

**Submission  
No 5**

**INQUIRY INTO PROPOSED AMENDMENTS TO THE  
INDEPENDENT COMMISSION AGAINST CORRUPTION ACT  
1988**

**Organisation:** Independent Commission Against Corruption  
**Name:** Hon Jerrold Cripps QC  
**Position:** Commissioner  
**Telephone:**  
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INDEPENDENT COMMISSION AGAINST CORRUPTION



ICAC COMMITTEE

30 MAR 2009

RECEIVED

Mr Frank Terenzini MLA  
Chair  
Committee on the ICAC  
Parliament of NSW  
Macquarie Street  
Sydney NSW 2000

Our Ref: Z08/0094

Dear Mr Terenzini

**RE: Inquiry into proposed amendments to the *Independent Commission Against Corruption Act 1988***

This is the submission of the Independent Commission Against Corruption (the Commission) to the inquiry currently being conducted by the Committee on the Commission into proposed amendments to the *Independent Commission Against Corruption Act 1988* (the ICAC Act).

The Committee is inquiring into whether the ICAC Act should be amended so that:

- the restriction in section 37 of the ICAC Act, which prohibits the use, in disciplinary proceedings, of evidence given under objection should be removed,
- the restriction in section 37 of the ICAC Act, which prohibits the use, in civil proceedings, of evidence given under objection should be removed, either generally or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, and
- the Commission's current function of assembling evidence for criminal proceedings should be made a primary function.

Proposed amendments to section 37 of the ICAC Act

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 criminal offences under the ICAC Act.

The Commission submits that the protection afforded by section 37 of the ICAC Act should not extend to protect witnesses who may face disciplinary proceedings or who become involved in civil proceedings. The Commission submits that there is a strong public interest argument in allowing the admission of compulsorily given evidence in such 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. Such conduct would usually warrant dismissal or, at the very least, some other form of disciplinary action. As the law currently stands, if an admission of corrupt conduct or misconduct is given under objection it cannot be used against the public official in any disciplinary proceedings. The need for public sector agencies conducting disciplinary proceedings to gather other evidence can be resource intensive as well as time consuming. 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 sufficient evidence. In some cases where there is insufficient evidence to immediately proceed with disciplinary proceedings a public authority may suspend an official pending the outcome of a criminal prosecution. A conviction for a serious criminal offence may, of itself, be grounds for disciplinary action. This however usually means that the public official continues to receive payment of salary. As prosecutions may take years to conclude and may not ultimately result in a conviction this can, at the very least, result in long delays in the finalisation of disciplinary action.

Any inability to take or successfully conclude disciplinary proceedings may result in a self-confessed corrupt public official remaining in public employment (and continuing to receive remuneration) and undermine attempts by the relevant public authority to prevent further corruption.

As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct under objection should not be able to avoid disciplinary action 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 Commonwealth *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. The Commission's recent investigation into allegations of serious and

systemic corruption affecting RailCorp (Operation Monto) established that RailCorp employees improperly allocated contracts totalling almost \$19m to companies owned or controlled by themselves, their friends or relatives and received at least \$2.5m of corrupt payments. 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 employees, contractors or others have admitted defrauding public sector agencies their admissions, including any relevant documents they have produced, should, in the public interest, 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.

It may be argued that removal of the protection afforded by section 37 in relation to disciplinary and civil proceedings may make it more likely that, knowing their evidence will be admissible against them, witnesses will lie to the Commission in order to protect themselves from disciplinary or civil proceedings. The Commission's experience does not support this argument. The argument pre-supposes that witnesses are more likely to make admissions knowing that they have some protection from disciplinary or civil proceedings. This has not been the Commission's experience. Generally, most witnesses deny any involvement in wrongdoing (despite being reminded of the criminal consequences of giving false or misleading evidence) and only make admissions when presented with clear and compelling evidence of their conduct. The existence of the protections under section 37 of the ICAC Act does not appear to have any relevance to a decision by a witness whether or not to give truthful evidence to the Commission.

