

INTRODUCTION TO THE NEW SOUTH WALES INDEPENDENT COMMISSION AGAINST CORRUPTION

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I. INTRODUCTION

The New South Wales (NSW) Independent Commission Against Corruption is a statutory body established by the *Independent Commission Against Corruption Act 1988* (“the Act” or “the ICAC Act”) by the NSW (State) Parliament.

It is not a national body and its jurisdiction is limited to the state of New South Wales, the largest state in the Commonwealth of Australia.

There are similar bodies in the states of Western Australia (the Corruption and Crime Commission) and Queensland (the Crime and Misconduct Commission).

In NSW there is also a Crime Commission, an Ombudsman and a Police Integrity Commission, all of which have separate jurisdiction over varying aspects of misconduct, criminal conduct and corruption.

The Commission is headed by a Commissioner who is appointed for a term not exceeding five years and which cannot be renewed. The ICAC Act also provides for the appointment of Assistant Commissioners (of which the writer is one) who assist the Commissioner in the exercise of the Commission’s powers and the overall management of the organization. Assistant Commissioners may also only be appointed for a non-renewable period of up to five years. The Commissioner or an Assistant Commissioner presides at hearings of the Commission.

To be eligible for appointment as a Commissioner or Assistant Commissioner, a persons must be admitted as a barrister and/or solicitor and be eligible for appointment as a Judge of the NSW Supreme Court or the Federal or High Court of Australia.

II. THE ESTABLISHMENT OF THE ICAC

The comments made in the Second Reading speech of the *Independent Commission Against Corruption Bill* in May 1988 by the Hon. Nick Greiner, MP, the then NSW Premier, Treasurer and Minister for Ethnic Affairs, describes the background leading to the establishment of the Commission:

There was a general perception that people in high office in this State were susceptible to impropriety and corruption. In some cases that has been shown to be true.

In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.¹

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¹ Hansard, 26 May 1988 (Volume 507, pp. 672-678).

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As spelled out in the Second Reading speech, the major points or strategies underlining the establishment of the Commission were as follows:

- Restoring the integrity and accountability of public administration through:
 - reform of practices and procedures for awarding government contracts
 - reform and clarification of the criminal law in relation to corruption, graft and perverting the course of justice
 - review of codes of conduct operating across the public sector.
- Establishing a body charged with the responsibility not just to investigate public corruption but also the very specific purpose of preventing corruption and enhancing integrity in the public sector.
- Giving to it an extensive jurisdiction that applies across the entire ambit of the public sector including Ministers, Members of Parliament, the judiciary, all holders of public offices and all employees of departments and authorities, local government members and employees.
- Establishing a body truly independent from the Executive, with the discretion to decide what it will investigate and how it will be investigated, subject only to being required to investigate matters referred to it by both Houses of Parliament.
- Acknowledging the secretive nature of corruption and the associated difficulty in detecting it, the Act would vest the Commission with very formidable powers akin to the coercive powers of a Royal Commission.
- Obliging and empowering the Commission to make definite findings about persons directly and substantially involved in allegations of corrupt conduct and not simply to allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusions.

Having enunciated these underlying principles or objectives, Mr Greiner commented:

The bottom line is simply this; the people of this State are fed up with half hearted and cosmetic approaches to preventing public sector corruption. This legislation will establish an institution that has strong and effective powers and has jurisdiction to look at the entire public sector. That is what the people expect. It is our responsibility to ensure that that expectation is met and not disappointed.²

It is also clear that Mr Greiner saw the Commission as having a continued existence beyond responding to the immediate public sector integrity problems of the late 1980s:

Indeed, in the long term I would expect its primary role to become more and more one of advising departments and authorities on strategies, practices and procedures to enhance administrative integrity. In preventing corruption in the long term, the educative and consultancy functions of the commission will be far more important than its investigatory functions.

Although the then Premier envisioned the primary role of the Commission would over time become that of corruption prevention, it is clear from the experience of the Commission that the investigation and prevention roles are mutually complementary functions, both of which are needed for an anti-corruption organisation to effectively meet the responsibility of monitoring and improving integrity in the public sector and to deal effectively with an ever-changing public sector landscape.

Following assent given to the *Independent Commission Against Corruption Act 1988* ("the Act") on 6 July 1988, the Commission commenced operations with a public sitting on 13 March 1989.

A. Fifteen Years of Operation of the ICAC

Since commencement the Commission has received over 25,000 complaints or reports. It is relevant here to note that in its first year of operation the Commission reported receiving 1,091 complaints while in

² Hansard *ibid.*

the last financial year (2003-2004) the Commission received 1,884 complaints or reports relating to corruption. It is clear that there continues to be a demand for the investigative, corruption prevention and education functions of the Commission.

To date the Commission has:³

- published over 90 formal investigation reports
- made over 800 corruption prevention recommendations⁴ in Commission publications, the majority of which have been implemented⁵
- held over 2,000 days of hearings
- published over 60 corruption prevention reports and resources
- published over 25 research reports
- provided formal corruption prevention advice in response to over 3,000 requests
- delivered over 1,000 training sessions and public presentations.

In addition to the above, Commission investigations which have exposed corrupt conduct by an individual have been followed by their resignation – in terms of outcomes, removal of a corrupt public official from public office is an important outcome regardless of whether it is achieved through a disciplinary process or resignation.

Since the inception of the Commission, public administration in New South Wales has undergone significant cultural change and improvement – this has been due in no small part to the efforts and successes of the Commission.

ICAC research has also shown that wide ranges of public sector organisations have adopted corruption prevention strategies and the implementation of these types of strategies across organisations continues to increase. Similarly the broader community see a continuing role for the Commission.

B. The ICAC Today

The Commission currently has a budget of \$16.45 million and employs approximately 118 staff.⁶ The organisational structure is based on the principal functions of the Act and is comprised of five sections:

- Strategic Operations Division
- Corruption Prevention, Education and Research Division
- Legal Division
- Corporate Services Division
- Assessments

The operational areas comprise staff from a wide range of professions and disciplines including criminal investigators, intelligence and financial analysts, research and policy officers, forensic accountants and lawyers.

The jurisdiction of the Commission extends to over 130 public sector organisations, employing over 300,000 people across the State. This is approximately 12 per cent of the entire NSW labour force.⁷ In addition, the Commission has jurisdiction over some 159 NSW Councils, comprising approximately 1,800 Councillors and more than 40,000 employees⁸, as well as NSW-based universities and NSW Boards and Committees.⁹

³ These figures are approximate only. Data sources are annual reports (including unpublished data for the 2003-2004 period), internal figures for the period 1 July 2004 to 16 August 2004, and the ICAC Publication List.

⁴ Corruption prevention recommendations range from those concerning changes to legislation to those concerning the internal policies and procedures of an organisation.

⁵ Recommendation for corruption prevention action - RECOS (ICAC website).

⁶ NSW Budget Estimates 2004-05, Budget Paper No. 3 - Volume 1 Page 2-61. Budget is for 2004-2005. Staff number represents the estimated average full time equivalent staff for 2004-05.

⁷ Source: NSW Premiers Department – Public Employment Office. Site visited 16 August 2004.

<http://www.premiers.nsw.gov.au/WorkAndBusiness/WorkingForGovernment/>.

⁸ Source: Local Government and Shires Association. Site visited 16 August 2004. <http://www.lgsa.org.au/site/councils.html>.

⁹ There are 10 universities within the ICAC jurisdiction and it is estimated there are over 1000 NSW boards and committees.

