Proposed amendments to the
Independent Commission Against Corruption Act 1988

Issues Paper

Committee on the
Independent Commission Against Corruption

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1. Introduction

On 14 August 2008, in a letter addressed to the Committee on the Independent Commission Against Corruption (the Committee), the Deputy Commissioner of the Independent Commission Against Corruption (the ICAC), Ms Theresa Hamilton, proposed a number of amendments to the *Independent Commission Against Corruption Act 1988* (the Act).[1] One suggested amendment involved removing the restriction on the use, in disciplinary and civil proceedings, of evidence obtained under objection by the Commission.

In its review report on the 2006-2007 Annual Report of the ICAC, the Committee considered the proposed amendment and concluded that any such amendment would require detailed examination and full consultation with relevant stakeholders.[2]

The Premier, the Hon Nathan Rees MP, wrote to the Committee on 27 November 2008[3] requesting that the Committee inquire into and report on:

- whether the Act should be amended to remove the restriction in s 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Commission in disciplinary proceedings;
- whether the Act should be amended to remove the restriction in s 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Commission in civil proceedings generally or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained; and
- if amendments are made to s 37, should the ICAC Act be amended to make its current function of assembling evidence for criminal proceedings a primary function of the Commission so as to ensure that the ICAC did not use its powers to obtain evidence under compulsion to the detriment of evidence admissible for use in criminal proceedings.

[1] The letter is reproduced at Appendix One.
[2] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, October 2008, Report No 3/54, p 24.
[3] The letter is reproduced at Appendix Two.

2. Background

2.1 Operation of s 37 of the ICAC Act

Section 37 of the ICAC Act operates to require a witness appearing before the Commission to answer any relevant question or produce any document or thing. The witness is not excused from answering any question or producing, even if what the witness says or produces may incriminate or tend to incriminate them.[4]

Provided the witness objects to answering a question or producing a document or thing,[5] the answer or document would not be admissible in evidence against the witness in any criminal, civil or disciplinary proceedings.[6] However, the evidence would be admissible against the witness in proceedings for offences against the ICAC Act and for contempt under the Act.[7]

Section 37 provides:

> **37 Privilege as regards answers, documents etc**
>
> (1) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not entitled to refuse:
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> (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 compulsory examination or public inquiry, 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 compulsory examination or public inquiry 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 compulsory examination or public inquiry before the Commission is not (except as otherwise provided in this section) admissible in

[4] A witness is also not excused from answering any question or producing any document or thing on any other ground of privilege, duty of secrecy, other restriction on disclosure, or any other ground: s 37(2) of the ICAC Act.
[5] ICAC Act, s 37(4)(b)
[6] ICAC Act, s 37(3)
[7] ICAC Act, s 37(4)(a). See Part 9 of the ICAC Act for offences under the Act and Part 10 of the ICAC Act for contempt under the Act.

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) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at a compulsory examination or public inquiry before the Commission, and

(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal 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 compulsory examination or public inquiry before the Commission,

the Australian 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.

Essentially the provisions of s 37 operate to abrogate the privilege against self-incrimination.

2.2 Privilege against self-incrimination

A. History

Considered a firmly established rule of the common law,[8] the privilege against self-incrimination entitles a person not to answer questions or produce material that may

[8] *Sorby v Commonwealth* (1983) 152 CLR 281 at 290 per Gibbs CJ.

tend to incriminate them in a criminal offence or expose them to a civil penalty.[9] It has been described in a number of cases as a:

- "fundamental….bulwark of liberty";[10]
- "human right, based on the desire to protect personal freedom and human dignity";[11]
- "basic and substantive common law right."[12]

It is traditionally accepted that the origins of the privilege against self-incrimination developed in the seventeenth century as a reaction to the procedures of the ecclesiastical courts and the Court of the Star Chamber.[13] These courts administered the ex officio oath, which operated to compel a person to testify on pain of excommunication or physical punishment, to their own guilt.[14] It was after these courts were abolished and the administration of the ex officio oath forbidden, that the privilege against self-incrimination began to achieve recognition in common law trials and by the second half of the seventeenth century the privilege was well established.[15]

The privilege today is often found in most statements of human rights, including the United States Constitution[16] and the International Covenant on Civil and Political Rights.[17]

B. Rationale

It has been commented that it is 'not easy to assert confidently that the privilege serves one particular policy or purpose.'[18] In *Environment Protection Authority v Caltex Refining Co Pty Limited,*[19] Mason CJ and Toohey J at 501 discuss one modern rationale for the privilege:

> Historically, the privilege developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt…
> In one important sense, the modern rationale for the privilege against self-incrimination is substantially the same as the historical justification –

[9] *Sorby v Commonwealth* (1983) 152 CLR 281; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
[10] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340 per Mason ACJ, Wilson and Dawson JJ.
[11] *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150 per Murphy J.
[12] *Reid v Howard* (1995) 184 CLR 1 at 11 per Toohey, Gaudron, McHugh, and Gummow JJ.
[13] *Sorby v Commonwealth* (1983) 152 CLR 281 at 317 per Brennan J.
[14] *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J.
[15] *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J.
[16] The principle is embodied in the Fifth Amendment to the United States Constitution, which in part states that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.
[17] Article 14(3)(g) states that in the determination of any criminal charge no one shall be compelled to testify against himself or to confess guilt.
[18] *Pyneboard Pty Limited v Trade Practices Commission* (1983) 152 CLR 328 at 335 per Mason ACJ, Wilson and Dawson JJ.
[19] (1993) 178 CLR 477.

> protection of the individual from being confronted by the "cruel trilemma" of punishment for refusal to testify, punishment for truthful testimony or perjury (and the consequential possibility of punishment). Naturally, methods of punishment are now different: modern-day sanctions involve fines and/or imprisonment, rather than excommunication or physical punishment. Further, the philosophy behind the privilege has become more refined – the privilege is now seen to be one of many internationally recognised human rights.

The Queensland Law Reform Commission in its 2004 Report, *The Abrogation of the Privilege Against Self-incrimination*, compiled a number of additional rationales for the privilege.[20] They include:

- **To prevent abuse of power:** the privilege maintains a proper balance between the powers of the State and the rights and interests of citizens.

- **To protect human dignity and privacy:** the privilege is considered a human right rather than merely a rule of evidence. The privilege acts as a shield against the 'indignity and invasion of privacy which occurs in compulsory self-incrimination.'[21]

- **To protect the accusatorial system of justice:** the presumption of innocence underlies the privilege against self-incrimination. Gibbs CJ in *Sorby v Commonwealth*[22] comments at 294:

  > It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt.

- **To protect the quality of evidence:** the basis for this rationale is that someone who is compelled to give self-incriminating evidence is more likely to lie than expose themselves to criminal prosecution. The prospect of perjury charges is considered less threatening than criminal charges.

