there is evidence to support multiple criminal charges.*

106. On 16 July 2015, Mr Lander advised Investigator P that he *"agree[d] that the matter should be referred to the DPP"* and that the *"brief should be considered by legal"*.<sup>151</sup>
107. On or around 18 August 2015,<sup>152</sup> Mr Lander referred Mr Rusby and four others (MORS Officer 1, MORS Officer 3, MORS Officer 2, and MORS Officer 5) to the DPP for prosecution. The referral included a letter to Mr Kimber (**referral letter**) which stated:<sup>153</sup>

*I refer the matter for your consideration as to whether a prosecution should be brought and if so for you to commence that prosecution.*

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<sup>147</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander re Referral of file 2014/000076, 6 July 2015 at p 2. ICAC Legal Officer 1 noted that she had *"read"* Investigator P's Investigation Report (at p 1), however, I note the Investigation Report was dated one day later than ICAC Legal Officer 1's memorandum. I assume ICAC Legal Officer 1 read the Investigation Report in draft form.

<sup>148</sup> Exhibit 91 – Running Sheet at p 55 (entry marked '07 Jul 2015 ... Matter Note').

<sup>149</sup> It is unclear what *"supporting documents"* were available to Mr Lander. On 7 July 2015, Investigator P uploaded some 23 individual files to the Resolve system which included witness statements, transcripts of interviews of witnesses with unsworn statements, two of the emails found in Mr Rusby's DPTI email account, and exhibit lists from the two searches of MORS Officer 1's premises: Exhibit 91 – Running Sheet at p 55. However, there was a zip file uploaded on 8 July 2015 called '20150707 OPS-RPT Report appendices zipped.zip' which contained a single pdf document that included some (but not all) of the 23 documents uploaded by Investigator P the previous day. The single pdf file also included additional documents that were not uploaded by Investigator P on the previous day.

<sup>150</sup> Exhibit 91 – Running Sheet at p 55 (entry marked '09 Jul 2015 ... Matter Note').

<sup>151</sup> Exhibit 91 – Running Sheet at p 55 (entry marked '16 Jul 2015 ... Matter Note').

<sup>152</sup> The letter and enclosed minute were dated 18 August 2015, however ICAC internal records suggest the files were delivered on 19 August 2015: See Exhibit 91 – Running Sheet at p 55 (entry 16 July 2015).

<sup>153</sup> Exhibit 96 - Referral Letter at p 1.

108. The referral also comprised a minute which outlined the background of the investigation and identified potential charges for the DPP to consider (**referral minute**),<sup>154</sup> and a brief of evidence (discussed at paragraph [143] below).

109. On 19 August 2015, Investigator P emailed the reporters stating:<sup>155</sup>

*I am happy to inform you that the Brief of Evidence compiled over the past 12 months has today been delivered to ODPP for final adjudication on what charges they wish to prefer against MORS Officer 1, MORS Officer 3, MORS Officer 2 and Rusby.*

110. On 20 August 2015, Investigator P also advised Mr Deegan of the fact of Mr Lander's referral of Mr Rusby and others to the DPP.<sup>156</sup>

111. On 5 November 2015, Investigator P met with the DPP solicitors who had conduct of the matter.<sup>157</sup> In relation to Mr Rusby, Investigator P noted:

*Rusby - DPP indicated that a charge of Abuse of Public Office would be preferred against Rusby re KI Trip. Joint charge with MORS Officer 1, MORS Officer 2 and MORS Officer 4. Charge (undecided as yet) to be preferred re clothing items purchased re Snow trip/holiday.*

112. After the 5 November 2015 meeting with the DPP solicitors, Investigator P provided DPP Solicitor 1 with additional documents that he had "found in the file that [he] had obtained during the investigation".<sup>158</sup>

113. Investigator P emailed DPP Solicitor 1 a copy of the 'Operation Order' that MORS Officer 2 told Investigator P he had prepared in relation to the Kangaroo Island trip (see paragraph [79] above).<sup>159</sup> The Operation Order recorded that the operation was to be called "Operation K.I. Return 2012" and was to be carried out between 15 and 17 November 2012.<sup>160</sup> The Operation Order listed MORS Officer 1, MORS Officer 2, MORS Officer 6, MORS Officer 4 and Mr Rusby as participating in the operation.<sup>161</sup> The Operation Order relevantly stated:<sup>162</sup>

#### MISSION

*To educate the boating community (both Recreational & Commercial) and if necessary to enforce the provision of the Harbours and Navigation Act 1993*

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<sup>154</sup> Exhibit 97 – Minute forming enclosure to letter from Mr Lander to Mr Kimber, 18 August 2015 (**Referral Minute**). See Exhibit 96 – Referral Letter at p 3 [3].

<sup>155</sup> Exhibit 374 – Email from Investigator P to Reporter M and Reporter T, 19 August 2015.

<sup>156</sup> Exhibit 375 – Email from Investigator P to Mr Deegan and 2 others, 20 August 2015.

<sup>157</sup> See Exhibit 351 – Email from Investigator P to AB and GM, 5 November 2015.

<sup>158</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015 at p 1.

<sup>159</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015.

<sup>160</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015 at p 7.

<sup>161</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015 at p 9.

<sup>162</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015 at pp 4, 7.

*and Regulations therefore reducing risk to persons utilising the waters around Kangaroo Island in particular.*

...

#### EXECUTION

*Transport Safety Compliance Officers (Marine) from DPTI will mount an education and enforcement operation covering the northern areas of Kangaroo Island ... with the primary focus on safe conduct of recreational boating activities, carrying the minimum safety equipment, registration and licensing requirements, checking commercial vessels relative to survey/qualifications etc.*

114. Investigator P also emailed DPP Solicitor 1 a copy of a media release relating to the first use of a new landing platform on Kangaroo Island by a cruise ship named 'Volendam', which was to arrive on 17 November 2012.<sup>163</sup>
115. On 23 November 2015, Investigator P was forwarded an email obtained by DPTI Employee 3 from Ms Leah Clarke (now Mrs Leah Rusby), who worked at the South Australian Tourism Commission at the time. The email had an attachment titled 'Volendam 17 Nov 2012 RSVP LIST'. Mr Rusby was on the list.

## Analysis

116. Mr Rusby has made submissions to me about a number of aspects of the investigation that he considers caused him psychological harm, prejudiced his reputation, and caused him a loss of earnings.<sup>164</sup> I have addressed each of Mr Rusby's submissions below.

### Delay in the investigation and prosecution

117. Mr Rusby has alleged that ICAC and the DPP conspired to draw out the investigation and subsequent laying of charges. Mr Rusby has submitted that, *"had ICAC investigators recommended charges singularly against (him) and had the DPP adjudicators and prosecutors assessed evidence at hand, at the ... early timeframe, the matter against (him) could have been dismissed years before it eventually was"*.<sup>165</sup> He further submitted that *"the impact of jointly charging all members rather than considering members individually was a mistake and was NEVER supported by any reliable evidence... This action was a form of conspiracy between the two agencies to allow more time for ICAC*

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<sup>163</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015.

<sup>164</sup> Exhibit 4 – Mr Rusby, Complaint to the Inspector, 19 February 2023 p 3.

<sup>165</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3.

*investigators to dig around for more dirt, again to justify their increasing investment in an already failing investigation”.*<sup>166</sup>

118. Mr Rusby’s submission suggests that there was an unreasonable delay in the investigation and subsequent laying of charges against him. It is outside of my jurisdiction to review the conduct of the DPP and so I will only focus upon whether there was any unreasonable delay in the investigation that was caused by ICAC or its employees.<sup>167</sup>
119. Insofar as Mr Rusby’s submission relates to ICAC’s consideration of charges against him, this submission is considered later in this Report at paragraphs [244] – [245].
120. I understand part of Mr Rusby’s submission to concern the fact he was disadvantaged by the fact that ICAC investigated him jointly with others.
121. I have found above at paragraphs [53] – [55] that Mr Lander’s decision to investigate the allegations about a number of DPTI employees raised by the reporters was appropriate. The allegations that were investigated were of a similar nature in that they concerned the misuse of government funds by a small group of DPTI employees within Mr Rusby’s directorate. The allegations against Mr Rusby were linked intrinsically to the allegations in respect of the other persons of interest. It would have been an inefficient use of ICAC’s resources for ICAC to have investigated the allegations against Mr Rusby in isolation to the allegations against the other persons of interest.
122. Mr Rusby has also submitted that as far as the investigation related to him, it was unreasonably delayed **because** he was investigated jointly with others.
123. On the topic of delay, Investigator P said in his evidence before me that, *“as an investigator [he understood] there was not to be a delay... But there was no, ‘you need to get this done and we need it done by Christmas’ or whatever the date. It was ‘what else do you need?’ ‘Where are you up to?’”*.<sup>168</sup> I understand from this evidence that although there were no strict timeframes imposed on investigators, Investigator P understood that it was important that investigations should not be unnecessarily delayed.
124. In considering whether the investigation suffered from unreasonable delay, I must first be satisfied that there was a delay that was longer than the nature of the investigation required.

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<sup>166</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3.

<sup>167</sup> Pursuant to ICAC Act Sch 4 cl 9(1)(a)(i).

<sup>168</sup> Exhibit 363 – Transcript (Investigator P) at p 79 L-21-29.

125. There was a period of approximately five months where Investigator P was waiting for the provision of the reporters' audit report before he commenced gathering other evidence in relation to the investigation.
126. The period of time between Investigator P being assigned the investigation in February 2014 and Mr Lander's referral of the matter for prosecution was 17 months. This was a lengthy period of time for an investigation of this type. However, on balance, and not without some hesitation, I do **not** find that that the delay was unreasonable. The investigation involved multiple persons of interest and a great many transactions which required investigation. There was some delay (not caused by ICAC) waiting for the provision of the reporters' audit report.
127. Finally, Mr Rusby has submitted that there was a conspiracy between ICAC and the DPP to draw out the investigation and prosecution of him to allow ICAC investigators more time to gather evidence.<sup>169</sup> From my review of ICAC's and the DPP's internal materials, I have found no evidence that any such conspiracy existed between ICAC and the DPP.

### Evidence of Mrs Rusby

128. Mr Rusby submitted that ICAC investigators had exculpatory evidence in relation to his attendance on the Kangaroo Island trip that was withheld or concealed from the DPP. He advised:<sup>170</sup>

*ICAC investigators made contact with, requested information from, and formally interviewed Ms Leah Clarke, a then employee of the South Australian Tourism Commission.*

*The information requested was a list of government delegates who were formally invited to represent their agencies at that event.*

*This list was subsequently provided to the ICAC investigating officer, supported by interview recordings made by the ICAC investigating officer, and should have formed in the mind of the ICAC investigating officer the view that all was in order, or at least should have raised some level of doubt over the allegation...*

*This information was purposefully withheld and/or concealed within the structure of ICAC and was never presented to the DPP by the ICAC...*

129. Ms Leah Rusby gave evidence before me which supported Mr Rusby's submission. Mrs Rusby recalled that she was "contacted by the ICAC office, by an... investigator".<sup>171</sup> She could not recall the name of the investigator but said their name started with an "M" and she suggested the name was something like

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<sup>169</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3.

<sup>170</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 2-3.

<sup>171</sup> Exhibit 363 – Transcript (Mr Rusby) at p 16 L- 30.

“Milakovic”.<sup>172</sup> At the time Mrs Rusby was contacted by the ICAC investigator, she was employed at the South Australian Tourism Commission.

130. Mrs Rusby told me that she participated in a formal interview with the investigator which she was told was being recorded.<sup>173</sup> The investigator asked her about an event on Kangaroo Island which involved a lunch to celebrate the docking of a cruise ship<sup>174</sup> and whether Mr Rusby and MORS Officer 4 were on the list of invitees and she advised that they were.<sup>175</sup> Mrs Rusby said that she offered to send a clearance document which listed Mr Rusby and MORS Officer 4 as being at the event and confirmed that she emailed the document to the investigator using her work email at the time.<sup>176</sup>
131. Mrs Rusby has been unable to produce a copy of the email which attached the clearance document that she told me she sent to the investigator because she no longer has any of her work emails from the time she was spoken to by the ICAC investigator. Mrs Rusby advised me that she has asked the Tourism Commission to search of the emails from dates back to 2013 until 2016 but they have been unable to find the emails that were sent.<sup>177</sup> Mrs Rusby also told me that she was never asked to sign a statement which reflected the telephone conversation that she had with the ICAC investigator.<sup>178</sup>
132. During his evidence before me, Investigator P was asked whether he recalled having a telephone conversation with Mrs Rusby about the Kangaroo Island trip. Investigator P did recall having a telephone conversation with her and thought he would have made a note of the conversation in the Running Sheet.<sup>179</sup> In response to whether he recalled recording the telephone conversation that he had with Mrs Rusby, Investigator P said that he did not record any telephone conversations.<sup>180</sup> Investigator P could not recall specifically what he discussed with Mrs Rusby, he said:<sup>181</sup>

*All I recall is it was about the KI trip. So whether she put me on to someone else or she – I don't know – I can't recall. I remember the name or the circumstances behind it but no, I can't recall the conversation directly.*

133. Investigator P also thought that he might have received some documents from either Mrs Rusby or someone else at SeaLink about the Kangaroo Island trip.<sup>182</sup>

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<sup>172</sup> Exhibit 363 – Transcript (Mr Rusby) at p 16 L-34.

<sup>173</sup> Exhibit 363 – Transcript (Mr Rusby) at p 16 L-40-42.

<sup>174</sup> This event was about the docking of a cruise ship named 'Volendam'.

<sup>175</sup> Exhibit 363 – Transcript (Mr Rusby) at p 18.

<sup>176</sup> Exhibit 363 – Transcript (Mr Rusby) at p 19.

<sup>177</sup> Exhibit 363 – Transcript (Mrs Rusby) at p 17 L-3-5.

<sup>178</sup> Exhibit 363 – Transcript (Mrs Rusby) at p 18.

<sup>179</sup> Exhibit 363 – Transcript (Investigator P) at p 111 L-16.

<sup>180</sup> Exhibit 363 – Transcript (Investigator P) at p 111 L-10.

<sup>181</sup> Exhibit 363 – Transcript (Investigator P) at p 111 L-20-22.

<sup>182</sup> Exhibit 363 – Transcript (Investigator P) at p 116.

134. I have been unable to locate any record of the telephone conversation between Mrs Rusby and Investigator P (or any ICAC investigator for that matter) in the Commission's holdings. A search by ICAC has been conducted for this material and it has not been located. I have also been unable to locate the email that Mrs Rusby said that she sent to an ICAC investigator. A search by the Commission has been conducted for this email and it has not been located.<sup>183</sup>
135. I have, however, located an email from 'Leah Clarke'<sup>184</sup> to an employee who worked at DPTI dated 23 November 2015.<sup>185</sup> The email attached an *"invitation list for the cruise ship arrival luncheon on board the vessel on KI 17 November 2012"*.<sup>186</sup> The email from Ms Clarke to the DPTI employee was forwarded to Investigator P on 23 November 2015 with a comment that it *"would provide evidence enough that some employees were formally requested to attend the event"*.<sup>187</sup>
136. I found Mrs Rusby to be a truthful witness when she gave her evidence before me. Given the passage of time between when she spoke with the ICAC investigator to the time she gave her evidence before me, it is unsurprising that she could not recall the investigator's name or the date on which the telephone conversation took place. I am satisfied that there was a telephone conversation between Investigator P and Mrs Rusby where they spoke about the cruise ship luncheon at Kangaroo Island.
137. I am unsure of the content of the conversation between Mrs Rusby and Investigator P during the telephone call. As I do not know the information that Mrs Rusby provided to Investigator P during the telephone call, I am unable to form a view as to whether Investigator P should have taken a statement from Mrs Rusby during the course of the investigation. Investigator P should have made a note of having a conversation with Mrs Rusby which recorded the content of the conversation and the date upon which it took place.
138. Mr Rusby has submitted that ICAC purposely withheld or concealed the fact that Mrs Rusby gave exculpatory evidence about allegation in relation to the Kangaroo Island trip that he was implicated in.
139. Investigator P was asked during his evidence whether, if Mrs Rusby had provided him with documents that were relevant to the legitimacy of the Kangaroo Island trip, he would have used that document. Investigator P

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<sup>183</sup> I requested that the Commission furnish me with any materials that relate to, mention Ms Clarke. None of the records located by the Commission indicate any direct contact between Ms Clarke and any ICAC employees: See Exhibit 414 – Letter from Commissioner Vanstone to the Inspector, 17 January 2024 at page 4 'Attachment 1.xlsx Request 03 sheet'.

