



Lessons from the NSW ICAC

‘This watchdog has teeth’

With the lessons of NSW ICAC in mind, a federal anti-corruption commission needs to have assured independence, adequate resourcing, proper accountability, coercive powers, public hearings, and ultimately the confidence of the public.

Conference paper: Accountability and the Law Conference
2017

Nicholas Cowdery AM QC

August 2017

Summary

- There is a strong need and broad public support for a federal anti-corruption commission with public hearings.
- Of the state commissions already established in Australia, NSW ICAC has been markedly successful in carrying out its legislated mission and provides a fair model for emulation, with refinement and adaptation, at the federal level.
- Premier Nick Greiner outlined in 1988 that NSW ICAC would only be effective with the powers of a Royal Commission, as “corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain”.
 - Such powers must be tempered by human rights considerations.
 - Premier Greiner also emphasised the role for ICAC in contributing to honest public administration, educating and advising public authorities and the community and in being a transparent and accountable body.
- The Cunneen case resulted in challenges to NSW ICAC’s independence, jurisdiction and ability to hold public hearings. This reaction was disproportionate to the core issue raised in the case which was promptly resolved by the High Court. This sort of broad attack on anti-corruption commissions can be fuelled by their success in investigating corruption at the highest levels of political power.
- NSW ICAC has been faced this year with a funding cut. It is an easy way for government to impair the effectiveness of such a body and steps would need to be taken to ensure that adequate resources continued to be allocated to a NIC.
- With the lessons of NSW ICAC in mind, a federal anti-corruption commission needs to have assured independence, adequate resourcing, proper accountability, coercive powers of a Royal Commission, the ability to hold public hearings at the discretion of the Commissioner without inappropriate reputational damage to others, respect for the rights of all, a focus on serious and/or systemic corruption and ultimately the confidence of the public.

Outline

- The Senate Select Committee on a National Integrity Commission is due to report in August 2017. It's Terms of Reference and some submissions are cited.
- The formation of the NSW ICAC is discussed and the intention behind its mandate.
- The Cunneen case is described, looking at its impact on the inquiries that followed and amendments that were made to the ICAC Act.
- Relevant sections of the ICAC Act are set out in an appendix, identifying the pre and post Cunneen provisions and the effect of the amendments on future ICAC operations.
- There is discussion of the Independent Panel's inquiry and recommendations, following the Cunneen case and leading to amending legislation, and some responses.
- The Inspector of ICAC's report on the Cunneen matter is examined, with some of his recommendations and the possible effects they might have, and some responses.
- The main impacts of the Cunneen case (and amending legislation) are summarised.
- In 15 areas some of the lessons from the operations and recent history of the NSW ICAC are identified and commented upon: from the establishment and support of a national commission, to the status of a commissioner, to gathering evidence, the nature of hearings and the publication of findings – and more.

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Introduction

This is a timely conference about accountability and a timely discussion of the prospect of a Federal Independent Commission Against Corruption [ICAC] or similar body. On 8 February 2017 the Senate established the Select Committee on a National Integrity Commission [NIC – those letters being used below where a federal body is meant]. It succeeded a 2016 Select Committee which lapsed upon the federal election. The 2017 Terms of Reference are **APPENDIX A** (page 33).

Submissions are available on the website:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen

An Interim Report of the 2016 Select Committee was published in May 2016. The final report of the 2017 Select Committee is due this month (August).

In its editorial on 6 March 2017 the *Sydney Morning Herald* said: “We believe corruption and political self-interest do not end at state borders. Establishing a federal watchdog would fill a gaping hole in oversight of bureaucracies and government in Canberra.”

A poll of 1,420 people commissioned by the Australia Institute reported in April 2017 that 80% of respondents supported or strongly supported a federal corruption-fighting body, 8% were opposed or strongly opposed and 78% wanted the hearings of any such body to be in public.

Transparency International, Australia supports a national body and public hearings.

