

**REVIEW OF THE INSPECTOR'S REPORT TO THE
PREMIER: THE INSPECTOR'S REVIEW OF THE
ICAC**

Organisation:

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Position:

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Comments on Submission by Department of Premier and Cabinet

The Hon David Ipp AO QC

- 1) I have already provided the Committee with my principal submissions in response to the Inspector's report. As requested, these comments are my response to the submissions made by the Department of Premier and Cabinet (DPC).

Basic shortcomings in the DPC's method of operation

- 2) While I respect the general work of the DPC and have due regard for their skill and expertise in their own field, their present assay into the "best practice" organization of an anti-corruption commission such as ICAC is misplaced. The DPC have no experience of controlling or even managing an anti-corruption agency, and no experience of conducting investigations into serious corruption, inquisitorial inquiries, or even adversarial inquiries. The DPC have ventured, without the requisite know-how and understanding, into territory that is highly specialized.
- 3) The DPC have not even made a study of the way that ICAC presently operates. This lack of knowledge and understanding permeates and adversely affects the entire body of their submissions.
- 4) In my principal submissions I observed that there were two basic streams running through the inspector's report. There are also two basic streams running through the DPC's submissions. The first is that there is something seriously wrong with the operation of ICAC. The second is that the powers of the Commissioner and of ICAC need to be curtailed severely and the entire character of the agency needs to be changed.
- 5) The first stream is fallacious. Through several operations, including – for example - Operations Jasper and Acacia, ICAC has exposed systemic corruption of a most serious kind. This has resulted in a change in the attitude of politicians and bureaucrats who have sought further education on ethical questions and who have become far more careful to conduct themselves within the law. I deal below in detail with the second stream.
- 6) No other anti-corruption agency in Australia has achieved anything like this success in multiple operations. I ask rhetorically: Why then is there such a pressing desire to make far-reaching changes in its structure and then to base those changes on agencies that do not have a history of achievements that is comparable with that of ICAC?

- 7) There has been widespread criticism of ICAC, largely by those persons who have been found to have engaged in corrupt conduct, and certain media outlets who for motives that are not clear, have conducted in a misleading but intensive campaign against ICAC. In my submission these criticisms are unfounded. What needs to be borne in mind in regard to this criticism is that it is open to all who have objections to ICAC's findings to seek judicial review in the courts. The Independent Panel comprising the Hon Murray Gleeson AC and Bruce McClintock SC considered this manner of holding ICAC accountable and did not propose any change.
- 8) Many have taken judicial review proceedings and have failed. The most notable successful party was Ms Cunneen, and she succeeded on a point of law (not involving judicial review of factual findings but on a jurisdictional issue) never previously argued by those who had previously tried to overturn ICAC findings, and which was not even argued by Ms Cunneen's counsel.
- 9) This history discloses no evidence of failure on the part of ICAC to achieve its statutory purposes. In my respectful submission, there is no reasonable ground that justifies any significant change to the ICAC Act.

Other defects in the DPC's method of operation

- 10) In establishing what in their view is the "best practice" for ICAC, the DPC has selected organizational features from various agencies. They expressly mention the proposed Law Enforcement and Conduct Commission (LECC), the NSW Electoral Commission (NSWEC), the Queensland Crime and Corruption Commission (QCCC), and the Victorian IBAC. This is an unfortunate method as each of these agencies has different functions, requires different expertise is of a different size to ICAC and none has a consistent history (over more than 25 years) of successful investigative operations. The following are some of the problems that arise in this connection:

The LECC

- (a) The proposed LECC combines the functions currently carried out by the current PIC, the Police Division of the Ombudsman and the Inspector of the Crime Commission. Self-evidently, the LECC will have to be a larger agency than ICAC as it will undertake operations presently carried out by three other agencies. The expertise required by the LECC staff will differ significantly as between its three separate sections. The work to be done by it will not be the same as that undertaken by ICAC. It is not an agency that can reliably provide an appropriate example for an efficient organizational structure of ICAC.
- (b) I would add that many of the recommendations made by Mr Tink

(who reported on the proposed structure for LECC) were based on two “needs”, The first was a need to “establish an organizational structure that will support a smooth transition to a combined model”. The second was a need to “develop a cohesive culture within the new commission and enable it to respond to the opportunity that a combined model presents for the efficient and effective allocation of work between divisions”. Importantly, these “needs” do not apply to ICAC. ICAC has long had a cohesive culture within its divisions.