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Major investigations conducted by the Commission have revealed extensive and systemic corrupt conduct resulting in corrupt conduct findings against a number of different individuals, recommendations for consideration of prosecution action arising from those findings and recommendations for changes to legislation and improvements to corruption prevention and risk management systems, policies and procedures.

The functions of investigation and public reporting play an important role in corruption prevention and education. While these functions are often referred to in the context of the Commission “exposing” corrupt conduct, this term is not used in the ICAC Act. The focus of the Commission’s investigative and reporting work is broader than simply the exposure of corrupt conduct and corrupt individuals.

The duality of functions to “expose” corruption continues today to be an important element as problems of corruption and serious systemic issues continually emerge. Most recently, the Commission has heard in public hearings evidence to suggest systemic and possible widespread problems in the area of building licensing. Another soon to be released report will highlight the systemic issues in the production of false trade and vocational qualifications and fraudulent documents. In both cases the Commission will have a significant corruption prevention response.

As an integral part of investigating and reporting on specific instances of corrupt conduct, the Commission investigates and reports on any systems deficiencies that may have provided opportunities for the corrupt conduct to occur. The Commission makes detailed recommendations to the relevant public sector organisations to help them redress these deficiencies. The Commission also seeks to analyse and emphasise the impact of corrupt conduct upon public sector systems.

A clear example is the Commission’s recent (June 2004) report on investigation into the fraudulent issue of competency and safety certification in the NSW construction industry. In investigating and reporting on the corrupt conduct of a number of accredited assessors, the Commission also analysed and emphasised the systems weaknesses that related to the actual conduct, and analysed the potential impact of the conduct on public safety, including the potential for holders of fraudulent safety and competency certification to work interstate under national accreditation arrangements.

Outside of investigations, the Commission undertakes other significant corruption prevention and education work, recent examples include:

- The delivery of a state-wide train-the-trainer programme for dealing with conflicts of interest in Local Government.
- A campaign to raise awareness of corruption issues in Non-English Speaking Background communities.
- The release of a number of publications including:
 - *Developing a statement of business ethics.*
 - *Providing advice on corruption issues: A guide for Members of NSW Parliament.*
 - *Providing advice on corruption issues: A guide for NSW Government Councillors.*
 - *Fact-Finder. A 20-step guide to conducting an inquiry in your organisation.*
 - *Regulation of secondary employment for Members of the NSW Legislative Assembly: Report to the Speaker of the Legislative Assembly.*

The increasing trend for Governments to outsource and contract important public functions and vital infrastructure has opened up different and challenging issues calling for the attention of the Commission. Similarly, continual changes to systems of administration, restructuring of government infrastructure and trends toward greater reliance on information technology systems creates new corruption risks that require identification and attention.

One important issue to note is that the jurisdiction of the Commission does not cover sworn police officers of the NSW Police Service. In 1996, following the Royal Commission into the NSW Police, the Police Integrity Commission (“the PIC”) was established.

Under its Act the PIC is now responsible for dealing with complaints of misconduct and corrupt conduct involving sworn officers of the NSW Police. The definition of “public official” under the ICAC Act however still includes “police officer” and the corruption prevention and education function for the NSW Police still remains with the Commission. The Commission also retains responsibility for investigating corrupt conduct concerning civilian employees of the NSW Police.

C. Functions of the ICAC

The principal functions of the Commission are set out under section 13 of the Act and can be summarised as follows:

- To investigate allegations of corrupt conduct and where appropriate report the results of those investigations.
- To provide advice and assistance to the public sector on preventing and eliminating corrupt conduct and to do so in co-operation with public authorities and public officials.
- To advise and educate the public sector and the community at large on strategies to eliminate and prevent corrupt conduct and to generally enlist and foster public support in the task of doing so.

The “other functions” set out in section 14 of the Act include assembling evidence that may be admissible in subsequent criminal proceedings, furnishing this evidence to the Director of Public Prosecutions and providing other evidence or information as appropriate to other authorities.

III. MEASURING THE ICAC’S EFFECTIVENESS

For agencies like the ICAC it is sometimes suggested that the success of its activities may be measured by the success of prosecutions arising from its investigations.

Advocating the use of conviction rates to measure the overall effectiveness of the Commission in achieving its objectives or functions demonstrates a failure to understand that the Commission is first and foremost a fact-finding and investigative body. This fails to understand the synergy between the functions of investigation, prevention and education in respect to corrupt conduct and that these functions are inextricably linked.

In noting the importance of this duality of objectives, Mr Greiner in his Second Reading Speech commented as follows:

Honourable members will note that the Commission is given specific functions to educate and advise public authorities and to co-operate with the Auditor General ... and similar bodies. For these sorts of reasons it would be crass and naive to measure the success of the ... Commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be enhancement of integrity and most importantly of community confidence in public administration in this State.¹⁰

While it is impossible to quantitatively measure the extent to which integrity in public administration in New South Wales has been enhanced or to measure the prevalence of corruption, it is possible to comment on some indirect measures relating to implementation of key corruption prevention policies and procedures with New South Wales public sector organisations. Comment can also be made on community perception about corruption in NSW.

A. Implementation of Corruption Resistance Strategies and Corruption Prevention Recommendations

In late 2001, the Commission commenced a major research project to develop a snapshot of corruption-related issues facing the diverse NSW public sector. The subsequent report published in January 2003 showed a generally healthy picture of the NSW public sector’s current identification and management of corruption risks – among the positive findings, it was particularly significant that a wide range of public

¹⁰ Hansard *ibid.*

sector organisations had, or were in the process of, implementing a range of corruption resistance strategies that have been promoted by the Commission.

In 2004 the Commission commenced further research to follow up on its findings in the January 2003 report. Preliminary unpublished results indicate that since publication of the report:¹¹

- implementation of a Code of Conduct had increased from 82% to 93%, with an additional 1% of organisations in the process of implementation
- implementation of a Risk Management Strategy had increased from 56% to 66%, with an additional 12% of organisations in the process of implementation
- implementation of an Internal Audit Plan had increased from 78% to 88%
- implementation of an Internal Auditor had increased from 72% to 86%, with an additional 1% of organisations in the process of implementation
- implementation of a Gifts and Benefits Policy had increased from 69% to 83%, with an additional 3% of organisations in the process of implementation
- implementation of an internal investigation system had increased from 82% to 93%, with an additional 4% of organisations in the process of implementation.

The Commission has also sought to follow up on the corruption prevention recommendations made in ICAC investigation reports. A review of the information available indicates the majority of recommendations have been implemented in some form by the public sector organisations concerned.¹²

B. Public Perceptions of Corruption and the ICAC

Since 1993, the Commission has conducted a series of surveys of the NSW community to ascertain perceptions of corruption and its effects. It is relevant to note that in 1993 92% of respondents thought corruption to be a problem in NSW as opposed to 82% in 2003 – it is very difficult to change public perception on such issues, so this decrease is very positive. Another important element is the proportion of respondents who perceived corruption to be a “major” problem in NSW versus a “minor” problem in NSW. As the following table demonstrates, while there is still concern about corruption in NSW there has been a shift in the perception of how serious that problem is.

Date	Major Problem	Minor Problem	Total
1993	55%	37%	92%
2003	31%	51%	82%

Source: *Community attitudes to corruption and the ICAC* (December 2003).

The public perception that “the ICAC is a good thing for the people of NSW” has remained stable over time (93% in 1993 and 94% in 2003). The public perception is that the ICAC has also succeeded in exposing corruption in NSW (80% in 1993 and 74% in 2003). Similarly, the public perception of the Commission’s success in reducing corruption has also remained stable (53% in 1993 and 55% in 2003).