<sup>184</sup> Noting that was Mrs Rusby's surname at the time of the email being sent.

<sup>185</sup> Exhibit 203 – Email from Ms Clarke to DPTI to Investigator P, 23 November 2015.

<sup>186</sup> Exhibit 203 – Email from Ms Clarke to DPTI to Investigator P, 23 November 2015.

<sup>187</sup> Exhibit 203 – Email from Ms Clarke to DPTI to Investigator P, 23 November 2015.

responded “of course... it’s exculpatory evidence. I’m not there to target and persecute, I’m there to investigate and provide the evidence, regardless of which way it falls”.<sup>188</sup>

140. Even though Investigator P did not make a note of the conversation he had with Mrs Rusby or take a statement from Mrs Rusby about the content of his conversation with her, the email, and the attached invitation list to attend the ‘Volendam’ ship cruise for lunch on 17 November 2012 was forwarded to Investigator P on 23 November 2015.
141. Annexed to MORS Officer 4’s statement dated 30 April 2015, was an email dated 15 October 2012 from Ms Clarke from a South Australian Tourism Commission email address which included an email from the Business Manager – Cruise Development from the South Australian Tourism Commission inviting both MORS Officer 4 and Mr Rusby to the ‘Volendam’ event.<sup>189</sup> Further, in his statement, MORS Officer 4 stated that he and Mr Rusby had:<sup>190</sup>

*... got an invite regarding the new passenger embarking/disembarking platform to be used by cruise ship owners over there. Because previously they used to anchor at Kingscote and it was a terrible place for the tender vessels to navigate around the Kingscote jetty ... the Department, in conjunction with Tourism SA, invested some money in [Kangaroo Island] and we built a platform which is multi-layered so that these tender vessels off a cruise ship which is anchored a kilometre or so off-shore at [Kangaroo Island] can bring in tourists, unload them and reload them. We had done a lot of work with the cruise companies and as part of that they invited a whole bunch of DPTI people to come and have a look at the operation.*

142. The inclusion of this material in MORS Officer 4’s statement indicates that Investigator P did not purposely withhold or conceal the fact that Mr Rusby had been invited to attend the ‘Volendam’ Cruise Ship luncheon on 17 November 2012.
143. I am not certain whether MORS Officer 4’s statement of 30 April 2015 was provided to the DPP at the time Mr Lander referred Mr Rusby and the other MORS employees for prosecution. This is because, regrettably, I have been unable to locate a record of what materials were contained in the brief of evidence ICAC provided to the DPP at the time of the referral. I have also been unable to determine what documents the DPP relied upon when they made the decision to charge Mr Rusby. I have reviewed the declarations delivery certificates which list the materials that were provided by ICAC to the

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<sup>188</sup> Exhibit 363 – Transcript (Investigator P) at p 116 L-8-9.

<sup>189</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 17-8.

<sup>190</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 4.



Magistrates Court. The first declarations delivery certificate<sup>191</sup> lists that MORS Officer 4's statement of 30 April 2016 was filed in the Magistrates Court.<sup>192</sup>

144. A DPP solicitor sent an internal memorandum dated 20 July 2016 to the DPP, Mr Kimber, which referred to the fact that Mr Rusby had a legitimate reason to attend Kangaroo Island. Mr Rusby had been invited to Kangaroo Island to *"dine on board a cruise ship to celebrate the building of a wharf capable of accommodating cruise ship tenders"*.<sup>193</sup> The contents of the internal memorandum suggests that the DPP was provided with the statement of MORS Officer 4 and/or the email from Ms Clarke.
145. I do not find that Investigator P deliberately withheld information from the DPP that Mr Rusby had been invited to attend the 'Volendam' Cruise Ship luncheon on 17 November 2012.

### Decision to place Mr Rusby on leave from DPTI

146. Mr Rusby also submitted that during the investigation, he was placed on forced leave by DPTI at the recommendation of ICAC.<sup>194</sup>
147. Mr Rusby submitted that, *"having spent over 8 months on forced leave, as recommended by ICAC to my then CEO, I had little alternative than to resign my employment with State Government..."*.<sup>195</sup>
148. To address this submission, I have reviewed ICAC's communication with DPTI during their investigation into Mr Rusby.
149. On 24 September 2014, GM granted authorisations under section 56 of the ICAC Act to Mr Deegan who was the Chief Executive of DPTI.<sup>196</sup> GM also granted authorisations under section 56 of the ICAC Act to the two DPTI employees who made the initial report to the OPI.<sup>197</sup>
150. The effect of the authorisations was to allow Reporter M and Reporter T to discuss *"the fact that an investigation [was] being undertaken by the Independent Commissioner Against Corruption into allegations of corruption*

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<sup>191</sup> I am unable to decipher the handwritten date on the certificate.

<sup>192</sup> Exhibit 142 – Declarations delivery certificate 1, 4 May 2016 at p 1.

<sup>193</sup> Exhibit 291 – Memorandum from DPP Solicitor 1 to Mr Kimber, 20 July 2016 at p 4.

<sup>194</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 2.

<sup>195</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 2.

<sup>196</sup> Exhibit 189 – ICAC, Authorisation under ICAC Act s 56 to Mr Deegan (DPTI), 24 September 2014;

Exhibit 190 – ICAC, Authorisation under ICAC Act s 56 to Reporter M (DPTI), 24 September 2014;

Exhibit 191 – ICAC, Authorisation under ICAC Act s 56 to Reporter T (DPTI), 24 September 2014.

<sup>197</sup> It was probably not correct for the authorisations to be given pursuant to s 56 of the ICAC Act as that was section confers an authorisation to 'publish' which was defined in the ICAC Act. The authorisation should have been given pursuant to s 54 of the ICAC Act as that was about the 'disclosure of information in the course of the administration of the' ICAC Act. However, nothing turns on that error.

*within the Marine Operations and Response Section (MORS)*<sup>198</sup> with the Chief Executive of the department.

151. On 16 October 2014, Mr Rusby was placed on what Mr Deegan referred to as “*Gardeners leave*”.<sup>199</sup> Gardener’s leave appears to be a colloquial term used by Mr Deegan to mean being placed on leave with pay where Mr Rusby was not to attend the office.<sup>200</sup> During the meeting with Mr Deegan, Mr Rusby was advised by Mr Deegan that auditors were attending his Walkley Heights worksite.<sup>201</sup> Mr Rusby was not advised of the purpose of the auditors attending at the worksite.<sup>202</sup>
152. Mr Rusby submitted that while he was on forced leave with pay from his role within DPTI, he was told by his work colleagues that there were rumours about him.<sup>203</sup> Mr Rusby confirmed that the rumours were based around the organisational structure of DPTI. Mr Rusby advised that the rumours were “*negative about (his) directorate ...*” and that he was told that his directorate was being split apart.<sup>204</sup> Mr Rusby confirmed that the rumours he heard were nothing about him being under investigation by ICAC.<sup>205</sup>
153. Investigator P gave evidence before me that there were communications between himself and the Deputy Chief Executive of DPTI, Mr Andrew Milazzo, and Mr Deegan during the investigation.<sup>206</sup> Investigator P recalled telling Mr Milazzo that ICAC were conducting an investigation.<sup>207</sup> Investigator P told me that he could not recall ever having a conversation with Mr Deegan about whether Mr Rusby should be placed on leave pending the outcome of the investigation.<sup>208</sup>
154. GM was also asked whether he ever advised or instructed Mr Deegan to place Mr Rusby on forced leave with pay during the investigation into Mr Rusby. GM responded, “*at no time did I give an advice or direction with regards to the way he (Mr Deegan) managed his employees other than our first meeting with him, expressing my concern over the way credit cards were used and their lack of audit and accountability*”.<sup>209</sup>

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<sup>198</sup> Exhibit 189 – ICAC, Authorisation under ICAC Act s 56 to Mr Deegan (DPTI), 24 September 2014; Exhibit 190 – ICAC, Authorisation under ICAC Act s 56 to Reporter M (DPTI), 24 September 2014; Exhibit 191 – ICAC, Authorisation under ICAC Act s 56 to Reporter T (DPTI), 24 September 2014.

<sup>199</sup> Exhibit 10 – Mr Rusby, Chronology at p 1 (entry marked ‘16 October 2014’).

<sup>200</sup> Exhibit 363 – Transcript (Mr Rusby) at p 32 L-18-19.

<sup>201</sup> Exhibit 10 – Mr Rusby, Chronology at p 1 (entry marked ‘16 October 2014’).

<sup>202</sup> Exhibit 10 – Mr Rusby, Chronology at p 1 (entry marked ‘16 October 2014’).

<sup>203</sup> Exhibit 363 – Transcript (Mr Rusby) at p 37.

<sup>204</sup> Exhibit 363 – Transcript (Mr Rusby) at p 37-8.

<sup>205</sup> Exhibit 363 – Transcript (Mr Rusby) at p 38 L-24-27.

<sup>206</sup> Exhibit 363 – Transcript (Investigator P) at p 89 L-4-11.

<sup>207</sup> Exhibit 363 – Transcript (Investigator P) at p 89 L-4-9.

<sup>208</sup> Exhibit 363 – Transcript (Investigator P) at p 94 L-15.

<sup>209</sup> Exhibit 381 – GM, Responses to questions posed by the Inspector, 22 February 2024 p 2 [10].

155. There is also a note made by GM on 19 September 2014 which reads, “*told Michael it was up to him what internal disciplinary action he wants to take. He asked what he could tell his HR staff to address disciplinary action. Told him, can’t say it is an ICAC investigation – understood*”.<sup>210</sup>
156. Mr Deegan gave evidence before me about placing Mr Rusby on forced leave. He said that he made the decision to place Mr Rusby on leave<sup>211</sup> and that nobody from ICAC had any part to play in his decision to place Mr Rusby on leave.<sup>212</sup>
157. There is no evidence before me that ICAC had any part in Mr Deegan’s decision to place Mr Rusby on leave with pay.

## Investigation report

158. According to the ICAC Corruption Investigation Process Policy, at the completion of an investigation, a “*report file*” would be prepared and forwarded to the Commissioner with “*appropriate findings*”.<sup>213</sup> At the time of the investigation, if an investigator considered that a matter should be referred to the DPP, an investigation report had to be completed by the primary investigator.<sup>214</sup> The allegations were either substantiated or unsubstantiated based on the evidence that had been obtained during the investigation.<sup>215</sup> The completed investigation report was then sent to the team leader for review and vetting.<sup>216</sup> Next, the brief of evidence was sent with the investigation report to the legal team at ICAC who vetted it again.<sup>217</sup> Someone from within the legal team then made a recommendation to Mr Lander.<sup>218</sup> Finally, Mr Lander vetted it and then once he was satisfied with the legal section, it was sent by Mr Lander to the DPP.<sup>219</sup>
159. Investigator P prepared an investigation report in relation to the investigation into Mr Rusby and other MORS employees dated 7 July 2015.<sup>220</sup>
160. The investigation report set out the allegations that were investigated during the investigation and an opinion was provided by Investigator P about whether the allegations were either substantiated or unsubstantiated.

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<sup>210</sup> Exhibit 381 – GM, Responses to questions posed by the Inspector, 22 February 2024 p 2 [10].

<sup>211</sup> Exhibit 363 – Transcript (Mr Deegan) at p 241 L-1-2.

<sup>212</sup> Exhibit 363 – Transcript (Mr Deegan) at p 249 L-1-5.

<sup>213</sup> Exhibit 445 – ICAC, Corruption Investigation Process Policy, 2 September 2013 at p 4 (heading ‘Investigation outcome’).

<sup>214</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-4-5.

<sup>215</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-5-6.

<sup>216</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-6-7.

<sup>217</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-7-8.

<sup>218</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-7-9.

<sup>219</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-9-10.

<sup>220</sup> Exhibit 64 – Investigation Report.

161. Investigator P gave evidence before me that he thought that for an allegation to be substantiated there had to be a reasonable prospect of conviction in relation to whichever offence he recommended was charged.<sup>221</sup>
162. Investigator P's investigation report considered three allegations against Mr Rusby – allegations 6, 7 and 8.<sup>222</sup>
163. Allegation 6 was described by Investigator P in the following terms:<sup>223</sup>

*Between 3 June 2013 and 10 July 2013, Rusby and MORS Officer 1, being public officer's (sic) improperly exercised power or influence with the intention of securing a benefit for them, by using MORS Officer 5 to purchase items on their behalf, a breach of section 251 of the CLCA.*

### **Findings**

*Evidence supplied by MORS Officer 5 describes that MORS Officer 1 contacted him so as to use MORS Officer 5's credit card to purchase clothing and that MORS Officer 1 stated to him Rusby was also present in the store.*

*There is documented evidence supporting information of Rusby holidaying in the snow with his family shortly after the purchase.*

*An analysis of purchases indicated MORS Officer 1 authorised purchases made by MORS Officer 5 relating to the Sony data projector, a VMS GPS navigation system and a Dremel glue gun, all of which were located in the residence of MORS Officer 1 during search warrant's being executed on 19th September 2014 and 21st January 2015. [This allegation related only to MORS Officer 1]*

*No clothing matching those purchased by MORS Officer 5 was located during the search of MORS Officer 1's residence.*

*On 7th May 2015, an application for MORS Officer 1 to attend an Examination was made, as it was believed it would have provided further evidence against Rusby for the allegation to be proven beyond a reasonable doubt, however this application was denied.*

**(my words)**

164. Investigator P found allegation 6 unsubstantiated in relation to Mr Rusby and the clothing items purchased at Paddy Pallin.<sup>224</sup> He found the allegation substantiated in respect of items located at MORS Officer 1's residence which only related to MORS Officer 1.<sup>225</sup>

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<sup>221</sup> Exhibit 363 – Transcript (Investigator P) at p 75 L-17-18.

<sup>222</sup> Exhibit 64 – Investigation Report at p 2-3.

<sup>223</sup> Exhibit 64 – Investigation Report at p 25-7 [71]-[83].

<sup>224</sup> Exhibit 64 – Investigation Report at p 27 [83].

<sup>225</sup> Exhibit 64 – Investigation Report at p 27 [83]; Exhibit 363 – Transcript (Investigator P) at p 151 L-1.

165. Allegation 7 was described by Investigator P in the following terms:<sup>226</sup>

*Between 11 November 2012 and 17 November 2012, Rusby, MORS Officer 1 and MORS Officer 2, being public officers improperly exercised power or influence with the intention of securing a benefit for another (BH), a breach of section 251 of the CLCA.*

### **Evidence**

...