- **To prevent convictions founded on false confessions:** based on the premise that a confession made under duress is likely to be unreliable.

C. Statutory abrogation

Whilst considered a firmly established rule of the common law, the privilege against self-incrimination is not considered immutable and may be modified by statute. In *Sorby v Commonwealth,*[23] Gibbs CJ at 298 stated:

> The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action.

[20] Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No. 59, December 2004, (QLRC 59) at pp 23-31.
[21] *Pyneboard Pty Limited v Trade Practices Commission* (1983) 152 CLR 328 at 346 per Murphy J
[22] (1983) 152 CLR 281
[23] (1983) 152 CLR 281

The courts will interpret legislation as having abrogated the privilege only if the intention is clearly apparent in the legislation itself.[24] In the absence of express words of abrogation, the question as to whether the privilege has been abrogated will be determined by assessing the "language and character of the provision and the purpose which it is designed to achieve."[25]

The privilege is often abrogated where the legislature considers there to be competing interests. As expressed in *Environment Protection Authority v Caltex Refining Co Pty Ltd*:[26]

> The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.

The above statement has potency when considering the functions of anti-corruption commissions such as the ICAC. Central to the success of commissions set up to investigate and expose corrupt behaviour is the power to compel testimony and produce documents.[27]

Some fear that due to the concealed nature of corrupt conduct, without abrogating the privilege against self-incrimination, anti-corruption commissions would be ineffective:

> The rationale for this power lies in the nature of corruption as insidious and uniquely difficult to detect and that traditional investigative powers and techniques were seen to have failed to deal with it.[28]

The Hon Nick Greiner MP, the then Premier, expressed similar reasoning in the Second Reading Speech to the ICAC Bill:

> …corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission.[29]

Where the privilege against self-incrimination has been abrogated by statute, it is common that restrictions are applied on the use of any evidence obtained under compulsion. Such restrictions preserve some protection for an individual and are said to confer "use immunity" or "derivative use immunity".[30]

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[24] *Sorby v Commonwealth* (1983) 152 CLR 281 at 289-290 per Gibbs CJ

[25] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason CJ, Wilson and Dawson JJ.

[26] (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J.

[27] Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, 2004, p 596.

[28] ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, November 1994 at p 32.

[29] The Hon Nick Greiner MP, Premier and Minister for Ethnic Affairs, 'Second Reading Speech: *Independent Commission Against Corruption Bill*' Legislative Assembly, 26 May 1988 at p 672.

[30] Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No. 59, December 2004, (QLRC 59) at p 17. A use immunity prevents the evidence given under compulsion from being used in proceedings against the individual who gave the evidence. A use immunity does not prevent the derivative use of incriminating evidence. A derivative use immunity prevents the use of information that has been

D. Abrogation provisions in other anti-corruption commissions

The privilege against self-incrimination has been abrogated in a number of investigative commissions with similar functions to the ICAC, including:

- Police Integrity Commission, NSW
- Crime and Misconduct Commission, Queensland
- Corruption and Crime Commission, Western Australia
- Law Enforcement Integrity Commissioner, Commonwealth

Police Integrity Commission, NSW

One of the principal functions of the Police Integrity Commission (PIC) is to detect, investigate and prevent police corruption and other serious police misconduct.[31] The PIC in executing this function may conduct hearings as part of their investigations.[32]

Section 40 of the *Police Integrity Commission Act 1996* (NSW) (the PIC Act) applies to witnesses appearing before the Commission and operates to require them to answer any relevant question or produce any document or thing. Section 40(2) mirrors the provisions found within s 37(2) of the ICAC Act and operates to abrogate the privilege against self-incrimination. Section 40(3), which restricts the use of any compelled testimony or documents, is also in similar terms to that found within s 37(3) of the ICAC Act with one notable exception: s 40(3) of the PIC Act allows evidence that was obtained under objection to be used in disciplinary proceedings under the *Police Act 1990* (NSW) (the Police Act)[33] and the *Public Sector Employment and Management Act 2002* (NSW) (the PSEM Act).[34] Disciplinary proceedings under these Acts are explored further below.

Crime and Misconduct Commission, Queensland

The Crime and Misconduct Commission (CMC) is an amalgamation of two former investigative commissions: the Criminal Justice Commission and the Queensland Crime Commission. These two commissions were merged to form the CMC in 2001, under the *Crime and Misconduct Commission Act 2001* (QLD) (CMC Act). The CMC has jurisdiction over three main areas: major organised crime; serious misconduct in units of public administration and witness protection.

In fulfilling its misconduct functions the CMC may conduct hearings as part of its investigations.[35] A witness appearing before the Commission at a misconduct hearing must answer a question put to them by the presiding officer.[36] The witness is not entitled to remain silent or refuse to answer the question on the grounds of self-incrimination.[37] Section 197 of the CMC Act then operates to restrict the use of any

given under compulsion to "set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character": *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wiberforce at 443.

[31] PIC Act, s 3(a)

[32] PIC Act, s 32

[33] Disciplinary proceedings under the Police Act include an order under ss 173 or 181D and proceedings under Division 1A or 1C of Part 9, an order under s 183A or any proceedings for the purpose of Division 2A of Part 9 with respect to an order under s 183A.

[34] Refers to disciplinary proceedings under Part 2.7 of the PSEM Act.

[35] CMC Act, s 176

[36] CMC Act, s 192(1)

[37] CMC Act, s 192(2)

answer, document, thing or statement given, in any civil, criminal or administrative proceeding, provided the witness claims self-incrimination privilege.

The position with regard to documents or things requested under an attendance notice is different to that for answers provided. A person, who has been issued with an attendance notice for a misconduct hearing,[38] requiring the person to produce a stated document or thing at the hearing, must produce the document or thing at the hearing unless the person has a reasonable excuse.[39] Self-incrimination is not a reasonable excuse for failing to produce the document or thing[40] and s 197 does not apply to documents or things produced under s 188.

Corruption and Crime Commission, Western Australia

The Corruption and Crime Commission of Western Australia (CCC) was established in 2004 by the *Corruption and Crime Commission Act 2003* (WA) (the CCC Act). The CCC has three main functions: misconduct; prevention and education to prevent misconduct; and, organised crime.[41]

As part of its misconduct function, the Commission's Investigations Unit undertakes investigations of serious public sector misconduct during which the Commission has the power to conduct examinations.[42]

The Commission has a range of powers to acquire information. The Commission has the power to obtain a statement of information;[43] documents or things;[44] and to require attendance at an examination.[45] Failure to comply, without reasonable excuse, with any notice to produce or summons to attend is considered contempt of the Commission.[46] Section 157(a) specifically excludes the failure to produce a document or thing on the basis of self-incrimination as a reasonable excuse.