In his submission to the Select Committee the Public Service Commissioner opposes it. He says of the Australian Public Service of more than 150,000 officers that the most recent annual State of the Service report “shows that the majority of misconduct was of a less serious kind. Between the 2014-2016 financial years, 1866 misconduct investigations were concluded, with only 228 investigations resulting in termination of employment. During the same time, 888 employees were reprimanded for their misconduct. In 2015-16, out of 717 finalised Code of Conduct investigations, 106 of those were identified as involving some type of behaviour that was reported by agencies as involving a form of corruption. In the last employee census conducted by the APSC, only 4% of APS employees [that is 6,000 people] reported having witnessed another employee engaging in behaviour they regarded as corrupt.” Objection is made to a federal body on the grounds that it would be too costly, likely to over-reach and

probably not effective. The Deputy Commissioner had referred in her submission in 2016 to existing bodies misusing and over-reaching their powers. She said that current arrangements, with responsibility distributed between law enforcement and specialist agencies, are working well. With respect, I think those submissions are too narrowly focused and very unpersuasive.

My topic today is “Lessons from NSW ICAC”. I have watched ICAC grow and develop, prosper and occasionally falter, throughout its life. I had many dealings with its Commissioners when I was DPP for NSW (1994-2011). Before that, as a Barrister, I appeared for parties before ICAC. My assessment is that the NSW ICAC has been markedly successful in carrying out its legislated mission and provides a fair model for emulation, with refinement and adaptation, at the federal level. This watchdog has teeth (much to the chagrin of various politicians and others) and its success shows that a toothless watchdog political compromise at the federal level (if such were contemplated) is to be actively resisted. But as with all public investigators, it is often necessary to strike appropriate balances between competing considerations.

To address this topic sensibly it is necessary first to provide some context by considering some of the history of the ICAC, where it is now (especially as a result of the fallout from the case of Margaret Cunneen SC) and some forces that have influenced where it may head in the future. A great deal of the detail of the life of ICAC will be left out (of course) – but I hope to provide sufficient background (in a rather lengthy preamble) to support some of the considerations that may point to some lessons to be learned in establishing a federal body.

NSW ICAC

It is fair to say (I think) that the NSW ICAC enjoys broad political, public and media support, despite occasional controversy about its conduct. The *Sydney Morning Herald* editorial (above, 6 March 2017) also said: “Notwithstanding a pushback from vested interests and some self-administered stumbles along the way, The NSW [ICAC] has been a significant positive contributor to democracy in this state.” Such bodies already exist in various forms in all States and Territories apart from the ACT (which is considering it) and the NT.

ICAC ACT 1988

In the Second Reading Speech on 26 May 1988 then Premier Greiner said (in part) of the ICAC:

“The third fundamental point I want to make is that the independent commission will not be a crime commission. Its charter is not to investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector. That is made clear in this legislation, and it was made clear in the statements I made prior to the election. It is nonsense, therefore, for anyone to suggest that the establishment of the independent commission will in some way derogate from the law enforcement role of the police or bodies such as the National Crime Authority. On the contrary, the legislation makes it clear that the focus of the commission is public corruption and that the commission is to co-operate with law enforcement agencies in pursuing corruption.

Honourable members will note that the bill makes specific provision to allow the commission to refer matters to other investigatory agencies to be dealt with. Obviously that will be the most sensible way to deal with the majority of matters that will come to the attention of the commission. The commission will monitor those investigations and will retain only the most significant and serious allegations of corruption.

My fourth point is that the independent commission is not a purely investigatory body. The commission also has a clear charter to play a constructive role in developing sound management practices and making public officials more aware of what it means to hold an office of public trust and more aware of the detrimental effects of corrupt practices. Indeed, in the long term I

would expect its primary role to become more and more one of advising departments and authorities on strategies, practices and procedures to enhance administrative integrity. In preventing corruption in the long term, the educative and consultancy functions of the commission will be far more important than its investigatory functions.

Honourable members will note that the commission is given specific functions to educate and advise public authorities, and to co-operate with the Auditor-General, the Office of Public Management, and similar bodies. For those sorts of reasons it would also be crass and naive to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this State.

The final point I want to make by way of introduction concerns the question of civil liberties. This commission will have very formidable powers. It will effectively have the coercive powers of a Royal commission. Those are features of the legislation that I foreshadowed in the election campaign. There is an inevitable tension between the rights of individuals who are accused of wrongdoing and the rights of the community at large to fair and honest government.

There will be those who will say that this legislation is unjustified interference with the rights of individuals who may be the subject of allegations. Let me make a number of points in response to that sort of claim. First, though the commission will be able to investigate corrupt conduct of private individuals which affects public administration, the focus is public administration and corruption connected with public administration. The coercive powers of the commission will be concentrated on the public sector.