*On 12 April 2015, 12 May 2015 and 2 September 2014, DPTI Employee 1, provided statements stating the following information:*

- *MORS Officer 1 utilised his credit card on 5 November 2012 to purchase accommodation at KI between the dates of 14 November and 17 November 2012, at Malibu Lodge.*
- *MORS Officer 1 approved the purchase made upon his credit card.*
- *The purchase was made via online booking system with no names requiring to be supplied.*

*Sealink Travel Group manifest obtained during this investigation listed MORS Officer 1 and MORS Officer 2 as travelling on 14 November 2012; however MORS employee (MORS Officer 6) ..., was listed as having a ticket purchased for him to travel to Kangaroo Island (KI) on 15 November 2012, along with MORS Officer 4 and Rusby.*

*On 27 August 2014, DPTI Employee 2 provided a statement stating the following information;*

- *He became aware of the planned trip to KI in early November 2012, with participants being MORS Officer 1, MORS Officer 2, Rusby, MORS Officer 4 and retired DPTI Director BH.*
- *He attended Cape Jervis on 14 November 2012, where he observed and filmed MORS Officer 1 and MORS Officer 2 awaiting departure of the ferry. This recording was provided to ICAC.*
- *He found the name of MORS Officer 6 (...) had been used on the ferry manifest and that MORS Officer 6 didn't travel to KI.*
- *As Manager of MORS Officer 1 and MORS Officer 2, they should have sought approval prior to travelling, which they did not.*
- *No Operational Orders had been submitted by MORS Officer 1 or MORS Officer 2, thus no approval had been given by him for the KI trip operationally. It was standard procedure to submit Operational Orders prior to any such travel or operation.*

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<sup>226</sup> Exhibit 64 – Investigation Report at p 27-33 [84]-[107].

*On 14 July 2014, MORS Officer 6, ..., provided a statement stating the following information;*

- He was not aware of travel arrangements to Kangaroo Island and he was at home ... between 14 November 2012 and 17 November 2012.*
- He did not travel to Kangaroo Island.*
- He recalled he attended to MORS vehicle maintenance in Adelaide on 12 November 2012, returning to ... on 13 November 2012.*
- He did not know who travelled in his name on the ferry.*

*On 3 September 2014, MORS Officer 4 ... provided a statement stating the following information;*

- He collected BH and Rusby to travel to Kangaroo Island but was unable to recall who had arranged it.*
- He had been informed MORS Officer 6 couldn't make it due to family issues.*
- He acknowledged BH travelled on a ticket purchased for MORS Officer 6 and stayed in the same accommodation.*
- MORS Officer 1, MORS Officer 2, BH, Rusby and he were the only ones who stayed in house.*
- He provided an email outlining Operational Orders for Kangaroo Island sent by MORS Officer 1 to MORS Officer 2, which he was copied in too.*
- Rusby and he were invited to attend DPTI business on the island, being their attendance to the launch of an embarking and disembarking floating platform to be used by cruise ships wanting to visit the island. An analysis of the Operational Orders does not refer to this launch as being attended by MORS Officer 1 or MORS Officer 2.*
- He was unable to recall who organised for BH to attend.*

*On 2 October 2014, MORS Officer 2 participated in an interview and provided the following information;*

- He had had a government issued credit card for 10 years but didn't know his exact limit.*
- He attended Kangaroo Island in November 2012 along with MORS Officer 1, Rusby, MORS Officer 4 and BH.*
- He knew BH had retired from SA Government.*
- MORS Officer 6 was supposed to go to Kangaroo Island but was told he pulled out last moment due to marital problems. He could not recall who said this.*

- *He declined to answer questions as to why BH, a non-Government employee would attend a Government paid Operational trip, but did state BH was showing the new Director around and introducing KI contacts to him.*
- *MORS Officer 1 and he utilised two cars and two boats at Kangaroo Island.*
- *MORS Officer 2 commented that he and MORS Officer 1 were already at the accommodation as they had left earlier to set things up.*
- *MORS Officer 2 produced a copy of Operational Orders during the interview.*
- *MORS Officer 2 indicates he, MORS Officer 1, MORS Officer 6, Rusby and MORS Officer 4 are named in the orders.*
- *MORS Officer 2 stated that he and MORS Officer 1 did complete some boat checks, but there were not many available due to the weather.*
- *MORS Officer 2 did not wish to answer any questions in relation to how the matter was arranged.*

*Operational Orders produced by MORS Officer 2 during his interview were searched for within the MORS office prior to his interview and could not be located.*

*An analysis of the orders produced by MORS Officer 2 failed to locate what duties Rusby and MORS Officer 4 were to undertake during the operation, although they were named.*

*MORS Officer 2 states that he and MORS Officer 1 were unable to complete many 'on water operational checks' due to inclement weather at KI, this is contradicted by an email located sent by Rusby to his daughter, named 'Dad doing work on KI', located after an analysis was completed of Rusby's emails.*

*A short video was attached to this email depicting Rusby controlling a boat on the water, MORS Officer 4 laying down at the rear of the boat. The video is believed to have been recorded by MORS Officer 2 on Friday 16 November 2012. The weather in the video appears to be fine and sunny.*

*An analysis of the orders indicates 'on water operational duties' were to take place, however a return attached to the rear is not completed.*

*Further emails were located which are between Rusby, MORS Officer 4, MORS Officer 1 and MORS Officer 2, which depict and infer a collusion between them all to arrange the KI trip.*

*On 20 April 2015, BH, ..., provided a statement stating the following;*

- *He was the Former Director, Transport Safety Regulation (DPTI).*
- *He retired from SA Government in April 2012.*

- *Rusby took over his position as Director.*
- *He knew Rusby well as Rusby worked as a Section Manager and Manager in the Transport department from mid-2000.*
- *He had wanted to catch up with DPTI Employee 6, who was on Kangaroo Island prior to his retirement but couldn't.*
- *He was unable to recall who contacted him to travel to Kangaroo Island but that it was some weeks before 15 November 2012.*
- *He had been collected by MORS Officer 4 on 15 November 2012 and Rusby had also been collected.*
- *He attempted to purchase a ferry ticket at the time but Rusby had stated, "Don't worry about it we've got a ticket that we'd purchased for someone who's not going now".*
- *He attempted to pay for his accommodation share but was informed it had also been paid for.*
- *He confirmed MORS Officer 1 and MORS Officer 2 were in attendance but was informed by someone MORS Officer 6 was unable to attend.*
- *He was driven around Kangaroo Island in a DPTI vehicle.*
- *He returned to the mainland by ferry with Rusby and MORS Officer 4.*

*Rusby did not wish to answer any questions in relation to this matter.*

*MORS Officer 1 did not wish to answer any questions in relation to this matter.*

### **Findings**

*The name of MORS Officer 6 was used by MORS Officer 1 to purchase a ferry ticket, and is believed to have been used to conceal that BH was the actual person going to travel on the ferry instead of MORS Officer 6.*

*Rusby authorised the use of this ticket by allowing BH to use the ticket on the day of travel (15 November 2012), which suggests Rusby had knowledge that a ticket was already in existence for BH to use, as MORS Officer 1 and MORS Officer 2 travelled to KI the day prior (14 November).*

*Rusby, MORS Officer 1 and MORS Officer 2 knew BH was no longer an employee of the government at the time of the ticket being used to allow BH to travel on the ferry.*

*MORS Officer 6 had no intention of travelling to nor did he have any knowledge of the trip to KI.*

*Purchases of fuel and food were made using MORS Officer 2's government issued credit card on KI.*



*To facilitate this offence Rusby, MORS Officer 1 and MORS Officer 2 conspired to utilise and authorise documents in the name of another person knowing that it was false.*

*On 7th May 2015, an application for MORS Officer 1 and MORS Officer 2 to attend an Examination was made, as it was believed it would have provided further evidence against Rusby and MORS Officer 1 for the allegation to be proven beyond a reasonable doubt, however this application was denied.*

166. Investigator P found the allegation substantiated.<sup>227</sup>
167. The investigation report does not include any details about allegation 8 other than the following paragraph:<sup>228</sup>
- Between 7 January 2014 and 9 January 2014, Rusby being a public officer improperly exercised power or influence with the intention of securing a benefit for himself, by using DPTI Employee 1 and a DPTI vehicle for his own personal use, a breach of section 251 of the CLCA.*
168. There was no analysis of the evidence supporting allegation 8 and no finding made by Investigator P as to whether he considered the allegation substantiated or unsubstantiated.
169. In his evidence before me, Investigator P was asked about why there was no analysis of allegation 8 in the investigation report. Investigator P could not assist with why there was no analysis of that allegation.<sup>229</sup> He believed that allegation 8 was unsubstantiated because there was insufficient evidence to prove any offence.<sup>230</sup>
170. The investigation report ultimately recommended that the file be referred to the DPP “for adjudication and prosecution” of Mr Rusby and three other MORS staff members (MORS Officer 1, MORS Officer 2 and MORS Officer 3).<sup>231</sup>

## Memorandum

171. ICAC Legal Officer 1 reviewed a draft of Investigator P’s investigation report and the supporting materials.<sup>232</sup> ICAC Legal Officer 1 wrote a memorandum dated 6 July 2015 to Mr Lander about Investigator P’s investigation into Mr Rusby and other MORS staff members.<sup>233</sup>

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<sup>227</sup> Exhibit 64 – Investigation Report at p 33 [107].

<sup>228</sup> Exhibit 64 – Investigation Report at p 4.

<sup>229</sup> Exhibit 363 – Transcript (Investigator P) at p 140.

<sup>230</sup> Exhibit 363 – Transcript (Investigator P) at p 141.

<sup>231</sup> Exhibit 64 – Investigation Report at p 33.

<sup>232</sup> Exhibit 91 – Running Sheet at p 55; Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015 at p 1.

<sup>233</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015.

172. ICAC Legal Officer 1's memorandum did not refer to allegation 6 in respect of Mr Rusby nor did the memorandum refer to allegation 8.

173. ICAC Legal Officer 1's memorandum did consider allegation 7 and recommended that the matter should be referred to the DPP.<sup>234</sup>

174. In relation to allegation 7, ICAC Legal Officer 1 stated:<sup>235</sup>

*While s251 might potentially be considered an appropriate charge for the relevant conduct, I would suggest that the offence of deception contrary to section 139 of the CLCA might be a more fitting offence in this scenario.*

175. ICAC Legal Officer 1 described their reasoning in the following terms:<sup>236</sup>

*The offensive conduct in this instance is the booking by MORS Officer 1 of the Sealink ticket in the name of a person whom he never intended to travel. It would possibly be easier to prove that MORS Officer 1 intended to deceive the Sealink in booking the name of a different passenger, in order to benefit a third person, rather than trying to prove he exercised influence by virtue of being a public officer in this case...*

176. ICAC Legal Officer 1's analysis of allegation 7 focussed solely on MORS Officer 1's conduct. There was no analysis of how Mr Rusby was implicated in the offending anywhere in the memorandum to Mr Lander. Notwithstanding that, ICAC Legal Officer 1 recommended to Mr Lander that "*there (was) enough on the brief for the DPP to adjudicate (sic) the matter and for charges to be laid*".<sup>237</sup>

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<sup>234</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015 at p 1.

<sup>235</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015 at p 1.

<sup>236</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015 at p 1.

<sup>237</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015 at p 2.

## Referral for prosecution

177. On 18 August 2015, Mr Lander provided a brief of evidence to the DPP in relation to the investigation into Mr Rusby and four others (MORS Officer 1, MORS Officer 3, MORS Officer 2, and MORS Officer 5).<sup>238</sup> Along with providing the brief of evidence to the DPP, Mr Lander also provided the referral letter<sup>239</sup> and referral minute<sup>240</sup> to Mr Kimber.
178. Section 7(1)(a)(i) of the ICAC Act provided:<sup>241</sup>

### 7—Functions

(1) There is to be an Independent Commissioner Against Corruption with the following functions:

(a) to identify corruption in public administration and to—

(i) investigate and refer it for prosecution; or ...

179. I am satisfied that the purpose of Mr Lander providing the brief of evidence to the DPP was to refer Mr Rusby for prosecution. A decision to “refer” a person for prosecution is a decision to recommend to the DPP that it consider charging a person with a criminal offence. Self-evidently, a decision to refer is not, and cannot be, a decision to prosecute a person, which the Commissioner has no power to do. Therefore, in providing the brief of evidence to the DPP, Mr Lander performed a function under section 7(1)(a)(i).
180. I am satisfied that Mr Lander referred Mr Rusby under section 7(1)(a)(i) by analysing the language used by Mr Lander in his referral letter and referral minute to Mr Kimber as well as the context in which Mr Lander determined to provide the DPP with the brief of evidence.
181. The referral letter to Mr Kimber stated:<sup>242</sup>

*I refer the matter for your consideration as to whether a prosecution should be brought and if so for you to commence that prosecution.*

...

*If in your opinion there is sufficient evidence to lay charges the investigator, with the assistance of a legal officer at this office, will attend to preparing an Information for filing based on your instructions.*

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<sup>238</sup> Exhibit 96 – Referral Letter.

<sup>239</sup> Exhibit 96 – Referral Letter.

<sup>240</sup> Exhibit 97 – Referral Minute.

<sup>241</sup> See also *Bell v The Queen* (2020) 286 ACrimR 501, 532 [158].

<sup>242</sup> Exhibit 96 – Referral Letter at p 1, 2.

182. The referral minute to Mr Kimber stated:

**Other notable transactions**

*It is also necessary to detail a few other transactions that are important:*

*The evidence reveals that during the relevant period, MORS Officer 1 made a purchase of ferry fares on 11 November 2012 for a 'work' trip to Kangaroo Island for 14 - 17 November 2012. The booking was made for MORS Officer 1, MORS Officer 2, MORS Officer 6, Trent Rusby (Director, Transport Safety Regulation at DPTI) and MORS Officer 4. MORS Officer 1 also arranged for the use of DPTI Employee 1's government credit card to pay for the three nights of accommodation that the travellers shared. MORS Officer 6 has stated that he was never invited on the trip (see his statement), and rather BH, a former manager within the MORS section travelled with them. Suspicion exists that this was a 'boys fishing trip'. However, MORS Officer 4 has provided a statement giving some legitimate business reasons for the trip. MORS Officer 2 in his record of interview said there were legitimate purposes for the trip ... It would appear that the payment of a ferry fare for a non-government employee is inappropriate, regardless of the fact that he [BH] was a recently retired senior manager of the section. However, MORS Officer 4 in his statement said that BH attended only after MORS Officer 6 could not, and that they were to learn from BH on the trip. That is contradicted by MORS Officer 6's statement. An email chain attached to the statement of [Investigator P] between the travellers suggest that it was always their intention that BH, rather than MORS Officer 6, attend. It appears as though there was no proper record keeping of what was achieved upon the trip. BH has given a statement where he says that he offered to pay for his ticket but Trent Rusby told him it was taken care of.<sup>243</sup>*

...

*In relation to the Kangaroo Island trip, you may consider charges against MORS Officer 1 (purchasing the ticket) and Rusby (telling BH he could accept a free ticket on the ferry). The most likely charge seems to be **abuse of public office**. The charge would seem to have to be limited to the ferry ticket for MORS Officer 6 because it would be very difficult to prove beyond reasonable doubt that there was no legitimate work purpose for the trip to Kangaroo Island at all. In relation to the purchase of the ticket in the name of MORS Officer 6, the evidence relies upon an email chain to prove that there was a prearranged plan to take BH from the start. Consideration would have to be given to whether it is necessarily improper to take BH, the retired former MORS employee, with them. Assuming that a statement can be obtained from somebody at DPTI stating that it is inappropriate to take a non-government employee on a paid work trip and that they needed higher authorisation, charges should be considered.*<sup>244</sup>

*(bold in original, underlining mine)*

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<sup>243</sup> Exhibit 97 – Referral Minute at p 4-5.