A statement of information produced in compliance with a notice under s 94, and a statement made by a witness in answer to a question that a Commission requires, is not admissible as evidence against the person in any civil or criminal proceedings.[47] However, the evidence is admissible in contempt proceedings, proceedings against the CCC Act and in disciplinary action. Disciplinary action under the CCC Act is defined as:

- action under section 8 of the *Police Act 1892*; and
- the taking of action against a person, with a view to dismissing, dispensing with the services of or otherwise.[48]

[38] CMC Act, ss 82(1) 82(b), 82(2)(a)
[39] CMC Act, s 188(2)(b)
[40] CMC Act, s 188(3)
[41] CCC Act, Part 2 Division 2
[42] CCC Act, s 137. Examinations are colloquially referred to as 'hearings': WA Corruption and Crime Commission, Hearing Practice Directions, Version 5 (22 January 2009), p 1
[43] CCC Act, s 94
[44] CCC Act, s 95
[45] CCC Act, s 96
[46] CCC Act, ss 158, 159 and 160
[47] CCC Act, ss 94(5) and 145
[48] CCC Act, s 3. Section 8 of the *Police Act 1892* (WA) concerns the removal of commissioned and non-commissioned officers.

Despite the above-mentioned restrictions the witness may be asked about any statement of information provided[49] or answer given to a question asked by the Commission,[50] under s 21 of the *Evidence Act 1906* (WA).[51]

The above-mentioned restrictions on the use of evidence obtained under compulsion do not apply to documents or other things produced.[52]

Australian Law Enforcement Integrity Commission

The Deputy Commissioner's letter to the Committee refers to the Law Enforcement Integrity Commission as providing a precedent for the use of evidence obtained under objection in disciplinary proceedings.[53]

In December 2006 the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (the LEIC Act) commenced operation and established the office of the Integrity Commissioner. The Integrity Commissioner is supported by the Australian Commission for Law Enforcement Integrity (ACLEI). The role of the Integrity Commissioner and ACLEI is to detect, investigate and prevent corruption in the Australian Crime Commission and the Australian Federal Police.[54] To fulfil these objectives the LEIC Act confers on the Integrity Commissioner a number of investigation, intelligence and reporting functions.[55]

As part of the investigation function, the Integrity Commissioner may conduct hearings.[56]A witness summoned to appear before the Commissioner is not excused from answering a question or producing a document or thing on the ground of self-incrimination.[57] Provided the witness first claims privilege against self-incrimination in relation to an answer given or document or thing produced, the answer or document or thing is not admissible in any criminal proceedings or any other proceedings for the imposition or recovery of a penalty.[58] However, the evidence is admissible in:

- proceedings for an offence against section 93;[59]
- confiscation proceedings;
- proceedings for an offence against section 137.1 or 137.2 of the Criminal Code (which deals with false or misleading information or documents) that relates to this Act;
- proceedings for an offence against section 149.1 of the Criminal Code (which deals with obstruction of Commonwealth public officials) that relates to this Act;

[49] CCC Act, s 94(6)
[50] CCC Act, s 145(2)
[51] Section 21 provides every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.
[52] Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, 2004, p 607.
[53] ICAC, Letter regarding proposed amendments to the ICAC Act, p 3 (see Appendix One)
[54] http://www.aclei.gov.au/www/aclei/aclei.nsf/Page/About_Us accessed, Tuesday 10 February.
[55] ACLEI, Practice Notes, 8 July 2008, p 2
[56] LEIC Act, s 82(1)
[57] LEIC Act, s 96(1)
[58] LEIC Act, s 96(4)
[59] Section 93 creates offences for failure to attend a hearing; failure to swear an oath, take an affirmation or answer a question; and failure to produce a document or thing.

- disciplinary proceedings against the person if the person is a staff member of a law enforcement agency.

Under the LEIC Act, disciplinary proceedings are defined as: [60]

- proceedings of a disciplinary nature under a law of the Commonwealth or of a State or Territory; and
- action taken under Subdivision D of Division 5 of Part V of the *Australian Federal Police Act 1979*.

[60] LEIC Act, s 5

3. Use of evidence obtained under compulsion in disciplinary and civil proceedings

3.1 Disciplinary proceedings

A. Definitions

Section 37(3) of the ICAC Act restricts the use of evidence obtained under objection in disciplinary proceedings. Neither the section nor the Act provides a definition of disciplinary proceedings.

The PIC Act has a similar provision to s 37 of the ICAC Act. Section 40(3) of the PIC Act restricts the use of compelled testimony in criminal and civil proceedings but allows its use in disciplinary proceedings under the Police Act and the PSEM Act.

Police Act

Disciplinary proceedings under the Police Act are primarily found in Part 9. It specifies disciplinary action and procedures that can be taken in respect of:

- misconduct and unsatisfactory performance;
- summary removal of police officers; and
- revocation of promotional appointment because of misconduct on obtaining promotion.

Proceedings for each of the above disciplinary actions must follow the rules of procedural fairness and an officer has the right to appeal any decision made to the NSW Industrial Relations Commission.

Penalties for misconduct and unsatisfactory performance may take the form of reviewable or non-reviewable action.[61] Non-reviewable action consists of action such as training and development, counselling and warnings.[62] Reviewable action consists of:

1) a reduction of the police officer's rank or grade;
2) a reduction of the police officer's seniority;
3) a deferral of the police officer's salary increment;
4) any other action (other than dismissal or the imposition of a fine) that the Commissioner considers appropriate.

A further definition of disciplinary proceedings is found in section 4 of the PIC Act, which defines them as proceedings for a disciplinary offence. A 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.[63]

[61] Police Act, s 173
[62] Police Act, Schedule 1
[63] PIC Act, s 4

Public Sector Employment and Management Act

A definition of what constitutes disciplinary action can be found within the PSEM Act. Part 2.7 of the PSEM Act concerns the management of conduct and performance of officers in the public service.[64] Section 42(1) defines disciplinary action, in relation to an officer, as:

1) dismissal from the Public Service
2) directing the officer to resign, or to be allowed to resign, from the Public Service within a specified time
3) if the officer is on probation – annulment of the officer's appointment
4) except in the case of a senior executive officer – reduction of the officer's salary or demotion to a lower position in the Public Service
5) the imposition of a fine
6) a caution or reprimand.

Section 44 of the PSEM Act provides for the issuing of guidelines as to how disciplinary proceedings under the Act should be conducted. Such guidelines must be consistent with the rules of procedural fairness.[65] An officer who has been punished due to misconduct has the right to appeal such a decision to the Government and Related Employees Appeal Tribunal.[66]

Incorporated in the NSW Public Service Personnel Handbook are the procedural guidelines administered by the Director of Public Employment. The procedural guidelines include a schematic showing the process of dealing with misconduct, which is reproduced at Appendix Three.