Second, corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission. Third, the commission will be required to make definite findings about persons directly and substantially involved. The commission will not be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusion. Fourth, the commission's activities will be monitored by a parliamentary committee. This committee will not be involved with specific operational matters, but will be concerned with looking at the overall effectiveness of the

commission's strategies. Fifth, there will be an operations relations review committee, which will advise the commission on actions to be taken in relation to complaints. In contrast to the parliamentary committee it will be closely involved in operational matters, and will have the necessary forensic expertise to provide the commissioner with advice on operations.

The bottom line is simply this: the people of this State are fed up with half-hearted and cosmetic approaches to preventing public sector corruption. This legislation will establish an institution that has strong and effective powers and has jurisdiction to look at the entire public sector. That is what the people expect. It is our responsibility to ensure that that expectation is met and not disappointed.”

It is important to bear in mind the nature of the investigatory role of ICAC. It is an investigator, not a court; nor is it a prosecutor. Its public hearings may resemble court proceedings in some respects, but there are fundamental differences of principle and practice. It may make allegations, but it does not lay corruption charges. ICAC investigates situations where there is a suspicion of serious corruption, perhaps capable of causing serious harm to the public good. Those caught up in the process have human rights that must be respected and protected – but “human rights” in that context do not include the sorts of rights to be found in Article 14 of the **International Covenant on Civil and Political Rights** [ICCPR]. Those rights are specifically provided for persons facing criminal charges and persons of interest to ICAC have not (yet or necessarily) been identified as criminal suspects, much less charged. ICAC is bound by the relevant legislation in the context of the overall protection of general human rights. Nobody being investigated by ICAC should expect to be entitled to anything more.

With those legislative intentions and (my) views in mind it is appropriate to look in a little more detail at the **ICAC Act** which provides for its principal objects, defines corrupt conduct and makes provision for dealing with complaints of corrupt conduct. I shall come to that; but before doing so it is necessary to consider the Cunneen case, because it prompted amendments to the **ICAC Act** that now guide its conduct in slightly different ways than before.

A brief **Timeline** is given at the end of this discussion (page 32).

CUNNEEN CASE

In **Independent Commission Against Corruption v Cunneen** [2015] HCA 14 (judgment on 15 April 2015) the High Court was required to decide, as the question was ultimately framed, whether or not conduct that could adversely affect the *efficacy*, but not the *probity*, of the exercise of an official function by a public official could be "corrupt conduct" as defined in the Act. ICAC unsuccessfully argued that it could.

Ms Cunneen SC is a Deputy Senior Crown Prosecutor for the State of New South Wales. Late in 2014 ICAC served a summons on her to appear before it to give evidence at a public inquiry to be conducted for the purposes of investigating an allegation or complaint:

"That on 31 May 2014 Deputy Senior Crown Prosecutor, Margaret Cunneen SC and Stephen Wyllie, with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, and that Sophia Tilley, with the intention to pervert the course of justice, did pretend to have chest pains, to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol level at the scene of a motor vehicle accident."

The brief background to the matter was that Ms Tilley, a friend of Ms Cunneen's son Stephen Wyllie, had been involved in a motor vehicle collision to which they had both been called. In fact, Ms Tilley had not been at fault in the collision and had a blood alcohol level of zero when tested.

Ms Cunneen's alleged conduct was not being investigated for the effect it might have on her official functions as a Crown Prosecutor in the sense that, as a public official, she might exercise her official functions in a different manner or make a different decision from that which would (and should) otherwise be the case. On the interpretation then given to the **ICAC Act** as it was, the allegation was that she was contributing to the corruption (in a broad, non-technical sense) of the official conduct of the police officers concerned in the investigation of the road accident.

Ms Cunneen, Mr Wyllie and Ms Tilley challenged the jurisdiction of ICAC and sought restraining orders in the Supreme Court where Hoeben CJ at CL dismissed the applications on 10 November 2014. On appeal the Court of Appeal on 5 December 2014, by majority, allowed the appeal (Basten and Ward JJA; Bathurst CJ dissenting primarily on the basis that the alleged conduct was capable of indirectly corrupting the process of a court comprised of public officials). ICAC appealed to the High Court. At the heart of the matter was the construction of section 8(2) of the **ICAC Act** (see **APPENDIX B**, page 34). It was not suggested that the police at the accident scene had,

in fact, been corrupted in the sense of having officially acted dishonestly or improperly by reason of anything said or done by Ms Cunneen, Mr Wyllie or Ms Tilley.