<sup>244</sup> Exhibit 97 – Referral Minute at p 10.

183. In relation to the referral letter, submissions made on behalf of Mr Lander state that:<sup>245</sup>

*Mr Lander couched the "referral" in the "referral letter" as "I refer the matter [being the investigation into the 5 MORS Officers, including Mr Rusby] for your consideration as to whether a prosecution should be brought and if so for you to commence that prosecution." The effect of what Mr Lander said in connection with Mr Rusby when "referring" the matter to the DPP was that whether charges against Mr Rusby should be considered by the DPP (not Mr Lander) depended upon whether certain further evidence could be obtained. It follows that Mr Lander had not formed the view that Mr Rusby should be prosecuted for the potential offence identified, or any offence... [Mr Lander] believed that further enquiries should be undertaken before charges were considered.*

...

*... on no reasonable view could it be said that Mr Lander recommended to the DPP that Mr Rusby be prosecuted for any offence. Rather, ... the investigation into five persons, including Mr Rusby, was referred to [sic] DPP for his "consideration as to whether a prosecution should be brought" and, as set out above, in the case of Mr Rusby, Mr Lander only stated that a charge should be considered if certain further evidence, which he identified, could be obtained.*

*(emphasis in original)*

184. I understand this submission to mean that Mr Lander does not consider that he referred Mr Rusby to the DPP for prosecution.
185. I find that in sending the referral letter, referral minute, and brief of evidence, Mr Lander performed a function under section 7(1)(a)(i) of the ICAC Act. Of course, the language used by Mr Lander in the referral letter gave deference to the fact that it was Mr Kimber, as the DPP, and not Mr Lander who had the ability to lay criminal charges based on the material provided to him by Mr Lander. Mr Lander's language in the referral letter also appropriately acknowledged that Mr Kimber must apply his own judgment as to whether criminal charges should be laid, and a prosecution should commence.
186. The referral minute demonstrates that Mr Lander had analysed Mr Rusby's conduct in relation to allegation 7 and that Mr Lander had set out what he thought the *actus reus* of the abuse of public office offence could be in relation to Mr Rusby. Mr Lander also acknowledged in the referral minute that more evidence needed to be gathered to prove that it was "*inappropriate to take a non-government employee on a paid work trip and [whether] they needed higher authorisation*".<sup>246</sup> I observe that Mr Lander's recommendation for further evidence to be obtained does not impact on Mr Lander's key reason why a

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<sup>245</sup> Exhibit 432 – Submissions on behalf of Mr Lander, 5 April 2024 at p 2 [1(b), 1(d)].

<sup>246</sup> Exhibit 97 – Referral Minute at p 10.

prosecution for abuse of public office should be considered, namely, the 19 March 2012 email chain which proved that the Mr Rusby was part of a prearranged plan to take BH to Kangaroo Island “*from the start*”.<sup>247</sup>

187. Mr Lander set out his opinion in the referral minute about how to particularise the offence of abuse of public office. This supports the suggestion that the brief was not provided to the DPP for the purpose of seeking an opinion, or advice. Mr Lander provided the DPP with the brief of evidence because Mr Lander made the decision to refer Mr Rusby (and others) to the DPP for prosecution.
188. Finally, the context in which Mr Lander provided the brief of evidence to the DPP is an important factor to consider when determining whether Mr Lander performed a function under section 7(1)(a)(i) of the ICAC Act.
189. The decision by Mr Lander to provide a brief of evidence to the DPP followed a direction from Mr Lander to Investigator P to “*bring the investigation to a conclusion*” and to “*conclude the investigation by writing your report*” (see paragraphs [95] – [96] above).<sup>248</sup> ICAC’s procedures refer to the preparation of an investigation report for the Commissioner with “*appropriate findings*” at the “*completion of an investigation*”.<sup>249</sup>
190. The investigation report was prepared and forwarded to Mr Lander. ICAC Legal Officer 1 also produced a memorandum which recommended to Mr Lander that “*there (was) enough on the brief for the DPP to adjudicate (sic) the matter and for charges to be laid*”.<sup>250</sup> After receiving the investigation report, a matter note made by Mr Lander states that he “*agree[d] that the matter should be referred to the DPP*” and that “*brief should be considered by legal*”.<sup>251</sup>
191. In this context, the fact that Mr Lander had instructed Investigator P to conclude the investigation and the tasks associated with the finalisation of an investigation had been carried out by ICAC employees supports my finding that the provision of the brief of evidence to the DPP was for the purpose of referring Mr Rusby for prosecution pursuant to section 7(1)(a)(i) of the ICAC Act.
192. In finding that Mr Lander referred Mr Rusby for prosecution and thus performed a function under section 7(1)(a)(i) of the ICAC Act, it is important to make it clear that I am satisfied that Mr Lander only referred Mr Rusby for prosecution for allegation 7, and that referral was subject to the provision of further

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<sup>247</sup> Exhibit 97 – Referral Minute at p 10.

<sup>248</sup> Exhibit 60 – Memorandum from Mr Lander to Investigator P re coercive hearing applications, 14 May 2015.

<sup>249</sup> Exhibit 445 – ICAC, Corruption Investigation Process Policy, 2 September 2013 at p 4 (heading ‘Investigation outcome’).

<sup>250</sup> Exhibit 93 – Memorandum from ICAC Legal Officer 1 to Mr Lander, 6 July 2015 at p 2.

<sup>251</sup> Exhibit 91 – Running Sheet at p 55 (entry marked ‘16 Jul 2015’).

evidence. I do not find that Mr Lander referred Mr Rusby for prosecution for allegation 6.

193. The referral letter stated that a brief of evidence accompanied the referral.<sup>252</sup> I have been unable to determine what material was contained in the brief of evidence. Neither the referral letter nor the referral minute particularise any enclosures and ICAC's records do not contain a list of materials that were provided to the DPP at the time of the referral. I cannot determine whether either Investigator P's investigation report or ICAC Legal Officer 1's memorandum formed part of the brief that was sent to the DPP.
194. Following the referral of the matter to the DPP, charges were laid against Mr Rusby and four other DPTI employees on a joint Information. The Information was filed in the Adelaide Magistrates Court on 24 February 2016.<sup>253</sup>
195. Mr Rusby was charged with one count of fail to act honestly in the performance of his duties contrary to section 26 of the PSHA Act. This was count 2 on the Information. This count relied upon the evidence gathered by ICAC about allegation 7.
196. Mr Rusby was also charged with three counts of theft contrary to section 134(1) of the CLCA. These were counts 10, 12 and 13 on the Information. The three charges related to purchases of clothing that were made on 2 July 2013, 3 July 2013, and 10 July 2013. The clothing purchase made on 2 July 2013 was allegation 6 in the ICAC investigation. Mr Rusby's involvement in allegation 6 was not referred by Mr Lander to the DPP.

## **Allegation 6 – Paddy Pallin purchases**

197. Allegation 6 related to purchases of clothing items that were made by MORS Officer 1 using MORS Officer 5's government credit card. Investigator P suspected that the items of clothing were purchased by MORS Officer 1 together with Mr Rusby for Mr Rusby's personal use on a family skiing holiday.<sup>254</sup> Investigator P considered whether Mr Rusby had committed the offence of abuse of public office contrary to section 251 of the CLCA.
198. In my opinion, there was insufficient admissible evidence gathered by ICAC at the time Mr Lander referred Mr Rusby to the DPP to prove that Mr Rusby had improperly exercised power or influence at the time the items of clothing were purchased at Paddy Pallin.
199. The only evidence gathered by ICAC about Mr Rusby's involvement in the purchases at Paddy Pallin were the answers that MORS Officer 5 gave in an

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<sup>252</sup> Exhibit 96 – Referral Letter at p 1.

<sup>253</sup> Exhibit 99 – Magistrates Court Information.

<sup>254</sup> Exhibit 64 – Investigation Report at p 27 [78]-[79].

interview that was conducted by Investigator P under caution on 28 September 2014.

200. In his 28 September 2014 interview, MORS Officer 5 told Investigator P that he received a telephone call from MORS Officer 1 who was at Paddy Pallin with Mr Rusby. MORS Officer 5 said that MORS Officer 1 asked to use MORS Officer 5's government issued credit card to make a purchase at the store. The basis upon which MORS Officer 5 believed Mr Rusby was present with MORS Officer 1 at the store at the time of the telephone call is unclear but there is no evidence that MORS Officer 5 actually spoke with Mr Rusby on the phone himself.
201. There was no admissible evidence to prove that Mr Rusby was in fact present at Paddy Pallin with MORS Officer 1 when the telephone call between MORS Officer 1 and MORS Officer 5 took place.
202. There was therefore no admissible evidence to prove that Mr Rusby improperly exercised power or influence by virtue of his public office to affect the Paddy Pallin purchases.
203. There was also no admissible evidence that Mr Rusby secured a benefit for himself or another. There was no admissible evidence that the purchases made at Paddy Pallin were for Mr Rusby's personal use as was suspected by ICAC at the time of the investigation. In fact, there was no evidence that the items of clothing purchased from Paddy Pallin were ever in Mr Rusby's possession.
204. Investigator P's conclusion that allegation 6 was unsubstantiated in respect of Mr Rusby was appropriate. I do not consider that the evidence gathered at the time of the referral was capable of establishing that Mr Rusby had committed the offence of abuse of public office contrary to section 251 of the CLCA, or indeed that he had committed any other corruption offence relating to this allegation.

## **Allegation 7 – Kangaroo Island trip**

205. Allegation 7 related to the trip that Mr Rusby made to Kangaroo Island between 15 and 17 November 2012 with three other MORS employees and BH.
206. To determine whether it was appropriate for Mr Lander to refer Mr Rusby to the DPP in relation to allegation 7, I have assessed the state of evidence that had been gathered by ICAC investigators at the date Mr Lander made the referral.
207. I have decided to review the evidence in support of the allegations because such a review is relevant to whether ICAC's function in referring Mr Rusby to the DPP was carried out in a manner likely to assist in preventing or minimising



corruption in public administration.<sup>255</sup> Generally speaking, if there is insufficient evidence to refer a person to the DPP for prosecution that is apt to be counterproductive in preventing or minimising corruption in public administration because it has the potential to divert attention and resources away from those whose corrupt conduct should be prosecuted by the DPP. In short, such referrals do not promote an efficient allocation of resources. Furthermore, a referral of a person to the DPP without a proper legal foundation may damage the legitimacy or reputation of ICAC.

208. I have not reviewed allegation 8 as the investigation report did not contain any content or analysis about it and no charges were laid in respect of it.

209. The elements of the offence of abuse of public office that were relevant to allegation 7 against Mr Rusby are:

- (a) That Mr Rusby was at the relevant time a public officer.
- (b) That Mr Rusby exercised power or influence that he had by virtue of his public office.
- (c) That Mr Rusby exercised that power or influence improperly, namely:
  - (i) he acted contrary to standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by such public officers;
  - (ii) he knew he was acting improperly or was reckless in acting improperly;
  - (iii) having regard to the circumstances, the conduct warrants the imposition of a criminal sanction. It would not warrant a criminal sanction, if for example,
    - Mr Rusby acted in the honest and reasonable belief that he was lawfully entitled to act in the relevant manner;
    - Mr Rusby had lawful authority or a reasonable excuse for the act;
    - the act was of a trivial character and caused no significant detriment to the public interest.
- (d) that Mr Rusby exercised the power or influence with the intention of securing a benefit for himself or another person.

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<sup>255</sup> ICAC Act Sch 4 cl 9(1)(b) and (c). These matters are relevant to an annual review and also an own motion review pursuant to clause 2(1)(c) of Schedule 4.

210. The evidence purportedly in support of this allegation during the ICAC investigation at the time Mr Lander referred Mr Rusby to the DPP is summarised below.
211. On 11 November 2012, MORS Officer 1's government credit card was used to purchase a SeaLink ferry ticket in the name of MORS Officer 6.<sup>256</sup>
212. MORS Officer 6 stated to ICAC investigators that he did not travel to Kangaroo Island on 15 November 2012.<sup>257</sup> He said that he had never seen the Operation Orders for the Kangaroo Island trip. He did not have a specific memory but would have recalled if he had been told he was travelling to Kangaroo Island because he would have been excited about being part of such a trip.<sup>258</sup>

### Purpose of the Kangaroo Island trip

213. The evidence before ICAC was that there were two purposes for the Kangaroo Island trip. First, MORS officers were required to carry out compliance checks regarding vessels moored on Kangaroo Island.<sup>259</sup>
214. Secondly, Mr Rusby and MORS Officer 4 were invited to attend the 'Volendam' cruise ship event held on 17 November 2012 by the South Australian Tourism Commission.<sup>260</sup> MORS Officer 4 stated that he and Mr Rusby had:<sup>261</sup>

*... got an invite regarding the new passenger embarking/disembarking platform to be used by cruise ship owners over there. Because previously they used to anchor at Kingscote and it was a terrible place for the tender vessels<sup>262</sup> to navigate around the Kingscote jetty ...*

*The Department, in conjunction with Tourism SA, invested some money in [Kangaroo Island] and we built a platform which is multi-layered so that these tender vessels off a cruise ship which is anchored a kilometre or so off-shore at [Kangaroo Island] can bring in tourists, unload them and reload them. We had done a lot of work with the cruise companies and as part of that they invited a whole bunch of DPTI people to come and have a look at the operation.*

215. Annexed to MORS Officer 4's statement was an email from Ms Clarke who worked at the South Australian Tourism Commission at the time which included an email from the Business Manager – Cruise Development from the South

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<sup>256</sup> Exhibit 71 – Statement of DPTI Employee 4, 3 June 2015 at p 15.

<sup>257</sup> Exhibit 88 – Statement of MORS Officer 6, 29 April 2015.

<sup>258</sup> Exhibit 88 – Statement of MORS Officer 6, 29 April 2015 at p 3.

<sup>259</sup> MORS Officer 4 recalled that "operation duties were conducted by MORS officers whilst on Kangaroo Island" following information from DPTI Employee 6 that there had been issues with "vessels mooring on moorings in American River and that it caused a whole bunch of headaches, and that people were speeding through the four knot zone". MORS Officer 4 also said that the purpose of the Kangaroo Island visit was about "raising our presence" in the region.

<sup>260</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 4.

<sup>261</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 4.

<sup>262</sup> According to the Australian Maritime Safety Authority's website, tender vessels are "small vessels used to transport people or goods between a vessel and the shore".