3.2 Civil proceedings

A. Definitions

Section 37(3) of the ICAC Act restricts the use of evidence obtained under objection in civil proceedings. Neither the section nor the Act provides a definition of civil proceedings.

The *Civil Procedure Act 2005* (NSW) defines civil proceedings as any proceedings other than criminal proceedings.[67] The types of relief that can be claimed in civil proceedings include:

(a) a claim for possession of land,
(b) a claim for delivery of goods,
(c) a claim for the recovery of damages or other money,
(d) a claim for a declaration of right, and
(e) a claim for the determination of any question or matter that may be determined by the court, and
(f) any other claim (whether legal, equitable or otherwise) that is justiciable in the court.

[64] Unless expressly provided, Part 2.7 does not apply to chief executive officers in the Public Service.
[65] PSEM Act, s 45
[66] *Government and Related Employees Appeal Tribunal Act 1980* (NSW), s 23.
[67] Section 3

There are also civil penalty proceedings, which are penalties imposed applying civil rather than criminal court process and are designed to punish or discipline a person rather than to compensate an aggrieved party.[68] They are distinct from civil proceedings seeking damages. The Queensland Law Reform Commission provides a convenient summary of the nature of civil penalty proceedings:

> Legislative regulatory schemes often create obligations, contravention of which are not a criminal offence but results in action by a government agency for the imposition of a penalty. Although the process generally follows the procedures in civil actions, the object of the proceeding is not, as in such actions, to obtain compensation for a private wrong. Rather, its purpose is to allow the state to enforce a public interest.[69]

Civil penalties are not only monetary fines but can also include injunctions, licence revocation and orders for reparation and compensation. The Australian Law Reform Commission commented that in some circumstances civil penalties may be more severe than criminal penalties.[70] For example, there are substantial civil pecuniary penalties available under the *Trade Practices Act 1974* (Cth)[71] and the *Corporations Act 2001* (Cth).[72]

B. Criminal Assets Recovery Act

The *Criminal Assets Recovery Act 1990* (NSW) (the CAR Act) provides a system for confiscation, without the requirement of a conviction, of the proceeds of crime related activity. Under the CAR Act, the NSW Crime Commission and the Police Integrity Commission[73] may take action to recover the proceeds of serious crime related activities. The Act permits the Supreme Court to order the forfeiture of property if it finds, on the balance of probabilities, that the person has in any time in the past six years engaged in serious criminal activity.[74] Proceedings under the CAR Act are considered civil proceedings.[75]

Serious criminal activity for the purposes of the CAR Act is anything done by a person that was at the time a serious criminal offence.[76] The CAR Act was originally enacted as the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW) and limited to serious drug-related activity. In 1997 the Act was renamed the CAR Act and broadened[77] to include certain serious criminal offences punishable by five years

[68] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* Report No 95, at [2.48]

[69] Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No. 59, December 2004, (QLRC 59) at p12

[70] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* (ALRC 95) at paragraph [2.49].

[71] In *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41–809 total civil penalties of $26 million plus costs were awarded – see ALRC 95 at [2.49]

[72] Mr Jonathan Broster, a former executive manager of the Satellite Group Limited, recently agreed to penalties of $200,000 (the maximum that can be imposed on directors under the Corporations Act) plus costs of $50,000: <www.asic.gov.au/asic/ASIC_PUB.NSF/>, 7 March 2002 – see ALRC 95 at [2.49]

[73] Section 19 of the PIC Act specifies that the CAR Act applies to the PIC in the same way as it applies to the NSW Crime Commission. The PIC may only exercise a function under the CAR Act after consultation with the NSW Crime Commission.

[74] CAR Act, s 3

[75] CAR Act, s 5(1)

[76] CAR Act, s 6(1)

[77] *Drug Trafficking (Civil Proceedings) Amendment Bill*

imprisonment or more, including, fraud, theft, bribery and corruption offences.[78] In the Second Reading Speech to the amending Bill, the Hon Jeff Shaw MLC, then Attorney General, stated:

> The addition of these types of offences to the Act will enable both the Police Integrity Commission and the Crime Commission to pursue persons who have engaged in serious criminal activity involving bribery, corruption and other serious offences.
>
> The ill-gotten gains made by these persons will become liable to forfeiture.[79]

The CAR Act authorises the NSW Crime Commission and the PIC to seek the following orders:

1. Restraining orders:[80] A restraining order prohibits a person from disposing or attempting to dispose of an interest in property to which the order applies.[81] An application for a restraining order must be accompanied by an affidavit of an authorised officer stating that the officer suspects the person has engaged in serious crime related activities and the grounds upon which that suspicion is based.[82]

2. Confiscation orders:[83] Confiscation orders are broken down into two further categories: assets forfeiture orders and proceeds assessment orders. An assets forfeiture order is an order forfeiting, to the Crown, all or any of the interests in property that are subject to a restraining order.[84] A proceeds assessment order requires a person to pay an amount assessed by the Supreme Court.[85]

Under s 53(1) of the ICAC Act, the ICAC may, before or after investigating a matter, refer the matter to any person or body it considers appropriate in the circumstances.

During the ICAC's recent investigation into tendering and payments in relation to NSW Fire Brigades capital works projects, the ICAC referred the receipt of corrupt proceeds to the NSW Crime Commission. The NSW Crime Commission obtained restraining orders against Mr Sanhueza and Mr Taylor. On 12 November 2008, the Supreme Court made a proceeds assessment order pursuant to the CAR Act against Mr Sanhueza for the sum of $950,000. On 20 November 2008 the Supreme Court made an assets forfeiture order under s 22 of the CAR Act that the interest in specified property (a farm at Merriwa, two flatscreen televisions and a laptop computer) of Mr Taylor be forfeited to and vest in the Crown.[86]

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[78] CAR Act, s 6(2)(d). Common offences against the Crimes Act 1900 that the ICAC recommends for prosecution include: s 178A (fraudulent misappropriation) maximum penalty 7 years; s 178BA (obtain money by deception) maximum penalty 5 years; s 178BB (obtain money by false or misleading statement) maximum penalty 5 years.
[79] The Hon J W Shaw MLC, Attorney General and Minister for Industrial Relations, 'Second Reading Speech: *Drug Trafficking (Civil Proceedings) Amendment Bill*, Legislative Assembly, 27 June 1997 at p11269.
[80] CAR Act, Part 2
[81] CAR Act, s 10(1)
[82] CAR Act, s 10(3)
[83] CAR Act, Part 3
[84] CAR Act, s 22(1)
[85] CAR Act, s 27(1)
[86] ICAC Report, *Investigation into tendering and payments in relation to NSW Fire Brigades capital works projects*, December 2008, p 6.

