

**Submission
No 14**

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

Organisation: NSW Fire Brigades
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Your Reference:

File No.: **NFB/03966**

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9 April 2009

Mr Frank Terenzini MP
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000



Dear Mr Terenzini

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

Thank you for the invitation to make a submission to the inquiry into proposed amendments to the *Independent Commissions Against Corruption Act 1988* (NSW) (**ICAC Act**).

I would like to take this opportunity to make a submission on behalf of the New South Wales Fire Brigades (**NSWFB**). I will address questions one and two of the terms of reference. I do not believe question three is relevant to the NSWFB.

1 Question One of the Terms of Reference

Section 37 of the ICAC Act

1.1 Section 37(1) of the ICAC Act provides that a witness summoned to attend, or appearing before the Independent Commission Against Corruption (**the Commission**) at a compulsory examination or public inquiry is not entitled to refuse: to be sworn or to make an affirmation¹; to answer any question relevant to the investigation put by the Commissioner or other presiding person²; or to produce any document or other thing in the witness' custody or control which is required to be produced under summons or by the person presiding³.

1.2 Section 37(2) of the ICAC Act states as follows:

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 any other ground.

¹ ICAC Act, s 37(1)(a).

² Ibid, s 37(1)(b).

³ Ibid, s 37(1)(c).

- 1.3 This provision removes the protection against self incrimination and enables the Commission to obtain full disclosure from a witness. However, section 37(3) of the ICAC Act protects a witness from the consequences of the abrogation of their right against self incrimination, by limiting the future use of the evidence. It is in the following terms:

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 evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.

Proposed amendment

- 1.4 The first proposed amendment is to remove the prohibition in section 37 of the ICAC Act of the use of compulsorily obtained evidence provided under objection to the Commission in disciplinary proceedings. The prohibition would then only apply to the use of the evidence in civil or criminal proceedings.
- 1.5 In order for such an amendment to be effective, the legislation would need to demonstrate a clear intention for evidence given by a witness to the Commission under objection to be admissible in disciplinary proceedings. This is because ‘the privilege against self incrimination is deeply ingrained in the common law’⁴ and will only be taken away if ‘a legislative intent to do so clearly emerges, whether by express words or necessary implication’⁵. Whilst it is possible that an intention for the evidence to be admissible in disciplinary proceedings would be implied by reason of the amendment, I believe it would be best for this to be expressed in the ICAC Act.
- 1.6 The Courts have interpreted provisions of statutes which render evidence inadmissible in civil or criminal proceedings, to include disciplinary proceedings.
- 1.7 For example, in *Police Service Board v Morris*⁶ Gibbs CJ provided that for some purposes the distinction between disciplinary and criminal proceedings may be important. However, the distinction is not important when considering provisions abrogating the privilege against self incrimination.⁷
- 1.8 In *Hartmann v Commissioner of Police*⁸, the Supreme Court of New South Wales Court of Appeal considered whether section 17(2) of the *Royal Commissions Act 1923* (NSW) which rendered evidence given by a witness to the Royal Commission inadmissible in any ‘civil or criminal proceedings’ excluded the admissibility of this evidence in proceedings before the Government and Related Employees Appeal Tribunal.

⁴ *Sorby v The Commonwealth* (1983) 152 CLR 309.

⁵ *Ibid.*

⁶ *Police Service Board v Morris* (1985) 156 CLR 397.

⁷ *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141, discussing *Police Service Board v Morris* (1985) 156 CLR 397.

⁸ *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141.

- 1.9 The Court unanimously found that the expression ‘any civil or criminal proceedings’ encompassed the full category of possible future proceedings.⁹ The Court held that the privilege against self incrimination existed to protect against the penalty of dismissal from employment and section 17(2) of the *Royal Commissions Act 1923* (NSW) provided a protection against the use of the evidence in future proceedings concerned with dismissal from employment.¹⁰ Further, the Court stated ‘if the legislature intended to diminish the otherwise wide scope of the words “in any civil or criminal proceedings” so as to exclude disciplinary proceedings, it was necessary, expressly or by necessary construction of the Royal Commission (Police Service) Act, for that to appear’.¹¹

Will the proposed amendment prevent information concerning corrupt conduct from being obtained?

