Report to Parliament | December 2008

Operation Pegasus
Operation Luno

NSW Police Integrity Commission



Operation Pegasus and Operation Luno
Report to Parliament | December 2008

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The Hon Peter Primrose MLC
President
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The Hon Richard Torbay MP
Speaker
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear President and Mr Speaker

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

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

Yours faithfully

J Pritchard
Commissioner

December 2008

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EXECUTIVE SUMMARY

On 14 May 2008 the Commission commenced a public hearing in relation to two separate instances of roadside breath testing conducted by officers of the New South Wales Police Force at Moree and Orange respectively.

At about 10.00pm on the night of 24 September 2007, David Webb, an officer of the Department of Corrective Services working out of the Moree Police Station, was pulled over by Senior Constable James Boaden of the NSW Police Force (NSWPF) on the Mungindi Road, outside Moree and subjected to a random breath test. He returned a positive reading of 0.95gms/100ml. Boaden advised Webb that he was under arrest and Webb was taken back to Moree Police Station for a Breath Analysis Sample or "BAS".

On arrival at the Moree Police Station, Webb was recognised by a colleague who was on duty that night. Telephone contact was made with Webb's supervisor, Assistant Superintendent John Weavers of the Department of Corrective Services, and Weavers was advised that Webb had been arrested after having tested positive to a roadside breath test. There then followed a series of phone calls involving Weavers, Senior Constable Phillip Smith who was also on duty that night at Moree Police Station and Inspector Jeffrey Budd who at the time was relieving as Local Area Commander for Mudgee but was usually stationed at Moree.

Police records relating to Webb's BAS test conducted later that night by Boaden and Smith at Moree Police Station recorded Webb as returning a reading of 0.000 gms/100ml. Webb was allowed to leave the police station without being charged with any offence.

The events of that night at Moree Police Station became the subject of an internal police investigation after information was received suggesting that it was not Webb who had undertaken the BAS test that resulted in the return of a nil reading. The Commission took over that investigation.

In the early hours of 21 December 2007, Adam James Clunes (Adam) was pulled over by Constable Kate Lanser of Orange Police in Byng Street, Orange and subjected to a random breath test. The sample supplied by Adam returned a high range reading of 0.202 gms/100ml. Adam was arrested and taken back to Orange Police Station for the purposes of undergoing a BAS test.

Adam is the son of Senior Constable Colin Clunes, who is also stationed at Orange Police Station. Having recognised Adam as Colin's son, Lanser telephoned Colin and advised him that his son had been arrested and he was being taken back to the Orange Police Station.

Senior Constable Mark Christie was the authorised BAS operator on duty that night at Orange Police Station. Christie conducted the BAS test on Adam resulting in a reading of 0.000gms/100ml. Adam left the police station later that morning without being charged with any offence.

The disparity between Adam's roadside breath test and his BAS test became the focus of an internal police investigation which was also taken over by the Commission.

The Commission's public hearing commenced on 14 May 2008 and ran for three days. The hearing was conducted in two parts to reflect the two investigations. In relation to the Moree matter, the general scope and purpose of the hearing was announced as follows;

Whether any current or former police officer, or any other person, has engaged in serious police misconduct or criminal activity in connection with the breath testing of David John Webb at Moree on 24 September 2007.

In relation to the Orange matter the general scope and purpose was announced as follows;

Whether any current or former police officer, or any other person, has engaged in serious police misconduct or criminal activity in connection with the breath testing of Adam James Clunes at Orange on 21 December 2007.

The hearing received oral evidence from ten witnesses in relation to the two matters.

In relation to the matter at Moree, the Commission heard evidence that Senior Constable Smith and Constable Boaden agreed that Smith would blow into the BAS machine and thereby substitute a sample of his breath for that of Webb. Both Smith and Boaden then completed the necessary paperwork purporting to reflect that Webb had in fact given the sample. That paper work, indicating that Webb had returned a nil reading, meant that he avoided any further police action when in fact the evidence suggests that he should have been charged. There was no evidence that Webb in any way encouraged Smith and Boaden in their actions or that he collaborated in any way with them. Webb had already left the station when the BAS test was undertaken by Smith and the paperwork completed.

Pursuant to section 16 of the *Police Integrity Commission Act 1996* (the Act) the Commission is of the opinion that Smith engaged in police misconduct in respect of his actions in relation to the breath testing of Webb.

The Commission is of the opinion that consideration should be given to the prosecution of Smith for the criminal offence of do act with intent to pervert the course of justice.

The Commission is of the opinion that consideration should be given to the taking of action against Smith pursuant to section 97(2)(c) of the Act. If no such action is taken the Commission is of the opinion that consideration should be given to the taking of action against Smith pursuant to section 97(2)(d) of the Act.

Pursuant to section 16 of the Act the Commission is of the opinion that Boaden engaged in police misconduct in respect of his actions in relation to the breath testing of Webb.

The Commission is of the opinion that consideration should be given to the prosecution of Boaden for the criminal offence of do act with intent to pervert the course of justice.

The Commission is of the opinion that consideration should be given to the taking of action against Boaden pursuant to section 97(2)(c) of the Act. If no such action is taken the Commission is of the opinion that consideration should be given to the taking of action against Boaden pursuant to section 97(2)(d) of the Act.

In relation to the matter at Orange, the Commission heard evidence that Senior Constable Mark Christie blew into the BAS machine at Orange Police Station instead of Adam Clunes and thereby

substituted a sample of his breath for that of Adam. Christie turned his back to the video camera positioned in the room so that it would not capture him blowing into the BAS machine. Adam was present when this occurred and was aware of what Christie was doing but there was no evidence that Adam encouraged Christie in his actions. There is no evidence that Lanser collaborated in any way in Christie's actions.

Pursuant to section 16 of the Act the Commission is of the opinion that Christie engaged in police misconduct in respect of his actions in relation to the breath testing of Webb.

The Commission is of the opinion that consideration should be given to the prosecution of Christie for the criminal offence of do act with intent to pervert the course of justice.

The Commission is of the opinion that consideration should be given to the taking of action against Christie pursuant to section 97(2)(c) of the Act. If no such action is taken the Commission is of the opinion that consideration should be given to the taking of action against Christie pursuant to section 97(2)(d) of the Act.

INTRODUCTION

1.1 As part of the Commission's wider interest in the misconduct risks faced by officers in local and specialist commands of the New South Wales Police Force (NSWPF), the Commission investigated two separate matters involving allegations of police misconduct in relation to the breath testing of motorists in two non metropolitan local area commands, being Barwon (Moree) and Canobolas (Orange). As the two investigations involved similar factual situations and raised the same misconduct issues, the Commission determined to hold public hearings to highlight the type of misconduct which in many circumstances may go undetected. The Commission's investigations were codenamed Pegasus (Moree) and Luno (Orange).

THE HEARINGS

1.2 The public hearing was held over three days commencing from 14 May and concluding on 16 May 2008. The hearing was conducted in two parts reflecting the two investigations.

1.3 In relation to Operation Pegasus, pursuant to section 32(3) of the *Police Integrity Commission Act 1996* ("the Act") the general scope and purpose of the hearing was announced as follows;

Operation Pegasus

Whether any current or former police officer or any other person has engaged in serious police misconduct or criminal activity in connection with the breath testing of David John Webb at Moree on 24 September 2007.

1.4 In relation to Operation Luno, pursuant to section 32(3) of the Act the general scope and purpose was announced as follows;

Operation Luno

Whether any current or former police officer, or any other person, has engaged in serious police misconduct or criminal activity in connection with the breath testing of Adam James Clunes at Orange on 21 December 2007.

THE WITNESSES

1.5 Ten witnesses gave evidence during the public hearing. One of these witnesses also gave evidence during an earlier private hearing held as part of Operation Luno and the transcript of this hearing was admitted into evidence during the public hearing. Seven of the witnesses were serving NSWPF officers. Two witnesses were officers of the NSW Department of Corrective Services, one of whom was the person the subject of the breath test in Operation Pegasus. The remaining witness was a civilian who was the subject of the breath test in Operation Luno.

1.6 The details of the witnesses are as follows:

Operation Pegasus

- Constable James William **BOADEN**
- Inspector Jeffrey Andrew **BUDD**
- Senior Constable Phillip William **SMITH**
- John Arthur **WEAVERS**
- David John **WEBB**

Operation Luno

- Senior Constable Mark Ronald **CHRISTIE**
- Adam James **CLUNES**
- Senior Constable Colin James **CLUNES**
- Constable Steven John **HALL**
- Constable Kate Louise **LANSER**

1.7 A short profile of each witness follows:

OPERATION PEGASUS

James William BOADEN

1.8 On 24 September 2007, James William Boaden (Boaden) held the rank of Constable with the NSWPF. He was stationed at the Moree Police Station. He administered a roadside breath test on David John Webb. He drove Webb back to his vehicle once Webb was allowed to leave the Moree Police Station and followed him home. Boaden admitted altering the records relating to Webb's breath tests and that he was aware that Smith undertook the BAS test on behalf of Webb.

Jeffrey Andrew BUDD

1.9 On 24 September 2007, Jeffrey Andrew Budd (Budd) held the rank of Inspector with the NSWPF. He was nominally attached to Moree Police Station but at the time was stationed at Mudgee Police Station as the Acting Local Area Commander for Mudgee. Budd received a telephone call from Weavers, the Assistant Superintendent of Corrective Services at Moree, on the evening of 24 September 2007. Budd was also a personal friend of Weavers. Weavers informed Budd that Webb, one of the Correctional Officers under his command, had been arrested and brought into Moree Police Station. Budd spoke to Smith about this later that evening.

Phillip William SMITH

1.10 On 24 September 2007 Phillip Smith (Smith) held the rank of Senior Constable with the NSWPF. He was stationed at Moree Police Station and was the senior officer and the BAS Operator on duty that night. He received telephone calls from Weavers and Budd after

Webb had been arrested and brought to the station. He admitted to undertaking the BAS test on behalf of Webb and authorising his release from the station.

John Arthur WEAVERS

1.11 On 24 September 2007 John Weavers (Weavers) was an Assistant Superintendent with the Department of Corrective Services attached to Moree Court Escort Security Unit. He was off duty that night but was contacted by a member of his staff at the Moree Police Station and informed that Webb had been arrested and brought to the police station. He spoke to Smith and Budd that evening about the arrest of Webb.

David John WEBB

1.12 On 24 September 2007, David Webb (Webb) was employed by the Department of Corrective Services and based at the Moree Police Station. He was subjected to a roadside breath test administered by Boaden. He recorded a reading above the legal limit, was arrested and taken back to Moree Police Station. On his arrival he asked a colleague to contact Weavers and inform him that he had been arrested. Later that evening, he undertook a further test using a hand-held alcolizer administered by Smith. Webb was later released that night without charge.

OPERATION LUNO

Mark Ronald CHRISTIE

1.13 On 21 December 2007, Mark Christie (Christie) held the rank of Senior Constable with the NSWPF and was stationed at Orange Police Station. He was the custody officer and BAS Operator on duty that night. Christie admitted undertaking the BAS breath test on behalf of Adam Clunes and releasing him without charge.

Adam James CLUNES

1.14 Adam Clunes (Adam) is the son of Colin Clunes. On the night of 21 December 2007 he tested positive to a roadside breath test administered by Constable Lanser. He was arrested and taken to Orange Police Station for the purposes of a BAS test. He did not undertake that BAS test and was released from custody by Christie. In his evidence he told the Commission that Christie had in fact undertaken the BAS test on his behalf.

Colin James CLUNES

1.15 On the night of 21 December 2007 Colin Clunes (Colin) held the rank of Senior Constable with the NSWPF and was stationed at Orange Police Station. He is the father of Adam James Clunes. He was not on duty on the night of 21 December 2007 but was telephoned by Lanser and informed that she had arrested his son following a positive roadside breath test. He spoke to Lanser by telephone a number of times that evening.

Steven John HALL

1.16 On the night of 21 December 2007 Steven Hall (Hall) held the rank of Constable with the NSWPF and was stationed at the Orange Police Station. On that evening he was on duty with Lanser. With Lanser he accompanied Adam back to Orange Police Station following his arrest. He commenced the COPS report in relation to Adam's arrest.

Kate Louise LANSER

1.17 On the night of 21 December 2007, Lanser held the rank of Constable with the NSWPF and was stationed at Orange Police Station. She was on duty with Hall. Lanser administered a roadside breath test on Adam and arrested him. She telephoned Colin and informed him that she had arrested his son Adam as he had tested positive to a roadside breath test. With Hall she accompanied Adam back to Orange Police Station.

THIS REPORT

1.18 In this Report, prepared and furnished pursuant to section 96 of the Act, the Commission examines the evidence heard during the public hearings. Evidence from the private hearing is also discussed where it is relevant to matters reported herein.

1.19 The Report contains the Commission's assessments and opinions and expresses a view as to whether or not police misconduct, or other misconduct, has occurred in relation to each matter examined. The Report also contains the Commission's recommendations in respect of those individuals who, in its opinion, come within the definition of *"affected person"* pursuant to subsection 97(3) of the Act.

1.20 Generally, persons are referred to in this Report, after the first mention of their name, by their surname only. This is done in the interest of economy and no discourtesy is intended.

2. THE EVIDENCE

OPERATION PEGASUS (MOREE)

BACKGROUND

2.1 At about 10.00 pm on 24 September 2007 David Webb (Webb), an officer with the NSW Department of Corrective Services based at Moree Police Station, was stopped on the Mungindi Road outside Moree and subjected to a random breath test by Senior Constable James Boaden (Boaden). The test resulted in a positive reading of 0.095gms/100ml. Webb was told he was under arrest and he would be taken back to Moree Police Station for a Breath Analysis Sample (BAS) test. Boaden had set up a roadside random breath testing unit that night with Constable John Dunne (Dunne).

2.2 On their return to Moree Police Station Webb spoke to another Corrective Services officer who was on duty at the station and asked him to contact his supervisor, Assistant Superintendent John Weavers (Weavers) attached to the Moree Court Escort Security Unit. Records obtained by the Commission indicate there was telephone contact between Moree Police Station and the mobile telephones of Weavers, Inspector Jeffrey Budd (Budd) and Senior Constable Phillip Smith (Smith), the BAS instrument operator on duty that night at Moree Police Station. The result of the BAS test conducted on Webb at Moree police station was recorded as 0.000gms/100ml. Webb was allowed to leave the station that night without charge.

2.3 The events of that night involving Webb's BAS test became the subject of an internal investigation by the New South Wales Police Force (NSWPF) which was taken over by the Commission. As part of its investigation the Commission reviewed the material collected during the NSWPF investigation, obtained further information and conducted a number of interviews, prior to holding hearings in May 2008.