C. ICAC Recommendations for Consideration of Prosecution

The above two sections highlight the achievements of the ICAC in the context of prevention and public perception. This is not to ignore however the prosecution action resulting from ICAC investigations, but to recognise that prosecution is not a principal function of the Commission under the Act – nor should it be.

Section 14(1)(a) of the Act provides as one of the “other functions” of the Commission to assemble briefs

¹¹ Preliminary unpublished data, August 2004. The recent example does not include boards or committees or Local Government organisations.

¹² Recommendation for corruption prevention action - RECOS (ICAC website).

of evidence that may be admissible in the prosecution of a person for an offence in connection with corrupt conduct and to provide that evidence to the Director of Public Prosecutions (“the DPP”). This complements the function of the Commission to form opinions as to whether consideration should be given to, amongst other things, prosecution action against particular persons. Further, when preparing investigation reports under section 74A of the Act, in respect of “affected” persons,¹³ the report must include a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of the persons for a specified criminal offence.

These provisions emphasise the role that the Commission plays in the prosecution process relating to corrupt conduct – to recommend consideration of prosecution action by the independent body charged with the statutory duty of making that decision and conducting those proceedings, being the DPP.

IV. PRINCIPAL FUNCTIONS - SECTION 13 ICAC ACT

Section 13 of the Act sets out the principal functions of the Commission:

13. Principal functions

(1) The principal functions of the Commission are as follows:

- (a) to investigate any allegation or complaint that, or any circumstances which in the Commission’s opinion imply that:

 - (i) corrupt conduct, or*
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
 - (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,**
- (b) to investigate any matter referred to the Commission by both Houses of Parliament,*
- (c) to communicate to appropriate authorities the results of its investigations,*
- (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,*
- (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,*
- (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,*
- (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,*
- (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,*
- (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,*
- (j) to enlist and foster public support in combating corrupt conduct,*
- (k) to develop, arrange, supervise, participate in or conduct such educational or advisory*

¹³ As defined in section 74A(3).

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programmes as may be described in a reference made to the Commission by both Houses of Parliament.

- (2) *The Commission is to conduct its investigations with a view to determining:*
- (a) *whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and*
 - (b) *whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and*
 - (c) *whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.*
- (3) *The principal functions of the Commission also include:*
- (a) *the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and*
 - (b) *the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.*
- (4) *The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings, etc. of guilt or recommending prosecution) prevents the Commission from including in a report, but this section is the only restriction imposed by this Act on the Commission's powers under subsection (3).*
- (5) *The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:*
- (a) *findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,*
 - (b) *opinions as to whether consideration should or should not be given to the prosecution or the taking of other action against particular persons,*
 - (c) *findings of fact.*

These principal functions (or objectives) as set out above are valid and appropriate for an anti-corruption agency - that is to investigate, prevent and educate. The Commission was created because of a need to respond to issues of public concern that could not be dealt with through traditional law enforcement/criminal investigation and criminal courts processes – to suggest that the primary objectives or functions of the Commission should align to such processes would defeat the very purpose for which the Commission was established.

It is the balance of investigating, examining laws, work practices and procedures of public authorities and public officials and exposure that enable the Commission to operate so effectively. Since the commencement of the Commission there is now general acceptance, both at a community level and by other investigative and complaint handling agencies, that the Commission through the experience, knowledge and expertise that it has accumulated on the subject, is the premier or lead agency ideally placed to deal with allegations of public sector-related corruption, in terms of investigation and corruption prevention and education, regardless of whether the alleged conduct could amount to a criminal offence.

The ever-increasing numbers of complaints of corruption and requests for corruption prevention advice and training that the Commission receives suggests that the Commission is considered the lead agency for dealing with allegations and issues of corruption or other misconduct within the public sector. It would be fair to say that the Commission has successfully created a branding that associates its name with these

functions in the public mind. Reinforcing the importance of the branding associated with the “ICAC” are the results of the most recent Community Attitude Survey. Most respondents (88%) were able to recognise the “ICAC” name when they heard it. In addition, most respondents recognised the ICAC to be independent of the government of the day and to also have jurisdiction in respect of corruption in local government and Members of Parliament.¹⁴

The Commission also provides information and assistance to counterpart bodies interstate and overseas, as well as providing input to the development of transnational legal instruments such as the UN Convention against Corruption. The level and frequency of requests for information, advice and collaboration that the Commission receives testifies to the Commission’s profile and reputation as a lead anti-corruption agency.

Directly linked with the principal function of investigating allegations of corrupt conduct is the Commission’s function to make findings or reach conclusions about the truth or otherwise of the allegations that are referred to it as provided for in section 13(3) of the Act.

The complementary nature of the functions to investigate allegations and reach conclusions on those allegations was highlighted during the Second Reading speech on the Bill. In the course of that speech Mr. Greiner noted the importance of empowering a fact-finding agency such as the Commission to make definite findings about persons directly and substantially involved in allegations of corrupt conduct and not simply to allow such persons’ reputations to be impugned publicly by allegations without coming to some definite conclusions.¹⁵

The efforts of the Commission in dealing with specific allegations of corruption through a dual process of investigation and corruption prevention, however, has been balanced against the other principal functions of providing advice and assistance more generally on corruption prevention and education/community awareness outside of investigations. In this respect, as the PJC has recently noted, the Commission is widely respected for its role and activity in corruption prevention by building corruption resistance in the New South Wales public sector.¹⁶

The Commission’s proactive corruption prevention and education functions, that is those which are not initiated as part of the Commission’s response to specific corruption allegations, are based on information and intelligence drawn from a range of sources. These sources include complaints and reporting data, information acquired during investigations and enquiries, research activity and other intelligence information.

The effective discharge of all the Commission’s principal functions relies on the fact that relevant information and activities are housed together in the one organization – this ensures the resources that are available for proactive prevention and education work are strategically directed toward the most significant and current corruption issues.

V. OTHER FUNCTIONS OF THE COMMISSION - SECTION 14 ICAC ACT

Section 14 sets out the “other” or secondary functions of the Commission.

14. Other functions of the Commission

(1) *Other functions of the Commission are as follows:*

- (a) to assemble evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish any such evidence to the Director of Public Prosecutions,*

¹⁴ ICAC, *Community Attitudes to Corruption and the ICAC*. December 2003.

¹⁵ Hansard, 26 May 1988 (Volume 507, pp. 672-678).

¹⁶ PJC Report No 1/53 May 2004 – at paragraph 3.10.

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(b) to furnish other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.

(1A) *Evidence of the kind referred to in subsection (1) (b) may be accompanied by any observations that the Commission considers appropriate and (in the case of evidence furnished to the Attorney General) recommendations as to what action the Commission considers should be taken in relation to the evidence.*

(1B) *A copy or detailed description of any evidence furnished to the appropriate authority of another jurisdiction, together with a copy of any accompanying observations, is to be furnished to the Attorney General.*

(2) *If the Commission obtains any information in the course of its investigations relating to the exercise of the functions of a public authority, the Commission may, if it considers it desirable to do so:*

(a) furnish the information or a report on the information to the authority or to the Minister for the authority, and

(b) make to the authority or the Minister for the authority such recommendations (if any) relating to the exercise of the functions of the authority as the Commission considers appropriate.