- 1.10 I believe consideration needs to be given to whether the proposed amendment will deter people from coming forward with information in the first place and whether they can be compelled to provide information.
- 1.11 I note the Commission has the power to require a public authority or public official to provide information, for the purposes of an investigation.¹² The term ‘public authority’ includes the NSWFB¹³ and the term ‘public official’ includes employees of the NSWFB¹⁴. The Commission also has the power to require any person to produce documents, for the purposes of an investigation.¹⁵
- 1.12 However, these requirements must be set aside by the Commission if it appears to the Commission that the person has a ground of privilege and it does not appear to the Commission that the person consents to compliance with the requirement.¹⁶ As the privilege against self incrimination has been found to cover disciplinary proceedings¹⁷, a requirement to provide information or produce documents may currently be set aside on this basis.
- 1.13 However, the proposed amendment removes the application of the privilege against self-incrimination in respect of disciplinary proceedings. Therefore, the Commission’s ability to obtain evidence will not be affected.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid, s 21(1).

¹³ Ibid, s 3, definition of ‘public authority’ includes a ‘statutory body representing the Crown.

¹⁴ Ibid, s 3, definition of ‘public official’ includes ‘an individual who constitutes or is a member of a public authority’ and ‘a person in the service of the Crown or of a public authority’.

¹⁵ Ibid, s 22(1).

¹⁶ Ibid, s 24(2).

¹⁷ *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141, discussing *Police Service Board v Morris* (1985) 156 CLR 397.

Will a person obtain protection under other provisions of the ICAC Act or any other Act?

- 1.14 Section 109(5) of the ICAC Act states ‘no criminal or civil liability (apart from this Act) attaches to any person for compliance, or purported compliance in good faith, with any requirement made under this Act’. This provision applies to any compliance under the ICAC Act, including the provision of evidence.
- 1.15 As the term ‘civil or criminal proceedings’ has been interpreted to include disciplinary proceedings, it is likely that the phrase ‘criminal or civil liability’ would also include liability in disciplinary proceedings. To be able to obtain protection from such liability, the compliance must be in good faith. The term ‘good faith’ means propriety or honesty.¹⁸ So long as a person’s evidence to the Commission is truthful, I believe it would be found to be in good faith.
- 1.16 However, I do not believe any liability in disciplinary proceedings would be due to the person’s compliance with a requirement under the ICAC Act, it would be due to the pre-existing facts.
- 1.17 In *X v Australian Prudential Regulation Authority*¹⁹, the High Court of Australia considered a provision of the *Royal Commission Act 1902* (Cth) which made it an offence to cause or inflict any violence, punishment, damage, loss or disadvantage to any person for or on account of their assistance to a Royal Commission. The Court unanimously found that an offence was not committed by the Australia Prudential Regulation Authority in using evidence given by a person to the Royal Commission to propose to disqualify them from holding their positions.
- 1.18 Kirby J found that the use of the evidence given by the witness to the Royal Commission for administrative, disciplinary or other purposes of the law was not for or on account of the evidence.²⁰ Instead, it was for or on account the pre-existing state of affairs which such evidence helped to prove or disprove.²¹ That pre-existing state of affairs had a reality independent of the evidence.²²
- 1.19 Similarly, I believe that any liability in disciplinary proceedings would not be due to a person’s compliance with a requirement of the ICAC Act. Rather, it would be due to the pre-existing state of affairs. Therefore, section 109(5) of the ICAC Act would not prevent the evidence from being used against the person in disciplinary proceedings.

¹⁸ Encyclopaedic Australian Legal Dictionary, definition of ‘good faith’.

¹⁹ *X v Australian Prudential Regulation Authority* (2007) 223 ALR 421.

²⁰ *Ibid*, at [129].

²¹ *Ibid*.

²² *Ibid*.

- 1.20 A disclosure made in accordance with the *Protected Disclosures Act 1994* (NSW) (**Protected Disclosures Act**), will be protected under provisions of that Act. However, in order to be protected by that Act, a disclosure must be made voluntarily.²³ A disclosure made by a person to the Commission by compulsion and under objection would not be considered to be made voluntarily. Therefore, it would not obtain protection under the Protected Disclosures Act.