WEBB'S ROADSIDE BREATH TEST

2.4 Webb told the Commission that as at 24 September 2007, he had been stationed with Corrective Services at Moree for only three days.[1] He worked at the Moree Police Station building and was involved in receiving prisoners from police custody, looking after those prisoners while they were in custody and transporting them to and from prison and court locations.[2]

2.5 Webb said that at the time he was living at Ashley, a village a short distance from Moree. On the evening of 24 September 2007, he had been consuming alcohol at Moree Golf Club from about 5.00 pm to about 9.00 pm or 10.00 pm. He couldn't recall how much he had drunk but he was drinking schooners of VB full strength beer and XXXX mid-strength beer.[3] He said that he did not believe that he would have tested positive on a breath test because he usually drank fairly slowly, and on the way home he had stopped and had a meal at the Shell Garage in Moree.[4]

[1] PIC Transcript D J Webb, 14 May 2008, p.24
[2] PIC Transcript D J Webb, 14 May 2008, p.10
[3] PIC Transcript D J Webb, 14 May 2008, Pp.10 – 11
[4] PIC Transcript D J Webb, 14 May 2008, Pp.11 – 12

2.6 Webb denied that as he approached the breath test site set up by Boaden and Dunne that he attempted to travel closely behind a truck in front of him so as to avoid being pulled over.[5] He also denied that he had said anything to Boaden, who administered the breath test, about his occupation or that he worked at Moree Police Station. He said that Boaden told him he had returned a positive reading and that he would be taken to Moree Police Station.[6]

2.7 Boaden said in his evidence that he saw the vehicle which was driven by Webb *"pushing up behind"* a truck as it went past the position that he and Dunne had set up. He thought that the driver was attempting to evade the police and decided to follow the vehicle in the police car. He caused the vehicle to pull over.[7]

2.8 After asking some questions in answer to which Webb acknowledged he had been drinking, Boaden asked him to blow into a tube attached to the breath test instrument. Boaden recalled that the instrument showed a reading of 0.095 and he told Webb that he had returned a positive reading and was under arrest for the purpose of being conveyed back to Moree police station for a further breath analysis test.[8]

2.9 Boaden informed the Commission that Webb said to him twice *"Can't you give me a break, I'm Moree CSU"*.[9] Boaden said he had replied;

"Mate, I don't care where you're from, if I let you off it is corruption and I won't be part of it".[10]

2.10 When recalled to give further evidence and asked whether he had told Boaden that he was from Moree CSU, Webb said that he couldn't exactly recall but he may have said this. He accepted that the effect of such words could be that he was inviting Boaden to treat him differently than someone who didn't work at Moree Police Station.[11]

THE ARRIVAL AT MOREE POLICE STATION

2.11 Following the administration of the breath test by Boaden, Webb was placed in the back of the police car. Boaden returned to the breath test site to collect Dunne and the three men then travelled to the Moree Police Station. Upon arrival at the station they went to the charge room.

2.12 Webb said in his evidence that when they entered he saw Jim Key (Key), another Corrective Services officer on duty that night. Webb said he asked Key to *"call the boss"* or *"call Weavers and let him know I've been picked up"* or something along those lines.

[5] PIC Transcript D J Webb, 14 May 2008, p.12
[6] PIC Transcript D J Webb, 14 May 2008, p.13
[7] PIC Transcript J W Boaden, 14 May 2008, p.104
[8] PIC Transcript J W Boaden, 14 May 2008, p.105
[9] PIC Transcript J W Boaden, 14 May 2008, p.106
[10] ibid
[11] PIC Transcript D J Webb, 15 May 2008, p.147

He said that he did so because it was departmental policy to inform supervisors of such incidents at the first available opportunity.[12] Webb said at this point Boaden asked him if he and Key knew each other. Webb informed Boaden that he worked in the station. After initially being taken to the cells, Webb was instructed to wait in the police station foyer area.[13]

2.13 Boaden's evidence was consistent with Webb in that Boaden said he heard Webb say to Key *"Give Weavers a ring"*[14] but added that when he asked Webb if he and Key knew each other Webb said *"Yes, I've been trying to tell you that ever since you arrested me"*.

2.14 Boaden told the Commission that when he realised that Webb was a Corrective Services officer who worked at Moree Police Station he felt *"lousy"* about arresting him. However, he told Webb;

"It's too late now, mate, you're on the CCTV camera, there's nothing I can do now".[16]

2.15 Boaden said that he had also broadcast via the police radio that he had arrested a person for a positive breath test and was bringing them to the police station for the purpose of the BAS test.[17]

2.16 When Boaden was asked if, had he known that Webb was a Corrective Services officer before he had tested him, there might have been a different result, Boaden said;

"I'd like to think not… I would like to think I would have done the right thing".

2.17 Boaden also acknowledged that by saying to Webb, *"It's too late"* he was inferring that there might have been a point in time when it was not too late, for something other than Webb's charging to have occurred.[18]

2.18 Boaden said after he had discovered that Webb was a Corrective Services officer he said to Smith *"You're not going to believe it, I brought one of the screws back"*, to which Smith had replied *"What are we going to do"*. Boaden said he told Smith;

"there's nothing we can do now, he's back, he's under camera, we've got to go through with it."[19]

2.19 Boaden said that he believed then that they would go through the process and Webb would be tested and charged.[20]

[12] PIC Transcript D J Webb, 14 May 2008 p.14
[13] ibid
[14] PIC Transcript D J Webb, 14 May 2008, p.108
[15] PIC Transcript D J Webb, 14 May 2008, p.110
[16] PIC Transcript J W Boaden, 14 May 2008, p.109
[17] PIC Transcript J W Boaden, 14 May 2008, p.108
[18] PIC Transcript J W Boaden, 14 May 2008, p.110
[19] PIC Transcript J W Boaden, 14 May 2008, p.111
[20] ibid

2.20 However, Boaden said that during his conversations with Smith at this time Smith also said to him;

"There's always other options. There's always options".[21]

2.21 Boaden agreed that this indicated that something other than the normal processes could possibly be followed.[22]

2.22 Boaden denied the proposition that the conversations he had with Smith and Webb suggested that they contemplated that a Corrective Services officer might be treated in a way different from an ordinary citizen of Moree. He explained it as being more a case that as Webb worked in the same building as the police it would make things *"uncomfortable"* with Corrective Services.[23]

2.23 For his part, Smith said that when he first saw Webb at the station, he too did not know that Webb was an officer of the Department of Corrective Services.[24] By this stage Webb had only been working at Moree Police Station for some three days. He found that out when Boaden said that he couldn't believe he'd arrested a Corrective Services officer.[25]

2.24 After Boaden had finished his evidence Smith was recalled to give further evidence and he was asked whether he had said to Boaden, *"There's always other options"*. Smith said that while he did not remember saying such a thing he may have.[26]

TELEPHONE CALLS

WEAVERS CALLS BUDD

2.25 At the time, Weavers was an Assistant Superintendent with the Department of Corrective Services attached to Moree Court Escort Security Unit. He had been in that position since about 2000 and at Moree since 30 November 1998.[27]

2.26 Weavers knew Smith as well as Boaden and Budd. He believed he had socialised with Smith and Budd, including going to Budd's home a couple of times.[28]

2.27 Weavers confirmed that he received a call from Key on the night of 24 September 2007, and Key told him that the police had brought Webb into the police station.[29] Weavers said that he was heavily intoxicated at the time and that consequently his memory of what took place that night was affected.[30] He later informed the Commission that he had been drinking to excess for some time following the death of his wife.[31]

[21] ibid
[22] ibid
[23] PIC Transcript J W Boaden, 14 May 2008, p.112
[24] PIC Transcript P W Smith, 14 May 2008, p.67
[25] PIC Transcript P W Smith, 14 May 2008, p.68
[26] PIC Transcript P W Smith, 15 May 2008, p.150
[27] PIC Transcript J A Weavers, 14 May 2008, p.27
[28] PIC Transcript J A Weavers, 14 May 2008, p.28
[29] PIC Transcript J A Weavers, 14 May 2008, p.30
[30] Op cit
[31] PIC Transcript J A Weavers, 14 May 2008, p.44

2.28 He was able to remember however, that he had then rung Budd *"as a courtesy thing"* to inform him that one of his (ie Weavers') officers had been brought into the Moree Police Station.[32] He believed that it was appropriate to do so as the police and Corrective Services officers had a good working relationship. He did not have the Superintendent's telephone number or those of the other Inspectors located at Moree, as he usually spoke to Budd when he had to liaise with police management. He denied that he had any intention of taking advantage of the relationship with Budd, for Webb's benefit.[33]

2.29 When asked if he had any conversation with Budd which could be interpreted as being for the benefit of Webb, he replied *"I don't recall. I don't think so"*. When however it was suggested to him that it would have been much more sensible to have rung the Moree Police Station to speak to another police officer, he had difficulty in answering and conceded that he could not answer the question.[34] He denied however that there was a specific purpose in calling Budd.[35]

2.30 Weavers said that Budd told him that he would find out why Webb had been arrested and get back to him. When Budd rang back he told Weavers that he had spoken to Smith and that Webb had been brought in for PCA (prescribed concentration of alcohol). Weavers added that Budd told him that he (Budd) had told Smith to go through the process, or similar to that. Weavers said that he understood this to mean that Smith was to go through the process and charge Webb.[36]

2.31 He said he was unsure about his response to this information, but conceded that he could have believed that as a Corrective Services officer working at the station, Webb was worthy of some special treatment. He denied however, saying this to Budd or that that was his purpose in ringing Budd.[37]

WEAVERS CALLS SMITH

2.32 Weavers then said that after he had spoken to Budd he rang Smith and said he had been told by Budd that Webb was to go through the process. Weavers also said that if Webb was going to "hit the dock" could Smith not put him on show where everyone else could see him.[38]

2.33 Weavers said he remembered talking to Smith on more than one occasion that night but said he didn't recall talking to him about what should happen in relation to the testing of Webb's blood alcohol level. He accepted that it was *"possible"* that he had asked Smith to do something "improper" in relation to the testing of Webb.[39] After further examination and inquiry as to whether there was anything he wished to add, Weavers said;

[32] PIC Transcript J A Weavers, 14 May 2008, p.31
[33] PIC Transcript J A Weavers, 14 May 2008, p.32
[34] PIC Transcript J A Weavers, 14 May 2008, Pp. 32 – 33
[35] PIC Transcript J A Weavers, 14 May, p.33
[36] PIC Transcript J A Weavers, 14 May 2008, Pp. 33 – 34
[37] PIC Transcript J A Weavers, 14 May 2008, p.35
[38] PIC Transcript J A Weavers, 14 May 2008, p.36
[39] PIC Transcript J A Weavers, 14 May 2008, p.37

"All I will say is that my level of intoxication was high. I'm speaking to you at the best of my recollection now, and I said I may. Now, whether that may have been, "Do the best you can for him," or, "Whatever little you can do for him," I don't know. I have no idea".[40]

2.34 Counsel Assisting then put to Weavers that he had asked Smith to arrange for *"someone else to blow in the bag for him"*. Weavers did not deny saying this but did not recall it either. He eventually conceded that, *"I suppose it may be possible, yes"*.[41] A little later, in the same context, Weavers conceded, when asked whether he would accept that he told Smith to get someone else to blow in the bag that night, that he could not recollect saying anything like that but *"I may, I may not have"*.[42]

2.35 Weavers said he found out later, perhaps from Smith, that Webb was *"right to go"*, from which he concluded that Webb had not been charged with anything.[43] Afterwards, Webb told him that *"they let him go, that he was right".*[44]

2.36 Smith told the Commission that he remembered receiving a call that night from Weavers, whom he had known for ten years.[45] They had a good relationship and had had social contact in the past, but not recently. He believed Weavers' call came in on the police station landline but that, because he feared possible telephone interception, he told Weavers he would call him back on his mobile telephone.[46]

2.37 The telephone records obtained by the Commission and tendered during the hearing[47] show three calls in the relevant period that night from Weavers' home telephone number to the Moree Corrective Services telephone number. There was also a call from Smith's mobile telephone to Weavers' mobile telephone number after the second call between Weavers' home telephone service and the Moree Corrective Services telephone service.

2.38 When asked about the content of the call he made to Weavers from his personal mobile,[48] Smith said that Weavers *"virtually"* said to him;

"Can't you get someone else to blow into the bag?"

2.39 Smith said he replied that he would *"… look after it from there"*.[49] He said Weavers was clear in this approach but he could not comment on Weavers' level of intoxication.[50] Smith said that by this response to Weavers, he meant that he would do his best to assist Webb to walk out of the station not having been charged.[51]

[40] PIC Transcript J A Weavers, 14 May 2008, p.38
[41] PIC Transcript J A Weavers, 14 May 2008, p.29
[42] PIC Transcript J A Weavers, 14 May 2006, p44
[43] PIC Transcript J A Weavers, 14 May 2008, p.39
[44] PIC Transcript J A Weavers, 14 May 2008, p.41
[45] PIC Transcript P W Smith, 14 May 2008, p.68
[46] PIC Transcript P W Smith, 14 May 2008, p.74
[47] PIC Exhibit 1
[48] PIC Transcript P W Smith, 14 May 2008, p.75
[49] PIC Transcript P W Smith, 14 May 2008, p.69
[50] PIC Transcript P W Smith, 14 May 2008, p.92
[51] PIC Transcript P W Smith, 14 May 2008, p.70

2.40 Boaden said he remembered Smith receiving telephone calls and that Smith came to him and said that Weavers had been on the phone and had suggested *"that one of us can blow in the bag for him"*, meaning Webb. Boaden said he told him *"We can't"*.[52]

2.41 When Weavers was recalled to the witness box and asked whether he had asked Smith that he or someone else breathe into the bag, he maintained his earlier position saying, *"I can't confirm nor deny that. Like I said, I may have said that … I was intoxicated, like I said. I may have said that".*[53]

BUDD CALLS SMITH

2.42 On the night of 24 September 2007, Inspector Jeffrey Budd was relieving as the Local Area Commander at Mudgee.[54] He told the Commission that Weavers had rung him and told him that Webb had been taken into custody. He saw Weavers' call as a *"courtesy"*, it not being unusual for him to get calls from Weavers. He did not agree that such a contact, in the circumstances of him having been away at Mudgee for some time, was in any way out of the ordinary.[55]

2.43 Budd said that after Weavers had told him that Webb had been brought into the Moree Police Station he had told Weavers that he would make a call and then get back to him. He then contacted Moree Police Station and spoke with Smith who told him that Webb had been brought in because of a positive random breath test.[56]

2.44 Budd told the Commission that Weavers had asked that Webb not be put in the dock. He said that he told Smith that if there was no need to, Webb should not be put in the dock. He said he was also concerned to examine what was happening because of the relationship between Corrective Services and the police. He said that Smith told him that everything was fine.[57]

