

**Supplementary
Submission
No 13a**

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

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Further Submission to the Inquiry by the Committee on Prosecutions Arising from the Independent Commission Against Corruption

I submit the following further comments regarding the first and second issues of your inquiry, for the Committee's consideration:

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

In summary, most parties have submitted the gathering and assembling of evidence for a criminal prosecution should *not* be a principal function of the ICAC.

The main reasons put forward for this approach are as follows:

1. ICAC's principal mandate is to investigate and expose corruption through establishing the truth. In fulfilling its mandate, ICAC's investigation processes are not restricted by the rules of evidence
2. Lines of inquiry should be pursued irrespective of their potential to result in a successful prosecution
3. ICAC uses coercive powers in its investigations, including powers to: summon witnesses to appear and compel witnesses to answer questions.
4. The exercise of powers which result in the abrogation of the right to silence and right against self-incrimination are not available to law enforcement agencies such as the police
5. The escalation of the gathering and assembling of admissible evidence to a principal function of ICAC has the potential to compromise the capacity of ICAC to fully expose corruption and in effect result in ICAC becoming just another law enforcement agency

In response to these points I note the following:

- Subsection 14(1) of the ICAC Act already provides that a function of ICAC is the gathering and assembling of evidence that may be admissible in the prosecution of a person for a criminal offence. For over 25 years ICAC has performed this function with some notable achievements.
- Unless ICAC effectively performs its function under subsection 14(1) *during the course of its investigation into suspected corrupt conduct*,

including (at least to a significant extent) prior to completion of its report under section 74, ICAC may be unable to express an informed opinion in its report pursuant to subsection 74A(2)(a) as to whether advice should be sought from the DPP with respect to criminal prosecutions. ICAC may not be able to express such an opinion (which has the potential to cause significant reputational damage and create significant work for the DPP) unless it is satisfied that there is potentially admissible evidence that might be sufficient to prove a relevant offence.

- In addition, as stated in my first submission, bringing prosecutions against identified alleged offenders is a crucial means by which ICAC can achieve one of its *principal functions* of *preventing* corruption through general deterrence, in addition to seeking to secure justice on behalf of the public. The failure to bring such prosecutions, in a timely manner in appropriate cases, has the potential to undermine public confidence in ICAC and its findings.
- In my submission, the critical issue is not whether the gathering and assembling of evidence in admissible form should be a principal or ancillary function of ICAC. What is important is that ICAC is clearly identified as the party responsible for undertaking such an exercise and adequately resourced to perform this work, rather than looking to the DPP or the police to perform this function.
- ICAC officers have the skills to gather admissible evidence of suspected criminal offences as they conduct investigations into suspected "corrupt conduct" (which usually involves criminal offences) and are ideally placed to do so because of the invaluable knowledge of the relevant facts, witnesses and persons of interest they will acquire through the course of their investigation.
- If the task of assembling admissible evidence is given to another agency to perform after ICAC has completed its investigation and published its report, the result will invariably be unnecessary duplication (as officers from the other agencies grapple to adequately comprehend the often complex facts and voluminous evidence) and even greater delays in the commencement of criminal prosecutions. A better solution would be to ensure that ICAC is adequately resourced with the required specialised skills and experience to conduct this work itself.

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

One of the proposals I put forward in my initial submission to enhance the effectiveness of relevant ICAC and DPP processes and procedures was the assembly of evidence concurrently with the conduct of ICAC's inquiry. I did acknowledge in my submission that in certain cases some aspects of brief preparation may need to be deferred until the evidence has developed.

In contrast, the Police Integrity Commission ("PIC") submitted it is important to wait until the end of an investigation before an informed assessment can be made as to what evidence should be compiled for the purpose of prosecution. In advancing its contention the PIC states at page five of its submission, as follows:

".....the common element in all inquiries conducted by commissions such as ICAC and the PIC is that the nature of the misconduct being investigated may not fully reveal itself until the end of the investigation and, until that time, it is inimical to the task being undertaken by the inquirers to expect the evidence to be simultaneously gathered in admissible form in order to support a prosecution for a potential as yet unidentified criminal charge."

In weighing up the practicality of preparing evidence at an early stage of an investigation, it might be worthwhile for the Committee to have regard to the way ASIC undertakes its investigations, which are often undertaken for regulatory purposes but also regularly result in criminal prosecutions.

ASIC has coercive powers akin to ICAC enabling it to:

- commence an investigation if there is a suspected contravention of corporations and related legislation; and
- require parties to produce documents and answer questions notwithstanding they may be incriminating.

ASIC may commence an investigation where the suspects and suspected contraventions of the law are unclear, or if identified at the commencement of the investigation, may ultimately change as the investigation progresses.

Similar to ICAC, ASIC is not bound by the rules of evidence in conducting compulsory examinations of persons or in taking various forms of administrative action for regulatory or enforcement purposes (e.g. banning persons from engaging in certain activities).

In utilising its investigation powers ASIC will gather documentary evidence, examine witnesses and prepare draft statements as the investigation progresses.

As indicated in my initial submission, I was the operational head of both the HHH and James Hardie investigations. I was also the principal investigator responsible for the Special Investigation into the collapse of the Spedley Group of Companies.

Whilst the precise nature and full range of misconduct may not have been apparent until the conclusion of these investigations, the identification of relevant and admissible evidence, including the preparation of draft witness statements, did not have to wait until their conclusion.

Indeed, in some cases it may be significantly quicker and easier for ICAC to take written statements from persons prior to holding its public inquiries or releasing its reports, as persons (including those individuals who are clearly witnesses) may be less willing to co-operate after those events.

Whilst it is acknowledged that a tailor made strategy needs to be deployed for each investigation, many aspects do lend themselves to being progressed concurrently.

It may also be desirable for the Committee to consider whether to replicate for ICAC some of the legislative provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), which assist ASIC in assembling briefs of admissible evidence, such as the following:

- pursuant to subsections 19(2)(a) and 49(3) of the ASIC Act, ASIC can require persons to provide "all reasonable assistance" in connection with an investigation or potential prosecution (subject to significant safeguards) and these powers are particularly useful in seeking to obtain witness statements from persons who, for one reason or another¹, are

¹ Reasons include confidentiality and potential breach of D&O insurance policy conditions regarding admissions

unwilling to volunteer their assistance in relation to the investigation or prosecution of other persons;

- pursuant to sections 76 to 79 of the ASIC Act statements made by persons at compulsory examinations are admissible in any administrative, civil or criminal proceedings (subject to significant safeguards) and these provisions are very valuable in securing admissible evidence from persons who are unwilling or unable to testify; and
- section 80 of the ASIC Act and section 1305 of the *Corporations Act 2001* (Cth) contain useful provisions to facilitate the admissibility of documents and copies of documents.



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