Utility of the proposed amendment for the NSWFB

- 1.21 Under clause 35(1)(a) of the *Fire Brigade Regulation 2008* (NSW) (**Fire Brigade Regulation**), a firefighter is guilty of misconduct if they contravene a provision of Part 3. Part 3 of the Fire Brigade Regulation stipulates the functions of firefighters. Part 3 includes, amongst other things, clauses regarding honesty and truthfulness²⁴, unacceptable behaviour²⁵, damage or misuse of departmental property²⁶ and solicitation, acceptance or retention of rewards or other benefits²⁷. Under clause 44 of the Fire Brigade Regulation, the NSWFB can hold a formal inquiry into a charge of misconduct.
- 1.22 It is possible that evidence given by a firefighter (or other employee of the NSWFB) compelled to appear before the Commission, may indicate that he or she is guilty of misconduct. If the proposed amendment is made, this evidence would be admissible in a formal inquiry regarding a charge of misconduct brought against the firefighter, pursuant to clause 44 of the Fire Brigades Regulation.
- 1.23 If the firefighter's own evidence of their misconduct is admissible, it may prevent the need for the officer conducting the inquiry to obtain further evidence or documents from other firefighters. This would bring greater efficiency to the inquiry process. It may also be possible for the inquiry to make a finding of misconduct, which could not otherwise be found.

2 Question Two of the Terms of Reference

Proposed Amendment

- 2.1 The second proposed amendment is to remove the prohibition in section 37(3) of the ICAC Act of the use of compulsorily obtained evidence provided under objection to the Commission, in civil proceedings generally, or in a specific class of civil proceedings, for example proceedings involving the recovery of funds or assets that were corruptly obtained. I will only address the proposal regarding proceedings involving the recovery of funds or assets that were corruptly obtained, as this is the most relevant to the NSWFB.

²³ Protected Disclosures Act, s 9(1).

²⁴ Fire Brigade Regulation, reg 16.

²⁵ Ibid, reg 18.

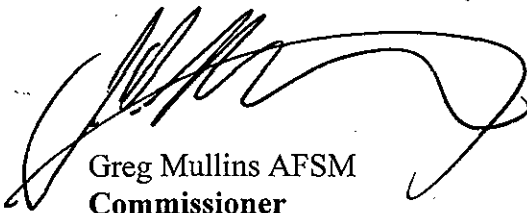
²⁶ Ibid, reg 19.

²⁷ Ibid, reg 22.

Utility of the proposed amendment for the NSWFB

- 2.2 If assets of the NSWFB are corruptly obtained, their recovery is governed by the *Criminal Assets Recovery Act 1990* (NSW) (**Criminal Assets Recovery Act**). Proceedings under this Act for a restraining order or a confiscation order are civil proceedings.²⁸
- 2.3 Under section 10 of the Criminal Assets Recovery Act, a restraining order may be obtained to prevent a person disposing, or attempting to dispose of, or dealing, or attempting to otherwise deal with, an interest in property.
- 2.4 Under section 22 of the Criminal Assets Recovery Act, an order forfeiting to, and vesting in, the Crown all or any interests in property that are, or are proposed to be, the subject of a restraining order, may be obtained.
- 2.5 Under section 27 of the Criminal Assets Recovery Act, a proceeds assessment order may be obtained. This requires a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived by the person from an illegal activity, within the last six years.
- 2.6 Assets subject to a forfeiture order under section 22 or a proceeds assessment order under section 27 are to be paid to the Proceeds Account.²⁹ This account is established and used by the Treasurer.³⁰ The NSWFB can then apply to the Treasurer for the recovery of any of its assets corruptly obtained.
- 2.7 A possible scenario in which the proposed amendment would be of use, is if the Commission does not make findings that particular assets were corruptly obtained. Although not found to be corruptly obtained by the Commission, these assets may still have been obtained as a result of serious crime related activities. Therefore it may be necessary to rely on a witness' evidence to the Commission regarding these assets, to obtain orders under the Criminal Assets Recovery Act.

Yours sincerely



Greg Mullins AFSM
Commissioner

²⁸ Criminal Assets Recovery Act, s 5(1).

²⁹ Ibid, ss 23(2) and 27(9).

³⁰ Ibid, s 32.