2.45 Aside from the question of whether or not Webb went into the dock, Budd denied that there had been any conversation with Weavers regarding what, if anything, might be done for Webb.[58]

2.46 Budd said Smith told him that Webb was waiting for a breath analysis.[59] Budd said that he told Smith that if Webb was tested and it proved positive he was to be charged and by this he meant that he would have *"to go through the process"*.[60] It was put to Budd that he would have only said such a thing if there was a risk that the process would not be gone through and he denied that this was the case. He explained that in his position as an Inspector and a Duty Officer it was commonplace for him to reiterate to his staff what should occur. He said he saw no risk of Webb being given special treatment.[61]

[52] PIC Transcript J W Boaden, 14 May 2008, p.113
[53] PIC Transcript J A Weavers, 14 May 2008,p.99 – 100
[54] PIC Transcript J A Budd, 14 May 2008, p.47
[55] PIC Transcript J A Budd, 14 May 2008, p.58
[56] PIC Transcript J A Budd, 14 May 2008, p.47
[57] PIC Transcript J A Budd, 14 May 2008, p.48
[58] PIC Transcript J A Budd, 14 May 2008, p.49
[59] Op cit
[60] PIC Transcript J A Budd, 14 May 2008, p.50
[61] Op cit

2.47 Budd said that after he had spoken to Smith he telephoned Weavers and told him that Webb had been picked up because of a positive roadside breath test and had been brought back to the station and was waiting to be put on the BAS instrument. He told Weavers that he didn't see any reason why Webb should have to go in the dock and that Webb was going to go through the process.[62]

2.48 Budd denied that in his call with Smith he had expressed the need for Smith to exercise caution or that he had intended to convey anything other than that Webb should be treated the same as any other potential offender, with the exception of whether he should be placed in the dock.[63]

2.49 It was the next day when Budd says he found out that Webb had apparently not gone over the limit on the BAS test. Having been shown the list of telephone calls[64] made that night and the next morning, Budd was prepared to assume that he told Weavers of the negative test result then.[65] He said that when he returned to Moree two or three weeks later, Smith told him that Webb *"went under, he didn't blow over"*, and *"that was it"*.[66]

2.50 For his part, Smith said that some time after the call from Weavers, he received a call from Budd. The list of telephone calls tendered during the hearing suggests a call was in fact made before any call from Weavers to the police station. While little if anything turns on this apparent inconsistency, one explanation is that the initial telephone contact between Weavers and Smith occurred during the same call that Key initiated to Weavers.

2.51 Smith said he was unable to recall the exact conversation with Budd but said that he remembered Budd telling him to be careful.[67] Later, he said that he had told Budd that *"he would look after it"*.[68] When he was recalled to give further evidence, Smith explained that in relation to this call, *"Reading between the lines, you'd say we wouldn't charge him, basically".*[69]

2.52 As to whether Budd had said to him *"Go through the process and if he gets tested, he gets charged"*, Smith said he did not remember. Significantly however, Smith did say that he did not tell Budd that Weavers had suggested that someone else blow in the bag.[70]

2.53 Boaden told the Commission that in relation to the telephone conversation between Smith and Budd, he recalled Smith saying on the telephone *"Yep, yep, no, I'll take care of it. It will be all right"*, after which Smith hung the phone up and said;

"That was Mr Budd. We've been given the green light".[71]

[62] PIC Transcript J A Budd, 14 May 2008, p.52
[63] PIC Transcript J A Budd, 14 May 2008, p.53
[64] PIC Exhibit 1
[65] PIC Transcript J A Budd, 14 May 2008, p.54
[66] PIC Transcript J A Budd, 14 May 2008, p.55
[67] PIC Transcript P W Smith, 14 May 2008, p.71
[68] PIC Transcript P W Smith, 14 May 2008, p.74
[69] PIC Transcript P W Smith, 15 May 2008, p.151
[70] PIC Transcript P W Smith, 14 May 2008, p.72
[71] PIC Transcript J W Boaden, 14 May 2008, p.114.

2.54 Boaden said that he thought that meant that Budd was aware of what was happening and that a certain course of action was expected of them. Boaden said that he believed then that something improper was going to follow but at that point he had not decided he would participate in what it was going to be.[72]

2.55 When Smith was recalled and asked about what he had told Boaden about his conversation with Budd, he said he did not recall but doubted that he had told Boaden that Budd had given them the *"green light"*. He did however say that he told Boaden that he would earn some *"brownie points"*.[73] By that he meant that Boaden would earn such points with Budd, as he was aware of there being a conflict between them.[74] It was also during this part of his evidence that Smith said he had not told Budd the whole story and, slightly at variance with his earlier evidence[75], he said he could not remember whether he had told Budd that Weavers had asked him to get someone to blow in the bag.[76]

THE SECOND ALCOLIZER TEST

2.56 Smith told the Commission that he did not tell Budd that his plan was to defer the taking of a second breath test as long as he could in the hope that Webb's reading would go down below the 0.09 reading he registered at the roadside test. In furtherance of the plan, he breath-tested Webb again at the inquiry counter, using an alcolizer. Smith recalled that the second reading was 0.13, which indicated a mid range or higher reading than he had registered at the roadside.[77] Smith said he had also not told Budd the result of this latter test.[78]

2.57 Boaden said that after Smith's call with Budd, Smith then asked him what he wanted to do. Boaden said that he told Smith;

"Mate, I don't want to do it but we've got no choice. It's not something I want to do, but we've got no choice".[79]

2.58 By this Boaden meant that Webb had to be tested. According to Boaden Smith then said *"We'll try and time him out"* meaning delay the BAS testing so that Webb's reading might become lower.[80] Normally, Boaden said, he would have started the 15 minutes of observation, which were required before BAS testing, as soon as he came back to the station.[81]

2.59 Boaden attempted to explain to the Commission his position as to whether he supported the *"timing out"* plan;

[72] PIC Transcript J W Boaden, 14 May 2008, p.115 – 116
[73] PIC Transcript P W Smith, 15 May 2008, p.150
[74] PIC Transcript P W Smith, 15 May 2008, p.152
[75] see footnote 70
[76] PIC Transcript P W Smith, 15 May 2008, p.154
[77] PIC Transcript P W Smith, 14 May 2008, p.70
[78] PIC Transcript P W Smith, 14 May 2008, p.73
[79] PIC Transcript J W Boaden, 14 May 2008, p. 116
[80] ibid
[81] PIC Transcript J W Boaden, 14 May 2008, p.117

"In my mind, a series of suggestions had been put in play coming from high up in the ranks, sent down to us. Again, I never spoke to any of them higher-ranking officers. I was only taking what I'd heard back as to who was on the phone at various particular times and that I was expected to fall into line with what was being discussed and what I'd heard from Phil saying, "Don't worry, we'll take care of it".[82]

2.60 In any event, by this stage at least, it was clear that Boaden's future actions would be heavily influenced by how he interpreted Smith's conversation with Budd albeit he only had Smith's version of it.

2.61 Smith told the Commission that after the conversation with Budd, he did *"delay the process"*, during which time he breath tested Webb but he returned a reading of 0.134 suggesting his blood alcohol was going up rather than down. Webb confirmed in his evidence that he was subjected to a second breath test by Smith and Boaden on a hand-held device.[83]

2.62 Smith said he spoke to Boaden and they decided to let Webb go and Boaden left the station with Webb.[84] Smith acknowledged that it was likely that Webb was significantly affected by alcohol but said that it was not his intention that Webb would be allowed to drive home.[85]

2.63 Boaden's evidence was that he was not present when the second alcolizer (the hand-held device) test was administered to Webb at the inquiry counter. He had remembered seeing Webb in the foyer of the police station drinking from a cup, which was not supposed to occur in such circumstances.[86] On this point, Webb confirmed that Key had provided him with a cup of coffee as he waited in the foyer.[87]

2.64 Boaden told the Commission Smith told him of the higher result in the second test and Smith added:

"We can't time him out. He's going higher… We could leave him here all night and he still wouldn't go below it".[88]

WEBB LEAVES THE STATION

2.65 According to Boaden's evidence it was not long after the second alcolizer test was administered to Webb that Smith told him to take Webb home and then return to the police station.[89] Boaden says he drove Webb back to his car and then followed him as he drove home to Ashley. It was safe to assume, said Boaden, that Webb was still over the limit.[90]

[82] PIC Transcript J W Boaden, 14 May 2008, p.118
[83] PIC Transcript D J Webb, 14 May 2008, p.15
[84] PIC Transcript P W Smith, 14 May 2008, Pp.74 – 75
[85] PIC Transcript P W Smith, 14 May 2008, p.76
[86] PIC Transcript J W Boaden, 14 May 2008, p.119
[87] PIC Transcript D J Webb, 14 May 2008, p.15
[88] PIC Transcript J W Boaden, 14 May 2008, p.119
[89] PIC Transcript J W Boaden, 14 May 2008, p.120
[90] PIC Transcript J W Boaden, 14 May 2008, p.121

2.66 Boaden said that on the journey back to Webb's car he told Webb:

"You've been very lucky tonight. This has got to stay between us. If this gets out, we'll lose our jobs".[91]

2.67 By saying this, Boaden admitted he was intending to convey the seriousness of what had taken place, namely that Webb had been let go when most likely he should have been charged with a serious traffic offence. According to Boaden, Webb responded *"It's safe with me"*.[92]

2.68 Smith said that he also said something to Webb at the police station on the night along the lines of *"We wouldn't even do this for police, so he was lucky".* Similarly, Smith said that he too intended to convey to Webb that he was getting away with something.[93]

2.69 Webb told the Commission that after the second alcolizer test, Smith returned shortly after and told him that he could leave.[94] Webb said he made no assumption about the lack of testing by way of machine at the station,[95] although he said that he thought the second test on the hand-held machine may have been the necessary test.[96] After Smith told him he could go, Boaden then drove him back to his vehicle.

2.70 Initially Webb told the Commission that during this trip there had been some brief discussion about what had happened but he could not remember the content. When recalled after having heard Boaden's evidence, Webb accepted that Boaden may have told him that he had been *"very lucky"*, that what had happened had to stay between them and that if it got out they could lose their jobs. He also conceded that he (Webb) may have said *"It's safe with me"* and that if that conversation did occur, that it suggested that something improper had happened.[97]

2.71 Webb also agreed that Smith may have told him *"we wouldn't do this for coppers"* or something similar.[98] Webb said that when he drove his vehicle home, with Boaden following him in the police vehicle, he did not think that he was under the influence of alcohol by that time.[99]

2.72 In his evidence Webb would only go so far as accepting that it *"appeared"* that he was actually aware by the time he left the police station that he had received preferential treatment.[100] There is little doubt that he in fact did receive such treatment.

[91] PIC Transcript J W Boaden, 14 May 2008, p.122
[92] Op cit
[93] PIC Transcript P W Smith, 14 May 2008, p.88
[94] PIC Transcript D J Webb, 14 May 2008, p.16
[95] PIC Transcript D J Webb, 14 May 2009, p.17
[96] PIC Transcript D J Webb, 14 May 2008, p.19
[97] PIC Transcript D J Webb, 15 May 2008, Pp.147 – 148
[98] PIC Transcript D J Webb, 15 May 2008, p.148
[99] PIC Transcript D J Webb, 14 May 2008, p.16
[100] ibid

2.73 The next day, at work, Webb saw Weavers and said that he had a brief conversation with him in which Weavers asked *"How did you go?"* to which Webb replied *"Yeah, no worries".*[101]

THE BAS TEST

2.74 Smith told the Commission that when Boaden returned to the station, the two of them went to the BAS room, where Boaden prepared the machine and Smith blew into the tube, producing the result of 0.00. Boaden then completed the relevant documents, one of which Smith countersigned.[102] He remembered Boaden telling him that he changed the entry on the document in the BAS book[103] from 0.09 to 0.06.[104] He was aware that the details had, at least in part, been fabricated by Boaden.[105]

2.75 Smith said he did not remember the COPS report[106] prepared in relation to Webb's arrest that night, although his name appeared on the record as having updated the entry.[107] The entry included the statement that Webb was *"the holder of a gold licence and at Moree police station he returned a reading of under 0.050"*, which Smith agreed was false. Although he could not remember having read the entry, he agreed that he would have verified it if he had in fact seen it.[108]

2.76 There was no custody record created for Webb, although Smith said that such an omission in the circumstance of a person such as Webb being brought back for a BAS test was not out of the ordinary.[109]

2.77 Smith also said that later, whether on that night or not, he told Boaden, *"If it does turn to shit, we'll just stick to our story".*[110]

2.78 Boaden admitted he was with Smith when Smith blew in the tube attached to the BAS machine with the intention that it would be passed off as being Webb's blood alcohol test. He also agreed that he completed various items of BAS documentation which, at least in part, were false, with the intention that they be passed off as truthful. He also accepted that those things happened so that Webb would be allowed to leave the police station without being charged for an offence of having the prescribed content of alcohol in his blood, when in fact he should have been so charged.[111]

2.79 Boaden told the Commission he also filled out the breath analysis paperwork and Smith then blew into the instrument. Boaden recorded the reading that Smith produced as zero, completed the BAS documents and then completed a COPS event. He admitted, *"all of which was obviously a fabrication"* insofar as it didn't actually contain correct information.[112]

[101] PIC Transcript D J Webb, 14 May 2008, p.17
[102] PIC Transcript P W Smith, 14 May 2008, p.76
[103] PIC Exhibit 2
[104] PIC Transcript P W Smith, 14 May 2008, p.78
[105] PIC Transcript P W Smith, 14 May 2008, p.79
[106] PIC Exhibit 6AC
[107] PIC Transcript P W Smith, 14 May 2008, p.84
[108] PIC Transcript P W Smith, 14 May 2008, p.85
[109] PIC Transcript P W Smith, 14 May 2008, p.87
[110] Op cit
[111] PIC Transcript J W Boaden, 14 May 2008, p.103
[112] PIC Transcript J W Boaden, 14 May 2008, p.122

2.80 On the BAS form, Boaden wrote *"Farmer"* as Webb's occupation; to have identified him as a Corrective Services officer may have led to an inquiry.[113] He altered the entry relating to the roadside test from 0.09 to 0.06 because, if there was to be an inquiry, it would have been far easier to explain a 0.060 reading going down to 0.000 rather than a 0.090 doing so.[114]

2.81 He also falsely completed the sections of the BAS document containing questions supposedly asked of Webb and answers given by him and other details about his drinking that evening.[115]

2.82 Boaden said he also signed the printout from the BAS machine, the certificate which also contained false details about the test and the form containing his observations of Webb which were partially false. Those details were designed to deflect inquiries by anyone who might ask how Webb's blood alcohol level had apparently dropped.[116]

2.83 Boaden said that later that night before he finished his shift he said to Smith that he could not believe what they had done. Smith referred back to the "brownie points" they had earned. Boaden told the Commission he took that to mean that they had earned points with people up the chain that could be used later explaining:

"that we could later use for - to get us out of a sticky situation or to get us somewhere where we wanted to go or to help us out in some way".