(2A) *A copy of any information or report furnished to a public authority under subsection (2), together with a copy of any such recommendation, is to be furnished to the Minister for the authority.*

(3) *If the Commission furnishes any evidence or information to a person under this section on the understanding that the information is confidential, the person is subject to the secrecy provisions of section 111 in relation to the information.*

These “other” functions of the Commission are secondary to the principal functions set out in section 13 of the Act. These functions permit the Commission to provide information to other bodies or agencies that is appropriate to the broader landscape of law enforcement, public sector accountability and criminal prosecution.

The Commission has the power to compel witnesses to answer questions when summoned to appear before the Commission, regardless of whether the answers will tend to incriminate the witness, on the basis that in doing so, their answers are not admissible against them in any later civil or criminal proceedings¹⁷ - this reflects the primacy of the Commission’s fact-finding function compared to other functions, as set out in the Act.

The Commission’s ability to assemble admissible evidence in support of prosecution action would be greater if evidence it received under compulsion such as answers to questions or documents produced during hearings was admissible in subsequent criminal proceedings. However, long-established and fundamental principles of the criminal justice system, particularly the privilege against self-incrimination and the requirement that admissions and confessions be made voluntarily, would have to be set aside in order to allow the admissibility of such evidence.

Section 17 of the Act also provides that the Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it consider appropriate. This section also reflects the role of the Commission as a fact-finding body and assists in avoiding unnecessary formalism in the manner it goes about this task especially during the conduct of its hearings.

The Commission is like any other investigative agency that collects information or evidence with a view

¹⁷ Section 37 of the Act.

to supporting prosecution action. The Commission also has available to it other extensive means for collecting admissible evidence in later prosecution proceedings such as powers under the *Listening Devices Act 1984* (NSW), the *Telecommunications (Interception) Act 1979* (Cth) and search warrant powers under the ICAC Act.

VI. PUBLIC INTEREST TO BE PARAMOUNT - SECTION 12 ICAC ACT

Section 12 of the Act states:

In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.

VII. DEFINITION OF CORRUPT CONDUCT – SECTIONS 8 AND 9 ICAC ACT

The definition of corrupt conduct is provided for in sections 8 and 9 of the Act.

The definition is very broad and covers a wide range of conduct not necessarily amounting to criminal conduct.

Section 8(1) provides as follows;

8. General nature of corrupt conduct

(1) *Corrupt conduct is:*

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

(2) *Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:*

- (a) *official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),*
- (b) *bribery,*
- (c) *blackmail,*
- (d) *obtaining or offering secret commissions,*
- (e) *fraud,*
- (f) *theft,*
- (g) *perverting the course of justice,*
- (h) *embezzlement,*
- (i) *election bribery,*
- (j) *election funding offences,*
- (k) *election fraud,*
- (l) *treating,*
- (m) *tax evasion,*
- (n) *revenue evasion,*
- (o) *currency violations,*
- (p) *illegal drug dealings,*
- (q) *illegal gambling,*

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- (r) *obtaining financial benefit by vice engaged in by others,*
- (s) *bankruptcy and company violations,*
- (t) *harbouring criminals,*
- (u) *forgery,*
- (v) *treason or other offences against the Sovereign,*
- (w) *homicide or violence,*
- (x) *matters of the same or a similar nature to any listed above,*
- (y) *any conspiracy or attempt in relation to any of the above.*

The second limb - or test of seriousness - of the definition is provided for in section 9 of the Act. It provides as follows:

9. Limitation on nature of corrupt conduct

- (1) *Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:*
- (a) *a criminal offence, or*
 - (b) *a disciplinary offence, or*
 - (c) *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
 - (d) *in the case of conduct of a Minister of the Crown or a member of a House of Parliament---a substantial breach of an applicable code of conduct.*
- (2) *It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.*
- (3) *For the purposes of this section:*

“applicable code of conduct” means, in relation to:

- (a) *a Minister of the Crown---a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or*
- (b) *a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)---a code of conduct adopted for the purposes of this section by resolution of the House concerned.*

“criminal offence” means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

“disciplinary offence” includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

The key concepts behind this definition are honesty, impartiality and upholding the public trust. These remain as relevant today as when the ICAC Act was first enacted.

The current definition of corrupt conduct is not limited to conduct that could constitute or involve a criminal offence.

As recognised by those who drafted the original legislation, and those responsible for subsequent amendments, notions of corrupt conduct are wider than the commission of a crime.

Whilst the commission of a crime, within the context of ss. 8 and 9 of the ICAC Act, continues to be an important indicator of corrupt conduct, there is other conduct which, although not necessarily amounting to criminal conduct, may, depending on the circumstances, nevertheless be widely regarded as no less corrupt. For example, the intentional release of confidential tendering information by a public official to a private company, which allows that company to gain an unfair advantage over its competitors, may not necessarily constitute a criminal offence. Nevertheless, such conduct would likely involve a disciplinary offence or grounds for termination of employment and would be regarded by ordinary members of the community as being corrupt. It is certainly the type of conduct that the Commission should have jurisdiction to investigate and determine.

A. Capacity to Make Corrupt Conduct Findings

Under section 13 of the Act as set out above, the Commission is specifically empowered to make findings of corrupt conduct.

The ability to make findings of corrupt conduct is highly relevant to the Commission's deterrent and educative roles.

The ability to make findings as to whether or not particular conduct is corrupt has become well established in the public mind. Any removal or diminution of this power is likely to create public unease.

Furthermore, the seriousness of the conduct in question, and the effect of that conduct, cannot be determined exclusively by reference to whether or not it may, in all the circumstances, constitute a criminal offence.

It is often argued that the use of a two-track system may avoid criticism that the "stigma" of corrupt conduct may be attached to individuals whose actions are relatively minor. What constitutes "minor" conduct, in the context of corruption, is largely subjective. As demonstrated below the process adopted by the Commission in considering whether a finding of corrupt conduct is available is unlikely to produce unjust results or to be based on "minor" conduct. In any event it is not clear that labelling a person's conduct as "official misconduct" etcetera would ultimately produce any less of a "stigma".

Some of the concerns previously expressed about the ability of the Commission to make findings of corrupt conduct appear to arise out of a concern that conduct might be labelled as corrupt conduct where it "technically" comes within the definition, even though the person whose conduct is in question acted innocently and without any corrupt intention. These concerns however do not reflect the reality of the process that the Commission must follow in order to form an opinion that corrupt conduct has occurred.

B. Findings of Fact and Findings of Corrupt Conduct

In accordance with the judgement of the NSW Court of Appeal, Mahoney JA in *Greiner -v- ICAC* (1992) 28NSWLR125 (in particular pages 155-158, 167-169), the process by which a determination of corrupt conduct is made in a particular case involves three essential steps. First, findings need to be made as to the basic facts. Secondly, there is a need to classify the factual matters in order to be able to determine whether the conduct in question falls within one of the categories in s. 8(1) and/or s. 8(2) of the ICAC Act. The third stage is to determine whether the conduct then satisfies s. 9 of the ICAC Act.

Findings of fact are only made after taking into account the totality of evidence before the Commission, and those affected by that evidence have been afforded an opportunity to respond to that evidence. Those responses are part of the material considered in drawing conclusions as to the factual matters. In reaching such conclusions, the civil standard of proof is applied however, the degree of persuasion necessary to establish findings on the balance of probabilities will vary according to seriousness of the issues involved (see *Briginshaw -v- Briginshaw* (1938) 60CLR336).