- (c) Thus, apart from their other defects, the DPC’s recommendations (including that relating to the “deliberative Commissioner’s Council”), based on these “needs”, are quite inappropriate for ICAC.
- (d) Further, many of the DPC recommendations derived from the LECC model are novel and untried. Moreover, the DPC has not produced any evidence tending to establish that these recommendations will result in an improvement or are “best practice” for ICAC.
- (e) The DPC recommendations are merely products of speculation, and speculation by persons who lack any relevant experience or know-how, without any first-hand (or, indeed, any) investigation of the actual detail relating to the day-to-day management of ICAC.

The NSWEC

- (f) The NSWEC is a much smaller agency than ICAC and its work is very different. It is simply not comparable to ICAC and it is absurd to suggest that what works at the NSWEC is something that should be applied to ICAC. It is like saying that an engine should be used for a racing car because it works well in a lawn mower.

The QCCC

- (g) The QCCC is a much larger agency than ICAC. Its structure does not support the structure contended for by the DPC. Additionally, its work and powers are different. Its focus is broadly dispersed, unlike ICAC which concentrates on corrupt conduct alone. For example, the QCCC investigates serious crime and police misconduct. This has led to a paucity of public inquiries by the QCCC into corruption. In recent times – according to what the QCCC has made public - it has investigated university plagiarists and an official selling fraudulent drivers’ licenses, and not much else. Compare this with ICAC’s recent record of investigating serious corruption. The DPC’s lack of understanding as to what ICAC requires is demonstrated by its reliance on the structure of the QCCC in making recommendations for ICAC.

The IBAC

- (h) The structure of IBAC also does not support the structure contended for by the DPC. Additionally, IBAC is a far smaller agency than ICAC. Its powers of investigation and the extent of its jurisdiction are significantly more limited than those of ICAC. IBAC has only relatively recently been created and is yet to establish a track record. Much of its structure has been derived from that of ICAC. IBAC should not have been used as a comparison for the purposes of considering what, if any, changes should be made to ICAC to achieve “best practice”.

A “panel” of commissioners

- 11) The DPC suggest that ICAC should be led by a “decision-making body, invested with the statutory powers of the Commission, constituted by a panel of Commissioners (or a Commissioner and Deputy Commissioners), rather than by a single Commissioner”. This egregious recommendation, if adopted, would lead to a bureaucratic monstrosity. It is a recipe for dissension, would cause a loss of collegiality, and would seriously prejudice strong leadership and consistent policy-making. It would obstruct urgent decision-making, which is required in an agency such as ICAC. It would make ICAC, presently an agency with less than 125 employees, an unnecessarily expensive and top-heavy absurdity.
- 12) This recommendation by the DPC for a “deliberative Commissioner’s Council” is contrary to the views expressed by the Gleeson/McClintock Independent Panel (in its July 2015 report). The Panel, unlike the DPC, was constituted by persons who have a deep degree of skill, experience and understanding of the workings of an agency such as ICAC.
- 13) The Panel specifically considered concerns that a decision to hold a public inquiry may be wrong or inappropriate (p 57 Panel report) and whether there should be any additional requirements which it is necessary to satisfy before the ICAC decides to hold a public inquiry (p 59 Panel report). The Panel considered the present scheme and the requirements of s 31 of the ICAC Act to be adequate and saw no merit in adding a further layer of decision-making to the process (p 61 Panel report). I strongly endorse this view. The issue was fully ventilated before the Panel and there is no rational basis that justifies a departure from its recommendation.
- 14) Curiously, the DPC submissions omit any reference to the relevant parts of the structures applicable to the IBAC, the QCCC, and the like agencies in Western Australia (the WACCMC) and South Australia (the SA ICAC). In regard to the IBAC and QCCC, any powers exercised by deputy or other commissioners are those delegated by the commissioner. Neither agency has a “panel” of commissioners that

requires unanimous or majority approval before particular powers can be exercised. The WACCMC and SA ICAC models offer no support for the DPC proposed structure.