2.84 This was a favour which he expected would be owed to them by Budd, based on his understanding of the approval which had been given for assisting Webb.[117] He then however said that he told Smith that he didn't want *"brownie points"* because he had just done what he thought was expected of him in the circumstances.[118]

2.85 In attempting to rationalise his actions Boaden said that when he was going through the process with the BAS machine he *"knew it was the wrong thing to do" but "it hadn't really formed in my mind that it was a criminal offence"*. Nonetheless, he conceded that he knew it was grossly improper.[119]

AN INTERNAL POLICE INVESTIGATION

2.86 Of interest to the Commission's investigation was the conduct of those involved in these matters during both the subsequent internal police investigation and the Commission's own investigation.

2.87 Soon after the events in question an internal police investigation was commenced following the receipt of information by NSWPF that Webb had been given preferential treatment in relation to an alleged breath testing offence.

[113] PIC Transcript J W Boaden, 14 May 2008, p.124
[114] PIC Transcript J W Boaden, 14 May 2008, p.125
[115] PIC Transcript J W Boaden, 14 May 2008, p.125
[116] PIC Transcript J W Boaden, 14 May 2008, p.126 – 128
[117] PIC Transcript J W Boaden, 14 May 2008, Pp.130ff
[118] PIC Transcript J W Boaden, 14 May 2008, p.133
[119] PIC Transcript J W Boaden, 14 May 2008, p.134

2.88 Smith told the Commission that when he discovered that an investigation had commenced and that he and Boaden were likely to be interviewed, he told Boaden to tell the truth.[120]

2.89 Webb gave evidence that he never spoke to Weavers about what had happened at the station that night but he had spoken to Smith and Boaden. He said that after two police officers conducting the internal investigation had approached him seeking an interview he telephoned Smith and asked him what was happening. Smith told him that he could not speak to him.[121]

2.90 Webb also agreed that he had spoken to Smith during a trip to Tamworth before the investigation started but that he had no recollection of the content of the conversation.[122] For his part, Smith confirmed that he had spoken to Webb during a journey with him from Moree to Tamworth and that Webb had said to him, *"Thanks for the other night, I'll buy you a beer".*[123]

2.91 Webb agreed that his conversation with Smith could have been along the lines of Smith suggesting that he was fortunate that he had not been charged. However, he said he couldn't remember whether the effect of what Smith was suggesting was that he should have been charged having regard to the likely content of his blood alcohol that night, due to what he described as *"a mental blank – block"* about the issue.[124]

2.92 Webb remembered one conversation with Boaden about the matter, which occurred after he (Webb) had been approached by the Commission investigators, in which he had mentioned this visit from the Commission to Boaden, but he said there had been no conversation with Boaden about the night in question.[125]

2.93 Smith gave evidence that some time after Weavers returned from holidays in early 2008, he briefly spoke to him about the events of 24 September 2007. Smith could not recall if he told Weavers that he (Smith) had supplied the breath sample but said that Weavers told him he was going to deny saying that he told Smith to get someone else to blow in the bag. Smith said that Weavers also said that he would say that he had just telephoned that night to check on Webb's welfare and to not put him in custody.[126] Smith said he believed that he told Weavers that he also would stick to that story. When interviewed by the investigating police, Smith said he had not told them the truth, and he had *"tried to protect everyone else, trying to get no-one into trouble".*[127]

2.94 When Weavers was recalled after Smith gave evidence he said he could not remember saying the things attributed to him by Smith about their conversation after Weavers' return from holidays. He did however remember that Smith had mentioned during that

[120] PIC Transcript J W Boaden, 14 May 2008, p.87
[121] PIC Transcript D J Webb, 14 May 2008, p.19
[122] PIC Transcript D J Webb, 14 May 2008, p.21
[123] PIC Transcript P W Smith, 14 May 2008, p.88
[124] PIC Transcript D J Webb, 14 May 2008, Pp.20 – 21
[125] PIC Transcript D J Webb, 14 May 2008, p.23
[126] PIC Transcript P W Smith, 14 May 2008, p.89
[127] PIC Transcript P W Smith, 14 May 2008, p.90

conversation that he (Weavers) had asked Smith to blow into the bag that night, but said that he had said to Smith that he could not remember what had happened.[128]

EXPLAINING CONDUCT

2.95 In evidence to the Commission Smith described his conduct as an act of stupidity. He said he had been under a lot of stress but, to his credit, added that he was not looking for excuses to say why he blew into the BAS machine. He added that it was *"a big mistake"* and while he couldn't say exactly why he did what he did he *"wasn't thinking to pervert the course of justice"*. With the benefit of hindsight he accepted that Webb should have been charged and put before the court *"for a misdemeanour"*.[129]

2.96 When pressed as to why he wanted to assist Webb, Smith referred back to the close working relationship between the police and Corrective Services adding, *"we don't want to create no hardship, animosity, between us".*[130]

2.97 If it had not been for the call from Weavers, Smith said he would probably have charged Webb after the second hand-held (alcolizer) breath test reading. But he attempted to downplay the extent to which Weavers' request figured in his subsequent actions because he was still relying on Webb testing negative on the second occasion. After Webb's reading increased in the second test he realised that his plan of delaying the test was not going to be of any assistance, explaining the position as;

"… I had no other option to - either one of us blow in the bag. We had no choice then".[131]

2.98 For his part, Boaden sought to explain his conduct in the context of what he called a previous history of disagreement between himself and Budd, including verbal intimidation and threats by Budd.[132] Believing that *"the order"* had come from Budd, Boaden said he could not stand up to what he believed Budd had requested because of their past history and would have done whatever Budd told him to do.[133] He later denied a suggestion put to him on behalf of Budd that he was falsely blaming Budd in order to wriggle out of his own difficult situation.[134]

[128] PIC Transcript J A Weavers, 14 May 2008, Pp.100 – 101
[129] PIC Transcript P W Smith, 14 May 2008, p.94
[130] PIC Transcript P W Smith, 14 May 2008, p.97
[131] PIC Transcript P W Smith, 14 May 2008, p.98
[132] PIC Transcript J W Boaden, 15 May 2008, p.141
[133] PIC Transcript J W Boaden, 15 May 2008, p.142
[134] PIC Transcript J W Boaden, 15 May 2008, p.145

OPERATION LUNO (ORANGE)

BACKGROUND

2.99 In the early hours of the morning of 21 December 2007 Constables Kate Lanser (Lanser) and Steven Hall (Hall) of Orange Police were on duty in Orange. Adam James Clunes (Adam), the son of Senior Constable Colin Clunes (Colin) was stopped and pulled over by Lanser and Hall in Byng Street. Adam was subjected to a random breath test, which was conducted by Lanser at 03:12 am using a portable alcolizer. The sample supplied by Adam returned a (high range) reading of 0.202gms/100ml. Consequently, Adam was arrested and taken back to Orange Police Station for the purposes of undergoing a BAS test.

2.100 Colin was also attached to Orange Police Station. Up until about May or June 2007 Colin had been Lanser's supervisor while she was a probationary constable although she was no longer working under his supervision at the time Adam was pulled over. Lanser's probationary period ended on 1 September 2007. After she had breath tested Adam, Lanser, having recognised Adam as Colin's son, contacted Colin on her mobile phone and informed him that she had arrested Adam.

2.101 On arrival at the police station Adam was escorted to the charge area where he was searched by Lanser and his property taken from him and documented. The custody officer on duty that morning was Senior Constable Mark Christie (Christie). Christie endorsed the Custody Management Record by entering Adam's details onto the police computer at 3:30 am.

2.102 According to the BAS data record book obtained by the Commission,[135] Christie was also the authorised Breath Analysis Operator on duty at Orange Police Station that morning. The record shows that Christie commenced a fifteen minute observation of Adam at 3.43 am and that he conducted the BAS test at 04.05 am using the BAS instrument. This test resulted in a reading of 0.000gms/100ml. Adam subsequently left the police station later that morning without being charged with any offence.

2.103 The disparity between the results of the two tests, that is Adam's roadside breath test and the BAS test back at the police station, became the focus of an internal police investigation commenced by the Local Area Commander and subsequently taken over by the Commission.

EVENTS LEADING UP TO ADAM'S ROADSIDE BREATH TEST

2.104 Adam was called to give evidence during the Commission's public hearing held as part of the investigation. Adam indicated at the beginning of his evidence that his memory of the events of 21 December 2007 was *"pretty good"*.[136]

[135] PIC Exhibit 4C
[136] PIC Transcript, A J Clunes, 16 May 2008, p. 163

2.105 Prior to the Commission's hearing Adam had participated in an interview with Commission officers where he denied any knowledge of any wrong doing surrounding the events in question. When asked from the outset of his evidence whether he had told the truth in his interview, he replied that he had not. He agreed that he had not supplied a sample of breath for testing in the BAS instrument. He said that the police officer, whose first name was Mark, had done so.[137] He had only found out the first name of the officer on the morning of 21 December 2007 and had no recollection of meeting him before then.[138]

2.106 In respect to how the events of that morning and preceding evening unfolded Adam told the Commission that he had been in Orange the night and morning with his friends having a good time and a few drinks.[139] He said he had not started drinking until 8.30 pm or 9.00 pm if not later. Initially he had a *"bit of punch"*, which he believed was alcoholic and a rum and coke at a friend's house. Then with some of his friends, he went to the Hotel Orange. He was there for an hour or an hour and a half and had one middy of pre-mixed Bundaberg Rum and Coke. He said he had nothing further to drink at that hotel.[140]

2.107 From there he went to the Standard Hotel at about 10.30 or 11.00 pm. When he arrived he had one can of pre-mixed rum and coke. Following that there was an incident which led to him being ejected from the hotel at approximately 11.30 or 12.00 midnight.[141] From there he went to the Royal Hotel but did not have any alcohol while he was there. He had something to eat and returned to the Standard Hotel not having had a drink for probably an hour.[142]

2.108 He remained outside the Standard for an hour or more, waiting for his friends and talking to people. While there he had one more drink, a pre-mixed Bundy and coke, which he obtained from a friend who was also in the area of the Standard Hotel.[143] One of the friends had a motor vehicle in the vicinity of the hotel. Adam, the owner of the vehicle and another friend left the hotel at about 3.00 am to go to the vehicle to drive home.[144]

2.109 His plan was to go back to the friend's house, which was about 12 kilometres from Orange. He said he already had the keys to the friend's vehicle and just took it upon himself to drive the car, which was in the car park next to the Standard Hotel.[145]

2.110 When Adam left the Standard Hotel with his friends they travelled in the car through an undercover car park near the Standard Hotel and came out on Byng Street. He said he went that way because it was shorter, not because he had in mind the possible need to evade the greater likelihood of police being on the main street.[146] He said he did not believe he was over the legal limit, or just didn't think he *"was much over"*, notwithstanding that he was a provisional licence holder,[147] and was therefore not permitted to have any alcohol in his system.[148]

[137] Op Cit
[138] PIC Transcript, A J Clunes, 16 May 2008, p.164
[139] PIC Transcript A J Clunes, 16 May 2008, p.165
[140] PIC Transcript A J Clunes, 16 May 2008, p.166
[141] PIC Transcript A J Clunes, 16 May 2008, p.167
[142] ibid
[143] PIC Transcript A J Clunes, 16 May 2008, p.168
[144] ibid
[145] PIC Transcript A J Clunes, 16 May 2008, p.170
[146] PIC Transcript A J Clunes, 16 May 2008, p.170 ff
[147] see section 9(1A) *Road Transport (Safety and Traffic Management) Act 1999*
[148] PIC Transcript A J Clunes, 16 May 2008, p.171

2.111 Adam drove into Byng Street, was pulled over and was approached by Lanser who he knew. He said that he assumed by the way she greeted him that she knew who he was.[149] He went on to say that Lanser *"used the alchometer thing you talk into"*, and asked him to count to 10. She then asked him to use a tube to blow into a machine.[150] She told him the result of the test, by saying it was $2, which he understood as 0.2, and that that was *"pretty high"*, which surprised him.[151]

2.112 Adam told the Commission that before he was taken to the police station he spoke to his father. This was during a call Lanser had made on her mobile phone to Colin. Adam said by the time he spoke to his father, Colin already knew that he had been pulled over, breathalysed and had produced a positive reading. Although Adam's recollection on this point was hazy it was enough for him to gauge that his father was "pretty cranky". His father told him to do what he was told to do by Lanser. While Adam said that this conversation took place just as they arrived at the police station Lanser's recollection was that it occurred while they were at the roadside where the vehicle had been stopped.[152] In any event, nothing turns on the point.

CONSTABLE KATE LANSER

2.113 Lanser grew up in Orange and following her graduation from NSW Police Academy on 1 September 2006 she was posted to Orange.[153] Her probationary period had ended on 1 September 2007. Up until about May or June 2007 while she was a probationary constable, Colin had been her team supervisor. She said she knew Adam as the son of Colin because *"he had come to the station for a lift home, and things like that"*.[154]

2.114 Lanser told the Commission that when she got out of the car and approached the vehicle, she saw that the driver was Adam. She tested him initially and obtained an indication of alcohol from his breath. As a result she went to the police car, obtained a tube and then retested him to obtain a reading.[155]

2.115 Lanser also said that she thought that she had not asked Adam about what he had to drink that night, despite it being the customary procedure to do so. She said she believed she did not adopt the procedure because of her familiarity with him. Nor, did she believe, that she said *"You're under arrest for the purpose of a breath analysis, and give a spiel and a caution",* for the same reason.[156] Hall said in his evidence that he informed Adam that he was under arrest and gave him the caution.[157]

2.116 Lanser asked Adam what his father would say and said that she would contact him and let him know that Adam had failed a breath test. The battery in Adam's mobile phone was flat so he was unable to provide her with his father's mobile telephone number.