Following the ICAC's recent investigations into bribery and fraud at RailCorp, eight people were referred to the NSW Crime Commission for consideration of action under the CAR Act. An assets forfeiture order and proceeds assessment order for the amount of $584,000 has been made in respect of one individual.[87]

In its 2007/2008 Annual Report, the ICAC indicates that one of the areas it will seek to focus on in the year ahead is 'identifying appropriate matters for referral to the NSW Crime Commission for consideration of action to seize illegally obtained assets and proceeds of crime."[88]

3.3 Issues for consideration

i) Is an amendment to s 37 needed?

In proposing an amendment to s 37 of the ICAC Act, the Deputy Commissioner of the ICAC reasoned that, without the possibility to use evidence of misconduct by public officials given under objection in disciplinary proceedings, proceedings commenced against those public officials might fail:

> A public official may give evidence to the Commission that the public official has solicited or accepted bribes in connexion with the performance of the public official's official duties or engaged in other forms of misconduct. As the law currently stands, if this evidence is given under objection it cannot be used against the public official in any disciplinary proceedings. Without other evidence it may not be possible to commence disciplinary proceedings, or if such proceedings are commenced they may fail due to lack of evidence. As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct should not be able to avoid disciplinary proceedings simply because there is a lack of other evidence of their conduct.[89]

The Deputy Commissioner further commented that it is not unusual for the Commission to hear admissions from witnesses who have perpetrated frauds involving substantial sums of money.[90] The Deputy Commissioner proposed that in such cases evidence given under objection should be available to use in any civil proceedings to recover lost monies:

> Where contractors or others have admitted defrauding public sector agencies their admissions should, as a matter of good public policy, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.[91]

The last two reports of the Committee have raised serious issues with regard to the ICAC's proposal to amend s 37. In its review report on the 2006-2007 Annual Report of the Inspector of the ICAC, the Committee observed:

> It should also be noted that a witness appearing before the ICAC is in a sense in a weaker position than a witness appearing before a court in an inquisitorial

[87] ICAC, *2007/2008 Annual Report*, October 2008, p 49
[88] ICAC, *2007/2008 Annual Report*, October 2008, p 4
[89] ICAC, Letter regarding proposed amendments to the ICAC Act, p 3 (see Appendix One)
[90] ICAC, Letter regarding proposed amendments to the ICAC Act, p 3 (see Appendix One)
[91] ICAC, Letter regarding proposed amendments to the ICAC Act, p 3 (see Appendix One)

> system of justice, generally regarded as providing less protection to the accused than the common law adversarial system that prevails in Australia. In an inquisitorial system the accused has the right to silence, even if it is rarely used in practice due to the fact that adverse inferences may be drawn from a refusal to answer questions.
>
> It is clear, then, to the Committee that removing the prohibition against the use of evidence given under objection during an ICAC investigation has potentially profound implications because it goes to the heart of one of the central pillars of the common law.[92]

In its review report on the 2006-2007 Annual Report of the ICAC, the Committee noted the implications of the proposed amendments have, given the ICAC's powers:

> The ICAC has extraordinary powers to compel people appearing before it to give evidence and produce documents that may incriminate them… Removing the bar on the use of self-incriminating evidence obtained under objection would involve a significant departure from the legal framework under which ICAC exercises such extraordinary powers.[93]

Suggested approach

Given the significant nature of the privilege against self-incrimination, the adequacies of the current situation should be explored. Consideration could be given to seeking advice from relevant agencies about the operation and efficacy of the current provisions, with particular regard to:

- whether disciplinary proceedings recommended by ICAC are failing due to lack of evidence; and
- the operation of the CAR Act with respect to referrals from the ICAC.

ii) Does the public interest in addressing and punishing corruption in the community have a greater importance than the privilege against self-incrimination?

The abrogation of the privilege against self-incrimination is commonly said to be justified in circumstances where the public interest in obtaining information outweighs the public interest in upholding the privilege. The ICAC was established primarily to investigate and expose corruption in the public sector. Due to the secretive nature of corrupt conduct and the difficulties associated with uncovering such conduct, it was desirable for the privilege against self-incrimination to be abrogated. To compensate for the loss of the privilege, restraints on the future use of information were enacted.

Suggested approach

To assess whether the public interest now requires those restraints to be removed so as to more effectively punish persons who admit to corrupt conduct, advice could be sought on a number of issues:

[92] Committee on the ICAC, *Review of the 2006-2007 Annual Report and Audit Reports of the Inspector of the Indpendent Commission Against Corruption*, October 2008, Report No 3/54, p 23.
[93] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, October 2008, Report No 3/54, p 24.

- Is there any evidence to suggest that removing the restriction on using evidence obtained under objection in civil and disciplinary proceedings will advance the public interest?
- Is the historical rationale for the privilege against self-incrimination still relevant today given the presence of procedural safeguards in most proceedings conducted today? Do these procedural safeguards offer sufficient protection against any possible abuse of power?
- Whilst there are no penalties of imprisonment for civil and disciplinary offences, are the consequences of such proceedings serious enough to warrant restrictions on the use of evidence obtained under objection?
- Whether clear definitions of which types of proceedings the evidence could be used in would need to be drafted to avoid any possible dispute and confusion.

iii) Would the ICAC be as effective in investigating, exposing and preventing corruption?

As mentioned above, one rationale for the privilege against self-incrimination is that someone who is compelled to give self-incriminating evidence is more likely to lie than expose himself or herself to criminal prosecution. Offering a witness immunity against the use of any incriminating evidence may encourage them to tell the truth. If this is removed witnesses may be reluctant to tell the truth and the ICAC may not be as effective in uncovering corrupt conduct.

In evidence before the Committee, the Commissioner of the ICAC commented on this issue:

> It has been said that the purpose of that section is to encourage people to be more honest and open when they talk to the Commission, in the belief that nothing they say will be used against them. I have spent nearly four years in the Commission and I have conducted all the public inquiries and most of the compulsory inquiries, and it has been my experience that that protection of itself does not cause people to tell the truth. People who tell the truth to ICAC usually tell the ICAC what they think it already knows, and even then they will put a gloss on what the truth is to make their conduct appear to be less culpable than would otherwise be the case.[94]

Suggested approach

There are a number of investigative commissions with objectives and powers similar to that of the ICAC, both in NSW and interstate. Some of these commissions do not restrict the use of evidence obtained under compulsion in certain proceedings. Advice could be sought from these commissions as to whether they consider that witnesses are reluctant to tell the truth given the possibility such evidence may be used against them.

[94] J Cripps, Commissioner, *Transcript of evidence*, 9 July 2008, p 3.

4. Assembling admissible evidence

4.1 Functions of the ICAC

A. Principal functions

The ICAC was established as a component of the 'Government's program to restore the integrity of public administration and public institutions in this State.' [95]

To fulfil this purpose the ICAC has principal functions falling within three main categories:

- investigating and publicly exposing corrupt conduct so lessons may be learned and its recurrence minimised;
- actively preventing corruption by giving advice and assistance to build resistance to corruption in the public sector; and
- educating the community and the public sector about corruption and its effects.