On 15 April 2015 the Full Court by majority (French CJ, Hayne, Kiefel and Nettle JJ; Gageler J dissenting) allowed the appeal. In the joint judgment the Court said [citations omitted]:

53. *It is not likely that an Act which is avowedly directed to investigating, exposing and preventing corruption affecting public authorities – and for which the justification for the conferral of extraordinary powers on ICAC was said to be the difficulty of discovering and exposing corruption in the nature of a consensual crime of which there is no obvious victim willing to complain – should have the purpose or effect of extending the reach of ICAC to a broad array of crimes having nothing to do with corruption in public administration apart from such direct or indirect effect as they might conceivably have upon the **efficaciousness** of the honest and impartial exercise of official functions by public officials.*

54. *The principle of legality, coupled with the lack of a clearly expressed legislative intention to override basic rights and freedoms on such a sweeping scale as ICAC's construction would entail, points strongly against an intention that ICAC's coercive powers should apply to such a wide range of kinds and severity of conduct. So does the impracticality of a body with such a wide jurisdiction effectively discharging its functions. It would be at odds with the objects of the Act reflected in s 2A. It would be inconsistent with the assurances in the extrinsic materials earlier referred to that ICAC was not intended to function as a general crime commission. And, last but by no means least, as Basten JA observed, an extended meaning of "corrupt conduct" would be far removed from the ordinary conception of corruption in public administration.*

55. *Logically it is more likely and textually it is more consonant with accepted canons of statutory construction that the object of s 8(2) was to extend the reach of ICAC's jurisdiction no further than to offences of the kind listed in s 8(2)(a)-(y) which could adversely affect the **probity** of the exercise of official functions by public officials in one of the ways described in s 8(1)(b)-(d).*

56. *Counsel for ICAC criticised that conclusion as in effect rejecting the plain and ordinary meaning of "adversely affect" in favour of an inference impermissibly drawn from the statement of the objects of the [ICAC Act](#) in [s 2A](#).*

57. *The criticism is misplaced. As was earlier observed, "adversely affect" is a protean expression capable of a number of meanings according to the context in which it appears. The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended. Contrary to counsel's submission, there was and is nothing impermissible about looking to the context in which [s 8\(2\)](#) appears or seeking guidance from the objects of the [ICAC Act](#) as stated in [s 2A](#). Rather, as Mason J stated in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*, it was and is essential to do so:*

*"[T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation; Attorney-General v Prince Ernest Augustus of Hanover*. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."*

Conclusion

1. *It was not disputed that, if "adversely affect ... the exercise of official functions by any public official" in s 8(2) means adversely affect the **probity** of the exercise of an official function by a public official in one of the ways listed in s 8(1)(b)-(d), the alleged conduct was not corrupt conduct within the meaning of s 8(2).*

Closely following the delivery of judgment in the Cunneen case, two relevant amending Acts were enacted in 2015: the **Independent Commission Against Corruption Amendment (Validation) Act 2015** ["**Validation Act**"] which commenced on assent on 6 May 2015 and, after the report of the Independent Panel (see below), the **Independent Commission Against Corruption Amendment Act 2015** which commenced on assent on 28 September 2015.

The **Validation Act** was passed expressly to validate all previous actions of ICAC following the Cunneen decision. It did not purport to reverse the High Court decision "*but validates actions taken by ICAC before 15 April 2015* [the date of the High Court

decision] on the previous understanding that corrupt conduct extended to relevant criminal conduct that adversely affected in any way the exercise of official functions” [see Explanatory Memorandum].

That legislation was challenged in the High Court and held to be valid: ***Duncan v Independent Commission Against Corruption*** [2015] HCA 32, 9 September 2015. The Court held unanimously “that cl 34 and 35 of Pt 13 deem those acts done by the respondent before 15 April 2015 to be valid to the extent that they would have been valid if the definition of corrupt conduct in s 8(2) of the ICAC Act encompassed conduct which adversely affected the **efficacy**, but not the **probity**, of the exercise of official functions”.