While often referred to as the civil standard of proof it is by no means an easy standard to meet. The Commission recently expanded upon this standard and what it involved:

As has already been observed, the ICAC does not sit as a criminal or civil court. It does not determine the rights of any person. Nevertheless, a finding of corrupt conduct against an individual is a serious matter. It may affect the individual's reputation. It is appropriate to observe that the standard of proof to be applied by the ICAC in making findings of fact and findings of corrupt conduct is the civil standard, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test has been said to be whether the issue has been proved to the reasonable satisfaction of the Tribunal, such satisfaction not being produced by inexact proofs, indefinite testimony or indirect inferences: Briginshaw -v- Briginshaw (1938) 60 CLR 336 at 362; Rejtek -v- McElroy (1965) 112 CLR 517 at 521. Before an adverse finding of fact is made or a finding of corrupt conduct is reached, the ICAC should be comfortably satisfied on the balance of probabilities that the finding should be made:

Bannister -v- Walton (1993) 30 NSWLR 699 and 711-712 (at p13)¹⁸.

Findings of fact are only made after taking into the account the seriousness of the issues and the degree of persuasion required to reach such conclusions.

Partiality and the exercise of official functions is potentially a broad concept. A decision which favours a person may be regarded as “partial” but should not come within s.8(1) simply because it is “wrong” in administrative law terms, or negligent in a civil law sense. In considering s.8, the Commission takes into account the state of mind of each person whose conduct is in question.

The Commission considers whether there was an actual or imputed appreciation that what was being done was, in the context in which it was done, carried out for a reason that is unacceptable (see Mahoney JA at 162 in *Greiner*). This does not, however, mean that simply because a person does not at the relevant time believe that his or her conduct is corrupt, the Commission is precluded from making an adverse finding (see Gleeson CJ at 140 in *Greiner*). Apart from dishonest conduct, conduct beyond negligence but not amounting to dishonesty in the accepted meaning of that term, may be conduct within s.8(1) of the ICAC Act if, for example, it amounts to a reckless disregard of indicators of dishonest or partial behaviour of others. Conflict between an official’s duty and his personal interest is also significant. Emphasis was placed on this latter aspect by Gleeson CJ in *Greiner*.

Finally, it is necessary to consider s.9 of the ICAC Act. It is appropriate to apply the provisions of s.9 to conduct found to be in s.8 in accordance with the approach of Priestley JA outlined in *Greiner* where by the word “could” was construed as meaning “would if proved”. In relation to s.9(1), the approach is to consider whether, in the case of a criminal charge which would be tried before a jury, the facts found by the Commission would, if the jury were to accept them as proved beyond reasonable doubt, constitute the offence charged. The approaches required in relation to s.9(1)(b), s.9 (1)(c) and s.9(d) are similar.

The above illustrates the seriousness and care with which the Commission approaches its capacity to make findings of corrupt conduct.

VIII. JURISDICTION OF THE ICAC

The key definitions relating to the jurisdiction of the Commission under the ICAC Act are “public official” and “public authority which are to be found in section 3 of the Act. They are defined as follows:

“Public authority” includes the following:

- (a) a Government Department, Administrative Office or Teaching Service,
- (b) a statutory body representing the Crown,
- (c) a declared authority under the Public Service Act 1979,
- (d) a person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:
 - (i) is part of the accounts prepared under the Public Finance and Audit Act 1983, or
 - (ii) is required by or under any Act to be audited by the Auditor-General, or
 - (iii) is an account with respect to which the Auditor-General has powers under any law, or
 - (iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
- (e) a local government authority,
- (f) the Police Force,
- (g) a body, or the holder of an office, declared by the regulations to be a body or office within this definition.

“Public official” means an individual having public official functions or acting in a public official capacity, and includes any of the following:

¹⁸ Report into conduct of the Hon. J Richard Face, (June 2004) at p 46.

- (a) the Governor (whether or not acting with the advice of the Executive Council),
- (b) a person appointed to an office by the Governor,
- (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
- (d) a member of the Legislative Council or of the Legislative Assembly,
- (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both,
- (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),
- (g) an officer or temporary employee of the Public Service or a Teaching Service,
- (h) an individual who constitutes or is a member of a public authority,
- (i) a person in the service of the Crown or of a public authority,
- (j) an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of "public authority" is kept, of attending meetings or carrying out the business of any body constituted by an Act,
- (k) member of the Police Force,
- (k1) an accredited certifier within the meaning of the Environmental Planning and Assessment Act 1979,
- (l) the holder of an office declared by the regulations to be an office within this definition,
- (m) an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.

The Commission was established to investigate, prevent and educate in respect of corruption affecting the NSW public sector. This role continues to remain relevant.

To fulfil this role the Commission was given jurisdiction not only over public officials and public authorities but also over others whose conduct could or does adversely affect either directly or indirectly the honest or impartial exercise of official functions by a public official or public authority. It is important to its role that the Commission continue to have jurisdiction to examine the conduct of those who seek to corrupt public officials or public authorities.

A. Government Businesses

As in other jurisdictions throughout the world a number of Government service providers have been corporatised (e.g. electricity generators, water, rail services). In NSW the *State Owned Corporations Act 1989* covers State owned corporations. Section 36(2) of that Act provides:

For the purposes of the Independent Commission Against Corruption Act 1988:

- (a) State owned corporations and their subsidiaries are public authorities, and
- (b) directors, officers and employees of State owned corporations or their subsidiaries are public officials,

but s.23 of (the ICAC Act) does not apply in relation to a Company State Owned Corporation or any of its subsidiaries or to persons who are public officials by virtue of their connection with a Company State Owned Corporation or any of its subsidiaries.

Schedule 1 of the *State Owned Corporations Act* operates as a list of "Company State Owned Corporations". Presently, it does not appear that there are any such organisations.

The Auditor General also has certain powers in respect to State owned corporations (e.g. s.24 and s.24A of the *State Owned Corporations Act*) which, irrespective of s.36, would bring State owned corporations within the definition of "public authority" in s.3 of the ICAC Act.

Although set up as corporations, these organisations remain in public ownership and are accountable to the public, through the State Government, for the way in which they exercise their functions and utilise their resources. Whilst these organisations continue to be in public ownership it is appropriate that the Commission continue to have jurisdiction over them.

B. Outsourced Government Functions

The current trend for contracting and tendering out Government services, and for privatising or corporatising Government enterprises, raises general questions about the continuing accountability for those services.

In considering the Commission's jurisdiction over contracted-out Government services, care needs to be taken to ensure that there remains a nexus between the conduct being investigated and public official functions. It is not, and should not be, the role of the Commission to investigate conduct in the private sector where such conduct has no nexus with the exercise of public official functions.

In this context it is also important to note that the meaning of "public official functions" is changing. Some services, which were traditionally seen as the province of Government are being or have been completely privatised. The former State Bank of NSW is an example. Since its sale by the Government, however, the State Bank ceased to be a public authority and accordingly, and appropriately, the Commission no longer has jurisdiction.

In other cases, however, the position will be less clear. This is particularly the case where a Government agency remains responsible for the provision of services to the public but elects to contract-out to the private sector the provision of those services. In these instances the provision of the services remains a public function.

Corruption in the provision of such services is likely to undermine confidence in the public sector agency responsible for the service, and may have a flow-on detrimental effect on the confidence of the community in the processes of the public sector and Government as a whole. Given that public money is being paid to private sector organisations to provide public services, it is important that the State have a role in overseeing how the money is utilised and ensuring that the appropriate corruption prevention and investigation mechanisms are in place. This argues strongly that the Commission should continue to have a role in this area.

Contracted-out services are likely to fall within the Commission's current jurisdiction given the definition of "public official" in s.3 of the ICAC Act.

This definition includes an individual having public official functions or acting in a public official capacity and includes "...an employee of or any person otherwise engaged by or acting for or on behalf of, or in place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs".

An example of this extended definition is instructive.