The principal functions of the ICAC can be found in s 13 of the Act and are reproduced in full at Appendix Four.

B. Secondary function of assembling admissible evidence

Aside from the principal functions specified in s 13 of the ICAC Act, the ICAC has other functions primarily around the assembling and provision of admissible forms of evidence to be used in criminal prosecutions. These other functions can be found in s 14 of the Act and are reproduced in full at Appendix Five.

Types of admissible evidence that the ICAC can assemble include documentary evidence, telephone interception evidence and evidence from Commission Officers or witnesses other than an accused.

4.2 Issues for consideration

i) Would making the assembling of admissible evidence a principal function of the ICAC be required if s 37 were amended?

The Premier has expressed a view that if s 37 is amended to allow evidence obtained under objection to be used in civil and disciplinary proceedings, the ICAC may focus on these powers to the detriment of its secondary function of assembling admissible evidence for criminal prosecutions.[96] Should the ICAC Act therefore be amended to make the ICAC's function of assembling admissible evidence a principal function?

<u>Suggested approach</u>

Advice could be sought from relevant agencies and stakeholders as to whether they

[95] The Hon Nick Greiner MP, Premier and Minister for Ethnic Affairs, 'Second Reading Speech: *Independent Commission Against Corruption Bill*' Legislative Assembly, 26 May 1988 at p672.
[96] Letter reproduced at Appendix Two.

consider that the ICAC is likely to use its powers to obtain evidence under objection to a greater extent, to the detriment of obtaining admissible evidence.

ii) Would making the assembling of admissible evidence a principal function of the ICAC alter the original objectives of the ICAC Act and thus the ICAC's role within NSW?

Section 2A of the ICAC Act sets out the principal objects of the Act, which are:

> (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
>
> (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
>
> (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
>
> (b) to confer on the Commission special powers to inquire into allegations of corruption.

There may be a concern that if the ICAC Act were to be amended to make the assembling of admissible evidence a principal function, this may alter the nature of the ICAC from an investigative commission designed to expose corruption into a law enforcement body. Such a change would be in keeping with the original intent behind the establishment of the ICAC, as outlined by the then Premier, the Hon Nick Greiner MP, in the Second Reading Speech to the Bill:

> The third fundamental point I want to make is that the independent commission will not be a crime commission. Its charter is not to investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector. That is made clear in this legislation, and it was made clear in the statements I made prior to the election. It is nonsense, therefore for anyone to suggest that the establishment of the independent commission will in some way derogate from the law enforcement role of the police or bodies such as the National Crime Authority. On the contrary, the legislation makes it clear that the focus of the commission is public corruption and that the commission is to co-operate with law enforcement agencies in pursuing corruption.[97]

<u>Suggested approach</u>

To assess whether the public interest would be served by potentially changing the focus of the ICAC from exposure and prevention of corrupt conduct to law enforcement as it relates to corruption, advice could be sought on a number of issues:

- Are changes needed to the ICAC's principal function in the event that s 37

[97] The Hon Nick Greiner, Premier and Minister for Ethnic Affairs, 'Second Reading Speech: *Independent Commission Against Corruption Bill*' Legislative Assembly Hansard, 26 May 1988, at p 672.

is amended?

- Would the ICAC be effectively transformed into a law enforcement body if the assembling of admissible evidence were a principal function?
- Would the proposed changes to the ICAC's principal function result in more private hearings and make the ICAC's work less transparent and limit the public exposure of corruption?
- What effect might a change to the ICAC's functions have on the extent to which the Committee can review the operations of the ICAC?
- Would the proposed changes affect the ICAC's relationship with the DPP? Would the Memorandum of Understanding between the DPP and the ICAC need to be altered?

iii) Will the ICAC need more powers and funding to adequately fulfil this function?

Amending the ICAC Act to make the assembling of admissible evidence a principal function may require more funding and powers to be granted to the ICAC. The proposed amendment may also impact on the resources available to fulfil the ICAC's other functions of prevention and education.

Suggested approach

A cost/benefit analysis could be undertaken to ascertain whether an amendment to the principal functions of the ICAC would involve additional costs, and if so, whether the benefits would outweigh the costs. Evidence could be sought from the ICAC in relation to this matter.

5. Conclusion

The ICAC's proposed amendments to s 37 of the ICAC Act raise fundamental issues with regard to one of the central pillars of the common law system, the privilege against self-incrimination. While there are precedents in some of the anti-corruption commissions in other jurisdictions for oral and documentary evidence obtained under objection to be used in disciplinary proceedings, and for documentary evidence obtained under objection to be used in civil proceedings, there appears to be no precedent for oral evidence obtained under objection to be used in civil proceedings. The question arises as to whether such a change is needed in NSW given the provisions in the CAR Act, which enable the ICAC to refer the recovery of fraudulently gained assets to the NSW Crime Commission.

The Premier's letter also raises the prospect that if the proposed s 37 amendments were enacted the ICAC might focus its efforts on the gathering of admissible evidence for disciplinarily or civil matters at the expense of criminal prosecutions. However, the proposed remedy to this possibility, to amend the ICAC's core functions to include the gathering of admissible evidence for criminal proceedings, has the potential to alter the nature and role of the ICAC.

The final matter to consider is that the ICAC has been granted extraordinary powers in an effort to eliminate corruption, a problem that has been almost impervious to traditional policing methods. The question arises as to whether, the proposed amendments achieve an appropriate balance between the powers necessary for the ICAC to combat corruption effectively and the safeguards relating to its coercive powers, such as, limitations on the subsequent use made of compulsorily obtained evidence given under objection.

Appendix One

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

Icc 227
C08/720

ICAC COMMITTEE
15 AUG 2008
RECEIVED

Mr Frank Terenzini MLA
Chair
ICAC Parliamentary Joint Committee
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Our Ref: Z08/0094

Dear Mr Terenzini

RE: Proposed amendments to the *Independent Commission Against Corruption Act 1988*

The purpose of this letter is to identify and seek the Committee's support for a number of amendments to the *Independent Commission Against Corruption Act 1988* (the *ICAC Act*).

Some of these amendments were foreshadowed by the Commissioner during our recent appearance before the Committee on Wednesday 9 July 2008.

Section 116(2)

Section 116(2) provides that if an offence against the *ICAC Act* is an indictable offence, a Local Court may nevertheless hear and determine the proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and prosecutor consent. Section 116(3) provides that if a Local Court convicts a person of such an offence then the maximum penalty that the court may impose is, in the case of an individual, the smaller of a fine of 50 penalty units or imprisonment for two years, or both, or the maximum penalty otherwise applicable to the offence.