Australian Tourism Commission inviting both MORS Officer 4 and Mr Rusby to the 'Volendam' event.<sup>263</sup>

216. Thirdly, MORS Officer 2 believed that BH showed Mr Rusby, as the new Director of Transport and Safety Regulation, "*around the island and contacts that the ex-Director [BH] had to the new Director, introducing him*".<sup>264</sup>

217. In an interview conducted under caution on 2 October 2014, MORS Officer 2 outlined the work that he undertook while he was on Kangaroo Island. He said:<sup>265</sup>

*We looked around at the operational logistics side of running an operation over there, the visibility costing factor, we looked at the potential for an oil spill, pollution with the cruise ship coming in and being a regular cruise ship, how would we get equipment over there, conducted on-water patrols getting a feel for the waters around the northern side of the Island as in the Operation Order.*

218. MORS Officer 2 also stated that he wrote the Operation Order for the Kangaroo Island trip.<sup>266</sup> MORS Officer 2 advised that MORS Officer 6 was mentioned in the Operation Order, but he did not travel to Kangaroo Island.<sup>267</sup> The content of the Operation Order is detailed. The Operation Order provided a risk analysis for the operation, as well as details about what tasks were to be conducted each day by the DPTI staff who attended the operation. It was suggested by a lawyer at the DPP that because the Operation Order was unsigned, this was evidence that there was no legitimate work purpose for Mr Rusby or any of the other MORS employees to have attended the Kangaroo Island trip.<sup>268</sup> Even if there were a requirement that the Operation Order should be signed, I am not satisfied that there was sufficient evidence which suggested that MORS Officer 2 lied when he stated that he had prepared the Operational Order. The existence of the Operation Order is consistent with the Kangaroo Island trip having some valid work purpose.

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<sup>263</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 17-8.

<sup>264</sup> Exhibit 82 – Transcript of interview of MORS Officer 2, 2 October 2014 at p 70.

<sup>265</sup> Exhibit 82 – Transcript of Interview of MORS Officer 2, 2 October 2014 at p 71 L-8-13.

<sup>266</sup> Exhibit 82 – Transcript of Interview of MORS Officer 2, 2 October 2014 at p 64 L-28.

<sup>267</sup> Exhibit 82 – Transcript of Interview of MORS Officer 2, 2 October 2014 at p 74 L-24.

<sup>268</sup> Exhibit 274 – Memorandum from DPP Senior Solicitor 1 and DPP Solicitor 1 to Mr Kimber, 15 December 2015 at p 2.

## Attendance of BH at Kangaroo Island

219. According to MORS Officer 4, the original intention was for MORS Officer 6 to attend the Kangaroo Island trip, but he could not make it due to family issues.<sup>269</sup>

220. MORS Officer 4 advised that BH attended the trip because:<sup>270</sup>

*He [BH] did not have a chance to talk to the guy that worked on Kangaroo Island and ... he hung on to the knowledge and an understanding of what happened in a regulatory sense, so it was good for us to actually get some of that knowledge from him as well.*

221. MORS Officer 4 further said that he knew that BH's ferry ticket was paid for by DPTI, but this was not the initial intention. MORS Officer 4 said that *"the plan was to actually take [BH] across on one of the patrol vessels. The weather wasn't that good so he actually came on the ferry with us"*.<sup>271</sup>

222. In an interview conducted on 20 April 2015, BH told Investigator P in his interview that he had been contacted in late 2012 by *"either MORS Officer 4 or Mr Rusby... I can't remember explicitly who. I'm more inclined to think it was Mr Rusby but I'm not clear on that"* about the Kangaroo Island trip.<sup>272</sup> BH stated that he intended to attend the Kangaroo Island trip at his own expense so that he could personally thank the Kangaroo Island Harbour Master, DPTI Employee 6, for his service.<sup>273</sup> BH recalled that when they arrived at Cape Jervis he walked towards the SeaLink office to purchase a ferry ticket when either MORS Officer 4 or Mr Rusby or both said to him, *"look don't worry about it. We've got a ticket that we'd purchased for someone who's now not going"*.<sup>274</sup>

223. BH told Investigator P that he questioned the appropriateness of using the ticket but was told by either Mr Rusby, MORS Officer 4 or both of them, that it would be *"cheaper this way"*.<sup>275</sup> BH said that he had heard that MORS Officer 6 was intending to attend but for family reasons, he had pulled out of the trip.<sup>276</sup>

224. In an interview conducted on 2 October 2014, MORS Officer 2 told Investigator P that he understood that Mr Rusby and BH were on Kangaroo Island to liaise with the Harbour Master and to introduce Mr Rusby to contacts as the new Director.<sup>277</sup>

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<sup>269</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 5.

<sup>270</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 5.

<sup>271</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 5.

<sup>272</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 8 L-16-27.

<sup>273</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 6 L-16.

<sup>274</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 7 L-5-7.

<sup>275</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 7 L-8-10.

<sup>276</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 11 L-28-30.

<sup>277</sup> Exhibit 82 – Transcript of Interview of MORS Officer 2, 2 October 2014 at p 70 L-2-4.

## The Kangaroo Island trip email chains

225. On 14 October 2015, Investigator P reviewed Mr Rusby's emails.<sup>278</sup> He located two email chains of relevance to allegation 7.
226. The first email chain commenced on 19 March 2012 when BH was employed as the Director of Transport Regulation Services within DPTI.<sup>279</sup> The email subject is '*Kangaroo Island Visit*' and includes emails between BH, Mr Rusby, MORS Officer 4 and another DPTI employee. The emails are focused on arranging for BH, Mr Rusby and MORS Officer 4 to visit Kangaroo Island in April 2012. BH and Mr Rusby both advised that they could not travel to Kangaroo Island on the dates proposed. Mr Rusby then emailed, "*any thought on doing it shortly after retirement ie a post get together*".<sup>280</sup> MORS Officer 4 responded, "*ok with me. Just need to work out how we arrange travel/accommodation*".<sup>281</sup> I find that the words to "*doing it shortly after retirement*" refers to doing the trip shortly after BH retires.
227. The second email chain commenced on 31 October 2012 between Mr Rusby, MORS Officer 4, MORS Officer 2 and MORS Officer 1.<sup>282</sup> The first email is from MORS Officer 1 advising of ferry times on 15 November 2012. Mr Rusby replied "*just one ferry ticket or?? [MORS Officer 4] to clarify*". MORS Officer 1 then replied to Mr Rusby, "OK". MORS Officer 2 then emailed, "*might I suggest an early start for the MSO's [MORS Officer 1 and MORS Officer 2] and the other MSO? Get across and get things set up – vessels on water ready for ON WATER ops*". Mr Rusby responded to MORS Officer 2's email, "*whatever suits – in your valuable hands*".<sup>283</sup> I find that Mr Rusby's question "*just one ferry ticket or?? [MORS Officer 4] to clarify*" could be a reference to whether MORS Officer 4 was to attend the Kangaroo Island trip on the same ferry as Mr Rusby.

## Analysis

228. In my opinion, there was no or insufficient evidence obtained during the ICAC investigation that could prove Mr Rusby committed the offence of abuse of public office.<sup>284</sup> In particular there was no or insufficient evidence to prove either that (a) he acted contrary to the standards of propriety reasonably expected by ordinary, decent members of the community; or (b) that he knew he was acting improperly or was reckless in acting improperly.<sup>285</sup>

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<sup>278</sup> Exhibit 254 – Statement of Investigator P, 19 August 2015 at p 15.

<sup>279</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officer 4, BH and another, 19 March 2012.

<sup>280</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officer 4, BH and another, 19 March 2012.

<sup>281</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officer 4, BH and another, 19 March 2012.

<sup>282</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officers 1, 2 and 4, 31 October 2012.

<sup>283</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officers 1, 2 and 4, 31 October 2012.

<sup>284</sup> Contrary to CLCA s 251.

<sup>285</sup> See CLCA s 238.

229. In the referral minute, Mr Lander stated that:<sup>286</sup>

*... the charge [against Mr Rusby] would seem to have to be limited to the ferry ticket for MORS Officer 6 because it would be very difficult to prove beyond reasonable doubt that there was no legitimate work purpose for the trip to Kangaroo Island at all. In relation to the purchase of the ticket in the name of MORS Officer 6, the evidence relies upon an email chain to prove that there was a prearranged plan to take BH from the start. Consideration would have to be given to whether it is necessarily improper to take BH, the retired former MORS employee, with them. Assuming that a statement can be obtained from somebody at DPTI stating that it is inappropriate to take a non-government employee on a paid work trip and that they needed higher authorisation, charges should be considered.*

230. Mr Lander's opinion that it would be difficult to prove that there was no legitimate work purpose for the Kangaroo Island trip was correct.

231. Mr Lander relied heavily on the two email chains dated 19 March 2012 and 31 October 2012 as proof that there was "a prearranged plan to take BH from the start" to Kangaroo Island,<sup>287</sup> and that the ferry ticket purchased by DPTI for MORS Officer 6 (a current employee) was always intended to be used by BH (an ex-employee).<sup>288</sup> However, Mr Lander was careful in his language not to express any concluded opinion on that topic.

232. Mr Lander was asked about the 19 March 2012 email chain in his evidence before me.<sup>289</sup> Mr Lander said that at the time he made the referral to the DPP, he thought that as of 19 March 2012, BH was not employed within DPTI.<sup>290</sup> Mr Lander stated, "I might be wrong but I understood BH was no longer in the position he previously occupied, which would mean that he – there that there would be no business reason for him to travel to Kangaroo Island".<sup>291</sup> Mr Lander also stated that he thought "that's what it was all about, the fact that they purchased a ticket in MORS Officer 6's name always on the basis that MORS Officer 6 wouldn't go, so they could take BH".<sup>292</sup>

233. Mr Lander was wrong about that matter. BH was an employee of DPTI on 19 March 2012 and continued to work in DPTI as the Director of Transport Safety Regulation until he retired from the position at DPTI altogether in April 2012.<sup>293</sup> That puts an entirely different perspective on the first email chain dated 19 March 2012 because it was entirely appropriate for BH to attend any Kangaroo Island trip at that time when he was still a government employee.

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<sup>286</sup> Exhibit 97 – Referral Minute at p 10.

<sup>287</sup> Exhibit 97 – Referral Minute at p 10.

<sup>288</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officers 1, 2 and 4, 31 October 2012.

<sup>289</sup> Exhibit 363 – Transcript (Mr Lander) at p 191 L-5.

<sup>290</sup> Exhibit 363 – Transcript (Mr Lander) at p 192 L-1-3.

<sup>291</sup> Exhibit 363 – Transcript (Mr Lander) at p 192 L-1-3.

<sup>292</sup> Exhibit 363 – Transcript (Mr Lander) at p 192 L-11-12.

<sup>293</sup> Exhibit 89 – Statement of BH, 20 April 2015 at p 1.

234. The 19 March 2012 email chain did contemplate that the original dates for the Kangaroo Island trip of 16 to 19 April 2012 may not be feasible. Mr Rusby's emails did raise the question whether the trip could be arranged after the retirement of BH as a "*post get together*" and this could BH's "*first consultancy*".<sup>294</sup> There was clearly a jocular tone to these emails. Nothing written or received by Mr Rusby in those emails could sustain a conclusion that on 19 March 2012, Mr Rusby was part of a conspiracy to unlawfully use government funds to pay for BH's ferry ticket to Kangaroo Island. There was no mention at all in those emails as to who would pay for BH's trip in the event that they met up for a "*post get together*" after BH's retirement.
235. Turning to the 31 October 2012 email chain, in his evidence before me, Mr Lander appropriately acknowledged that there was no evidence in those emails that Mr Rusby was part of a prearranged plan to take BH to Kangaroo Island from the start.<sup>295</sup>
236. There was also no evidence in either email chain which could possibly have supported an inference that Mr Rusby was part of a conspiracy to authorise and use documents in the name of another person (BH) knowing that they were false.<sup>296</sup> In other words, nothing written by Mr Rusby or read by Mr Rusby in that email chain could have proved beyond reasonable doubt that Mr Rusby knew that DPTI would pay for BH's ferry ticket and that a false paper trail would be created (by buying a ticket in in the name of MORS Officer 6) to conceal that fact.
237. I also consider that there was no or insufficient evidence that Mr Rusby knew that MORS Officer 6 was **not** going to attend Kangaroo Island when MORS Officer 1 purchased the ticket in his name on 12 November 2012.
238. On 29 October 2012 (two weeks before the trip), MORS Officer 2 emailed MORS Officer 1 regarding accommodation planning for the Kangaroo Island trip. MORS Officer 2 wrote that three maritime services officers (MSOs) were listed as being possible attendees – MORS Officer 1, MORS Officer 2 and MORS Officer 6.<sup>297</sup> Furthermore, the Operation Order which MORS Officer 2 showed to Investigator P during his interview on 2 October 2014 included reference to the same three MSOs (importantly, including MORS Officer 6) as being part of the operation.<sup>298</sup>
239. This email and the Operation Order (and MORS Officer 2's statement to ICAC) demonstrates that, whether or not MORS Officer 6 was informed about the

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<sup>294</sup> Exhibit 90 – Emails between Mr Rusby, MORS Officer 4, BH and another, 19 March 2012.

<sup>295</sup> Exhibit 363 – Transcript (Mr Lander) at p 194 L-5.

<sup>296</sup> Exhibit 64 – Investigation Report at p 33.

<sup>297</sup> Exhibit 74 – Statement of MORS Officer 4, 30 April 2015 at p 21. This important email was never referred to in any ICAC analysis of allegation 7.

<sup>298</sup> Exhibit 378 – Email from Investigator P to DPP Solicitor 1, 5 November 2015 at p 9.

Kangaroo Island trip,<sup>299</sup> those planning the Kangaroo Island trip contemplated that MORS Officer 6 would attend. In short, the first plank of the conspiracy hypothesis – that Mr Rusby knew that MORS Officer 1 purchased a ticket for MORS Officer 6 knowing he would not attend, and that MORS Officer 6 was a “dummy MSO for BH” – was founded on very shaky grounds.

240. True, there was *prima facie* evidence that on 15 November 2012, Mr Rusby authorised BH to use a ferry ticket to Kangaroo Island which was purchased in MORS Officer 6’s name.<sup>300</sup> In his interview with Investigator P, BH advised that either MORS Officer 4 or Mr Rusby or both said to him, “look don’t worry about it. We’ve got a ticket that we’d purchased for someone who’s now not going”.<sup>301</sup> BH questioned the appropriateness of using the ticket but was told that it would be “cheaper this way”.<sup>302</sup>
241. In my opinion, a court could not have been satisfied beyond reasonable doubt that Mr Rusby knew that his authorisation of BH’s government paid ferry ticket valued at approximately \$155.36<sup>303</sup> to travel to Kangaroo Island was improper. A trier of fact could not **exclude** beyond reasonable doubt that Mr Rusby believed that BH’s presence at Kangaroo Island could be justified as providing him with some assistance in carrying out his official functions due to BH’s previous position and his ability to introduce him to relevant people. That was a plausible reason Mr Rusby could have offered to ‘shout’ BH’s ticket on 15 November 2012.
242. Furthermore, neither the ICAC officers nor Mr Lander appear to have considered section 238 of the CLCA which provided that, in considering whether a public officer’s conduct was improper, the officer will not be taken to have acted improperly for the purposes of an offence of abuse of public office unless the person’s act was such that in the circumstances of the case, the imposition of a criminal sanction was warranted. The act would not warrant a criminal sanction if, for example, the act was of a trivial character and caused no significant detriment to the public interest.
243. Even if Mr Rusby’s authorisation was unwise or inappropriate or ‘bending the rules’, this is a long way from proving that Mr Rusby had committed a crime. I

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<sup>299</sup> MORS Officer 6 acknowledged that he was often “out of the loop”. Exhibit 362 – Transcript of interview of MORS Officer 6, 14 July 2014 at p 36 L-28-30.

<sup>300</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 7 L-5-7.

<sup>301</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 7 L-5-7.

<sup>302</sup> Exhibit 265 – Transcript of Interview of BH, 20 April 2015 at p 7 L-8-10.

