

**Submission
No 20**

**INQUIRY INTO PROTECTIONS FOR PEOPLE WHO
MAKE VOLUNTARY DISCLOSURES TO THE
INDEPENDENT COMMISSION AGAINST
CORRUPTION**

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SUBMISSION TO COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION – INQUIRY INTO PROTECTIONS FOR PEOPLE WHO MAKE VOLUNTARY DISCLOSURES TO THE ICAC

A. INTRODUCTION

1. The Terms of Reference for the Independent Commission Against Corruption (ICAC) Parliamentary Committee's inquiry refer to:

whether the law should be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to the ICAC for the purposes of the ICAC's functions.

It appears that this sort of provision would be unique in Australia. Various similar analogues are discussed below, but none creates the sort of broad immunity for 'whistleblowers' apparently contemplated.

2. The inquiry's terms of reference mention immunity from "*criminal, civil or disciplinary liability*". Immunity from '*civil*' liability would not seem to be justified, unless that is a reference only to civil penalty provisions. Civil rights (such as rights to compensation) are a *specie* of property vesting in individuals. It is not good public policy that the State should grant to a person, presumptively found to be corrupt, an immunity at the expense of those who would otherwise be able to bring civil suits to seek redress for the particular harm done to them as a result of the corrupt conduct. This would be to impose the cost of the public good (associated with exposing corruption) onto private individuals. This is to be distinguished from an immunity from criminal liability, where the State is in fact the litigating party, albeit on behalf of its citizens.
3. The Bar does not support an extension of immunity to disciplinary proceedings. Those proceedings (such as professional conduct proceedings, or public service employment related administrative proceedings) have a protective purpose. The consequence of granting immunity in relation to those proceedings might be to leave a person known to be corrupt in a position to exercise a public function or trust (such as a senior public service role or practicing as a legal practitioner).
4. As to whether criminal immunity is justified for people who make voluntary disclosures to ICAC, the Bar Association does not take any position. There are obvious potential implications for the rule of law and public confidence in the justice system if corrupt politicians or bureaucrats are seen to be entitled to special treatment if they report their own wrongdoing. That interest will need to be balanced against the desirability of encouraging people to report corruption to ICAC. The balancing of competing interests in this area is a matter for the Committee, and the Parliament.

5. The Committee's consideration will be informed by the existing indemnities and immunity from prosecution in criminal law in New South Wales. These are currently dealt with in sections 32 (Indemnities) and 33 (Undertakings) of the *Criminal Procedure Act 1986 (NSW)* (CP Act). These provisions both involve the relevant act (that is, the indemnity or undertaking) being carried out by the NSW Attorney General. The decision to grant an indemnity or undertaking is discretionary.
6. A question to be considered is whether the power to grant immunity should rest with the ICAC or the Attorney General (or with some other office). There would be arguments for and against empowering an ICAC Commissioner with such powers. The ultimate aim of the ICAC is to investigate, expose and prevent corruption involving or affecting public authorities and public officials (and to educate about corruption and its detrimental effects): see s 2A of the *Independent Commission Against Corruption Act 1988 (NSW)* (ICAC Act). Thus an ICAC Commissioner might feel justified in deciding to grant immunity resulting in an outcome whereby corruption is exposed, but not prosecuted, as this fulfills the objects of the ICAC Act.
7. On the other hand, an Attorney General, exercising discretion under ss 32 or 33 of the CP Act, might well have regard to a broader range of public policy factors when considering the exercise of that discretion. For example, an Attorney General might, for policy or practical reasons, decline to grant immunity to a principal wrongdoer just because they made a voluntary disclosure to ICAC.
8. This paper addresses in Section B the current protections under the ICAC Act. In Section C it contains a brief survey of the position adopted by other regulators. The position of the ACCC, dealing with cartel conduct, is particularly apposite.
9. It is hoped that this material will assist the Inquiry.

B. CURRENT PROTECTIONS UNDER THE ICAC ACT

Privileges and objections: Investigation stage

10. Sections 24 and 25 of the ICAC Act preserve privileges against compulsory requirements of the Commission to produce a statement, information, document or thing, or in respect of the Commission's powers of entry, inspection and copying.
11. Section 26 deals specifically with the privilege against self-incrimination, and provides that if a statement or document tends to incriminate the person and the person objects to production, it cannot be used in proceedings against the person: s 26 of the ICAC Act.

Privileges and objections: Inquiry stage

12. A witness at a compulsory examination or public inquiry can take an objection to answers given or documents produced and such answers and documents will then not be admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings: ss 37(3), 37(4)(b) and 38 of the ICAC Act.

13. However, a witness summoned to appear is not entitled to refuse to answer any question put by the Commissioner or other presiding person, or to refuse to produce any document which is in his or her custody and which the witness is required to produce by the summons or the person presiding: s 37(1) of the ICAC Act.
14. This is so even if:
 - a. the document or answer may incriminate or tend to incriminate the witness;
 - b. the document or answer is subject to legal professional privilege (unless it relates to the appearance of a person at an ICAC examination or inquiry: s 37(5)); or
 - c. the document or answer is subject to any other privilege or duty of secrecy, other restriction on disclosure: s 37(2) of the ICAC Act.