- 15) Recommendation 11 of the Andrew Tink report gives the commissioner the final say if matters cannot be resolved by consensus. This has been completely ignored in the DPC submission.
- 16) According to the DPC submission, the following are additional potential benefits of such a structure:
 - (a) The proposed model does not require the commissioner to have or quickly develop skills in managing the organizational aspects of the agency.
 - (b) Multiple Commissioners mean that “a more diverse set of skills and experiences may be brought to bear on Commission deliberations”, including “policy, financial investigation and audit skills”.
 - (c) Separation of the statutory decision-makers (the Commissioners) from the organisation (the executive manager and staff) also “allows for the better use of the particular skill sets of each person to be aligned with particular functions. For example, former judicial officers would be responsible for making legal decisions based on submissions, while an executive manager...would be responsible for the day-to-day running of the organisation”;
- 17) These so-called benefits are illusory.
- 18) The DPC seems to be unaware, and certainly makes no reference to the fact that ICAC has a Deputy Commissioner, one of whose principal tasks is to manage staff issues), as well as executive directors of the investigation, corruption prevention, legal and corporate services divisions. The Deputy Commissioner, and the executive directors of the different divisions are experts in their respective fields and bring vast experience and know-how to their respective roles. Their advice is frequently sought, in regard to their areas of speciality, by agencies throughout Australasia, Asia and Africa.
- 19) All the important decisions of ICAC are taken after full (and minuted) consultation with all these executive officers.
- 20) Thus, nothing can be added to the existing structure that would give additional assistance to a new commissioner to “quickly develop skills in managing the organizational aspects of the agency”. The existing executive already provides that assistance.
- 21) Further, there already exists an unparalleled set of diverse skills and experiences that in fact *are* “brought to bear on Commission

deliberations”, including “policy, financial investigation and audit skills”. The addition of new, inexperienced, commissioners would detract, rather than add, to the task of a new commissioner.

- 22) The “better use of the particular skill sets” of each of the existing members of the ICAC executive is currently deployed through the existing structure. The Deputy Commissioner in effect fulfills the role of an “executive manager” who is “responsible for the day-to-day running of the organization”.
- 23) The notion that the proposed new structure would add something to the existing set-up is false and displays a regrettable lack of knowledge on the part of the DPC of what actually occurs in regard to the existing management of ICAC.
- 24) The DPC asserts that a panel of Commissioners may “assist in alleviating tensions that can arise between a single Commissioner and a single Inspector” because “a panel structure reduces the extent to which the entire Commission or Inspectorate is identified with a particular individual”. I have in my principal submissions dealt with the problem that has arisen because of these tensions. I repeat that during my time as commissioner there were no tensions whatever and, to my knowledge, there was no such tension involving any of my predecessors. The existing structure, thus, is not the cause of the tensions. The tensions plainly arise because of a personality clashes. No structure can avoid those. Care should be taken, before interfering with what has proved to be a highly successful and internationally admired and respected anti-corruption agency without identifying the person and office whose conduct has been responsible for these problems.
- 25) One “potential benefit” put forward for the proposed structure is that it would be a check against “agency capture”. There is no evidence or even suggestion in the DPC submission (or any other submission made to the Committee) that any ICAC commissioner has been the subject of “agency capture”. The proposition that commissioners have been “captured” by ICAC is entirely without foundation and is indeed absurd. Any person who has had any experience of dealing with any of the past commissioners (and it seems that the DPC has not) would dismiss the idea out of hand. The proposition is based entirely on a combination of ignorance and wild speculation.
- 26) Finally, the DPC asserts that the proposed creation of a structure with multiple commissioners would be consistent with “the Government’s commitment to the maintenance of a strong and effective Commission.” This appears to be a strikingly disingenuous comment. The headline in an article on p 6 of The Australian newspaper of 31 August 2016, dealing with these particular DPC recommendations is “Bid to dilute commission powers”. There is much to support this interpretation of

the intent underlying the DPC's recommendations. They are indeed disturbing to any person who wishes to maintain a strong and effective ICAC.