In the event that the Committee supports the recommended amendments to section 37 of the ICAC Act, consideration should also be given to amending section 26 of the ICAC Act. This section applies to a requirement under section 21 of the ICAC Act for a public authority or public official to produce a statement of information and a requirement under section 22 of the ICAC Act for a person to produce any document or other thing. Section 26(2) provides that if the statement, document or other thing tends to incriminate the person and the person objects to production at the time, neither the fact of the requirement, the statement, document or other thing itself may be used in any proceedings against the person (except proceedings for an offence against the ICAC Act). This would preclude the use of such material in disciplinary and civil proceedings. In the event section 37 is amended similar amendments should be made to section 26.

### Assembling evidence

The Commission's "principal functions" are set out in section 13 of the ICAC Act. Section 14 of the ICAC Act sets out the "other functions" of the Commission. Section 14(1)(a) of the

ICAC Act provides that these other functions include “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” (the DPP).

The Commission submits that it should be clear from the ICAC Act that the Commission is able to continue to obtain and assemble evidence that may be admissible in a criminal prosecution even though the Commission has completed its investigation into whether or not corrupt conduct has occurred.

This could be achieved by making the function specified in section 14(1)(a) one of the principal functions specified in section 13 of the ICAC Act and amending the wording of the function to make it clear that the Commission’s functions include obtaining admissible evidence as well as assembling admissible evidence.

During the course of its investigations the Commission often finds evidence of criminal offences. Where the Commission prepares a report on an investigation it is required by section 74A(2)(a) of the ICAC Act to include a statement in relation to each “affected person” as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence. There are also instances where, although no report has been prepared, the Commission may seek the advice of the DPP with respect to the prosecution of the person for a specified criminal offence.

In order to provide advice, the DPP requires the Commission to provide briefs of evidence which contain evidence in a form admissible in a criminal court and which address each element of the relevant offence. Such material is, of course, necessary in the event a prosecution is commenced.

The DPP does not undertake the role of gathering evidence. This effectively means that, if any prosecution action is to be considered by the DPP and if any prosecution is to be commenced, the Commission must collect the necessary admissible evidence.

Obtaining admissible evidence for provision to the DPP takes up substantial Commission resources.

In the Commission’s recent investigation into allegations of serious and systemic corruption affecting RailCorp (Operation Monto), section 74A(2)(a) statements were made with respect to 33 individuals involving over 660 different offences. As of 1 March 2009 the Commission was in the process of completing briefs of evidence arising out of this and other investigations involving 38 individuals. Briefs of evidence relating to another 94 individuals, previously prepared by the Commission, were with the DPP awaiting advice.

Although evidence will be gathered during the course of an investigation by the Commission not all evidence will be in a form admissible in a criminal court. In some cases the full extent of possible criminal conduct may not be established until the end of the Commission's investigation. It is often necessary to obtain additional admissible evidence after the conclusion of an investigation. In some cases, after considering the material provided by the Commission, the DPP may request the Commission to obtain additional evidence before finalising the DPP's advice or may recommend the commencement of prosecution subject to the Commission obtaining additional specified admissible evidence.

The obtaining of sufficient admissible evidence requires the allocation of significant resources both during and after an investigation. Where an investigation has concluded the Commission can no longer exercise its coercive statutory powers but must rely on the co-operation of witnesses to obtain statements and other required evidence.

Given the importance of ensuring the DPP has the necessary admissible evidence to properly consider whether prosecution action is warranted, the importance of ensuring that any prosecution action is supported by the appropriate admissible evidence, and the level of resources which the Commission needs to devote to this function, the Commission submits that the obtaining of admissible evidence for prosecution purposes should be recognised as one of its principal functions.

Please advise if you require any additional information in relation to this submission.

Yours sincerely



The Hon. Jerrold Cripps QC  
Commissioner

23 March 2009