Immunity from prosecution

15. The ICAC may recommend to the Attorney General that a person be granted an indemnity from prosecution: s 49(1) of the ICAC Act.
16. The ICAC may also recommend to the Attorney General that a person be given an undertaking that an answer, statement or disclosure in proceedings before the ICAC (including a compulsory examination or public inquiry or other investigative activity), or the fact of disclosure or production of a document in such proceedings, will not be used in evidence against that person: ss 49(2), (3) and (4) of the ICAC Act.

C. EXAMPLES OF POSITIONS TAKEN BY OTHER REGULATORS

Australian Competition and Consumer Commission (ACCC)

17. The ACCC has an *Immunity and cooperation policy for cartel conduct (Policy)*: https://www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA2.pdf.
18. The rationale for such a policy is that cartels usually involve secrecy and deception and such collusion is difficult to detect and there may be little documentary evidence. This makes discovery and proof of the existence of cartels more difficult than other forms of corporate misconduct. Corruption involves similar hallmarks of deception, secrecy and collusion.
19. The Policy explains:

“An immunity and cooperation policy in relation to cartels encourages insiders to provide information and enables the ACCC to penetrate the cloak of secrecy. When the extent of the immunity to be provided, or the process for recognising cooperation with law enforcement authorities is certain, persons are more likely to take advantage of such a policy and disclose illegal and harmful conduct.”

The ACCC is responsible for granting civil immunity (in respect of ACCC-initiated proceedings). The Commonwealth Director of Public Prosecutions (CDPP) is responsible for granting criminal immunity but the ACCC can make a recommendation to the CDPP to grant criminal immunity where civil immunity may be granted.

20. Stated shortly, the requirements for a civil immunity are:
 - a. being first in the cartel to disclose;
 - b. full and truthful admissions, disclosure and cooperation;
 - c. has not coerced others to participate in the cartel; and
 - d. has or will cease conduct in the cartel;
 - e. the ACCC has not already planned to commence legal proceedings in respect of the cartel.

Australian Securities and Investments Commission (ASIC)

21. ASIC does not appear to have an immunity policy but does have one in relation to enforcement: http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf.
22. That policy indicates that a cooperative approach to dealings with ASIC may benefit a person of interest. For instance:

“...early notification of a breach or a cooperative approach to an investigation will often be relevant to ASIC’s consideration of which remedy or combination of remedies should be pursued. However, as the CDPP conducts most criminal prosecutions investigated by ASIC, it is the CDPP that ultimately determines (after consultation with ASIC) whether or not charges should be laid and the appropriate charges for most criminal matters.”

Australian Taxation Office (ATO)

23. Pursuant to section 284-225 of Schedule 1 to the *Taxation Administration Act 1953* (Cth), a penalty amount imposed by the ATO may be reduced (it is arguable that the penalty amount *must* be reduced) by specified percentages if voluntary disclosures are made by a taxpayer in certain circumstances (usually to do with time of disclosure).

NSW Director of Public Prosecutions

24. Under s 19 of the *Director of Public Prosecutions Act 1986* (NSW) the DPP can request the Attorney General grant indemnity from prosecution or to give an undertaking that an answer, statement or disclosure will not be used in evidence under the CP Act.
25. The DPP Guidelines (<http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>) provide that:

“A request for an indemnity or undertaking on behalf of a witness will only be made by the Director to the Attorney General after consideration of a number of factors, the most significant being:

- 1. whether or not the evidence that the witness can give is reasonably necessary to secure the conviction of the accused person;*
- 2. whether or not that evidence is available from other sources; and*
- 3. the relative degrees of culpability of the witness and the accused person.”*

Commonwealth Director of Public Prosecutions

26. Early notification of breaches and cooperation may be relevant to the CDPP’s considerations as set out in the Prosecution Policy of the Commonwealth:

https://www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth_0.pdf

27. The CDPP can give undertakings that a person will not be prosecuted or answers, documents and information given by a person will not be used against that person in specified proceedings: s 9(6), (6B), (6D), (6E) and (6F) of the *Director of Public Prosecutions Act 1983* (Cth).

The Commonwealth Government is presently considering Deferred Prosecution Agreements (DPA) for serious corporate crime. Both the Commonwealth’s Discussion Paper and the responses of various bodies and institutions (including the NSW Law Society, the ATO, IBA, Law Institute) can be found at: <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>

28. As set out in the Consultation Paper, a DPA is a voluntary, negotiated settlement between a prosecutor and defendant. Under a DPA scheme, where a company has engaged in a serious corporate crime and the crime has either been self-reported by the company or identified by investigators, prosecutors would have the option to invite the company to negotiate an agreement to allow it to avoid a conviction (ie, defer the prosecution). The terms of a DPA typically require the company to comply with conditions, cooperate with any investigation, and pay a financial penalty. A breach of the terms would result in the prosecution resuming with the possibility of additional penalties. This decision to enter into DPA negotiation is at the discretion of the prosecuting agency.

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