<sup>303</sup> The total payment made for the tickets to Kangaroo Island was for 5 people and 2 boats. The total cost was \$1,553.60. I have taken the total and divided that by 5 to come to the value of \$310.72. I halved \$310.72 as there was only evidence in the ICAC brief to prove that BH’s ferry ticket was paid for using government funds from Cape Jervis to Kangaroo Island.



consider it was trivial in nature and caused no significant detriment to the public interest.<sup>304</sup>

## Did Mr Lander err when he referred Mr Rusby for prosecution?

244. Mr Rusby has submitted that “*had ICAC investigators recommended charges singularly against [him] ... [the charges] could have been dismissed years*” earlier.<sup>305</sup> I understand this aspect of Mr Rusby’s submission to be referring the terms of Mr Lander’s referral of Mr Rusby for prosecution.

245. For the reasons I have set out above at paragraphs [177] – [192], I have found that Mr Lander performed a function under section 7(1)(a)(i) of the ICAC Act by referring Mr Rusby for prosecution in respect of allegation 7. In doing so, Mr Lander erred by referring Mr Rusby for prosecution.

246. I consider that Mr Lander’s performance of his function under section 7(1)(a)(i) of the ICAC Act in respect of Mr Rusby was affected by two material errors. The first error was Mr Lander’s incorrect assumption that BH had retired from DPTI at the time of the email chain on 19 March 2012. This error was material because it led to the mistaken view that the first email chain could have supported an inference that Mr Rusby was part of a conspiracy in relation to the purchase of BH’s ticket. The second error was Mr Lander’s failure to consider whether Mr Rusby’s conduct was improper according to the considerations set out in section 238 of the CLCA.

247. Mr Lander has submitted to me that:<sup>306</sup>

*it cannot reasonably be found that the "referral", in the context in which it was made, should not have been made in circumstances where the DPP, following his own independent analysis, decided to prosecute Mr Rusby for offences that had not been identified by Mr Lander.*

248. Commissioner Vanstone has submitted to me:

*Apparently the Director considered there were reasonable prospects of conviction, because Rusby was charged.*<sup>307</sup>

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<sup>304</sup> Furthermore, neither the ICAC officers nor the Commissioner appear to have considered section 238 of the CLCA which provided that in considering whether a public officer’s conduct was improper, the officer will not be taken to have acted improperly for the purposes of an offence of abuse of public office unless the person’s act was such that in the circumstances of the case, the imposition of a criminal sanction was warranted. The act would not warrant a criminal sanction if, for example, the act was of a trivial character and caused no significant detriment to the public interest.

<sup>305</sup> Exhibit 205 – Mr Rusby, Submission to the Inspector, 11 August 2023 at p 3.

<sup>306</sup> Exhibit 432 – Submissions made on behalf of Mr Lander, 5 April 2024 at p 3 [1(f)].

<sup>307</sup> Exhibit 418 – Submissions of Commissioner Vanstone, 26 March 2024 at p 1.

... the very fact that charges were laid against Rusby shows, at least, that fair minds could differ on the question.<sup>308</sup>

249. I respectfully disagree with both Mr Lander and Commissioner Vanstone. The fact that the DPP determined to charge Mr Rusby with a corruption offence arising from the evidence gathered about allegation 7 has no bearing upon my consideration of whether Mr Lander erred when he performed his function to refer Mr Rusby for prosecution. Whether or not the DPP erred in charging Mr Rusby with a corruption offence concerning allegation 7 does not alter the conclusion that Mr Lander's analysis about the quality of evidence against Mr Rusby was incorrect.
250. The ICAC Act did not provide a test that should be applied when Mr Lander determined to refer a matter for prosecution pursuant to section 7(1)(a)(i) of the ICAC Act. There was also no policy in place at ICAC which provided guidance to ICAC employees as to the test Mr Lander would apply when performing his function under section 7(1)(a)(i) to refer a matter for prosecution.<sup>309</sup>
251. Mr Lander's evidence before me was that, when determining to refer Mr Rusby and others to the DPP, he applied "*the same as the DPP would have, that there's a reasonable prospect of a conviction and in our assessment it's in the public interest to prosecute*".<sup>310</sup>
252. If the reasonable prospect of conviction test was the correct threshold for referral of a matter to the DPP for prosecution, I find respectfully that Mr Lander was in error in finding that there was a reasonable prospect that Mr Rusby would be convicted of any such corruption offence.
253. Commissioner Vanstone has submitted that the threshold for referral is that there must be a *prima facie* case – namely, that there must be some evidence which is capable of proving each element of the offence. I am satisfied that there was no *prima facie* case against Mr Rusby arising out of allegation 7, although I recognise that on this issue, reasonable minds may differ.
254. Ultimately, I find that Mr Lander erred in performing his function under section (7)(1)(a)(i) of the ICAC Act in referring Mr Rusby for prosecution to the DPP for the reasons given above. The two material errors are specified at paragraph [246] above.
255. However, for the reasons given at paragraphs [266] – [278], Mr Lander's error was not the substantial cause of Mr Rusby being charged by the DPP with any criminal offence.

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<sup>308</sup> Exhibit 444 – Submissions of Commissioner Vanstone, 15 April 2024 at p 1.

<sup>309</sup> Exhibit 363 – Transcript (Investigator P) at p 142 L-12-16.

<sup>310</sup> Exhibit 363 – Transcript (Mr Lander) at p 177 L-4-5.

256. I do not consider there is any evidence of corruption in public administration in Mr Lander's conduct of referring Mr Rusby for prosecution. Mr Lander's conduct could not constitute any offence against Part 7 Division 4 of the CLCA,<sup>311</sup> the PSHA Act,<sup>312</sup> or the *Public Corporations Act 1993 (SA)*.<sup>313</sup>
257. There is no evidence of misconduct in public administration on the part of Mr Lander. There is no evidence that Mr Lander contravened any code of conduct<sup>314</sup> by referring Mr Rusby for prosecution.
258. There is no evidence of maladministration in public administration by Mr Lander.
259. Mr Lander's conduct in referring Mr Rusby for prosecution does not demonstrate that a practice, policy or procedure of ICAC resulted in an irregular and unauthorised use of public money or substantial mismanagement of public resources. I have formed this view because I do not consider that the referral of one individual for prosecution where there was insufficient evidence to establish that the individual had committed a corruption offence could be said to result in irregular and unauthorised use of public money or substantial mismanagement of public resources.
260. I also do not consider that Mr Lander's conduct in referring Mr Rusby for prosecution involved substantial mismanagement in or in relation to the performance of official functions. Again, I have formed this view because I do not consider that, in the circumstances of this case, the performance of Mr Lander's function involved substantial mismanagement in or in relation to the performance of official functions. This is because I have found that it was appropriate for Mr Lander to have decided to investigate Mr Rusby based on the report that was made to the OPI and the resources involved in investigating the allegations. Further, considering whether to perform the referral function was the same whether the outcome was that a referral was made or not.

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<sup>311</sup> As in force at the time of the referral.

<sup>312</sup> As in force at the time of the referral.

<sup>313</sup> As in force at the time of the referral.

<sup>314</sup> Commissioner for Public Sector Employment, *Code of Ethics for the South Australian Public Sector* (13 July 2015).

## Did Mr Lander’s referral of Mr Rusby for prosecution cause undue prejudice to Mr Rusby’s reputation?

261. Mr Rusby has submitted to me that as a result of the investigation and prosecution his “*executive career was destroyed*”.<sup>315</sup> Mr Rusby further submitted that “*charges were laid against [him] without an ounce of credible proof, only to be completely withdrawn at a later date, damage done. [He] became unemployed and unemployable*”.<sup>316</sup> Mr Rusby’s submission suggests that he considers that his reputation has been unduly prejudiced by the investigation and prosecution of him by ICAC.
262. The concept of prejudice to a person’s reputation involves the concept of harm or damage. For the purposes of this Report, I am examining whether, any prejudice suffered by Mr Rusby because of Mr Lander’s referral to the DPP was undue.
263. The Cambridge Dictionary defines ‘undue’ as meaning “*to a level that is more than is necessary, acceptable or reasonable*”. The Oxford Languages Dictionary defines ‘undue’ as meaning “*unwarranted or inappropriate because excessive or disproportionate*”.
264. I have therefore approached the issue of whether ‘undue prejudice’ to Mr Rusby’s reputation was caused by Mr Lander’s referral of Mr Rusby for prosecution by reference to whether the prejudice was unwarranted or inappropriate, having regard to the nature of the investigation and the scope of the alleged corruption.
265. Furthermore, in determining whether undue prejudice was caused by ICAC, I must be satisfied whether a particular exercise of power or performance of a function by ICAC can fairly and properly be considered a cause of Mr Rusby’s undue prejudice.<sup>317</sup>
266. The ICAC Act did not confer on ICAC any power to lay criminal charges against Mr Rusby. Section 7(1) of the *Director of Public Prosecutions Act 1991* (SA) makes it clear that the power to lay charges against Mr Rusby was entirely at the discretion of the DPP. The DPP ‘Prosecution and Policy Guidelines’ (**DPP Prosecution Guidelines**) provides guidance as to the consideration that should have been given by the DPP before it laid criminal charges against Mr Rusby. The DPP Prosecution Guidelines provided that a prosecution should

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<sup>315</sup> Exhibit 14 – Email from Mr Rusby to the Inspector, 20 June 2023 at p 1.

<sup>316</sup> Exhibit 14 – Email from Mr Rusby to the Inspector, 20 June 2023 at p 1.

<sup>317</sup> *March v Stramere* (1991) 171 CLR 506 at 522 per Deane J: “*For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility whether an identified negligent act or omission of the defendant was **so connected with the plaintiff’s loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it.***” (emphasis mine).

not proceed unless there is a reasonable prospect of conviction, and the prosecution is in the public interest.<sup>318</sup>

267. In determining whether there is a reasonable prospect of conviction, the DPP Prosecution Guidelines stated:<sup>319</sup>

*The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.*

268. Mr Rusby's referral to the DPP by ICAC was **not** a matter of public knowledge at the time Mr Lander referred the matter to Mr Kimber as it was subject to section 54 of the ICAC Act.
269. Section 54 of the ICAC Act disallowed a person from directly or indirectly disclosing information obtained in the course of the administration of the ICAC Act in connection with a matter that formed or was the subject of a report, investigation or referral unless an authorisation to disclose information was provided by the Commissioner. Accordingly, the fact that Mr Rusby had been referred by ICAC to the DPP was a matter that was only known to those who fell within the exceptions to section 54 or were authorised to know that information by Mr Lander.
270. A difficult consideration is whether undue prejudice to Mr Rusby's reputation was caused because Mr Rusby would not have been charged with any criminal offending by the DPP if Mr Lander had not provided the evidence that comprised allegations 6 and 7 to the DPP at all.
271. The terms of the referral from ICAC to the DPP is important in determining the issue of causation. In his letter to the DPP dated 18 August 2015, Mr Lander wrote: "*I refer the matter **for your consideration** as to whether a prosecution should be brought and if so for you to commence that prosecution*" (emphasis mine).<sup>320</sup> Mr Lander's use of language in his letter to Mr Kimber makes it plain that his purpose in referring Mr Rusby to the DPP for prosecution<sup>321</sup> was for the DPP to undertake its own assessment whether (a) there was a reasonable prospect of conviction and (b) it was in the public interest to lay a charge for a corruption offence against Mr Rusby based on the material ICAC had obtained during the investigation and had provided to the DPP.

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<sup>318</sup> Exhibit 366 – DPP, Prosecution and Policy Guidelines, October 2014 at p 5.

<sup>319</sup> Exhibit 366 – DPP, Prosecution and Policy Guidelines, October 2014 at p 5.

<sup>320</sup> Exhibit 96 – Referral Letter at p 1.

<sup>321</sup> Pursuant to ICAC Act s 7(1)(a)(i).

272. Mr Kimber gave evidence before me that Mr Lander's recommendation about whether to charge an individual was "*not determinative of anything*" and was "*background*".<sup>322</sup>

[The recommendation by the Commissioner is] *only relied upon in terms of giving some background as to what the Commissioner feels in the brief and to the investigation. Ultimately, if there's admissible evidence of a potential charge, that has to come from the brief itself and what is revealed from the evidence in the brief and the inferences that can be properly drawn from that evidence. So it's important background but it's not determinative in any way...*<sup>323</sup>

273. Self-evidently, the DPP did not agree with the recommendation of Mr Lander about what charge to lay against Mr Rusby in relation to allegation 7. The DPP reviewed the evidence against Mr Rusby independently of any ICAC analysis and clearly arrived at its own conclusion about the adequacy of the evidence to support that charge.
274. The reasoning of the DPP for laying the charges was different from that of Mr Lander.<sup>324</sup> The DPP considered that it was appropriate to charge Mr Rusby in respect of the Kangaroo Island trip on the basis that the trip was not work related.<sup>325</sup> In coming to the conclusion that the trip was not work related, the DPP made no mention of the fact that there was evidence gathered during the ICAC investigation that Mr Rusby had been invited to attend the 'Volendam' event by the South Australian Tourism Commission at Kangaroo Island on 17 November 2012.
275. The DPP also did not agree that allegation 6 was unsubstantiated because Mr Rusby was charged with three offences of theft based on the evidence that was gathered during the ICAC investigation in relation to allegation 6 despite Mr Lander not having referred Mr Rusby to the DPP for prosecution in relation to allegation 6.
276. It is beyond my jurisdiction to make any findings in relation to whether the DPP should or should not have laid charges against Mr Rusby. However, it follows from the above analysis that I do not believe that there was admissible evidence against Mr Rusby capable of proving either allegations 6 or 7.
277. Mr Lander's provision of evidence to the DPP, which had been gathered by ICAC investigators did not cause undue prejudice to Mr Rusby's reputation. The evidence was provided to the DPP by Mr Lander, as part of his referral for

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<sup>322</sup> Exhibit 363 – Transcript (Mr Kimber) at p 164.

<sup>323</sup> Exhibit 363 – Transcript (Mr Kimber) at p 162 L-17-22.

<sup>324</sup> Exhibit 274 – Memorandum from DPP Senior Solicitor 1 and DPP Solicitor 1 to Mr Kimber, 15 December 2015.

<sup>325</sup> Exhibit 274 – Memorandum from DPP Senior Solicitor 1 and DPP Solicitor 1 to Mr Kimber, 15 December 2015 at p 1.

prosecution, so that the DPP could review the material to form its own view about whether there was a sufficient basis to lay criminal charges.

278. I am **not** satisfied that a significant or substantial reason contributing to the laying of the charge against Mr Rusby resulted from the recommendation to lay a charge against Mr Rusby or the referral of material by Mr Lander to Mr Kimber.

## Mr Lander's public statement and media authorisation

279. Mr Rusby has made submissions about how material that was published about him, in relation to being charged with corruption offences has affected him.

280. Mr Rusby submitted that *"on 22 March 2016 ... Commissioner (Lander) ... decided to issue a public statement identifying me by my age, and by my address, the issue being that my address was Wistow, a very small town ... I was not well identified within my community..."*<sup>326</sup>

281. Mr Rusby also submitted that on:<sup>327</sup>

*2 April 2016, the first Advertiser... article came out, I woke alongside my wife and children to see a full page spread, including dated pictures of myself... only to read about what I had apparently done and that I was part of some highly organised crime gang involved in racketeering... I and my family, including my elderly mother, were reluctant to even leave their homes for fear of being seen within, what was a very small community.*

## Mr Lander's public statement

282. On 22 March 2016, Mr Lander made a public statement, pursuant to section 25 of the ICAC Act in the following terms:<sup>328</sup>

*On 25 February 2016, five public officers employed or formerly employed by a South Australian public authority were charged with a combined total of 31 counts of dishonesty and one count of breaching the Public Sector (Honesty and Accountability Act) 1995. The alleged offences occurred between 25 October 2012 and 22 January 2015.*

*A ... from ..., a ... man, a 48 year old man from Wistow....., a ... man and a ... from ... have been bailed to appear in the Adelaide Magistrates Court at 10am on 29 March 2016.*

283. The other four people who were also charged were identified in Mr Lander's public statement in the same way as Mr Rusby by reference to their age, gender, and suburb of residence.

