Submission No 15

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

Organisation: NSW Police Association

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

April 20, 2009

Dear Mr Terenzini,

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

I write to inform the Committee that the Police Association of NSW opposes any action to remove the protection given by section 37(3) of the *Independent Commission Against Corruption Act 1988* prohibiting the use of compulsorily obtained evidence provided under objection in disciplinary proceedings .

Although Police are not subject to the jurisdiction of the *ICAC Act* , we recognize the very significant legal and public policy issues that support the protection provided by section 37.

The ICAC has been given very significant coercive powers in order to achieve its legislative aims, namely:

(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.

The Commission does not have a prosecutorial role under the Act, nor does it have a role in the industrial arena. In order to allow it to efficiently investigate, expose and prevent corrupt behaviour, its coercive powers are tempered by granting protection to witnesses

who may self-incriminate. The Commission may, at the appropriate time, refer any matter to a "relevant authority" for further investigation (section 53). The result is that corrupt conduct and schemes may be exposed, while leaving the criminal investigations to police, and prosecutions to the independent prosecuting authority (the Director of Public Prosecutions).

In the industrial forum the burden of proof is such that the onus is on the employee to prove unfair dismissal (or harsh, unjust or unfair disciplinary penalty) and on the employer to establish, on the balance of probabilities (*Briginshaw v Briginshaw* (1938) 60 CLR 336), that the misconduct, which may fall short of criminal behaviour, was serious and wilful enough to justify the action taken against the employee. Where the employee has been convicted of serious criminal behaviour, that is, where the material facts of the circumstances leading to the disciplinary action will have been determined beyond reasonable doubt, the industrial processes will be heard in this context. It would be injudicious to address the industrial ramifications of the alleged criminal behaviour prior to their determination at law – particularly so as the burden and onus of proof are so different in the industrial forum.

The normal rules of evidence do not apply in the Commission's public hearings and counsel representing a witness are allowed to examine or cross-examine only with the leave of the Commissioner. In other words, for the most part, the evidence adduced by coercion remains untested. The Commission hearings do not provide the opportunity for the complete processes of the criminal law to take place, as it is not a criminal court. It is really like a standing royal commission.

The risk of the Commission becoming a defacto industrial forum could be very real – untested evidence adduced through coercion will be used by employers to discipline or remove employees who will then have to prove to the Industrial Relations Commission that such an action was harsh, unjust or unfair.

The role of the ICAC is stated in section 2A of the Act. Section 53 clearly implies that the Commission should refer matters requiring investigation and prosecution to the relevant authority to pursue. The Commission should not have its jurisdiction expanded beyond section 2A.

Yours faithfully,

Greg Chilvers
Director
Research and Resource Centre