

The Hon. Damien Tudehope MP  
Chair  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

28 September 2017

Your Ref: LAC17/166

Our Ref: Z17/0234

Dear Mr Tudehope

**SUBJECT: Parliamentary Committee on the Independent Commission Against Corruption – hearing held 15 September 2017 – answers to questions on notice**

I refer to the recent hearing by the Parliamentary Committee on the Independent Commission Against Corruption on the "Inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption". During the hearing five questions on notice were asked by members of the Committee. I now provide answers to those questions. I have paraphrased the questions for clarity.

*Question 1 asked by the Chair and Reverend the Hon. Fred Nile: could the Commission give a suggested amendment to the ICAC Act which provides protection for making a voluntary disclosure by all members of the public?*

In considering appropriate wording for any amendment, the Commission is firmly of the view that that whilst individuals should be encouraged to come forward with disclosures and complaints, they ought not be able to use any protections available to escape liability for any conduct done by them with regards to the disclosed conduct (see subsection 2 below).

In drafting the following I have modelled the suggested amendments on those contained in the *Public Interest Disclosures Act 1994*.

*(1) A person is not subject to any criminal or civil liability for making a complaint or providing information to the Commission and no action, claim or demand may be taken or made of or against the person for making the disclosure.*

*(2) This protection applies only to the disclosure and does not extend to any substantive criminal conduct to which the complaint or information referred to in subsection 1 refers or to which it in any way relates.*

*(3) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person.*

*(4) The following are examples of the ways in which this section protects persons who make complaints or provide information to the Commission.*

- a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in proceedings for defamation*
- with respect to any information disclosed where the person is subject to a duty to maintain confidentiality, that person is taken not to have committed an offence*
- where a person is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law relevant to the oath, rule or practice*
- is not liable to disciplinary action because of the disclosure.*

*Question 2 by the Hon. Ron Hoenig: What percentage of matters go to the Ombudsman?*

In the financial year 2016-2017, of the 2035 matters that were reviewed by the Assessment Panel (note, this does not include total number of complaints received), 11 matters were referred to the Ombudsman. This equates to 0.54% of those matters.

Generally, the matters referred related to potential maladministration by a public official or to the public interest disclosure oversight functions of the Ombudsman

*Question 3 by the Hon. Ron Hoenig: If somebody is concerned and they want to provide information—as they would to a law enforcement agency—on the basis that their identity not be disclosed, should there be legislation to enable a similar provision for them to be able to do that to the commission?*

### 3(a) Re importance of confidentiality and security

The confidentiality and security of those providing information to the Commission is one of its paramount concerns. Were it to be undermined, it would foreclose a vital resource needed to identify possible corrupt conduct and render the Commission's task that much more difficult. As can be seen, the drafters of the ICAC legislation quite clearly appreciated these issues.

Section 111 of the ICAC Act provides that documents or any other things coming into a person's possession, custody or control by reason of, or in the course of the person's exercise of functions under the ICAC Act, cannot be required to be produced. The Commission considers that the identity of persons volunteering information is information falling within the scope of that protective framework.

### 3(b) Immunity from production not absolute

Immunity from subpoenas or like process however cannot be absolute. The law provides mechanisms by which information may be required of the Commission under subpoena or similar process. It is then for the court to determine whether disclosure and access is necessary in the interests of justice. Whilst the Commission may resist production on well-established grounds, including a claim based on public interest immunity to protect the

identity of those volunteering information, ultimately it will be for a court to determine whether documents or other records should be produced or disclosed.

Additionally, Commission officers have a statutory duty of disclosure to the Director of Public Prosecutions, which includes disclosing the existence of information and documents that are the subject of statutory publication restrictions or may be the subject of a claim of public interest immunity: s 15A Director of Public Prosecutions Act 1986 and came into effect on 1 January 2013.

### 3(c) Compulsory examinations and public hearings of the Commission

The evidence taken in compulsory examinations and those parts of public inquiries conducted in private (including the identity of the relevant witnesses) is subject to a somewhat different protective regime. In addition to being conducted in the absence of the public, directions can and are usually made pursuant to s 112 of the Act to restrict the publication of the evidence. Witnesses in such examinations do not volunteer information but give evidence under compulsion, albeit some witnesses are considerably more frank and candid than others despite such compulsion.

In relation to Commission information generally and private examination material particularly, the Commissioners have a broad discretion to restrict or authorise the disclosure of information according to whether satisfied that it is necessary or desirable in the public interest to do so. The Commissioners have a discretion to vary or revoke any directions made if satisfied according to the same standard.

### 3(d) Commission power to protect the safety of persons

Separately, the Commission also has power to make any necessary arrangements, including the making of orders for the purpose of protecting the safety of a person who is assisting the Commission. In appropriate circumstances, the Commission may consider making arrangements, including making orders, to protect those who assist by volunteering information.

The *Public Interests Disclosures Act* 1994 also makes provision for the protection of public officials volunteering information to the Commission. That protection includes restrictions on the disclosure of their identity. What falls within the scope of the Act is carefully defined and excludes disclosures where motivated to avoid disciplinary action or disclosures about the merits of government policy. The confidentiality afforded under the Act does not apply where an investigating agency is of the opinion that disclosure is necessary to investigate a matter effectively or it is otherwise in the public interest to do so.

In considering a possible amendment to the ICAC Act directed specifically to voluntary disclosures that provides a level of certainty to those providing information to the Commission the following may be noted.