The Commission also recently examined the role of WorkCover NSW outsourced accredited assessors responsible for assessing the competency of operators of certain heavy plant and equipment (*Report on Investigation into Safety Certification and Training in the NSW Construction Industry* – June 2004). Although not directly employed by WorkCover, these assessors were fulfilling WorkCover responsibilities and accordingly the Commission found they were exercising "public official functions" within the meaning of s.3(1) of the ICAC Act and undertook assessments on behalf of WorkCover within the meaning of s.3(1)(m) of the ICAC Act. The Commission was also satisfied that WorkCover accredited trainers are "public officials" as they exercise public official functions and do work on behalf of WorkCover.

C. Members of Parliament

From the time of its inception the ICAC Act was intended to apply to Members of Parliament. The definition of "public official" specifically includes Ministers and members of the Legislative Council and Legislative Assembly, being the two houses of the NSW Parliament. This inclusion is clearly in line with community expectations that Members of Parliament be in the same position as other public officials for the purpose of the Commission's jurisdiction.

Section 9(3) of the Act provides that a substantial breach of the applicable code of conduct shall bring Members of Parliament under the jurisdiction of the Commission for the purposes of section 9(1)(b).

Sections 9(4) and (5) apply only to Members of Parliament.

The Commission has a unique relationship with the Parliament and its Members. The nature of this relationship was considered by the Commission in its *Report on investigation into conduct of the Hon. J Richard Face* (June 2004). In that report Assistant Commissioner Johnson quoted (p.42) with approval the following comments of the current Clerk of the Legislative Assembly;

The ICAC has a special relationship with the Parliament. In general terms the Parliament created the ICAC to protect the public interest, prevent breaches of public trust and guide the conduct of public officials. The legislation gives the ICAC significant powers and discretion to expose corruption through investigations, to prevent corruption by giving advice and developing resistance to corrupt practices in public sector organisations, and to educate the public sector and the community about corruption and the role of the Commission. Viewed from one perspective, the ICAC Commissioner is one among a number of public officials who assist the Parliament to carry out its role of scrutinising the executive and thereby holding it accountable. Such officials are often referred to as ‘officers of Parliament’ as they perform the work that the House, if it wished, might perform. The ICAC reports to Parliament and there is oversight of its work by a parliamentary committee. On the other hand, under section 3 of the ICAC Act the Commission has jurisdiction over all Members of Parliament, their staffs and the staff of Parliament generally. In respect to the Parliament therefore the ICAC plays a number of distinct roles, including an active role in educating members of Parliament about their rights and obligations.¹⁹

It is appropriate that the Commission continue to be able to investigate allegations of corruption involving Members of Parliament to help maintain public confidence in our political administration and system of government.

IX. POWERS OF THE ICAC

Under its Act, the Commission is entrusted with extensive and coercive powers. These powers are essential to the Commission’s performance of its functions under the Act. In particular they also reflect the nature of the Commission’s role or function as a fact-finding body charged with getting to the truth of allegations and complaints that are referred to it. As the Commission said in its *Report on the Investigation into North Coast Development (Volume 5)*:²⁰

The rules that apply in our courts, particularly in our criminal courts, are not designed to ferret out the truth. They serve a different purpose. From time to time, matters arise which cause concern in the community, and lead to a decision that other methods are necessary. It is felt that it is more important to get to the truth, than simply to pursue offenders. Disclosure and control are the prime goals, rather than conviction and punishment. The opportunity for conviction and punishment will not be lost, if what is revealed can lead to criminal proceedings, within the constraints imposed by the system, and the need to maintain scrupulous fairness in the prosecution and trial process. But they are not the main objective.

A number of matters disclosed in the course of this Inquiry, had been the subject of rumour for years. Traditional methods of criminal investigation lacked the powers necessary to uncover them. That is why it was appropriate for the Commission to undertake the investigation, with the special powers conferred by Parliament for the control of corruption in the public sector. It is the same approach that leads, from time to time, to the establishment of Royal Commissions.

The objective was more limited. It was to disclose sufficient to enable corrupt practices, and practices conducive to corruption, to be identified. That disclosure enables the problem to be met, not only by changes to the law, as are recommended, but also by public awareness, which provides the opportunity for public attitudes to be developed, and community expectations to be made clear to all in public life.

¹⁹ “Constitutional and Parliamentary Reform Issues in the Reform of Parliament” contained in *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (edited by Macintyre and Williams), Wakefield Press, 2003, at 261-262.

²⁰ 1990, pp 35-36.

Amongst other things, the Commission is empowered to:

- compel public officials to produce a statement of information (section 21)
- compel any person or agency to produce documents and other material (section 22)
- enter the premises occupied by a public authority and inspect and copy documents (section 23)
- conduct private and public hearings (section 30)
- summon witnesses to appear before its hearings (section 35) and
- apply for and obtain search warrants (section 40).²¹

The Commission may also apply for listening devices under the *Listening Devices Act 1984* and for telephone intercepts under the *Telecommunications (Interception) Act 1979*.

A. Power to Obtain Information – Section 21 ICAC Act

Section 21 of the Act gives the Commission the power to require, by notice in writing, a public authority or public official to produce a statement of information. Section 21 notices are often used to obtain details of a person's financial situation so that the Commission can prepare a financial profile. Public officials can write in the relevant information in answer to the questions in the notice. It is not necessary for them to provide original documentation such as bank statements, receipts, etc. For persons who are not public officials, a section 22 notice requiring the production of relevant original documentation can be issued, however this requires the recipient to locate and produce original documentation, thereby causing possible inconvenience to the individual concerned.

B. Power to Enter Public Premises - Section 23 ICAC Act

Section 23 empowers the Commission to enter public premises, inspect documents and take copies of those documents. It provides as follows:

23. Power to enter public premises

- (1) *For the purposes of an investigation, the Commissioner or an officer of the Commission authorised in writing by the Commissioner may, at any time:*
 - (a) *enter and inspect any premises occupied or used by a public authority or public official in that capacity, and*
 - (b) *inspect any document or other thing in or on the premises, and*
 - (a) *take copies of any document in or on the premises.*
- (2) *(Repealed)*
- (3) *The public authority or public official shall make available to the Commissioner or authorised officer such facilities as are necessary to enable the powers conferred by this section to be exercised.*

Section 23 is potentially a very useful power. This is especially so where the Commission wishes to obtain highly relevant documents and material quickly but unlike a search warrant, it does not require any threshold of belief or suspicion to be satisfied about the existence of documents or material on the premises before it may be issued. It also lends itself to be executed covertly where the Commission does not wish its interest in a matter to be known. Unlike a section 22 notice it also allows the Commission to obtain the documents or material directly through its own inspections without having to rely on the searches of a third party.

C. Hearings - Division 3 ICAC Act

Under its Act the Commission has the power to conduct hearings. These hearings may be either in public or private or both. In considering whether to hold hearings as part of an investigation the Commission is required to have regard to what it considers relevant to the public interest under section 31 of the Act. That section provides as follows:

²¹ The power for the Commissioner to issue search warrants under section 40(4) of the Act has never been exercised.

31. Public and private hearings

- (1) *A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.*
- (2) *Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by a legal practitioner representing such a person, as well as to a closing submission by a legal practitioner assisting the Commission as counsel.*
- (3) *In reaching these decisions, the Commission is obliged to have regard to any matters which it considers to be related to the public interest.*
- (4) *The Commission may give directions as to the persons who may be present at a hearing when it is being held in private. A person must not be present at a hearing in contravention of any such direction.*

Significantly, contrary to the position with the common law applicable to the criminal courts of Australia, the Commission during its hearings can compel a person to answer questions and produce documents notwithstanding that to do so may tend to incriminate them in the commission of a criminal offence; in effect the privilege against self incrimination is overridden and a witness must answer questions and produce documents regardless.