[149] PIC Transcript A J Clunes 16 May 2008 p. 171
[150] PIC Transcript A J Clunes 16 May 2008 pp. 172 – 173
[151] ibid
[152] PIC Transcript K L Lanser, 16 May 2008, p.189 – 191
[153] PIC Transcript K L Lanser, 16 May 2008, p.204
[154] PIC Transcript K L Lanser, 16 May 2008, p.188
[155] PIC Transcript K L Lanser, 16 May 2008, p.188
[156] PIC Transcript K L Lanser, 16 May 2008, p.201
[157] PIC Transcript S J Hall, 16 May 2008, p. 220

Lanser used her mobile to call his mother who in turn provided Colin's mobile telephone number. After she had called Colin, Adam was taken to the Orange Police Station.[158] She said these calls occurred while she, Adam and Hall were still at the roadside.[159]

2.117 Lanser said she rang Colin out of courtesy. However, when asked whether there was anything that had happened previously that encouraged her to think it would be a good idea to contact Colin, she related an incident some six months previously when Adam had been given traffic infringement notices by another police officer also attached to Orange Police Station. She had heard Colin say in the station that he *"wasn't happy about it."*[160] She was unable to recall the exact words Colin used but she agreed that Colin's unhappiness was directed towards the police officer who had issued the traffic infringement notices to Adam apparently because he thought it was unfair that his son Adam had received two infringement notices rather than one. Lanser said that she did not know if Colin's view had been expressed directly to the police officer who had issued those infringement notices. Nevertheless, she agreed that the incident was in her mind when she had decided that it would be appropriate to contact Colin about his son having been pulled over.[161]

2.118 During her evidence Lanser initially denied that Colin had made any suggestion about what should happen in relation to Adam.[162] She acknowledged however that Colin had said to her something along the lines of *"He'll lose his licence. He'll lose his job"* but he had not suggested to her that she should actually do something about that.[163]

2.119 Lanser was taken to evidence she had given to the Commission at an earlier private hearing[164] and having been shown that evidence, she agreed that Colin had in fact said to her, words to the effect of, *"You've got to do something, Katie. He'll lose his licence"*, but that he still made no suggestion about what she should do.[165]

2.120 Lanser said however she believed that Colin wanted her to do something which would result in Adam not losing his licence and said she *"could only think that he wanted her to not take Adam back to the station"*.[166] She said she believed that she told Colin that Adam was going to be taken back to the police station. She said she was upset because *"I knew Col was upset"*.[167] She also said she told Hall the effect of what Colin had said to her and they agreed that they were going to take Adam back to the police station anyway as, *"these are our jobs. It's not worth it. There are two other people in the car"*. By this Lanser meant that if they did something improper they could lose their jobs and it was not worth that.[168] She repeated her belief that Colin had implied that something improper might be done such as not taking Adam back to the station.[169]

[158] PIC Transcript K L Lanser, 16 May 2008, p.188
[159] PIC Transcript K L Lanser, 16 May 2008, p.189 - 191
[160] PIC Transcript K L Lanser, 16 May 2008, p.190
[161] PIC Transcript K L Lanser, 16 May 2008, p.189 - 191
[162] PIC Transcript K L Lanser, 16 May 2008, p.192
[163] Op Cit.
[164] Private PIC Transcript K L Lanser, 19 March 2008, p.22
[165] PIC Transcript K L Lanser, 16 May 2008, p.193
[166] ibid.
[167] PIC Transcript K L Lanser, 16 May 2008, p.194
[168] PIC Transcript K L Lanser, 16 May 2008, p.195
[169] ibid

CONSTABLE STEVEN HALL

2.121 Hall said that he had remained in the police vehicle while Lanser approached the other vehicle after it had been pulled over. He said that Lanser told him that the driver was *"Clunesy's son"*.[170] Hall had only been stationed at Orange Police Station for a short time and did not know Adam. He found out either from Lanser or by seeing the alcolizer readout that Adam had recorded a reading of 0.202.[171]

2.122 Hall said that he was aware of some telephone calls in which Lanser was attempting to contact Colin and he saw that after the calls she was upset. He said Lanser didn't tell him exactly what had been said during the calls but he got the impression that Colin was not happy about what had happened. All he could remember about the conversation was that Lanser said something like *"We've got to do what we've got to do"* or *"you've got to do what you've got to do".*[173]

2.123 Hall said he informed Adam that he was under arrest and cautioned him. There was then some conversation with the other occupants of the car about how they were going to get home. After they departed Hall and Lanser took Adam to Orange Police Station. Hall said that he could not smell alcohol on Adam because he was not close enough to him at any time but he thought he was affected by alcohol because of the reading on the alcolizer. When they arrived at the police station they entered the custody room and Lanser began completing the arrest documents.[174]

SENIOR CONSTABLE COLIN CLUNES

2.124 Colin is a leading senior constable stationed at Orange Police Station.[175] He was on the Central Coast when he received a telephone call from Lanser informing him that his son, Adam, had been pulled over and breath tested.[176] He said that he could not recall what he said to her in response except that he thought he had said something like *"Kate, just do what you've got to do"* by which he meant *"Do your job … Run the process and do whatever you have to do to follow the processes"*.[177] He also said that this was consistent with what he had told Lanser during the time he had supervised her as a probationary constable.[178]

2.125 In relation to Lanser's evidence that he had said to her, *"You've got to do something, Katie. He'll lose his licence"*, he said that he probably would have said something like that but he attributed that to being angry at his son being out so late on a Thursday night before work the next day and to having just been woken up early in the morning. However, he denied that he intended Lanser to understand that she had to do something to stop Adam losing his licence.[179]

[170] PIC Transcript S J Hall, 16 May 2008, p.218
[171] PIC Transcript S J Hall, 16 May 2008, p.219
[172] PIC Transcript S J Hall, 16 May 2008, p.220
[173] ibid
[174] PIC Transcript S J Hall, 16 May 2008, p.221
[175] PIC Transcript C J Clunes, 16 May 2008, p.205
[176] PIC Transcript C J Clunes, 16 May 2008, p.207
[177] Op Cit
[178] PIC Transcript C J Clunes, 16 May 2008, p.208
[179] PIC Transcript C J Clunes, 16 May 2008, p.207 – 208

2.126 When asked whether he wanted her to do something other than her duty he responded:

"Not really. As I said, I told Katie, "Do what you've got to do." We don't want things to happen to our sons, but if the wrong thing's done, the wrong thing's done".

2.127 In any event he said he believed that he was not in a position to influence Lanser to make it all go away.[180]

2.128 He agreed that he had made his displeasure known in the station about the number of infringement notices issued to Adam on a previous occasion.[181] He said that he had *"probably had a bitch about it"*, then had words with the officer in question when confronted by that officer, but could not recall the detail of their conversation.[182]

AT THE STATION

2.129 Adam said in his evidence that on arrival at the Orange Police Station he was taken to the charge room by Lanser where another officer who he now knew to be "Mark" read out a form and took his property. Because his father was a police officer at the station he knew a lot of the other officers by sight and also knew a few names, however, he did not remember having met Mark before.[183] Some time later he went with Mark into another room where the BAS instrument was located.[184]

2.130 The room in which the BAS instrument was located was under continual surveillance by closed circuit television camera. The Commission obtained a copy of the video recording for the period in question. The video was played to Adam and he recognised himself entering the room and then leaving with the time showing as 04:00:09 on the recording. A little over a minute later, the video showed him re-entering the room and going over to the BAS instrument with the police officer he identified as Mark and then going back and standing in the doorway of the room. He then returned to the BAS instrument and stood alongside a desk near the instrument with Mark who stood with his back to the camera.[185]

2.131 In relation to what was depicted on the video Adam said he didn't think anything was said and that Mark was showing him the machine.[186] At the time of 04:00:47 as shown on the video, Mark had the tube from the instrument in his hand. This was, Adam said, when he (Mark) breathed into it.[187]

2.132 Adam told the Commission that before they went into the room for the first time, Mark told him that he (Mark) was going to breathe into the instrument.[188] Mark did not give any reason but he did tell Adam not to tell anyone.[189] Adam assumed from what Mark was saying that no one else knew what he was about to do.[190] Mark told him that he

[180] PIC Transcript C J Clunes, 16 May 2008, p.209
[181] PIC Transcript C J Clunes, 16 May 2008, p.208
[182] PIC Transcript C J Clunes, 16 May 2008, p.211
[183] PIC Transcript A J Clunes, 16 May 2008, p.173 – 174
[184] PIC Transcript A J Clunes, 16 May 2008, p.174
[185] PIC Exhibit 1
[186] PIC Transcript A J Clunes, 16 May 2008, p.177
[187] PIC Transcript A J Clunes, 16 May 2008, p.178
[188] PIC Transcript A J Clunes, 16 May 2008, p.178
[189] PIC Transcript A J Clunes, 16 May 2008, p.178
[190] PIC Transcript A J Clunes, 16 May 2008, p.182

was going to have his back to the wall where the camera was located. There was no conversation about what had been recorded on the instrument. While they were still in the BAS room, another officer, Jeremy Commins, had a brief conversation with Adam about giving him a lift home.[191]

2.133 Adam said that Mark informed him that, *"everything was right"* and that the result of the test was zero as he was typing it into the computer.[192] Shortly after the test was completed he received his property and was free to go. Commins, to whom he had spoken earlier, then drove him to his friend's house.

2.134 Lanser gave evidence that on arrival at the charge room at the station Christie was on duty as the supervisor, custody manager and BAS operator. She said she believed that she made Christie aware that Adam was Colin's son. She thought she also told Christie that Colin was making her feel bad about the whole series of events.[193]

2.135 Lanser did not remember any conversation with Christie about what might then happen and said she had never had any discussion with Christie about him having blown in the machine for Adam.[194] She had concluded that by the time Adam was back at the station there was only one course of action to be taken, being the correct one.[195]

2.136 For his part, Hall said that after arriving at the station, he left Lanser and Christie to look after Adam's custody. When he was shown the COPS record of the event[196] he agreed that it appeared that Christie had, later that evening at 10.22 pm, added that part of the record that showed the BAS reading.[197]

2.137 Hall commenced the COPS report of the incident at approximately 0523 hours on the morning of 21 December 2007, which was after Adam had left the police station without being charged. Hall was shown a copy of the COPS report.[198] He said that he was unsure if the words *"slightly affected"* appearing alongside the heading *"Level of Intoxication"* were his but that was how he perceived Adam on the night and he formed that view only because Adam had said he had been at the pub.[199]

SENIOR CONSTABLE MARK CHRISTIE

2.138 Senior Constable Mark Christie is a police officer of nine and a half years experience. He commenced working at Orange Police Station in about August 2007. Before moving to Orange he had been attached to the Deniliquin Local Area Command and has spent most of his service in country stations.[200]

[191] PIC Transcript A J Clunes, 16 May 2008, pp.179 – 180
[192] PIC Transcript A J Clunes, 16 May 2008, p.180
[193] PIC Transcript K L Lanser, 16 May 2008, p.196
[194] PIC Transcript K L Lanser, 16 May 2008, p.197
[195] PIC Transcript K L Lanser, 16 May 2008, p.198
[196] PIC Exhibit 3C, barcode 7132411
[197] PIC Transcript S J Hall, 16 May 2008, p.222
[198] PIC Exhibit 3C, barcode 7132411
[199] PIC Transcript S J Hall, 16 May 2008, p 223-4
[200] PIC Transcript M Christie, 16 May 2008, p.248

2.139 Christie gave evidence after Adam had done so. At the beginning of his evidence, he admitted that when he was in the BAS room with Adam he had blown in the tube of the BAS instrument when Adam should have done so.[201] When asked to explain his behaviour he mentioned his involvement in a number of high-stress incidents for which he had been medicated and to his empathy for Adam's position. He referred to having been assaulted in the cells, suffering concussion, being hospitalised and to subsequent treatment, including medication for stress.[202] He said the position was escalated by Lanser, who he said was crying when she brought Adam into the charge room. He denied ever having done anything similar before and attributed his actions to him having started *"to feel very much different about life".*[203] Christie said he felt overwhelmed by the situation describing it as very daunting and emotional.[204]

2.140 As to his empathy for Adam's situation, Christie sought to further explain this by describing that he was aware that Adam lived a considerable distance from town, was in great peril of losing his driver's licence, his job and his career. He agreed however, that such matters applied to others who tested positive to the presence of alcohol in their system and who were charged. He denied that the fact that Adam's father was a fellow police officer had anything to do with his actions.[205] He said that he knew Colin only in passing at that stage, having met him on change of shifts.[206]

2.141 Christie also denied asking Lanser the reason for her emotional state when she came into the station with Adam, but said she had told him that Adam was Colin's son and that he had received infringement notices in the past.[207]

2.142 Despite knowing the relationship between Colin and Adam, he denied that it then occurred to him that he might do something to help Adam out. Rather, he said, that arose almost immediately before the breath analysis.[208]

2.143 He agreed he had told Adam that there was a camera in the BAS room, having considered that he would conceal what was going to happen from the camera by standing with his back to the camera. He agreed that by doing so he was taking a very big risk.[209]

2.144 Christie said that he didn't believe that Adam was affected by alcohol. He agreed however, that as Adam was a driver on a provisional licence, that any recording of blood alcohol would most likely have the effect that he would lose his licence.[210]

2.145 Afterwards, he said to Adam something to the effect that he was not to say anything to anyone else about what had taken place, in the hope that what had happened in the BAS room would remain a secret.[211]

[201] PIC Transcript M Christie, 16 May 2008, p.229
[202] PIC Transcript M Christie, 16 May 2008, p.231
[203] PIC Transcript M Christie, 16 May 2008, Pp.231 - 232
[204] PIC Transcript M Christie, 16 May 2008, p.229
[205] PIC Transcript M Christie, 16 May 2008, p.230
[206] PIC Transcript M Christie, 16 May 2008, p.234
[207] PIC Transcript M Christie, 16 May 2008, p.232
[208] PIC Transcript M Christie, 16 May 2008, p.233
[209] PIC Transcript M Christie, 16 May 2008, p.234
[210] PIC Transcript M Christie, 16 May 2008, p.235
[211] PIC Transcript M Christie, 16 May 2008, p.235

2.146 He was shown the BAS data record book relevant to that night,[212] which he agreed he had filled in. He said he had cautioned Adam and asked him the questions recorded on the form and had obtained from Adam the information relating to the amount of alcohol that he had drunk and had accurately recorded what he was told.[213] Although he thought that Adam was unaffected by alcohol, the documents on which he was to record such matters and the computer entry which would follow their completion did not provide for such a conclusion. Consequently he recorded Adam as being slightly affected.[214] Christie also said that he accurately recorded what Adam told him about his consumption of alcohol, including that just before driving his car he had a mouth full of rum and coke but that he was scared to tell the police owing to holding a provisional driver's licence.[215]

2.147 He said that he had followed every other procedure other than not doing the breath analysis properly. That, he agreed, had led to the result that Adam had been able to leave the station not having been charged, as *"perhaps"* he might otherwise have been.[216] He agreed that he had completed the other standard documentation in respect of the observation and testing of Adam.