The information that may be volunteered to the Commission can range in use and usefulness from broad background intelligence to information amounting to specific evidence of wrong doing. A blanket protection which attaches simply because information is volunteered may not properly account for what use the Commission might or should make of the information. As noted above, it may be unavoidable that the Commission, in order to properly investigate particular information brought to it or which is relevant to an existing investigation, may necessarily need to disclose information that might tend to reveal the volunteer's identity at some point. Accordingly, the Commission would be concerned to ensure that any amendment not fetter its ability to fully and appropriately investigate or otherwise deal with information brought to it relating to possible criminal or corrupt conduct.



Should the Committee consider that some specific provision should be made, the Commission would not favour non-disclosure being applied to volunteers as a matter of course and that in any case, there should be provision for the Commission to consider whether such protection should give way if the public interest should require it.

*Question 4 from the Chair: Regarding the Inspector of ICAC, Mr Nicholson's, report about Operation Vesta in which he made a recommendation that sections 8 and 9 of the ICAC Act be amended to remove the word "could" and to replace it with another test in terms of the publication of corrupt conduct and referrals to the Director of Public Prosecutions. What are the Commission's views?*

In terms of removing the word "could" from our jurisdiction as found in sections 8 and 9 of the Act, I would argue strenuously against such an amendment. Sections 8 and 9 define the nature of corrupt conduct which allow the Commission to investigate allegations. The use of the word "could" needs to be considered in the context of Act.

The 'test' for the Commission to make findings (as opposed to be able to investigate) requires consideration of the provisions of section 13(3A) of the Act which provides that the Commission may make findings a person has engaged in corrupt conduct only if satisfied that the person has engaged in such conduct.

This is more fully set out in every public Commission report in an Appendix. For your information I attach a copy of that Appendix.

*Question 5 by the Hon. Trevor Khan: Is material from what I would describe as the old ICAC essentially still on the ICAC website—former reports and the like? And media releases?*

The Commission's Communications and Media division have advised that media releases are posted to the Commission's website when they are publicly distributed. There is no requirement or specific policy that media releases be posted on the website for any specified length of time. Generally the Commission's practice has been for all publicly available material (including investigation reports, public inquiry transcripts, media releases and fact sheets) relating to completed investigations to be removed from the website after 10 years. Copies of reports can be provided on request.

As I indicated to the Committee, from time to time the Office of the Director of Public Prosecutions may request the Commission to remove an investigation report and associated materials from its public website which relate to an ongoing prosecution or hearing if there is a real prospect that the publication may affect the accused's right to a fair trial. Ordinarily those requests are made by the DPP via Executive Director of Legal.

I trust the above answers the questions put to the Commission by the Committee.

Yours sincerely



The Hon. Peter Hall QC  
Chief Commissioner





## Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

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

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

- (a) *collusive tendering,*
- (b) *fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,*
- (c) *dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,*
- (d) *defrauding the public revenue,*
- (e) *fraudulently obtaining or retaining employment or appointment as a public official.*

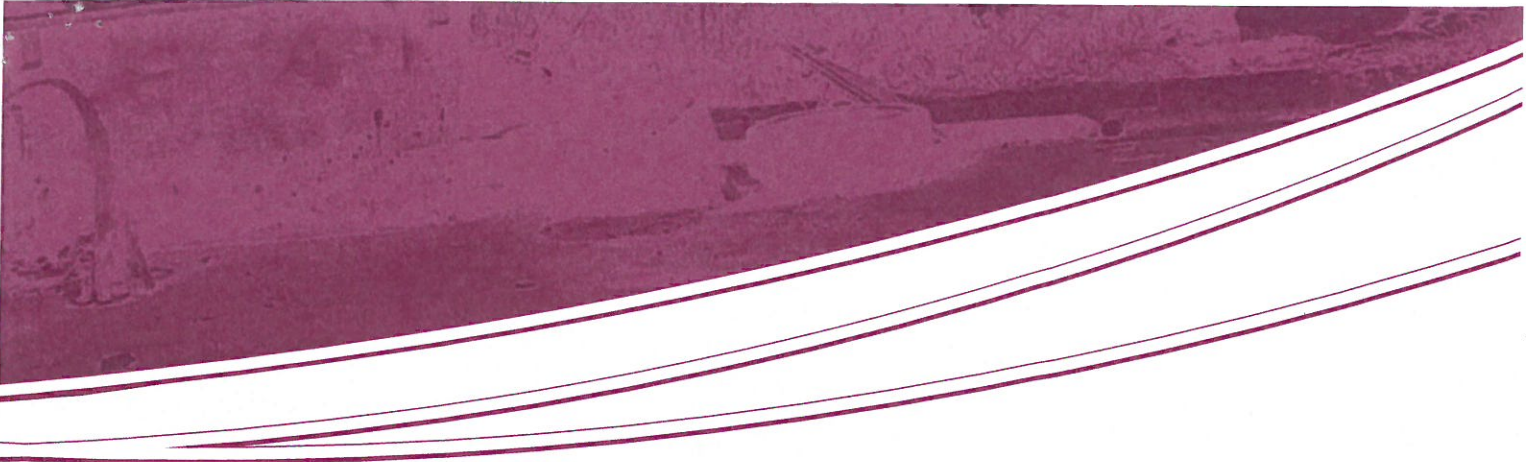
Subsection 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (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.*

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Subsection 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded





by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission adopts the following approach in determining findings of corrupt conduct.


First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of subsections 8(1), 8(2) or 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirement of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite

standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:



*...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

*...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejcek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.