This is provided for by section 37 of the Act as follows:

37. Privilege as regards answers, documents, etc.

- (1) *A witness summoned to attend or appearing before the Commission at a hearing is not entitled to refuse:*
 - (a) *to be sworn or to make an affirmation, or*
 - (b) *to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a hearing, or*
 - (c) *to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.*
- (2) *A witness summoned to attend or appearing before the Commission at a hearing is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.*
- (3) *An answer made, or document or other thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.*
- (4) *Nothing in this section makes inadmissible:*
 - (a) *any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or*
 - (b) *any answer, document or other thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2), or*
 - (c) *any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.*
- (5) *Where:*
 - (a) *a legal practitioner or other person is required to answer a question or produce a document or other thing at a hearing before the Commission, and*
 - (b) *the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between a legal practitioner (in his or her capacity as a legal*

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practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing before the Commission,

the legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

The qualification to this requirement is that any evidence given by the witness cannot be subsequently used against them in any later criminal or civil proceedings.

A legal practitioner may be granted leave to appear on behalf of the witness who has been summonsed to appear before a hearing of the Commission.

The power to conduct hearings, particularly public hearings, has attracted considerable attention since the Commission's inception.

In particular, the decision whether to hold public hearings as part of an investigation is a significant one. The Commission is well aware of the publicity and media attention that its public hearings attract and the potential effects on the reputation of those appearing as witnesses before them. In this respect, when conducting public hearings the Commission is obliged to observe the rules of natural justice. The Commission's obligation in this regard follows from the possibility that a hearing might result in an adverse report and consequent harm to the reputation of persons against whom allegations are made.²²

In determining whether to hold public hearings the Commission will have regard to such issues as:

- the investigative purpose and value of hearings
- their deterrent effect
- their educative value, particularly in addressing significant, widespread or systemic corruption
- the accountability and transparency of the Commission in the conduct of its investigations.

In deciding to hold private hearings, the Commission may have regard to:

- the need to define the issues to be further investigated
- the integrity of the investigation, particularly the opportunity to test evidence to establish its potential value to the investigation, and obtain evidence from a number of persons without them being aware of evidence given by others
- protection of reputations from unnecessary damage
- potential impact on other investigations or proceedings.

In considering the role of public hearings for the Commission, it must be remembered that the Commission is not a judicial body. It is an investigative body, and hearings are conducted with that function in mind.

1. Public Versus Private Hearings

To assist in determining whether it is in the public interest to hold public hearings, the Commission has regard to a list of possible considerations. These considerations include:

- the integrity of the investigation (it may be prejudicial to the investigation to publicly divulge the fact the Commission is conducting an investigation, to identify the witnesses or make known the extent of evidence obtained)
- protection of reputation from anticipated but untested or unverified evidence
- whether information is being sought at a preliminary stage for the purposes of determining whether further investigative effort is required. In this regard if it is ultimately decided not to proceed further there is no requirement for the Commission to prepare a report in relation to the matter (see s.74(3))

²² ICAC v. Chaffey (1993) 30 NSWLR 21 per Gleeson CJ at 30.

of the ICAC Act)

- the need to protect the identity of a witness or an informant
- the requirements of s.18(2) of the ICAC Act which requires that where there are proceedings for an indictable offence conducted by or on behalf of the Crown, in order to ensure that the accused's right to a fair trial is not prejudiced, the Commission must, to the extent it thinks necessary, ensure that, as far as practicable, any hearings are conducted in private during the currency of the proceedings
- any application made by, or on behalf of those appearing before the Commission that it is in the public interest for the hearing to be conducted in private
- whether the hearing involves closing submissions. Section 31(2) of the ICAC Act provides that the Commission may decide to hear closing submissions in private.

The possible advantages of holding hearings in public include:

- public hearings allow a wide exposure of corrupt conduct
- public hearings are an important mechanism for educating the public about corruption
- public hearings provide a mechanism for public officials to be publicly accountable for their actions
- public hearings can be an important deterrent to corrupt conduct. If people know their conduct may be subject to public exposure they may be less likely to engage in corrupt activity
- public hearings sometimes encourage others to come forward with information, including information relevant to the investigation
- public hearings provide transparency to the Commission's fact-finding process and as such enhance public confidence in that process.

Private hearings allow the detection of inconsistencies in evidence given by different parties, as witnesses give their evidence unaware of what else might have been said by other parties. This is particularly the case where the investigation plan involves hearing from key individuals towards the end of a hearing to test their evidence against that provided by other witnesses earlier in the proceedings.

There have been occasions where witnesses have given much more full and frank evidence in private than when they have been recalled to give evidence in public hearings. This may be due to concern or trepidation about having their evidence exposed to colleagues and associates by way of a public forum. It has also been observed that some witnesses at public hearings seem to play up to the media or the public gallery.

Hearings are merely one tool in the investigative arsenal for the Commission. As previously indicated the Commission is not a court and nor does it attempt to operate like one (such as requiring the equivalent standard of proof beyond reasonable doubt). The Commission's hearings are part of the investigative process. A court only hears matters at the conclusion of an investigation where there are grounds to consider a case. As an investigative tool, it will not always be appropriate for the Commission to conduct hearings in public.

2. Private Hearings – Public Reports

The Commission is required under its Act to prepare a report to Parliament of the results of its investigation where it has conducted public hearings.

It should also be appreciated that the Commission has the capacity to conduct hearings in private but produce a public report to account for the findings made in the matter.

The power to conduct public hearings is particularly important in carrying out the Commission's functions. Public hearings are perhaps best used to highlight corrupt conduct that may be significant, systemic or widespread. Given that public hearings involve significant Commission resources, consideration must also be given to maximizing the impact of public hearings, particularly in addressing systemic corruption risks.

The Commission employs public hearings as appropriate, but undertakes other measures, including the collection and dissemination of evidence to the appropriate authorities in individual instances, and the conduct of systemic reviews of corruption risks, as a means of addressing and preventing corruption. The

pre-occupation with the Commission's public hearings must also be seen against the regularity with which they are now held. As previously noted, for the 2002/03 reporting year, the Commission conducted just 18 days of public hearings involving four investigations.

A further relevant consideration is that public hearings are of little value unless sufficient evidence is gathered beforehand. Unless they are underpinned by effective prior investigative work, public hearings will become a blunt tool for investigating corruption.

It is often said that the Commission's hearing powers amount to no more than "naming and shaming". This suggestion fails to understand the roles that hearings play in the Commission meeting its objectives and carrying out its functions under the Act, as outlined in this section.

The Commission submits that the current regime, where it must consider the public interest in making the decision to hold hearings, as well as the requirements of procedural fairness established by the Courts²³ is sufficient to ensure consideration is given to the protection of the rights of individuals. Furthermore, the decision to hold a public hearing does not in itself involve a denial of natural justice.²⁴

In deciding whether to hold public hearings, the Commission also gives consideration to the possibility of interfering with pending criminal proceedings. While the Commission is given authority by s.18 of the ICAC Act to run public hearings alongside court proceedings, it is also required to ensure that as far as possible Commission hearings do not prejudice proceedings for Crown prosecution of indictable offences.