THE AFTERMATH

2.148 Lanser found out about the zero result on the BAS test when the certificate was brought to the muster room by Christie.[217] She could remember that there was some resulting conversation amongst police present, possibly including Hall and Commins, but was extremely vague on all details, save for recalling there were some queries expressed about how it could be that Adam had registered zero when he'd registered 0.202 at the roadside.[218] She said she had some suspicions about the possibility that something improper had happened but said she had no certain knowledge at the time about what that may have been.[219]

2.149 Lanser said she was uncertain whether she had let Colin know that his son had been released without charge.[220] Evidence of the timing of telephone calls presented during the hearing[221] appears to suggest there had been a telephone conversation between her and Colin after Adam had left the station.[222]

2.150 Hall said that he saw the BAS certificate which had been produced by Christie and saw that it recorded that Adam had produced a reading of 0.000gms/100ml on the BAS instrument. Hall said he asked Christie how that was possible after he had produced a result of 0.202 gms/100ml and was told that Adam had had a mouth of alcohol before leaving the pub.[223] Hall said that he thought that it was a *"feasible"* explanation but added that he had only done two PCA charges in his career and was inexperienced in that area of policing.

[212] PIC Exhibit 4C
[213] PIC Transcript M Christie, 16 May 2008, p.238
[214] PIC Transcript M Christie, 16 May 2008, p.243
[215] PIC Transcript M Christie, 16 May 2008, p.245
[216] PIC Transcript M Christie, 16 May 2008, p.240
[217] PIC Transcript K L Lanser, 16 May 2008, p.198
[218] PIC Transcript K L Lanser, 16 May 2008, Pp.129 – 200
[219] PIC Transcript K L Lanser, 16 May 2008, p.203
[220] PIC Transcript K L Lanser, 16 May 2008, p.201
[221] PIC Exhibit 2
[222] PIC Transcript K L Lanser, 16 May 2008, p.202
[223] PIC Transcript S J Hall, 16 May 2008, p.224

2.151 As to whether there had been a conversation about the camera in the BAS room Hall said he could remember hearing something but could not recall when it was or in what circumstances. Otherwise, he said his only knowledge about what Christie had done that night was from hearing *"rumours that something wasn't right about the evening".*[224]

2.152 Christie said he did not recall saying anything about the existence of a camera in the BAS room to other police after the event but claimed that Commins had raised the issue of him having blown in the instrument. Christie said that he had denied doing so and there had been further conversation about whether the whole event had been staged as some sort of integrity test.[225]

2.153 Adam said that he didn't speak to his father until later the same day when he was at work. He said that he still did not tell him the full truth and that he only told him what he had told Commission investigators during his earlier interview, that is that he (Adam) had blown in the tube of the machine.[226]

2.154 Colin said he returned to Orange and saw Adam later that same day. Adam told him he had tested positive at the roadside, with a high reading. According to Colin, Adam told him that he did the test, and that the result was zero. Colin said he found that surprising but Adam also told him that he'd had a mouthful of drink beforehand.[227]

2.155 Colin said that it was over the preceding couple of days before the Commission's hearing that he had first heard from his son what had actually happened and he then instructed him to tell the truth to the Commission. He also said that he had not heard from any police officer what had occurred.[228] As Adam told the Commission when he gave evidence, at that time he still had not told his father the whole truth.[229]

[224] PIC Transcript S J Hall, 16 May 2008, p.226
[225] PIC Transcript M Christie, 16 May 2008, p.236
[226] PIC Transcript A J Clunes, 16 May 2008, p.185
[227] PIC Transcript C J Clunes, 16 May 2008, p.211
[228] PIC Transcript C J Clunes, 16 May 2008, p.213
[229] PIC Transcript A J Clunes, 16 May 2008, p.185

3. AFFECTED PERSONS

3.1 The Commission is required to furnish a Report to Parliament in matters where the Commission has conducted a public hearing; s 96(2) of the Act.

3.2 A person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, an investigation, is an "affected person" for the purposes of a Report to Parliament by the Commission.[230]

3.3 Subsection 97(2) of the Act requires the Commission to include in a Report to Parliament a statement in respect of each affected person as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

a) the prosecution of a person for a specified criminal offence;
b) the taking of action against the person for a specified disciplinary offence;[231]
c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer;
d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.

3.4 In addition, pursuant to subsection 16(1)(a) of the Act, the Commission may form opinions as to whether police misconduct, or other misconduct, has occurred. These opinions help to inform whether any recommendations should be made or opinions expressed as to whether consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences.

3.5 The expression *"police misconduct"* is not specifically defined by the Act. It nevertheless includes the following types of conduct (see section 5 of the Act):

a) Police corruption;
b) the commission of a criminal offence by a police officer;
b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990*.
c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988*, involving a police officer;
d) any other matters about which a complaint can be made under the *Police Act 1990*.

3.6 It follows that *"police misconduct"* may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, the sanction for which may, for example, be nothing more than additional training and development.

[230] Subsection 97(3), *Police Integrity Commission Act 1996*
[231] The power of the Commissioner of Police to refer a departmental charge against a police officer for a hearing by the Police Tribunal was repealed on 8 March 1999. Since that date, the powers and obligations of the Commissioner to recommend or state whether consideration should be given to the prosecution of a person for a specified "disciplinary offence" (subsections 16(1)(b), 97(2)(b) of the Act) has no effective application to police officers. This is so even for police misconduct that occurred before this date.

3.7 Before expressing any opinion that misconduct may have occurred (section 16(1) of the Act) or that in all the circumstances it is of the opinion that consideration should be given to the prosecution of any person for a specified criminal offence (section 97(2)(a) of the Act), the Commission should be comfortably satisfied of the relevant facts applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw*.[232] His Honour said at p 361:

> *"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences".*

3.8 Despite the protection given by the declaration under section 41 of the Act any answers given under objection or following a declaration made under section 41 are available to be used by the Commissioner of Police when considering whether to make an order under sections 173 or 181D of the *Police Act 1990*. Similarly, such material is admissible in proceedings under Divisions 1A or 1C of the *Police Act 1990*, or in proceedings for the purpose of an order under section 183A of that Act or any proceedings for the purposes of Division 2A of Part 9 of that Act with respect to an order under section 183A, and any disciplinary proceedings (section 40(3)). The same applies to any documents produced under objection.

THE OFFENCE OF PERVERT THE COURSE OF JUSTICE

3.9 The offence of perverting the course of justice is defined in section 312 of the *Crimes Act 1900 (Crimes Act)*, as obstructing, preventing, perverting or defeating the course of justice or administration of the law. Section 319 of the Crimes Act states that;

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

3.10 The elements of the offence are that the person must do an act or make an omission with the intention that the act or omission will pervert the course of justice.

3.11 In the High Court decision of *R v Rogerson*[233] Justices Brennan and Toohey said:

> *"The gravamen of the offence of an attempt to pervert the course of justice is an interference with the due exercise of jurisdiction by courts and other competent judicial authorities. ... an act which has a tendency to deflect the police from invoking that jurisdiction when it is their duty to do so is an act which tends to pervert the* ***course of justice****. Subject to a limited discretion not to prosecute, it is the duty of police to prosecute when offences are committed."*

[232] (1938) 60 CLR 336
[233] R v Rogerson [1992] 174CLR268

3.12 It has been well established since then that an act which has a tendency to deflect the police from prosecuting a criminal offence before a judicial tribunal or from adducing evidence of the true facts, is an act which tends to pervert the course of justice and if done with the intent to achieve that result, constitutes an attempt to pervert the course of justice.

PREPARING THIS REPORT

3.13 Following the conclusion of the Commission's public hearing on 16 May 2008, written submissions were prepared by Counsel Assisting the Commission and served on those witnesses called to give evidence at the hearing for the purposes of making any submissions in reply.

3.14 By the closing date provided for receipt of submissions in reply, submissions were received on behalf of Weavers, Boaden and Budd in relation to Operation Pegasus and on behalf of Lanser and Colin in relation to Operation Luno.

3.15 These submissions have been taken into account in the preparation of this Report and are referred to where considered relevant.

AFFECTED PERSONS – OPERATION PEGASUS

3.16 In relation to Operation Pegasus, Counsel Assisting identified the following as *"affected persons"* for the purposes of section 97 of the Act;

Phillip William Smith
James William Boaden
Jeffrey Andrew Budd
John Arthur Weavers

3.17 Each of the affected persons gave his evidence after a declaration had been made under section 41 of the Act. Therefore pursuant to section 40 of the Act the evidence they gave is not admissible against them in subsequent criminal or civil proceedings, except for proceedings for an offence against the Act, or for contempt, under the Act.

PHILLIP WILLIAM SMITH

3.18 In the opinion of the Commission Smith is an affected person because he is the subject of the following substantial allegations;

a) He perverted the course of justice in respect to the breath testing of Webb on

24 September 2007, in that he administered a second alcolizer test on Webb, in which Webb also produced a reading in excess of the permitted limit and Webb was not charged.

b) He perverted the course of justice in respect to the breath testing of Webb on 24 September 2007, in that he provided a breath sample for the BAS test which should have been given by Webb.

c) He perverted the course of justice in respect to the breath testing of Webb on 24 September 2007 in that he, knowing that the record of the BAS test was false, signed the record authenticating it.

3.19 When he commenced his evidence Smith admitted that he had provided the breath sample for the BAS test that Webb was meant to take.[234] Smith admitted that his actions were an act of stupidity and that it was his intention to assist Webb because of his position as a Corrective Services officer. His plan was to avoid creating an atmosphere of animosity between the police and Corrective Services officers who worked together in the Moree Police Station.[235]

3.20 Smith's plan was to allow Webb sufficient time between the roadside test and the BAS test for his blood/alcohol level to fall below the permitted limit.[236] It was on this basis that he administered a second test on Webb using a handheld alcolizer.[237]

3.21 The result of the second test was that Webb's reading was higher than that produced at the roadside test. It was then that Smith decided that there was no alternative but to release Webb without charge and complete the BAS test himself.[238]

3.22 Shortly after Webb had been brought into the Moree Police Station by Boaden, Smith received a telephone call from Weavers. In his evidence Smith said that because he suspected that the telephones in the station may have been intercepted he told Weavers that he would ring him back, using his mobile phone. When he telephoned, Weavers asked him if he could arrange for someone to provide a substitute breath sample for Webb.[239] It was because of this request that Smith said that he felt that there was no choice for him other than to arrange for Webb to be released without charge when the second test also went over the limit.[240]

3.23 It is clear from the evidence of Smith regarding his actions that it was his intention to permit Webb to be released from custody without charge and thus not have to face court in respect to the drink driving offence. Webb's arrest by Boaden set in train a course of action which, if followed correctly, could have resulted in the charging of Webb with a criminal offence. Smith's intervention in not following proper procedure and substituting his own breath sample for that of Webb in the BAS test prevented that course from being followed and thus affected the final outcome.

[234] PIC Transcript P W Smith, 14 May 2008, p.76
[235] PIC Transcript P W Smith, 14 May 2008, p.97
[236] PIC Transcript P W Smith, 14 May 2008, Pp.74 – 75
[237] PIC Transcript P W Smith, 14 May 2008, Pp.74 – 75
[238] PIC Transcript P W Smith, 14 May 2008, p.70
[239] PIC Transcript P W Smith, 14 May 2008, p.69
[240] PIC Transcript P W Smith, 14 May 2008, p.98

3.24 Smith said that while he did not think in terms of perverting the course of justice,[241] nevertheless there is little doubt on the available evidence that his actions had that result.

3.25 Because Smith gave evidence under objection his evidence cannot be used against him in any criminal proceedings.[242] Nevertheless the evidence of Boaden that he assisted Smith to undertake the BAS test on behalf of Webb after Webb had been released from custody may be available to be relied upon in any prosecution of Smith.

3.26 The Commission is of the opinion that consideration should be given to the prosecution of Smith for the offence of do act with intent to pervert the course of justice in respect to the breath testing of Webb on 24 September 2007.

3.27 The Commission is also of the opinion that Smith engaged in police misconduct in respect of his actions in relation to the breath testing of Webb.

3.28 The Commission is of the opinion that consideration should be given to the taking of action against Smith pursuant to subsection 97(2)(c) of the Act. If no such action is taken the Commission is of the opinion that consideration should be given to the taking of action against Smith pursuant to subsection 97(2)(d) of the Act.

JAMES WILLIAM BOADEN

3.29 In the opinion of the Commission Boaden is an affected person because he is the subject of the following substantial allegations:

a) He perverted the course of justice in respect to the breath testing of David John Webb on 24 September 2007, in that he falsified the records relating to the roadside breath test conducted on David John Webb.
b) He perverted the course of justice by assisting Senior Constable Phillip William Smith in the BAS test in which he substituted his breath sample for that of David John Webb.

3.30 In his evidence to the Commission Boaden admitted to assisting Smith to substitute his breath sample for that of Webb and to falsifying the official documentary and computer records of the test. He also admitted to permitting Webb to drive his vehicle home, when he was aware that Webb had failed the second alcolizer test and was likely to still be affected by alcohol.

3.31 Boaden arrested Webb at the roadside after he had failed the initial breath analysis test and transported him to Moree Police Station to undertake a BAS test. At that stage although Webb had apparently informed him that he was a member of the Corrective Services unit attached to Moree Police Station, this had not meant anything to Boaden.

[241] PIC Transcript P W Smith, 14 May 2008, p.94
[242] Sections 40 and 41 *Police Integrity Commission Act 1996*

3.32 In his evidence Boaden described other influences on his actions which occurred when he arrived at the Moree Police Station with Webb. He realised that he had arrested a Corrective Services officer and Smith had said that there were always *"other choices"* to completing the process and charging Webb.

3.33 After he had become aware of Webb's position Boaden also became aware of a number of telephone calls between Smith, Weavers and Budd. It was particularly following the call between Smith and Budd that Boaden concluded that Budd had approved the release of Webb without charge.

3.34 Boaden informed the Commission that his actions were the result of what he described as a previous history of disagreement between himself and Budd, including verbal intimidation and threats by Budd.[243] Despite what he said during his evidence, that he told Smith and Webb that he would not be involved in anything corrupt, Boaden, believing that "the order" had come from Budd, said he would have done whatever Budd told him to do because he could not stand against what he believed Budd had requested because of their past history.[244] Counsel for Budd put to Boaden that in saying this he was falsely blaming Budd in order to "wriggle out" of his difficult situation, a proposition which Boaden denied. [245]

3.35 Following the administration of the second alcolizer test by Smith, Boaden said that Smith informed him that Webb had registered a higher blood/alcohol level than he had registered in the roadside test.[246] It must have occurred to Boaden, even though he had not been present when Smith administered the test on Webb that Webb should not have been permitted to drive a vehicle.

