

**Submission
No 13**

**PROSECUTIONS ARISING FROM INDEPENDENT
COMMISSION AGAINST CORRUPTION
INVESTIGATIONS**

Name: Mr Glen Unicom

Date Received: 4/08/2014



Mr Greg Smith SC MP
Chair
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie Street
SYDNEY NSW 2000

1 August 2014

Dear Mr Smith

Inquiry into prosecutions arising from Independent Commission Against Corruption investigations

Thank you for the opportunity to make this submission to the Committee.

I am currently a consultant to KordaMentha forensic, conducting corporate and regulatory investigations into misconduct, fraud and corruption.

I have had over thirty years' experience with ASIC and its predecessors with responsibility for the management and conduct of many of Australia's most complex and high profile corporate investigations and related litigation.

High profile investigations I have led include:

- (i) The investigation of the \$5.6 billion collapse of the HIH Insurance Group of companies following the referral of 56 matters from the HIH Royal Commission. This culminated in twelve former HIH officers being convicted of criminal offences, with eight of those officers being sentenced to terms of imprisonment. This included the sentencing of Brad Cooper to a total of eight years' imprisonment for corruptly giving a cash benefit to influence an officer of HIH under section 249B of the *Crimes Act NSW*; and
- (ii) The investigation relating to James Hardie arising from the Special Commission of Inquiry into the Medical Research and Compensation Fund. The successful completion of civil penalty proceedings resulted in a landmark decision which clarified the responsibilities of directors of public companies.

Set out below are my comments in relation to the terms of reference.

1. Whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence should be a principal function of the ICAC

For the reasons set out below, I consider preparing and referring a brief to the DPP for advice should be a principal function of the ICAC.

The *Independent Commission Against Corruption Act 1988* (ICAC Act) sets out in section 2A the principal functions of ICAC, which relevantly include:

“2A(a)(i) to investigate, expose and prevent corruption involving or affecting public authorities and officials”.

Further, section 14(1)(a) of the ICAC Act specifically includes *other* functions of the Commission, including:

“14(1)(a) to gather and assemble, during or after the discontinuance or completion of its investigations, 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 such evidence to the Director of Public Prosecutions”.

In discharging its obligations, ICAC conducts public hearings of allegations involving corruption, in order to investigate and expose wrongdoing in the full view of the community.

This has the effect of ‘naming and shaming’ individuals through exposing their corrupt conduct.

However, one of the principal functions of ICAC is also to *prevent* corruption.

The question this Committee may need to consider is whether ICAC will sufficiently meet its objective to *prevent* corruption if it does not also refer matters to the Director of Public Prosecutions Office (DPP), as is envisaged in section 14(1)(a) of the ICAC Act. In other words, does ICAC achieve a sufficient deterrent effect if prosecutions do not follow?

It is well recognised the strongest deterrents include:

- (i) criminal prosecution of wrongdoers; and
- (ii) confiscation of proceeds of their criminal activities.

In my view, in cases involving serious corruption and substantial profits, it is essential the fruits of the inquiry are assembled as a brief of evidence and submitted to the DPP for advice as to the availability of criminal charges against wrongdoers.

I submit ICAC is the appropriate party to perform the function of assembling the brief of admissible evidence for referral to the DPP.

An alternative might be to refer the material gathered in the conduct of the inquiry to the NSW Police for that agency to prepare a brief of evidence. I do not consider this to be an

efficient way of dealing with matters of this nature, given the complexities in identifying the relevant evidential material.

ICAC staff are best placed to assemble a brief in a more efficient and timely manner.

A failure to refer a brief to the DPP on a timely basis will result in a loss of confidence in ICAC and may bring into question whether merely 'naming and shaming' individuals is a sufficient outcome, particularly given that ICAC inquiries are very expensive and time consuming.

Confiscation of the proceeds of corrupt activities is also a key deterrent for potential wrongdoers. In my view, whilst the confiscation powers should still reside with the NSW Crime Commission, consideration may need to be given as to whether the current asset confiscation regime is adequate to fully address recovery of proceeds of corrupt behaviour.

2. The effectiveness of relevant ICAC and Director of Public Prosecutions processes and procedures, including alternative methods of brief preparation.