Section 18 provides that:

- (1) *The Commission may do any or all of the following:*
- (a) *commence, continue, discontinue or complete any investigation,*
 - (b) *furnish reports in connection with any investigation,*
 - (c) *do all such acts and things as are necessary or expedient for those purposes,*

despite any proceedings that may be in or before any court, tribunal, warden, coroner, Magistrate, justice of the peace or other person.

- (2) *If the proceedings are proceedings for an indictable offence and are conducted by or on behalf of the Crown, the Commission must, to the extent to which the Commission thinks it necessary to do so to ensure that the accused's right to a fair trial is not prejudiced:*
- (a) *ensure that, as far as practicable, any hearing or other matters relating to the investigation are conducted in private during the currency of the proceedings, and*
 - (b) *give directions under section 112, having effect during the currency of the proceedings, and*
 - (c) *defer making a report to Parliament in relation to the investigation during the currency of the proceedings.*

(2A) *Subsection (2) does not apply:*

- (a) *(in the case of committal proceedings) before the commencement of the committal hearing, that is, the commencement of the taking of the evidence for the prosecution in the committal proceedings, and*
- (b) *(in any other case) after the proceedings cease to be proceedings for the trial of a person before a jury.*

- (3) *This section has effect whether or not the proceedings commenced before or after the relevant investigation commenced and has effect whether or not the Commission or an officer of the Commission is a party to the proceedings.*

In practical terms, court proceedings are one of the matters given consideration in determining whether

²³ *ibid* at ICAC v. Chaffey (1993) 30 NSWLR 21 per Gleeson CJ at 30.

²⁴ *ibid* at 31.

it is in the public interest to hold public hearings. In fact, in conducting its investigations prior to hearings, the Commission has due regard to any relevant court proceedings that may be under way at the time.

It has been suggested that public hearings may operate to poison the evidence that may be relied upon in any subsequent prosecution proceedings. This suggestion appears to be based on the notion that the publicity that public hearings attract somehow taints the evidence that might be adduced in any later prosecution proceedings.

The Commission submits that it is highly unlikely that public hearings could have this effect on evidence adduced at those hearings. There are different rules governing the admissibility of evidence during criminal proceedings and there is often a considerable delay (often between one and two years) between the Commission's public hearings, its report and any later criminal proceedings flowing from its recommendations.

X. ACCOUNTABILITY MECHANISMS OF THE ICAC

As can be appreciated, the Commission is entrusted with extensive and significant coercive powers. Those powers reflect the Commission's role as a fact-finding body and are essential to assist the Commission in its primary functions of investigating and preventing corrupt conduct. As a corollary, the Commission accepts that it must be held accountable for the exercise of those powers.

Under the current provisions of the Act, there are two major mechanisms by which the Commission is held accountable in exercising its powers under the Act. These are:

- The Parliamentary Joint Committee
- The Operations Review Committee

There are other mechanisms of accountability or external supervision aside from those found in the Act such as judicial review and legislative accountability (for example, various inspection powers given to the NSW Ombudsman in relation to powers under other legislation such as the *Telecommunications Interception Act 1979* and the *Law Enforcement (Controlled Operations) Act 1998*).

A. The Parliamentary Joint Committee (“the PJC”)

The PJC is provided for under Part 7 of the Act. It is comprised of eleven members drawn from both houses of the NSW Parliament.

The primary functions of the PJC are to:

- monitor and review the exercise by the Commission of its functions
- report to both Houses of Parliament matters appertaining to the Commission or connected with the exercise of its functions to which, the attention of Parliament should be directed
- examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report
- examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission
- inquire into any question in connection with its functions that is referred to it by both Houses of Parliament, and report to both Houses on that question.

In particular the provisions of s.64(2) of the Act should also be noted. That section provides as follows:

- (2) *Nothing in this Part authorises the Joint Committee:*
- (a) *to investigate a matter relating to particular conduct, or*
 - (b) *to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or*
 - (c) *to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.*

As the PJC itself has noted, the rationale for this is clear;

The Committee [PJC] does not have the ability to review the Commission's decisions and findings, to investigate, or to examine the legality and propriety of the Commission's actions with respect to particular complaints. It is the Committee's opinion that these statutory restrictions imposed upon the Committee under s. 64(2) are appropriate. Committee members have neither the qualifications nor expertise to conduct investigations, nor does the Committee have the resources to serve as an appeal mechanism for individuals dissatisfied with the decisions and findings of the Commission.

Moreover, it is the Committee's opinion that since Committee Members (in common with all Members of Parliament) fall within the investigative jurisdiction of the ICAC, it would be inappropriate for Members to be involved in investigating complaints against the ICAC. The Committee is concerned that such a circular oversight system could give rise to allegations of either conflicts of interest or "paybacks" for previous investigations (paragraph 2.2.3).

It would be undesirable for a class or category of public officials subject to the jurisdiction of the Act to be also able to investigate or review particular investigative decisions taken by the Commission in relation to persons from that same class or category.

B. The Operations Review Committee ("the ORC")

The ORC has eight members, comprising the Commissioner (chairperson), Assistant Commissioner nominated by the Commissioner (the Deputy Commissioner), one²⁵ person appointed on the recommendation of the Attorney General and four²⁶ persons appointed on recommendation of the Minister and with the concurrence of the Commissioner. Pursuant to s.60 of the ICAC Act, the Commissioner of Police is also a statutory member of the ORC. Under the provisions of the *Police Act 1990*, this function cannot be delegated.

Under the current provisions of the Act the ORC operates as a consultative mechanism, providing advice to the Commissioner on whether the Commission should investigate a complaint or discontinue the investigation of a complaint. The functions of the ORC are provided for under part 6 of the Act. Section 59(1) in particular provides as follows:

- (a) *to advise the Commissioner whether the Commission should investigate a complaint made under this Act or discontinue an investigation of such a complaint;*
- (b) *to advise the Commissioner on such other matters as the Commissioner may from time to time refer to the Committee.*

It should be noted however that while the ORC must be consulted in relation to complaints made under s.10 of the Act there is no statutory requirement to consult the ORC regarding complaints referred to it by principal officers under s.11 of the Act nor any matter received by the Commission that is categorised as "Information" rather than as a complaint. The Commission itself makes the determination on classifying or categorising a complaint.

It is also important to bear in mind that the ORC's function is to provide advice, and that advice is not binding on the Commissioner.

Notwithstanding these statutory provisions, it has been the practice of the Commission to refer s.11 complaints to the ORC where those complaints have proceeded to a formal investigation or what the Commission now refers to as a Category 1 investigation, that is the more serious and lengthier complex investigations. A schedule of matters that are also classified as 'Information' is also provided at each meeting of the ORC.

²⁵ Governor appointed position.

²⁶ Governor appointed positions.

Under the Act the Commissioner must also meet with the ORC at least every three months. Originally the ORC met once every month, however, since March 2002 the ORC has met every two months, its members noting the increased quality and high standard of reports that it now receives.

The statutory relationship between the ORC and the Commission has, however, been supplemented by broad terms of reference which extends its functions beyond those provided for under the Act.

XI. CONCLUSION

The ICAC continues to play an important and strategic part in public administration and the body politic generally in New South Wales. Reference has already been made to the importance of the dual role of corruption investigation and prevention – the two activities are inextricably linked. The success of the prevention function depends on it being linked to that of investigation.

Bodies like the ICAC must however continue to be ever vigilant in identifying and anticipating new and changing forms of corruption and be innovative in their response to dealing with this. They must also be prepared to accept that their success in carrying out their functions and tasks will not always meet with universal approval, often least of all from their political masters who create them. It remains, however, a most noble and essential pursuit necessary to any system of fair and equitable public administration.