3.36 In his evidence Boaden informed the Commission that on the journey back to Webb's car he told Webb: *"You've been very lucky tonight. This has got to stay between us. If this gets out, we'll lose our jobs"*.[247] Boaden admitted he was intending to convey to Webb the seriousness of what had taken place, namely that Webb had been let go when most likely he should have been charged with a serious driving offence. He said Webb responded *"It's safe with me"*.[248]

3.37 Boaden said that when he returned to Moree Police Station after accompanying Webb to his home and he was assisting Smith to provide the breath sample on behalf of Webb he *"knew it was the wrong thing to do"* but *"it hadn't really formed in my mind that it was a criminal offence"*. Nonetheless, he conceded that he knew it was grossly improper.[249]

3.38 In relation to the initial encounter between Webb and Boaden when Boaden pulled Webb over for a roadside breath test, to the extent that there is any conflict in the evidence between Boaden and Webb as to what happened at this time and what was said between them prior to their arrival at Moree Police Station, then the Commission

[243] PIC Transcript J W Boaden, 15 May 2008, p.141
[244] PIC Transcript J W Boaden, 15 May 2008, p.142
[245] PIC Transcript J W Boaden, 15 May 2008, p.145
[246] PIC Transcript J W Boaden, 14 May 2008, p.119
[247] PIC Transcript J W Boaden, 14 May 2008, p.122
[248] Op cit
[249] PIC Transcript J W Boaden, 14 May 2008, p.134

is satisfied that Boaden's evidence is to be preferred to that of Webb. In most respects Webb himself, albeit reluctantly, conceded the accuracy of Boaden's evidence about these matters.

3.39 The Commission is also satisfied that Boaden's evidence is to be preferred when he said that Webb sought some *"break"* when he was initially pulled over by Boaden. The Commission is also satisfied that Webb fully appreciated that he had received preferential treatment back at Moree Police Station when he was eventually allowed to leave the station without charge and in circumstances where the evidence before the Commission established that he otherwise should have been. There is however no evidence that suggests Webb was anything other than a passive beneficiary of Smith's and Boaden's conduct nor is there any evidence that Webb encouraged or urged Boaden and Smith in their actions back at the station.

3.40 Boaden also gave his evidence under objection and consequently his evidence is not available to be used against him in any criminal proceedings. Nevertheless the evidence of Smith that Boaden assisted him to undertake the BAS test on behalf of Webb may be available to be used against Boaden in any prosecution of him.

3.41 The Commission is of the opinion that consideration should be given to the prosecution of Boaden for the criminal offence of do act with intent to pervert the course of justice in respect to the breath testing of Webb on 24 September 2007.

3.42 The Commission is also of the opinion that Boaden engaged in police misconduct in respect of his actions regarding the breath testing of Webb.

3.43 The Commission is of the opinion that consideration should be given to the taking of action against Boaden pursuant to subsection 97(2)(c) of the Act. If no such action is taken the Commission is of the opinion that consideration should be given to the taking of action against Boaden pursuant to subsection 97(2)(d) of the Act.

JEFFREY ANDREW BUDD

3.44 As previously noted, in his submissions Counsel Assisting identified Budd as an *"affected person"*. No issue was taken with this in submissions in reply on behalf of Budd.

3.45 The Commission is of the opinion that Budd is an affected person because he is the subject of the following substantial allegation:

a) He perverted the course of justice in respect to the breath testing of David John Webb on 24 September 2007, in that he indicated to Smith to take steps to avoid charging Webb with a drink/driving offence.

3.46 Counsel Assisting submitted that there is a lack of evidence to establish this allegation and thus to permit the opinion to be formed that Budd engaged in police misconduct. Submissions in reply on behalf of Budd supported this submission.

3.47 Boaden said that following the telephone conversation between Smith and Budd, Smith said to him that Budd had given the *"green light"* to the release of Webb without charge. This together with Smith's comment that they had earnt "brownie points" with Budd appears to have encouraged the belief in Boaden at least that Budd had given his approval to the actions proposed by Smith.

3.48 Smith said that some time after the call from Weavers, he received a call from Budd. He could not recall the exact conversation but remembered Budd telling him to be careful.[250] His evidence was that he had told Budd that *"he would look after it"*.[251] In later evidence on 15 May 2008, Smith said that when he spoke to Budd he had read between the lines and understood the conversation to mean *"we won't charge him, basically"*.[252]

3.49 As to whether Budd had said to him *"Go through the process and if he gets tested, he gets charged"*, Smith said that he did not remember that being said by Budd. Smith said he did not inform Budd that Weavers had requested if someone else could take the BAS test on behalf of Webb, nor did he tell Budd the result of Webb's roadside test.[253]

3.50 Budd's evidence concerning the telephone conversation he had with Weavers is that Weavers did not request anyone do anything unlawful. Weavers' request extended only to not placing Webb in the dock if it could be avoided. Budd's evidence concerning his conversation with Smith was that he told Smith to charge Webb if that was what had to be done.

3.51 As Counsel Assisting submitted, there is no evidence that Budd actually said anything to Smith that could in all the circumstances amount to an attempt to deflect Smith from his duty and thus amount to any form of misconduct. That Boaden may have thought that Budd had given tacit approval or *"green light"* for the actions he and Smith took was based on what he heard Smith say and on what Smith had told him about his conversation with Budd; there was no direct conversation or contact between Boaden and Budd on the night in question. Budd also denied that he said anything to Smith other than that he should do his duty and to a large extent Smith's evidence as to the content of the actual words spoken between them is consistent with this. In relaying both sides of the conversation to Boaden, Smith had added ingredients far beyond the terms of the actual conversation between them regardless of whether Smith's or Budd's version of it is preferred.

3.52 The Commission is not of the opinion that consideration should be given to the prosecution of Budd for the criminal offence of do act with intent to pervert the course of justice in respect to the breath testing of Webb on 24 September 2007.

[250] PIC Transcript P W Smith, 14 May 2008, p.71
[251] PIC Transcript P W Smith, 14 May 2008, p.74
[252] PIC Transcript P W Smith, 15 May 2008, p.151
[253] PIC Transcript P W Smith, 14 May 2008, p.72

3.53 The Commission is not of the opinion that Budd engaged in police misconduct in respect of his actions regarding the breath testing of Webb.

JOHN ARTHUR WEAVERS

3.54 The Commission is of the opinion that Weavers is an affected person because he is the subject of the following substantial allegation:

a) He did an act to pervert the course of justice in respect to the breath testing of David John Webb on 24 September 2007, in that he requested Smith to arrange for another person to provide a sample of breath to be used in the BAS test which was to be undertaken by Webb.

3.55 The evidence of Weavers' involvement in the events of the night of 24 September 2007 is provided by himself together with Smith, Budd and to some extent Boaden.

3.56 Smith's evidence was that Weavers asked him to arrange for someone to substitute the breath sample for Webb. Weavers was unable to remember requesting Smith to arrange the substitution and he said his lack of memory was the result of the amount of alcohol he had consumed that night. Budd's evidence was that the only requests made by Weavers to him were to find out what Webb had been arrested for and not to place him in the dock if it was avoidable. Smith's is the only evidence which suggests that there was a request from Weavers for assistance in providing a substitute breath test for Webb and not charging him.

3.57 Counsel Assisting submitted that the Commission should be of the opinion that consideration should be given to the prosecution of Weavers for a specified criminal offence, namely doing an act to pervert the course of justice in making the request of Smith as to whether he could *"get some one else to blow into the bag"*, meaning some one instead of Webb, such that Webb would be allowed to leave the station without charge. It was also submitted that the Commission should be of the opinion that consideration should be given to the taking of action against Weavers for a specified disciplinary offence, namely the offence of misconduct within the meaning of section 46 of the *Public Sector Employment and Management Act 2002* in respect of the same conduct. As Counsel Assisting noted, such matters are not limited to occasions when a person is on duty, as at the time of the request to Smith it was Weavers' evidence that he was at home and not on duty.

3.58 In support of this submission, Counsel Assisting submitted that the Commission would be satisfied that Weavers made a request to Smith that *"someone else blow in the bag"*, intending by this that Webb would be allowed to leave the station without being charged with any offence. In further support of this submission, Counsel Assisting submitted that Smith had no reason to lie.

3.59 Weavers himself conceded that it was possible that he said this to Smith and did not directly deny it when it was squarely put to him, falling back on his hazy memory brought on by his alcohol affected condition that night.

3.60 In submissions in reply on behalf of Weavers, it was pointed out that Smith was the only other witness to the conversation with Weavers and that while Weavers could not recall what he said to Smith, even accepting that this leaves Smith's evidence uncontradicted, it is hardly cogent or compelling evidence to support a conclusion of misconduct or to recommend consideration of prosecution action for the charge of perverting the course of justice. In further support it was submitted that Smith's evidence as to his conversation with Weavers strengthened as Smith was questioned, but his initial version was expressed merely as Smith thinking that Weavers "virtually" said to him *"Can't you get someone else to blow into the bag?"* and that this account should be considered the most reliable.

3.61 The Commission is satisfied that Weavers did say to Smith, *"Can't you get someone else to blow into the bag"*, and did so in the context of Smith having informed Weavers that Webb had been brought back to the station after having failed a roadside breath test.

3.62 Counsel for Weavers also pointed out that Smith himself appears to have considered dealing with Webb in a partial way even before he spoke with Weavers during which Weavers made the comment to him. Reliance is placed on Boaden's evidence that after having arrived back at the station and telling Smith that he had *"brought one of the screws back"* Smith had said to him, *"there's always other options. There's always options"*, which Boaden at least agreed meant that something other than normal processes could possibly be followed.[254]

3.63 Counsel for Weavers also submitted that far from it being anything that Weavers may have said that influenced Smith to act the way he did, it was more the prospect of helping Boaden earn "brownie points" with Budd that was the major factor in motivating Smith to act as he did, given that he was aware of prior conflict between Budd and Boaden.

3.64 The Commission is satisfied that the evidence does establish that Smith's desire to assist Boaden figured prominently in influencing his actions, as he acknowledged himself in his later explanation to Boaden when seeking to assuage Boaden's concerns as to what they had done.

3.65 Weavers' intoxicated state on the night in question and at the time he made the inquiry of Smith was also relied upon by his Counsel in submissions in reply. Weavers' action, it was submitted, was done when he was heavily intoxicated and consequently, if the request was made, the necessary intent was not present. The question of whether the intention was formed before he became intoxicated does not arise because on his evidence Weavers was intoxicated when he received the return call from Smith. Neither Smith nor Budd were able to testify as to how intoxicated they believed Weavers was.

[254] See foot note 21

3.66 Weavers himself described his state of intoxication as "high"[255] and that for some time prior to the night in question he had *"hit the bottle every night"*[256] which might involve taking a mixture of valium and whiskey.[257] That evidence was not contradicted or disputed.

3.67 Which ever view be taken of Smith's evidence, even if the stronger version be preferred, the Commission is not satisfied that there is sufficient evidence to conclude that by Weavers' inquiry of Smith he intended or attempted to interfere in the course of what should otherwise have happened to Webb back at the police station. Weavers' comment to Smith was in the form of a question and said while he was affected by alcohol albeit there is no evidence to permit any view to be safely reached as to the level of that intoxication. It is unclear what Weavers would have done or said had Smith replied in the negative; as it is, Smith said that he responded to Weavers' inquiry in that he would *"look after it from here"*.[258] That it was not followed up by Weavers may be explained by the comfort he gained from Smith's response or at least Smith's failure to reject it outright. In any event, all that can be said is that there is no evidence that Weavers sought to agitate the issue further beyond his simple inquiry. There was no relationship of authority that Weavers occupied in relation to Smith as for example, had Weavers been Smith's supervising officer, which may have coloured the message sought to be conveyed to Smith.

3.68 Submissions were also made on behalf of Weavers dealing with the element of *"intent"* in offences under section 319 of the *Crimes Act 1900*, i.e. a person must have committed an act, with the intention that it would in any way pervert the course of justice.

3.69 Sub-Section 428B(1) of the *Crimes Act 1900* provides as follows:

> *An "offence of specific intent" is an offence of which an intention to cause a specific result is an element.*

3.70 Sub-section 428B(2) lists those sections of the *Crimes Act 1900* for which specific intent is an element and the list includes offences against section 319.

3.71 Sub-section 428C(1) of the *Crimes Act 1900* provides that:

> *Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent.*

3.72 For a prosecution of Weavers for the offence of attempting to pervert the course of justice to be successful the prosecution would have to establish beyond a reasonable doubt that if he did make the request that he also had the requisite intention to pervert the course of justice.

[255] PIC Transcript J A Weavers 14 May 2008, p 38
[256] PIC Transcript J A Weavers 14 May 2008, p 44
[257] PIC Transcript J A Weavers 14 May 2008, p 44
[258] PIC Transcript P W Smith, 14 May 2008, p 69

3.73 Taking into consideration Weavers' evidence that he was heavily intoxicated when he made the telephone call to Smith and the provisions of section 428C and bearing in mind the requisite standard of proof, it cannot be said with any safety that the requisite intention would have been present.

3.74 The Commission is not of the opinion that consideration should be given to the prosecution of Weavers for the criminal offence of do act with intent to pervert the course of justice in respect to the breath testing of Webb on 24 September 2007.

3.75 As Weavers is not a member of the NSWPF the Commission does not have to form an opinion as to whether or not he engaged in police misconduct. However it is in a position to form an opinion as to whether he has engaged in other misconduct. In all the circumstances the Commission is not of the opinion that Weavers engaged in other misconduct in respect to the breath testing of Webb on 24 September 2007.

AFFECTED PERSONS – OPERATION LUNO

3.76 In relation to Operation Luno Counsel Assisting identified the following persons as *"affected persons"*;

Mark Ronald Christie
Colin James Clunes

MARK RONALD CHRISTIE

3.77 In the opinion of the Commission Christie is an affected person because he is the subject of the following substantial allegations:

a) He perverted the course of justice in respect to the breath testing of Adam Clunes on 21 December 2007 in that he substituted his own breath sample for one which should have been produced by Adam Clunes for the BAS Test.
b) He perverted the course of justice by falsifying the report of the BAS test purportedly undertaken by Adam Clunes on 21 December 2007.

3.78 In his evidence to the Commission Christie admitted that he had provided the breath sample for the test that Adam should have undertaken. He admitted that it was his intention that Adam should be released without charge. He gave as his reason that he felt some sympathy for Adam given his age and the fact that he may lose his job as a result of his actions.

3.79 Together with Christie's own evidence, Adam also gave evidence that the BAS test had been performed by someone else being a police officer who he knew to be "Mark". His evidence was that it was Christie and not himself who provided the breath sample for the BAS test.