It is acknowledged the ICAC investigation team does a good job in gathering and assembling relevant material to enable counsel assisting an inquiry to conduct examinations of relevant witnesses.

However, the difficulty is determining from all the material presented at the inquiry the particular material which is admissible in evidence and presenting that material in the form of a brief for consideration by the DPP. It is this complex and time consuming phase which requires more timely and significant support.

I submit the ICAC investigation team needs to be sufficiently resourced to enable it firstly, to support counsel assisting and secondly, to prepare a brief of evidence concurrently with the conduct of the inquiry. The concurrent assembling of evidence by a specialist team will facilitate the timely presentation of a brief of evidence to the DPP.

In formulating an approach, ICAC could engage with other investigation agencies such as ASIC and the ACCC who routinely conduct examinations and compile a brief of evidence concurrently with conducting an investigation.

While some aspects of the brief preparation may need to be deferred until critical decisions are made in the investigation, such as who should be considered for prosecution and who should be witnesses, many aspects can be progressed concurrently. In particular the taking of statements of witnesses in admissible form often facilitates the identification of critical evidentiary issues and gaps and can bring a focus and clarity to the investigation.

Deferring the commencement of the preparation of a brief of evidence until the conclusion of an inquiry and tabling of a report, may result in significant delay and compromise the success of any subsequent criminal proceedings. Any delay also fails to meet community expectations in bringing timely prosecutions for cases involving serious corruption.

3. Adequacy of resourcing

The investigation and prosecution of corrupt conduct is inherently complex.

The key players are generally persons who occupy positions of trust and have significant power and influence with sufficient resources available to fund the legal defence of any allegations against them.

Further, corruption often occurs in covert circumstances. Establishing the requisite knowledge and criminal purpose of the corrupt conduct often requires the assistance and co-operation of some of the players involved in the criminal enterprise.

There are potential pitfalls in negotiating the co-operation of those involved in criminal conduct, resulting in the prosecution being compromised if the assistance of these individuals was not appropriately procured.

If the Committee is persuaded to recommend that ICAC should assemble the brief of evidence concurrently as proposed above, this will likely require an increase in ICAC's resources.

Further, establishing corrupt conduct to the prosecution standard of beyond reasonable doubt requires investigators and lawyers with highly specialised skills and experience. It is critical that appropriately skilled and experienced investigators and lawyers are available to ICAC, particularly in the most high profile and complex corruption cases.

During an investigation of corrupt conduct, complex evidentiary and strategic issues can arise. In complex cases, other investigation agencies such as ASIC may engage senior criminal counsel to advise and facilitate critical phases of the investigation, such as:

- (i) Procuring the co-operation of less culpable players; and
- (ii) Obtaining of evidence from witnesses on an induced basis.

At the pre-brief phase, the DPP is also kept informed of significant issues. The DPP's input is sought during this phase, when required.

4. Any other related matters

An important consideration for the Committee is whether examinations should be conducted in public or in private.

Whilst it is acknowledged that public inquiries facilitate the most transparent and timely exposure of corruption, I submit that on balance it is preferable to conduct examinations in private for the following reasons:

- (i) With appropriate confidentiality directions being given to the examinee, it will assist in preventing collusion between witnesses and falsification of evidence;
- (ii) Given that only the examinee and their legal representative will be permitted to attend the examination it will significantly reduce the costs of the inquiry;
- (iii) It will avoid potential damage to a person's reputation where no finding of corruption is made; and
- (iv) ICAC will still be able to discharge one of its key functions of exposing corruption through tabling the inquiry report in parliament.

A potential complication of conducting public examinations has recently emerged with the High Court's decisions in *X7 v Australian Crime Commission* [2013] HCA 29 and most recently *Lee v The Queen* [2014] HCA 20.

The issue of concern in these cases was whether publishing an accused's transcript of a compulsory examination may put at risk the prospect of a fair trial. The provision to the prosecution of the accused's defence may compromise the fundamental common law

principle requiring the prosecution to prove the guilt of an accused. The High Court has reiterated in the X7 case, the principle is so fundamental that "no attempt to whittle it down can be entertained".

If you would like to discuss any aspect of this submission or require further information, please contact me on [REDACTED] I would be happy to elaborate on my views before the Committee, if appropriate.

Yours sincerely

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Glen Unicomb