284. The public statement was made after the Information was laid in the Magistrates Court and one week before Mr Rusby's first court appearance for the matter which occurred on 29 March 2016.<sup>329</sup>

285. Mr Lander said in his evidence before me that the purpose of publishing the public statement was *"to advise that those people had been charged without*

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<sup>326</sup> Exhibit 12 – Mr Rusby, 'ICAC Committee Opening Statement', undated at p 3.

<sup>327</sup> Exhibit 12 – Mr Rusby, 'ICAC Committee Opening Statement', undated at p 5.

<sup>328</sup> Exhibit 101 – Mr Lander, Public Statement under ICAC Act s 25, 22 March 2016.

<sup>329</sup> The first return date was 29 March 2016: Exhibit 197 – *R v Rusby* (Magistrates Court of South Australia, AMC-16-2483, commenced 26 February 2016) at p 1.



*naming them*<sup>330</sup> and that it was in the public interest to publish the public statement because *“the public ought to know that the organisation was doing what it was created to do, that is to investigate corruption in public administration”*.<sup>331</sup> I agree with Mr Lander that, generally speaking, there is a public interest in members of the public knowing that ICAC was investigating matters.

286. Before making a public statement in connection with a particular matter, pursuant to section 25 of the ICAC Act (see **Appendix A**), Mr Lander was required to form the opinion that it was appropriate to make the public statement in the public interest having regard to the following matters:

- (a) the benefits to an investigation or consideration of a matter under this Act that might be derived from making the statement;
- (b) the risk of prejudicing the reputation of a person by making the statement;
- (c) whether the statement is necessary in order to allay public concern or to prevent or minimise the risk of prejudice to the reputation of a person;
- (d) if an allegation against a person has been made public and, in the opinion of the Commissioner following an investigation or consideration of a matter under this Act, the person is not implicated in corruption, misconduct or maladministration in public administration – whether the statement would redress prejudice caused to the reputation of the person as a result of the allegation having been made public;
- (e) the risk of adversely affecting a potential prosecution;
- (f) whether any person has requested that the Commissioner make the statement.

287. There is no material on the Commission’s systems that record the reasons for Mr Lander deciding to issue the public statement about Mr Rusby and nothing to record what regard Mr Lander had to any of the provisions of section 25 of the ICAC Act. Mr Lander was asked in his evidence before me whether he recalled having regard to the matters listed in section 25 of the ICAC Act.<sup>332</sup> Mr Lander advised that *“some (he) would have”*.<sup>333</sup> He did not know at the time he gave his evidence which he had regard to.<sup>334</sup>

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<sup>330</sup> Exhibit 363 – Transcript (Mr Lander) at p 198 L-17-18.

<sup>331</sup> Exhibit 363 – Transcript (Mr Lander) at p 205 L-21-22.

<sup>332</sup> Exhibit 363 – Transcript (Mr Lander) at p 200 L-11-14.

<sup>333</sup> Exhibit 363 – Transcript (Mr Lander) at p 200 L-15.

<sup>334</sup> Exhibit 363 – Transcript (Mr Lander) at p 200.

288. Although Mr Lander’s public statement did not name Mr Rusby, it did identify his gender, his age, and the fact that he lived in Wistow, which is a small country town in South Australia with a population of 274 people.<sup>335</sup>
289. Mr Rusby has submitted to me that, even though he was not referred to by name in Mr Lander’s public statement, he was able to be identified in Wistow because it identified his gender, age, and place of residence. The naming of his place of residence was of particular concern for Mr Rusby. This was because, as Mr Rusby submitted, Wistow is a “*very small country town*”<sup>336</sup> and the description in the statement identified him within his community “*with absolutely no redress as to his innocence*”.<sup>337</sup>
290. Although the statement did not name Mr Rusby, I accept Mr Rusby’s evidence that Mr Lander’s statement contained information that would tend to identify him by virtue of his gender, age, and the fact that he resided in Wistow.
291. Further, given the fact that releasing the details of Mr Rusby’s age and place of residence could have identified him as being one of the five people charged with offending, Mr Lander should have had regard to section 25(b) of the ICAC Act, namely, that the inclusion of Mr Rusby’s age, gender and place of residence risked prejudicing Mr Rusby’s reputation and therefore should not have been included in the public statement.
292. It was unnecessary for Mr Lander to have published in the public statement the age **and** place of residence of Mr Rusby. Certainly, the latter had no bearing upon either the ICAC investigation or the charges themselves. The publication of the combined details of occupation (“public officer”), age and residence was capable of identifying Mr Rusby as being one of the five public officers charged with the criminal offences specified in the public statement.
293. I do **not** consider there is any evidence of corruption in public administration in Mr Lander’s conduct of publishing the public statement. There is no evidence that he committed a criminal offence against Part 7 Division 4 of the CLCA,<sup>338</sup> the PSHA Act<sup>339</sup> or the *Public Corporations Act 1993 (SA)*.<sup>340</sup>
294. Furthermore, there is no evidence of misconduct in public administration on the part of Mr Lander in publishing the statement. There is no evidence that

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<sup>335</sup> 2016 Census, population of Wistow - [2016 Wistow, Census All persons QuickStats | Australian Bureau of Statistics \(abs.gov.au\)](https://abs.gov.au).

<sup>336</sup> According to 2016 Census data, Wistow’s population was less than 300 people: Australian Bureau of Statistics, [Wistow – 2016 Census All persons](https://abs.gov.au) (accessed 23 August 2023).

<sup>337</sup> Exhibit 12 – Mr Rusby, ‘ICAC Committee Opening Statement’, undated at p 3.

<sup>338</sup> As in force at the time of the referral.

<sup>339</sup> As in force at the time of the referral.

<sup>340</sup> As in force at the time of the referral.

Mr Lander contravened any code of conduct<sup>341</sup> by publishing Mr Rusby's gender, age and place or residence in his public statement.

295. There is no evidence of maladministration in public administration. There is no evidence that Mr Lander's conduct in publishing the public statement resulted in an irregular and unauthorised use of public money or substantial mismanagement of public resources. I also do **not** consider that Mr Lander's conduct in publishing Mr Rusby's gender, age and place of residence involved substantial mismanagement in or in relation to the performance of official functions.

## Media authorisation

296. On 2 April 2016, The Advertiser published an article written by Mr Hunt titled 'Five Transport Department officers face charges over credit card misuse'.<sup>342</sup> The subtitle read, "*Five transport department officers – including two senior managers – face dozens of corruption-related charges following a long-running investigation by the Independent Commissioner Against Corruption*". The Magistrates Court file was probably the source of Mr Hunt's article.<sup>343</sup>
297. The article named Mr Rusby as one of the officers facing "*more than 30 charges following an Independent Commission Against Corruption investigation into the department's marine safety regulation division*".<sup>344</sup> The article also included a picture of Mr Rusby.<sup>345</sup>
298. On 29 March 2016, Mr Rusby's matter was first mentioned in the Magistrates Court. Mr Hunt probably accessed the Magistrates Court file which contained the names of Mr Rusby and the four co-accused; what offences the men were charged with and the details of those charges.
299. On 29 March 2016, the day of Mr Rusby's first court appearance, Mr Hunt, a journalist from The Advertiser newspaper made an application to the Adelaide Magistrates Court for access to court documents.<sup>346</sup>

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<sup>341</sup> Commissioner for Public Sector Employment, *Code of Ethics for the South Australian Public Sector* (13 July 2015).

<sup>342</sup> Exhibit 23 – 'Five Transport Department officers face charges over credit card misuse' (online, *The Advertiser*, 2 April 2016).

<sup>343</sup> Exhibit 367. Mr Hunt stated in his letter to the Inspector that he cannot recall what the source of the information contained in the article was. However, it was his practice to access the Magistrate's file if he had applied to access it.

<sup>344</sup> Exhibit 23 – 'Five Transport Department officers face charges over credit card misuse' (online, *The Advertiser*, 2 April 2016) at p 1.

<sup>345</sup> Exhibit 23 – 'Five Transport Department officers face charges over credit card misuse' (online, *The Advertiser*, 2 April 2016) at p 2.

<sup>346</sup> Exhibit 210 – Mr Hunt, Application for access by media to court documents re AMC-16-2483, 29 March 2016.

300. On 30 March 2016, Mr Hunt sent an email to ICAC seeking authorisation under section 56 of the ICAC Act, to publish an article about the investigation and charges against Mr Rusby and four others.

301. Mr Lander provided an authorisation under section 56 of the ICAC Act that read:<sup>347</sup>

*I authorise the Advertiser to publish information that the five persons who appeared before the court on Tuesday were the subject of an ICAC investigation which led to the laying of those charges.*

302. Mr Lander was asked in his evidence before me, why he gave the authorisation to the journalist from The Advertiser to publish the fact that the five men who had been charged were subject to an ICAC investigation. Mr Lander said that he could not specifically recall now why he gave his authorisation but that “*it was uncontroversial... at that stage, they had been named, it was uncontroversial, I would have thought, to say that the investigator was ICAC*”.<sup>348</sup> Further that, “*it didn’t impact them (the five men) that the investigator was ICAC rather than the police*”.<sup>349</sup>

303. Mr Hunt sought authorisation from Mr Lander before publishing his article because he wished to include in his article the fact that the charges were laid as a result of an ICAC investigation into Mr Rusby and the other four men. Mr Hunt sought this authorisation pursuant to section 56 of the ICAC Act, which stated:

A person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish or cause to be published—

(a) information tending to suggest that a particular person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under this Act...

304. Mr Hunt’s article could have been published without that authorisation. The only difference would have been that the article would not have tended to suggest that Mr Rusby and other co-accused were the subject of an ICAC investigation.

305. I agree with Mr Lander that, at the time Mr Hunt sought Mr Lander’s authorisation under section 56 of the ICAC Act, it was uncontroversial for the journalist to be authorised to publish the fact that the charges had been brought about because of an ICAC investigation into Mr Rusby and the four other men.

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<sup>347</sup> Exhibit 184 – Mr Lander, Handwritten note providing s 56 authorisation to the Advertiser, undated; Exhibit 183 – Emails between ICAC Media Officer and Nigel Hunt, 30 March 2016.

<sup>348</sup> Exhibit 363 – Transcript (Mr Lander) at p 206 L-12.

<sup>349</sup> Exhibit 363 – Transcript (Mr Lander) at p 200 L-17-18.

306. On 7 April 2016, an article was published in the Coober Pedy Regional Times about Mr Rusby having been charged with criminal offending being brought about because of an ICAC investigation. The Coober Pedy Regional Times article identified that the source of its information about the criminal charges against Mr Rusby was The Advertiser article written by Mr Hunt which was published on 2 April 2016.

## Did the publication of the public statement or the media authorisation caused undue prejudice to Mr Rusby's reputation?

307. In determining whether undue prejudice was caused by ICAC, I must be satisfied whether a particular exercise of power or performance of a function by ICAC can fairly and properly be considered a cause of Mr Rusby's undue prejudice.

308. Mr Rusby has submitted that he and his family "*suffered great humiliation and shaming*" within their community **as a result of** the public statement.<sup>350</sup>

309. I accept that Mr Rusby suffered undue prejudice to his reputation (in the sense that the prejudice was unwarranted) as a result of the publication of the articles in the Advertiser and Coober Pedy Regional Times. The prejudice to his reputation was unwarranted because he should not have been charged with any criminal offence.

310. However, the undue prejudice to Mr Rusby's reputation was not caused by any exercise of power or performance of a function by ICAC. First, as discussed above, ICAC was not the cause of Mr Rusby being charged. That was a decision made by the DPP.

311. Secondly, ICAC was not the cause of the publication of the articles in the media. Once Mr Rusby's matter was before the Magistrates Court, journalists were at liberty to publish the fact that Mr Rusby was a person charged with criminal offences, the fact of any court hearings in relation to Mr Rusby's matter and any material that was available on the Magistrates Court file<sup>351</sup> subject to any non-publication orders made by the Court.<sup>352</sup>

312. Thirdly, the public statement made by Mr Lander on 22 March 2016 did not itself cause any prejudice to Mr Rusby's reputation. Mr Rusby believes that he heard about that public statement from his lawyer, but understandably did not tell anyone else about it. Mr Rusby stated that no one else (apart from his lawyer)

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<sup>350</sup> Exhibit 12 – Mr Rusby, 'ICAC Committee Opening Statement', undated at p 3.

<sup>351</sup> That the Court granted the media access to pursuant to section 51 of the *Magistrates Court Act 1991* (SA).

<sup>352</sup> There were no non-publication orders made in respect of Mr Rusby's matter.

spoke to him about the public statement. People in Wistow spoke to him about the article published in The Advertiser on 2 April 2016, but not about the public statement.<sup>353</sup> The damage to Mr Rusby's reputation was caused by the media publicity on and after 2 April 2016 and not by the public statement on 22 March 2016.

313. Mr Rusby has submitted to me that ICAC failed to *“take the necessary steps to conceal (his) identity... from public humiliation in the media by releasing... information to the media”*.<sup>354</sup>
314. Mr Lander's decision to authorise Mr Hunt to include in his article the fact that Mr Rusby was the subject of an ICAC investigation did not cause undue prejudice to his reputation. The same damage to Mr Rusby's reputation would have been caused if the media articles had stated that there had been an investigation into Mr Rusby without mentioning it was an investigation by ICAC, or if the article had made no mention of any investigation at all, but simply published the details of the charges.

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<sup>353</sup> Exhibit 363 – Transcript (Mr Rusby) at p 51.

<sup>354</sup> Exhibit 12 – Mr Rusby, 'ICAC Committee Opening Statement', undated at p 5.

## Conclusion

315. There was sufficient information provided in the report to the OPI to justify the investigation into Mr Rusby and the other MORS officers.
316. Mr Rusby made several submissions to me about deficiencies he perceived in the way the investigation into him was conducted by ICAC. Whilst I acknowledge the difficulty that Mr Rusby would have encountered in sourcing his own evidence about the practices of ICAC during its investigation of him, I have found all of Mr Rusby's submissions to me on this topic to be unsupported by evidence.
317. Mr Lander erred in performing his function when he referred Mr Rusby for prosecution in relation to allegation 7. ICAC did not conduct a thorough analysis of whether there was evidence capable of proving that Mr Rusby had committed a corruption offence relating to allegation 7.
318. Having reviewed all of the evidence gathered during the ICAC investigation and the material relied upon by the DPP, I find that the evidence was incapable of proving that Mr Rusby committed either the offence under section 26 of the PSHA Act or the offences of theft under section 134(1) of the CLCA.
319. Concerning the alleged offence under section 26 of the PSHA Act, the evidence gathered during the ICAC investigation was incapable of proving that Mr Rusby did not act honestly in the performance of his duties as a public sector employee when he travelled to Kangaroo Island or authorised BH to attend Kangaroo Island.
320. Concerning the alleged offence under section 134(1) of the CLCA, there was no evidence that Mr Rusby ever dealt with or was in possession of any of the property that it was alleged he committed theft of. There was no admissible evidence that Mr Rusby was ever present when the purchases of the clothing (which were the subject of the theft charges) were made.
321. However, I do not find, for the reason stated in paragraph [277], that Mr Lander's referral of Mr Rusby to the DPP for prosecution caused undue prejudice to Mr Rusby's reputation.
322. I have found that the reference to Mr Rusby's gender, age, and place of residence in Mr Lander's public statement dated 22 March 2016 about the investigation and prosecution of Mr Rusby and others could have enabled some members of the public to identify that the public statement was about Mr Rusby.
323. However, I do not find, for the reasons stated in paragraphs [309] to [312], that ICAC did not cause any undue prejudice to Mr Rusby's reputation.
324. I have found no evidence of unreasonable invasions of privacy by ICAC, the OPI or employees of ICAC or the OPI.