3.80 The evidence also demonstrates that in doing so Adam was the beneficiary of Christie's conduct. While he may have been aware that Christie's actions were wrong there is no evidence that Adam in any way incited or encouraged Christie in this regard. As Counsel Assisting submitted, accepting that the effect of this evidence is that Adam thereby tacitly agreed with what Christie proposed, the Commission is satisfied that even when viewed in this light, it provides no basis to express an opinion that Adam engaged in other misconduct. As Adam is not a police officer the question of whether any police misconduct thereby occurred does not arise.

3.81 The evidence as to Adam's actual state of sobriety at the time Christie blew into the BAS machine does not permit any firm conclusions to be reached. As Counsel Assisting submitted, it appears at least possible that he was and most likely should have been subjected to the possible loss of his licence particularly as he was at the time the holder of a provisional drivers licence and therefore subject to a lower permissible level of alcohol in his blood. In any event, it is of no consequence as regards Christie's actions nor does it detract from the seriousness of those actions.

3.82 As Christie gave evidence under objection that evidence is not available for use in any prosecution of him for offences that might arise from the evidence. However the evidence of Adam is available for use in any prosecution of Christie for the offence of perverting the course of justice. There is also the closed circuit video of the BAS room where the test took place.

3.83 The Commission is of the opinion that consideration should be given to the prosecution of Christie for the criminal offence of do act with intent to pervert the course of justice in respect to the breath testing of Adam Clunes on 21 December 2007.

3.84 The Commission is also of the opinion that Christie engaged in police misconduct in respect of his actions regarding the breath testing of Adam.

3.85 The Commission is of the opinion that consideration should be given to the taking of action against Christie pursuant to subsection 97(2)(c) of the Act. If no such action is taken the Commission is of the opinion that consideration should be given to the taking of action against Christie pursuant to subsection 97(2)(d) of the Act.

COLIN JAMES CLUNES

3.86 Counsel Assisting submitted that Colin is an affected person for the purpose of this investigation. No issue was taken with this in submissions in reply on behalf of Colin.

3.87 The Commission is of the opinion that Colin Clunes is an affected person because he is the subject of the following substantial allegation;

a) That he attempted to pervert the course of justice in respect to the breath testing of his son Adam Clunes in 21 December 2007 in that he requested Constable Lanser to take action not to charge Adam Clunes with a serious driving offence following his failure of the roadside breath test.

3.88 In her evidence to the Commission Lanser said that when she spoke to Colin he said to her that she had to do something as Adam would lose his licence and his job if he were charged. Her evidence was that while she was disturbed by the request she did not allow it to deter her from performing her duty.

3.89 For her part, Lanser was placed in a difficult position which she herself appreciated as soon as she recognised Adam as the driver of the car. She had only been a police officer for just over 12 months and in performing her duties she had now encountered the son of her former supervisor, a more senior police officer, who was also based at the same police station as her.

3.90 In the circumstances it was not surprising that she wished to make contact with Colin to advise him that she had pulled over his son and that he had failed a breath test, particularly as she was determined to see proper process followed. Lanser was also aware of Colin's reaction when Adam had received previous traffic infringements from fellow officers so she appreciated that Colin was likely to be unhappy with this turn of events. As Counsel Assisting submitted, in these circumstances, feeling that Colin's anger may be directed against her, Lanser rang him in an attempt to defuse the situation in which she found herself. That she did so however, in the circumstances, does not amount to any form of police misconduct.

3.91 The Commission is satisfied, as was submitted by Counsel Assisting, that there is sufficient evidence to permit the conclusion that during their conversation Colin said to Lanser, "You've got to do something, Katie". No issue was taken with this in submissions in reply on behalf of Colin.

3.92 Colin said that he was unable to recall making the request but if he had done so it was because he was extremely angry at the time. His evidence was that he always told those officers who were under his supervision that they had to perform their duty without fear or favour.

3.93 Colin also denied that he intended Lanser to understand that she had to do something to stop Adam losing his licence.[259] When asked whether he wanted her to do something other than her duty he responded;

> *"Not really. As I said, I told Katie, "Do what you've got to do." We don't want things to happen to our sons, but if the wrong thing's done, the wrong thing's done".*

3.94 He also believed that he was not in a position to influence Lanser to make it all go away.[260]

3.95 However, in all the circumstances, the Commission is satisfied that there is insufficient evidence to establish any misconduct on behalf of Colin such that he intended for Lanser to do something to interfere with what should otherwise be the proper course of events. Viewed from Lanser's perspective, she no doubt felt some discomfort after the phone call with Colin and that, at least in her mind, she felt that Colin had suggested something improper could be done. That Colin may have wanted that result would be understandable given his relationship to Adam but that does not establish, when the conversation is viewed as a whole, that this was what he intended to convey to Lanser. That there was a prior supervisory relationship between Lanser and Colin may have added to Lanser's sense of discomfort but there is no evidence that Colin himself sought to take any advantage of that prior relationship.

3.96 The Commission is not of the opinion that consideration should be given to the prosecution of Colin Clunes for the criminal offence of do act with intent to pervert the course of justice in respect to the breath testing of his son Adam Clunes on 21 December 2007.

3.97 The Commission is not of the opinion that Colin Clunes engaged in police misconduct in respect of his actions regarding the breath testing of his son Adam Clunes.

[259] PIC Transcript C J Clunes, 16 May 2008, p.207 – 208
[260] PIC Transcript C J Clunes, 16 May 2008, p.209

APPENDIX 1 - ROLE AND FUNCTIONS OF THE COMMISSION

The Commission was established under the *Police Integrity Commission Act 1996* (the Act) on the recommendation of the Royal Commission into the New South Wales Police Service. The principal functions of the Commission, set out in section 13 of the Act, are:

(a) to prevent police misconduct,

(b) to detect or investigate, or manage other agencies in the detection or investigation of, police misconduct,

(c) (repealed)

(d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.

As far as practicable, the Commission is required to turn its attention principally to serious police misconduct (subsection 13(2)).

In January 2007 the Act was amended to provide for a system of investigation, referral and oversight of complaints against certain members of the NSW Police Force who are not police officers. Sections 5A and 13A were inserted into the Act. Section 5A defines corrupt conduct of administrative officers.[261] Section 13A sets out the functions of the Commission in relation to administrative officers as follows:

(a) to prevent corrupt conduct of administrative officers,

(b) to detect or investigate, or oversee other agencies in the detection or investigation of, corrupt conduct of administrative officers.

As far as practicable, the Commission is required to turn its attention principally to serious corrupt conduct of administrative officers (subsection 13A(2)).

In July 2008 the Act was further amended to extend the Commission's jurisdiction to include the detection, investigation and prevention of misconduct of officers of the New South Wales Crime Commission.

POLICE MISCONDUCT

The expressions "police misconduct" and "serious police misconduct" are not specifically defined by the Act. They nevertheless include the following types of conduct (see subsection 5(2)):

(a) police corruption,

(b) the commission of a criminal offence by a police officer,

[261] Corrupt conduct is defined as any conduct of an administrative officer that is corrupt conduct for the purposes of the Independent Commission Against Corruption Act 1988.

(b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990*,

(c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer,

(d) any other matters about which a complaint can be made under the *Police Act 1990*.

It follows that "police misconduct" may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, the sanction for which may, for example, be nothing more than additional training and development.

INVESTIGATIONS

In matters where the Commission determines to carry out an investigation (whether or not in the nature of a preliminary investigation), it has a wide range of powers at its disposal in order to acquire information. For example, the Commission may:

- require public officials and public authorities to produce statements of information (section 25);
- require any person (whether or not a public official or public authority) to produce documents or other things (section 26);
- enter public premises (section 29);
- obtain search warrants (section 45);
- obtain warrants under the *Telecommunications (Interception and Access) Act 1979*;
- obtain warrants under the *Surveillance Devices Act 2007*; and
- require persons to attend and give evidence before a hearing of the Commission, either in public or in private (section 38).

REPORTS TO PARLIAMENT

When does the Commission Submit a Report to Parliament Regarding an Investigation?

In circumstances where the Commission has conducted a public hearing for the purposes of an investigation, the Commission must prepare a report to Parliament in respect of the matter to which the public hearing related (subsection 96(2)). The Commission may also prepare a report to Parliament in relation to any other matter that has been, or is, the subject of an investigation (subsection 96(1)). A report to Parliament must be furnished to the Presiding Officer of each House of Parliament as soon as possible after the Commission has concluded its involvement in the matter, unless it is considered desirable, in the public interest, for the making of the report to be deferred (subsections 96(3), (4) and (5)).

COMPONENTS OF A REPORT TO PARLIAMENT REGARDING AN INVESTIGATION

A report to Parliament in relation to an investigation will generally contain a number of components. Under subsection 97(1) of the Act the Commission is authorised to include statements as to any of its assessments, opinions and recommendations, and the reasons for any of its assessments, opinions and recommendations. The Commission must then, in respect of each "affected person",

make a statement as to whether or not consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences and, in the case of police officers, certain other forms of disciplinary action (subsection 97(2)). An "affected person" is a person "against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned" (subsection 97(3)).

THE COMMISSION'S APPROACH TO THE ASSESSMENT OF INFORMATION AND EVIDENCE

In forming the assessments, opinions and recommendations referred to above, the Commission may not make a finding or form an opinion that a specified person is guilty of, or has committed, is committing, or is about to commit a criminal or disciplinary offence (subsection 16(2)(a)). The Commission may form opinions as to whether police misconduct or other misconduct may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur (subsection 16(1)(a)). However it is important to bear in mind that the Commission is an investigative agency, it is not a court or tribunal in the sense that it may determine whether a person has committed a criminal or disciplinary offence.

Accordingly the Act deems permissible opinions concerning police misconduct or other misconduct not to be findings or opinions that the person is guilty of or has committed, or is committing or is about to commit a criminal offence (subsection 16(3)). That said, the Commission recognises, bearing in mind the definition of police, or other, misconduct may include conduct that amounts to criminal and disciplinary offences, that such an opinion may in some circumstances take on the appearance of a finding of a court or tribunal. The Commission's approach is, as far as possible, to avoid the expression of opinions that may be characterised as findings by a court.

The standard of proof applied by the Commission to the formation of an opinion as to whether a person has engaged in police misconduct or other misconduct is the balance of probabilities. Such an opinion will be reached having regard to the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336, that is, the more serious the matters under consideration, the more stringent will be the requisite degree of satisfaction.

RECOMMENDATIONS AND OPINIONS THAT CONSIDERATION BE GIVEN TO THE PROSECUTION OF A PERSON FOR A CRIMINAL OR DISCIPLINARY OFFENCE

If, in the Commission's opinion, the available evidence is sufficient to establish a prima facie case in respect of a criminal or disciplinary offence then, except in one very limited circumstance discussed below, it is the Commission's approach to recommend that consideration should be given to the prosecution of a person for a specified criminal or disciplinary offence.[262] Such a recommendation will be made to the relevant prosecutorial authority, for example, the New South Wales Director of Public Prosecutions. The Commission will not have regard to considerations, such as whether there is a reasonable prospect of conviction, or public policy considerations when deciding whether to make such a recommendation. These, and other discretionary considerations, are appropriately matters for the relevant prosecutorial authority. That said, the Commission may express opinions as to the veracity of evidence received from individual witnesses.

[262] The power of the Commissioner of Police to refer a departmental charge against a police officer for hearing by the Police Tribunal was repealed on 8 March 1999. Since that date, the powers and obligations of the Commission to recommend or state whether consideration should be given to the prosecution of a person for a specified "disciplinary offence" (subsections 16(1)(b), 97(2)(b)) have no effective application to police officers. This is so even for police misconduct that occurred before this date. Those powers and obligations may however have application to other public officials.

The circumstances in which the Commission may, in the exercise of its discretion, decline to furnish or defer furnishing a brief of evidence to the relevant prosecutorial authority are:

- where it is considered that to do so is likely to be counterproductive to the Commission's pursuit of its principal statutory functions; or
- where the relevant person has already been considered for or has been prosecuted in relation to the same, or substantially the same, subject matter and evidence, and it would be unnecessary or duplicitous for the Commission to make a recommendation that consideration should be given to additional prosecutions.

Statements Regarding *"Affected Persons"*

Subsection 97(2) of the Act requires that:

The report must include, in respect of each "affected person", a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) the prosecution of a person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary offence,

(c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer.

RECOMMENDATIONS AND OPINIONS REGARDING DISCIPLINARY ACTION AGAINST POLICE

"Reviewable action" within the meaning of section 173 of the *Police Act 1990* refers to forms of disciplinary action that would ordinarily apply to more serious breaches of discipline. The available forms of reviewable action are:

- a reduction in a police officer's rank or grade;
- a reduction in a police officer's seniority;
- a deferral of a police officer's salary increment; and
- any other action (other than dismissal or the imposition of a fine) that the Commissioner of Police considers appropriate.

Owing to the seriousness of these forms of disciplinary action, a police officer may appeal the imposition of any of these penalties to the Industrial Relations Commission of New South Wales.

In addition to the requirement to include in a report to Parliament a statement of the Commission's opinions regarding those against whom substantial allegations have been made, the Commission has discretion to recommend that consideration be given to other disciplinary action. This includes

"non-reviewable action" within the meaning of section 173 of the *Police Act 1990*. Non-reviewable action is disciplinary action available against police officers for less serious breaches of discipline.

There is no avenue of appeal to the Industrial Relations Commission against the imposition of a form of non-reviewable action. The available forms of non-reviewable action are:

- coaching;
- mentoring;
- training and development;
- increased professional, administrative or educational supervision;
- counselling;
- reprimand;
- warning;
- retraining;
- personal development;
- performance enhancement agreements;
- non-disciplinary transfer;
- change of shift (but only if the change results in no financial loss and is imposed for a limited period and is subject to review);
- restricted duties; and
- recording of adverse findings.

OTHER TYPES OF RECOMMENDATIONS AND OPINIONS

If the Commission considers it appropriate in the circumstances, a report to Parliament may also include recommendations for the taking of other action. Such recommendations may, for example, relate to the need for law reform or for changes to policies and procedures affecting the way in which police or other persons carry out their respective duties and responsibilities.

APPENDIX 2 - WITNESS LIST OPERATION PEGASUS

Witness	Date of Evidence
BOADEN, James William	14 and 15 May 2008
BUDD, Jeffrey Andrew	14 May 2008
SMITH, Phillip William	14 and 15 May 2008
WEAVERS, John Arthur	14 May 2008
WEBB, David John	14 and 15 May 2008

OPERATION LUNO

Witness	Date of Evidence
CLUNES, Adam James	16 May 2008
CLUNES, Colin James	16 May 2008
HALL, Steven John	16 May 2008
LANSER, Kate Louise	19 March 2008*, 16 May 2008
CHRISTIE, Mark Ronald	16 May 2008

* Evidence given in private

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