The concern in relation to these provisions arises in the context of convictions for offences under section 87 of the *ICAC Act* of giving false or misleading evidence to the Commission. Section 87 of the *ICAC Act* creates an indictable offence with a maximum penalty of 200 penalty units or imprisonment for five years, or both.

The giving of false or misleading evidence to the Commission at a compulsory examination or public inquiry fundamentally affects the Commission's ability to effectively perform its principal functions under the *ICAC Act*. It has been the Commission's experience that most witnesses who are involved in corrupt conduct knowingly give false evidence. It is only when

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they are faced with overwhelming evidence of their involvement in corrupt conduct that some change their evidence and make admissions. Even these admissions are often limited to what they think the Commission already knows.

Witnesses who give false evidence do not appear to be concerned about the possible criminal consequences. This may be due to the relatively light sentences which are being imposed on persons convicted of offences under section 87 of the *ICAC Act*. The Commission is concerned that a perception exists that people who tell lies at a compulsory examination or public inquiry will either not be punished or will not receive any serious punishment. It is certainly the case that the prospect of possible punishment is not acting as a deterrent.

In considering sentencing for an offence under section 87 of the *ICAC Act*, the Court of Criminal Appeal has previously held that, at least in the absence of extraordinarily compelling subjective circumstances, penalties which do not involve a significant sentence of full-time imprisonment are manifestly inadequate and inadequate to a point verging on irresponsibility (*R v Aristodemou*, NSW CCA, 30 June 1994).

Unfortunately, there has been a tendency of lower courts to impose comparatively light sentences for offences under section 87 of the *ICAC Act*. Where terms of imprisonment are imposed these have generally been suspended. In the last few years convictions in the Local Court for section 87 offences have all, with one exception, resulted in the imposition of suspended sentences. The one exception involved the imposition of a 4 month period of imprisonment to be served as home detention.

The Commission has recently been provided by the Office of the Director of Public Prosecutions with some statistics comparing penalties imposed by local and higher courts with respect to offences of perjury under section 327(1) of the *Crimes Act 1900* (which is analogous to an offence under section 87 of the *ICAC Act*) and making a false statement on oath under section 330 of the *Crimes Act 1900*. A copy is attached.

The statistics clearly indicate a substantial difference in penalties imposed by the Local Court and those imposed by higher courts. The number of sentences involving an actual period of imprisonment is significantly higher in the higher courts. The fact higher courts more often impose periods of imprisonment is recognition of the seriousness of such offences.

The Commission requests that section 116 of the *ICAC Act* be amended so that it does not apply to offences under section 87 of the *ICAC Act*. This would ensure that such offences are dealt with in the higher courts where the maximum penalty may be imposed.

Section 37

The current effect of section 37 of the *ICAC Act* is that, if a witness at a compulsory examination or public inquiry objects to answering a question or producing a document or

other thing, then the answer, the document or other thing is not admissible in evidence against the witness in any criminal, civil or disciplinary proceedings. The legislation provides an exception in relation to prosecutions for offences under the *ICAC Act*.

The protection should not extend to protect witnesses who may be facing disciplinary proceedings who are or become involved in civil proceedings. I do not consider there is any real justification for a person who has given evidence compulsorily to be protected from those answers in subsequent disciplinary or civil proceedings.

A public official may give evidence to the Commission that the public official has solicited or accepted bribes in connexion with the performance of the public official's official duties or engaged in other forms of misconduct. As the law currently stands, if this evidence is given under objection it cannot be used against the public official in any disciplinary proceedings. Without other evidence it may not be possible to commence disciplinary proceedings, or if such proceedings are commenced they may fail due to lack of evidence. As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct should not be able to avoid disciplinary proceedings simply because there is a lack of other evidence of their conduct.

The removal of the protection with respect to disciplinary proceedings is not without precedent. Section 40 of the *Police Integrity Act 1996* serves a similar purpose to section 37 of the *ICAC Act*. However it contains a notable exception in that evidence given under objection is nevertheless admissible against the witness in disciplinary proceedings under the *Police Act 1990* and the *Public Sector Employment and Management Act 2002*. Section 96 of the *Law Enforcement Integrity Commissioner Act 2006* also allows evidence given under objection to be used in disciplinary proceedings if the person giving the evidence is a staff member of a law enforcement agency.

It is not unusual for the Commission to hear admissions from witnesses of frauds perpetrated on public authorities. In the Commission's recent investigation into allegations of serious and systemic corruption affecting RailCorp (Operation Monto), evidence was given by a number of witnesses in which they admitted defrauding RailCorp of substantial sums of money. This evidence was given under objection which means that it cannot be used by RailCorp in any civil action it might consider taking to recover the amounts.

Where contractors or others have admitted defrauding public sector agencies their admissions should, as a matter of good public policy, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.

Summary offences

A number of offences in the *ICAC Act* are summary offences which means that a prosecution must be commenced within 6 months of the date from when the offence was alleged to have

been committed, unless another limitation period is specified with respect to the particular offence (section 179 *Criminal Procedure Act 1986*). Given the nature of the Commission's investigations it is not always possible to identify that an offence has occurred until after the expiration of the 6-month period. In other cases it may be that the offence has been identified but it may not be possible to commence criminal proceedings within the 6-month period without compromising the Commission's investigation by alerting persons to the fact that the Commission is conducting an investigation or divulging evidence obtained in the course of the investigation.

Recent examples of these problems have emerged in the Commission's investigation into corruption allegations affecting Wollongong City Council (Operation Atlas).

During the course of this investigation a number of public officials were required to provide statements of information under section 21 of the *ICAC Act*. It subsequently became apparent, as additional evidence was obtained, that a number of people provided false or misleading responses. It is an offence under section 82 of the *ICAC Act* for a person to knowingly furnish information in response to a section 21 notice which is false or misleading in a material particular. The relevant penalty includes imprisonment for up to 6 months. The offence however is a summary offence. As the false or misleading nature of the statements was not apparent until after the 6-month period it was not possible to commence any prosecution action under section 82 of the *ICAC Act*.

An additional problem arose in Operation Atlas when it was discovered that two persons had impersonated Commission officers. Evidence in relation to this was only obtained more than 6 months after the event. Although it is an offence under section 95 of the *ICAC Act* to impersonate a Commission officer, no prosecution could be commenced due to the expiration of time.

Section 116 of the *ICAC Act* has previously been amended to provide that proceedings for summary offences under sections 80(c) and 81 of the *ICAC Act* may be commenced within 3 years of the commission of the alleged offence. That section also provides that proceedings for an offence under section 112 of the *ICAC Act* may be commenced within 2 years after the commission of the alleged offence.

The Commission recommends that section 116 be amended to provide that proceedings for offences under sections 82 and 95 of the *ICAC Act* may be commenced within 3 years after the commission of the alleged offence.