325. I have not found any evidence of corruption, misconduct, or maladministration in public administration by Mr Lander or any employees of the OPI or ICAC in the course of my review into this matter.
326. It follows that I do not find that the conduct of Mr Lander or any employees of the OPI or ICAC warrants a referral to SAPOL or another law enforcement agency for further investigation or prosecution.



# Appendix A

## *Independent Commission Against Corruption Act 2012 (SA)*

The following extracts from the ICAC Act appear as they were between 1 September 2013 and 4 December 2016.<sup>355</sup> These were therefore the applicable provisions when the OPI assessed the report on 29 January 2014 and at all times when ICAC were investigating Mr Rusby.

### **3—Primary objects**

- (1) The primary objects of this Act are—
  - (a) to establish the Independent Commissioner Against Corruption with functions designed to further—
    - (i) the identification and investigation of corruption in public administration; and
    - (ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and
  - (b) to establish the Office for Public Integrity to manage complaints about public administration with a view to—
    - (i) the identification of corruption, misconduct and maladministration in public administration; and
    - (ii) ensuring that complaints about public administration are dealt with by the most appropriate person or body; and
  - (c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).
- (2) While the Commissioner may perform functions under this Act in relation to any potential issue of corruption, misconduct or maladministration in public administration, it is intended that the primary object of the Commissioner be—
  - (a) to investigate serious or systemic corruption in public administration; and
  - (b) to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate.

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<sup>355</sup> Although the ICAC Act was amended on 24 November 2014 and 27 November 2014, the provisions cited here (sections 3, 5 and 56) were not altered.

## 5—Corruption, misconduct and maladministration

(1) **Corruption in public administration** means conduct that constitutes—

- (a) an offence against Part 7 Division 4 (Offences relating to public officers) of the *Criminal Law Consolidation Act 1935*, which includes the following offences:
  - (i) bribery or corruption of public officers;
  - (ii) threats or reprisals against public officers;
  - (iii) abuse of public office;
  - (iv) demanding or requiring benefit on basis of public office;
  - (v) offences relating to appointment to public office; or
- (b) an offence against the *Public Sector (Honesty and Accountability) Act 1995* or the *Public Corporations Act 1993*, or an attempt to commit such an offence; or
- (c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or
- (d) any of the following in relation to an offence referred to in a preceding paragraph:
  - (i) aiding, abetting, counselling or procuring the commission of the offence;
  - (ii) inducing, whether by threats or promises or otherwise, the commission of the offence;
  - (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;
  - (iv) conspiring with others to effect the commission of the offence.

(2) If the Commissioner suspects that an offence that is not corruption in public administration (an **incidental offence**) may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of corruption in public administration (whether or not the Commissioner has identified the nature of that corruption), then the incidental offence is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corruption in public administration.

(3) **Misconduct in public administration** means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

(4) **Maladministration in public administration**—

- (a) means—
    - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
    - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
  - (b) includes conduct resulting from impropriety, incompetence or negligence; and
  - (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.
- (5) Without limiting or extending the conduct that may comprise corruption, misconduct or maladministration in public administration, this Act applies to conduct that—
- (a) occurred before the commencement of this Act; or
  - (b) occurs outside this State; or
  - (c) comprises a failure to act; or
  - (d) is conduct of a person who was a public officer at the time of its occurrence but who has since ceased to be a public officer; or
  - (e) is conduct of a person who was not a public officer at the time of its occurrence but who has since become a public officer.

## **56—Publication of information and evidence<sup>356</sup>**

A person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish, or cause to be published—

- (a) information tending to suggest that a particular person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under this Act; or
- (b) information that might enable a person who has made a complaint or report under this Act to be identified or located; or
- (c) the fact that a person has made or may be about to make a complaint or report under this Act; or
- (d) information that might enable a person who has given or may be about to give information or other evidence under this Act to be identified or located; or
- (e) the fact that a person has given or may be about to give information or other evidence under this Act; or
- (f) any other information or evidence publication of which is prohibited by the Commissioner.

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<sup>356</sup> Although section 56 was not amended during the period 1 September 2013 to 4 December 2016, the definition of 'publish' was amended on 27 November 2014, in terms that are not relevant to this matter.

Maximum penalty:

- (a) in the case of a body corporate—\$150 000;
- (b) in the case of a natural person—\$30 000.

The following extracts from the ICAC Act appear as they were between 1 September 2023 and 26 November 2014. These were therefore the applicable provisions when the Commissioner commenced the investigation into Mr Rusby on 10 February 2014 and for the initial stages of the investigation.

## **7—Functions<sup>357</sup>**

- (1) There is to be an Independent Commissioner Against Corruption with the following functions:
  - (a) to identify corruption in public administration and to—
    - (i) investigate and refer it for prosecution; or
    - (ii) refer it to South Australia Police or the Police Ombudsman for investigation and prosecution;
  - (b) to assist inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration;
  - (c) to give directions or guidance to inquiry agencies and public authorities, and to exercise the powers of inquiry agencies in dealing with misconduct and maladministration in public administration, as the Commissioner considers appropriate;
  - (d) to evaluate the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration in public administration;
  - (e) to conduct or facilitate the conduct of educational programs designed to prevent or minimise corruption, misconduct and maladministration in public administration;
  - (f) to perform other functions conferred on the Commissioner by this or any other Act.
- (2) The Commissioner is not subject to the direction of any person in relation to any matter, including—
  - (a) the manner in which functions are carried out or powers exercised under this or any other Act; and
  - (b) the priority that the Commissioner gives to a particular matter in carrying out functions under this or any other Act.

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<sup>357</sup> On 27 November 2014, section 7(1)(a)(ii) was amended to a broader group of law enforcement agencies that the Commissioner could refer a matter to for investigation and prosecution.

- (3) The Attorney-General may request the Commissioner to review a legislative scheme related to public administration and to make recommendations to the Attorney-General for the amendment or repeal of the scheme.
- (4) The Commissioner is to perform his or her functions in a manner that—
- (a) is as open and accountable as is practicable, while recognising, in particular, that—
    - (i) examinations relating to corruption in public administration must be conducted in private; and
    - (ii) other Acts will govern processes connected with how misconduct and maladministration in public administration is dealt with; and
  - (b) deals as expeditiously as is practicable with allegations of corruption in public administration; and
  - (c) as far as is practicable, deals with any allegation against a Member of Parliament or member of a council established under the *Local Government Act 1999* before the expiry of his or her current term of office.
- (5) For the purposes of exercising his or her functions under subsection (1)(d) or (e), or for reviewing a legislative scheme under subsection (3), the Commissioner—
- (a) may conduct a public inquiry; and
  - (b) may regulate the conduct of the inquiry as the Commissioner thinks fit,
- (and, for the avoidance of doubt, the inquiry will not be a proceeding for the purposes of section 55)

## **54—Confidentiality<sup>358</sup>**

- (1) A person must not, directly or indirectly, disclose information obtained in the course of the administration of this Act in connection with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act except—
- (a) for the purposes of the administration or enforcement of this Act; or
  - (b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or
  - (c) for the performance of the functions of the Commissioner under another Act; or
  - (d) as otherwise required or authorised by this Act.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) The Commissioner may, as the Commissioner considers appropriate, provide, or authorise the provision of, information connected with a matter that is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act to—
- (a) a person who makes a complaint or report to the Office; or

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<sup>358</sup> Section 54 was substantially amended on 27 November 2014. The revised provision is extracted below.

- (b) a person who is the subject of a complaint, report or investigation; or
  - (c) a person who is required by the Commissioner or an investigator to answer a question, produce a document or other thing or provide a copy of a document or a statement of information; or
  - (d) an inquiry agency, public authority or public officer; or
  - (e) a law enforcement agency; or
  - (f) a Minister; or
  - (g) the Auditor-General; or
  - (h) a legal or technical expert from whom advice is sought in the course of an investigation; or
  - (i) a person conducting a review under Part 5; or
  - (j) any other person of a class prescribed by the regulations.
- (3) Without limiting the matters to which the Commissioner may have regard in determining whether it is appropriate to provide or authorise the provision of information under subsection (2), it is intended that the Commissioner have regard to whether that action may assist in the prevention of the commission of an offence constituting or involving corruption.
- (4) Information connected with a matter that is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act provided by the Commissioner or on the authorisation of the Commissioner will be taken to be provided on the understanding that the information is confidential unless the person to whom the information is provided is informed in writing to the contrary.
- (5) Information obtained by a person present when information or evidence is being given before the Commissioner, the Deputy Commissioner, an examiner or an investigator under this Act will be taken to be provided by the Commissioner to the person on the understanding that the information is confidential unless the person is informed by the Commissioner in writing to the contrary.
- (6) If the Commissioner provides, or authorises the provision of, information to a person on the understanding that the information is confidential, that person, and any person or employee under the control of the person, is subject to the same rights, privileges, obligations and liabilities under this section as if the person obtained the information in the course of the administration of this Act.

The following extracts from the ICAC Act appear as they were between 27 November 2014 and 4 December 2016. These were therefore the applicable provisions for the latter initial stages of the investigation into Mr Rusby, including when Mr Lander made a public statement on 22 March 2016.

## **25—Public statements**

The Commissioner may make a public statement in connection with a particular matter if, in the Commissioner's opinion, it is appropriate to do so in the public interest, having regard to the following:

- (a) the benefits to an investigation or consideration of a matter under this Act that might be derived from making the statement;
- (b) the risk of prejudicing the reputation of a person by making the statement;
- (c) whether the statement is necessary in order to allay public concern or to prevent or minimise the risk of prejudice to the reputation of a person;
- (d) if an allegation against a person has been made public and, in the opinion of the Commissioner following an investigation or consideration of a matter under this Act, the person is not implicated in corruption, misconduct or maladministration in public administration—whether the statement would redress prejudice caused to the reputation of the person as a result of the allegation having been made public;
- (e) the risk of adversely affecting a potential prosecution;
- (f) whether any person has requested that the Commissioner make the statement.

## 54—Confidentiality

- (1) A person must not, directly or indirectly, disclose information obtained in the course of the administration of this Act in connection with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act except—
  - (a) for the purposes of the administration or enforcement of this Act; or
  - (ab) for the purposes of referring a matter in accordance with this Act to a law enforcement agency, inquiry agency, public authority or public officer; or
  - (b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or
  - (c) for the performance of the functions of the Commissioner under another Act; or
  - (ca) in accordance with an authorisation of the Commissioner given in accordance with the regulations; or
  - (d) as otherwise required or authorised by this or another Act.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) Any disclosed information connected with a matter that is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act will be taken to be disclosed on the understanding that the information is confidential unless the person to whom the information is disclosed is informed in writing to the contrary by the Commissioner.
- (5) Information obtained by a person present when information or evidence is being given before the Commissioner, the Deputy Commissioner, an examiner or an investigator under this Act will be taken to be provided by the Commissioner to the person on the understanding that the information is confidential unless the person is informed by the Commissioner in writing to the contrary.
- (6) If the Commissioner provides, or authorises the provision of, information to a person on the understanding that the information is confidential, that person, and any person or employee under the control of the person, is subject to the same rights, privileges, obligations and liabilities under this section as if the person obtained the information in the course of the administration of this Act.

## ***Criminal Law Consolidation Act 1935 (SA)***

The following extracts from the CLCA Act appear as they were between 15 October 2012 and 14 December 2012. These were therefore the applicable provisions at the time of the Kangaroo Island trip that was subject of investigation into Mr Rusby.

### **238—Acting improperly**

- (1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.
- (2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.
- (3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if—
  - (a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or
  - (b) there was lawful authority or a reasonable excuse for the act; or
  - (c) the act was of a trivial character and caused no significant detriment to the public interest.
- (4) the act was of a trivial character and caused no significant detriment to the public interest. In this section—

**act** includes omission or refusal or failure to act;

**public officer** includes a former public officer.

### **251—Abuse of public office**

- (1) A public officer who improperly—
  - (a) exercises power or influence that the public officer has by virtue of his or her public office; or
  - (b) refuses or fails to discharge or perform an official duty or function; or
  - (c) uses information that the public officer has gained by virtue of his or her public office, with the intention of—
    - (d) securing a benefit for himself or herself or for another person; or
    - (e) causing injury or detriment to another person,is guilty of an offence.



Maximum penalty:

- (a) for a basic offence—imprisonment for 7 years;
- (b) for an aggravated offence—imprisonment for 10 years.

(2) A former public officer who improperly uses information that he or she gained by virtue of his or her public office with the intention of—

- (a) securing a benefit for himself or herself or for another person; or
- (b) causing injury or detriment to another person,

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 7 years;
- (b) for an aggravated offence—imprisonment for 10 years.

## Appendix B – Terms of Reference

I, Philip Strickland SC, Inspector, on my own motion, intend to undertake a review into the investigation and prosecution of Trent Rusby pursuant to Schedule 4, clause 2(1)(c) of the Independent Commission Against Corruption Act 2012 (ICAC Act).

My review will examine the exercise of power, performance of functions and involvement of the Office for Public Integrity (OPI) and the Independent Commissioner Against Corruption (ICAC) in the investigation and prosecution of Mr Rusby including:

- whether there was any evidence of:
  - corruption, misconduct or maladministration on the part of ICAC, the OPI or employees of ICAC or the OPI;
  - unreasonable delay in the investigation; and
  - unreasonable invasions of privacy by ICAC, the OPI or employees of ICAC or the OPI.
- whether undue prejudice to the reputation of Mr Rusby was caused.
- whether the practices and procedures of ICAC and the OPI were effective and efficient.
- whether ICAC and the OPI carried out their functions in a manner that was likely to assist in preventing or minimising corruption in public administration.
- whether ICAC achieved an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to Mr Rusby's reputation.

The areas of the investigation and prosecution that will be the subject of the review include (but are not limited to):

- the decision by Commissioner Lander dated 10 February 2014 to investigate Mr Rusby;
- the investigation of Mr Rusby by ICAC;
- authorisations to disclose and publish information provided under the ICAC Act;
- the referral of allegations against Mr Rusby by ICAC to the Director of Public Prosecutions;
- the public statement made by Commissioner Lander on 22 March 2016; and
- ICAC's conduct during the prosecution of Mr Rusby.

My review will be conducted in accordance with my powers and functions under Schedule 4 of the ICAC Act, noting the power to make recommendations under clause 9(1)(c) and the powers related to referral and findings of undue prejudice to reputation under clause 9(6).

Any report I prepare will be prepared in accordance with the requirements of Schedule 4, clause 9(9) of the ICAC Act.

I am required to deliver the report to the President of the Legislative Council and Speaker of the House of Assembly as required by Schedule 4, clause 9(10) of the ICAC Act.