- 27) According to that article, the changes proposed by the DPC are so fundamental they "might require the commissioner to reapply for her job". In substance, the proposed recommendations are extraordinarily drastic and far-reaching. They would make it very unlikely that any experienced Supreme Court judge would, in the future, be prepared to accept the position of commissioner of ICAC. A sad state of affairs indeed.

The application of the GSE Act – the loss of independence and other issues

- 28) Turning to a different recommendation, the DPC proposes that the GSE Act should cover ICAC staff. Not being subject to the GSE Act preserves ICAC's independence. It is fundamental to ICAC that this independence is preserved.
- 29) Bringing ICAC staff within the GSE Act is contrary to what was intended when ICAC was established. In the May 1988 second reading speech, the Premier noted that the commissioner was to have "total direction and control of the commission" and "the structure of the commission will, of course, be a matter for the commissioner..." (Hansard 676). I repeat, this is a significant aspect of ICAC's independence.
- 30) Bringing ICAC staff under the GSE Act would, as recognized in the DPC submission (p 17), create a conflict of interest as the Public Service Commissioner, the Public Service Advisory Board and the Public Service Commission are subject to ICAC's jurisdiction. It is inadequate to address this, as suggested in the DPC submission, by having some vague provision that ICAC is not required to comply with any provision of the GSE Act "if it reasonably considers that to do so would prejudice an investigation."
- 31) Generally, it is of great importance that the Commissioner continues to bear ultimate responsibility for the management, direction and control of ICAC staff. This is needed to ensure proper executive control over these matters and for the purposes of maintaining and encouraging morale. The present structure, with the Deputy Commissioner having immediate responsibility for staff and the commissioner exercising an overall supervisory function, is ideal.

Sundry other recommendations

- 32) The suggested reforms in Part 4 of the DPC submission (public record of the outcome of subsequent legal action) ignore the fact that ICAC investigations are separate from criminal prosecutions and that the outcome of the latter has no bearing on corrupt conduct findings or factual findings made by the ICAC. Here again, a lack of understanding

is demonstrated of the ICAC Act and the manner in which ICAC is by law required to carry out its functions.

- 33) ICAC already publishes the outcome of prosecution actions on its website in two separate places. One is on the first page of its website. The other is on the webpage for the relevant investigation (this page also gives access to the investigation report and other information relevant to the investigation, including transcripts). Legislation is not required for this purpose.

Conclusion

- 34) The DPC recommendations, in substance, will result in resources being removed from anti-corruption activities that have proved to be startlingly effective and allocated to senior management – this at a time when ICAC’s resources have been significantly reduced. I submit that this would be an indefensible consequence.
- 35) In my previous submissions I referred to the international and national reputation of ICAC, and the fact that is a drawcard for like agencies throughout Australasia, Asia and Africa who wish to study what they regard as “best practice”. The DPC recommendations, if adopted, will emasculate ICAC, result in the loss of independence, seriously inhibit ICAC from effectively carrying out its statutory functions and destroy its reputation,.
- 36) One must ask: why is this end being sought? The answer has to be found in the consequence that will follow should the DPC’s recommendations be accepted. These are obvious. Public inquiries, such as those in Operations, Jasper, Acacia, Spicer and Credo will become things of the past. Corruption on the part of politicians, to all intents and purposes, will be protected from exposure. ICAC will be confined to investigations of less important instances of corruption – such as those involving local authorities and universities. Is this what is desired by those who have the relevant legislative responsibility?

The Hon David Ipp AO QC
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