Section 112

Section 112 allows the Commission to make non-publication orders. There is considerable doubt as to whether this section allows the Commission to make non-publication orders with

respect to written submissions made about available findings and recommendations arising from evidence given at compulsory examinations or public inquiries.

At the conclusion of its public inquiries (and some compulsory examinations if it is proposed to produce a public report) Counsel Assisting the Commission makes submissions as to what findings and recommendations may be available to the Commission on the evidence. These submissions are usually written.

It is the usual practice for the submissions of Counsel Assisting to be provided to all relevant parties. In certain circumstances submissions received in response may also be circulated to other interested parties for comment.

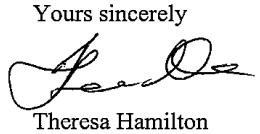
In many cases it is preferable that submissions not be publicly available, at least until such time as the Commission has published its findings and recommendations in its section 74 report. This is because the submissions may canvass findings and recommendations that may not ultimately be accepted by the Commission. Publication of such submissions may have an adverse impact on reputation and may incite unnecessary public speculation. Publication may result in members of the public erroneously believing the submissions represent the findings or view of the Commission.

There have been cases in the past where copies of submissions have been obtained and published by the media which has led to unnecessary speculation as to what findings might ultimately be made by the Commission. This problem could be overcome by amending section 112 of the *ICAC Act* to make it clear that the Commission has power to make non-publication orders with respect to written submissions.

Please advise if you require any additional information in relation to any of the above matters.

A copy of this letter will be provided to the Premier for his information.

Yours sincerely



Theresa Hamilton
Deputy Commissioner
14th August 2008

D10135371

Appendix Two

ICC 214
C08/1252

Premier of New South Wales
Australia

Recd 2/12/08 NM

27 NOV 2008

Mr Frank Terenzini MP
Chair
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Mr Terenzini Frank,

I refer to the letter from the Commissioner of the Independent Commission Against Corruption (Commission) dated August 2008 to the Committee setting out the Commission's view as to the need for a number of amendments to the *Independent Commission Against Corruption Act 1988*.

I also refer to the Committee's October 2008 report on the 2006-2007 Annual Report of the Commission and your letter of 21 October 2008 providing a copy of the report.

One of the amendments requested by the Commission was an amendment to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Commission in disciplinary proceedings and civil proceedings.

This requested amendment raises important issues in relation to the scope of the privilege against self-incrimination.

The Committee's report expresses the view that the Commission's requested amendment to section 37 would require detailed examination and consultation.

I request that the Committee, pursuant to its functions under section 64(1)(b), inquire into and report to Parliament on:

1. Whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption in disciplinary proceedings;

2. Whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption in civil proceedings generally or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained; and

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TEL: (02)9228 5239 FAX: (02)9228 3935 URL: www.premiers.nsw.gov.au G.P.O. BOX 5341, SYDNEY 2001.

3. If either of the amendments referred to in paragraphs 1 or 2 above is made, whether the *Independent Commission Against Corruption Act 1988* should also be amended to make the Independent Commission Against Corruption's current function of assembling evidence for criminal proceedings a primary function.

If amendments of the kind referred to in paragraphs 1 or 2 above are made, there would be a risk that the Commission would use its powers to obtain evidence under compulsion to a greater extent, which may be to the detriment of obtaining admissible evidence for possible criminal proceedings. It is for this reason that advice would be appreciated on whether the Act should also be amended as proposed in paragraph 3 to make the Commission's current function of assembling evidence for criminal proceedings a primary function.

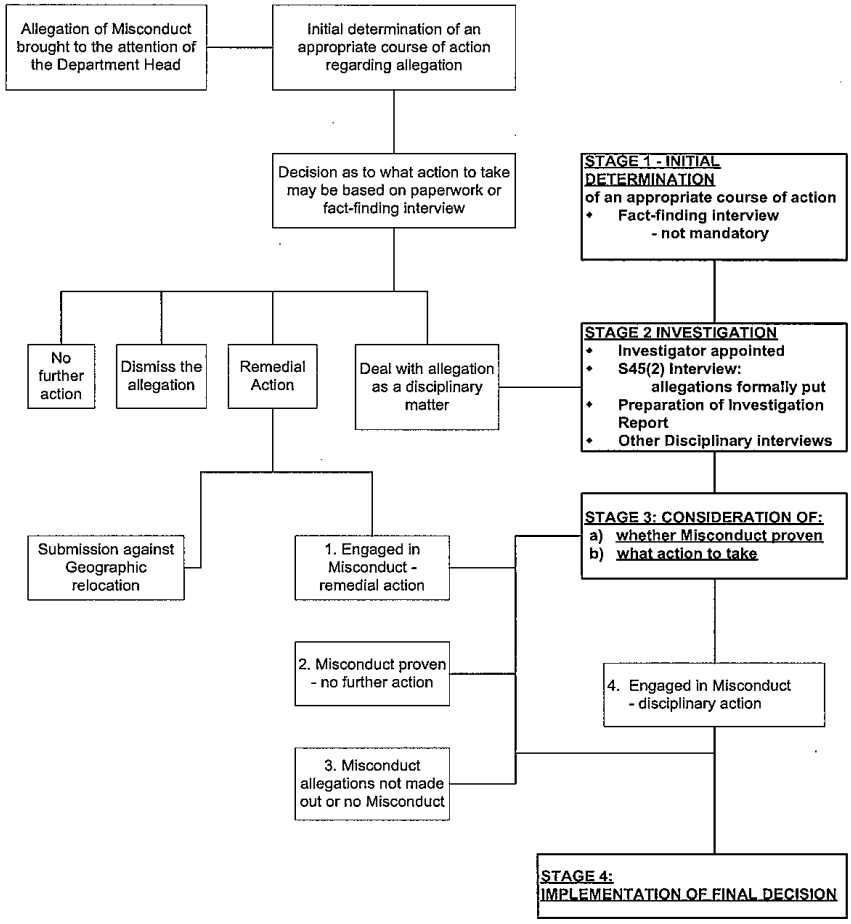
I would be grateful if the Committee would give priority to consideration of these matters.

Yours sincerely

Nathan Rees MP
Premier

Appendix Three

SCHEMATIC OF PROCESS IN PROCEDURAL GUIDELINES



Appendix Four

Independent Commission Against Corruption Act 1988

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

(1A) Subsection (1) (d) and (f)-(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the Police Integrity Commission Act 1996 .

(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.

(2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.

(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.

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

(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 section 9 (5) and this section are the only restrictions 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:
(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or
(ii) whether consideration should or should not be given to the taking of other action against particular persons,
(c) findings of fact.

Appendix Five

Independent Commission Against Corruption Act 1988

Section 14: Other functions of 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,
(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.