ICAC ACT AS AMENDED

Relevant parts of the ICAC Act as amended in 2015 are in **APPENDIX B** (page 34). **Yellow shaded** text is for emphasis, **green shaded** text indicates additions made by the amending legislation and **red shaded** text indicates deletions made by the amending legislation.

Section 2A Principal Objects of the Act remained unaltered.

Section 8 General Nature of Corrupt Conduct was extended in a few respects and had subsection (2A) added to address collusive tendering, fraudulent applications, dishonest dealings in public funds, defrauding the public revenue and fraudulent employment or appointment.

Section 9 Limitation on Nature of Corrupt Conduct and section 10 Complaints about Possible Corrupt Conduct remained unaltered.

Section 12A was added – a direct consequence of the Cunneen case. It is a qualified direction to ICAC as to the areas of conduct with which it should concern itself.

Provisions were added concerning electoral matters and other areas and a new section 74BA provides that ICAC may only include in a report (under section 74) a specific finding or opinion of corrupt conduct if it is “serious” corrupt conduct. “Serious” is not defined.

INDEPENDENT PANEL

The amending legislation was preceded by a number of inquiries.

On 27 May 2015 the NSW Government appointed an independent panel to review the **ICAC Act** in the light of the Cunneen developments:

Review of the Jurisdiction of the Independent Commission Against Corruption;
Independent Panel: The Hon. Murray Gleeson AC (Chair – former Chief Justice of Australia) Mr Bruce McClintock SC [who had conducted a review of the **ICAC Act** in January 2005 and who has recently been appointed Inspector of ICAC].

The Independent Panel reported on 30 July 2015.

Panel Recommendations

The Terms of Reference and Executive Summary are **APPENDIX C** (page 40). The recommendations made were as follows.

The Panel recommends the following amendments to the Act:

Recommendation 1: Section 8 The Panel recommends that the Act be amended to include within the definition of corrupt conduct in section 8 conduct of any person (whether or not a public official) that impairs or could impair public confidence in public administration and which could involve any of the following matters:

- (a) collusive tendering;
- (b) fraud in or in relation to applications for licences, permits or clearances under statutes designed to protect health and safety or designed to facilitate the management and commercial exploitation of resources;
- (c) dishonestly obtaining or assisting or benefiting from the payment or application of public funds or the disposition of public assets for private advantage;
- (d) defrauding the revenue;
- (e) fraudulently obtaining or retaining employment as a public official.

This could be done by inserting a new subsection in section 8 (perhaps subsection (2A)) and would necessitate a consequential amendment to section 7(2).

If section 8 is amended in the manner recommended, subsection (3) will give the amendment application to conduct that occurred previously, so long as the words “or, in the case of conduct falling within [the proposed new subsection] the commencement of that subsection” are added after “this subsection”. The Panel recommends that addition. The Panel also recommends that the words “or expanding” be added to section 8(6) after the word “limiting”.

Recommendation 2: Section 13 The Panel recommends that section 13(1) be amended to add to each of paragraphs (e) to (j) a reference to promoting the integrity and good repute of future administration.

Recommendation 3: Section 13 If Parliament is of the view that breaches of the Parliamentary Electorates and Elections Act 1912, the Election Funding, Expenditure and Disclosures Act 1981 or the Lobbying of Government Officials Act 2011 should be made the subject of the ICAC’s jurisdiction, the Panel recommends that this be done by inserting a subsection in section 13(1) to the following effect:

(ba) to investigate any allegation or complaint that, or any circumstances which in the Commission’s opinion imply that there has been a breach of the Parliamentary Electorates and Elections Act 1912, the Election Funding , Expenditure and Disclosures Act 1981 or the Lobbying of Government Officials Act 2011.

This would require a consequential amendment to section 12A.

Recommendation 4: Section 74B The Panel recommends that the Act be amended so that the Commission’s power to make findings of corrupt conduct may be exercised only in the case of serious corrupt conduct. This could be achieved by the insertion of a new section 74B(1A) to that effect. (A number of other corresponding amendments would need to be made to section 74B to conform to the proposed new subsection.)

Releasing the Independent Panel’s report the Government issued a media release:

Securing the future of the ICAC

11th August 2015

The Independent Commission Against Corruption will be given revised powers allowing it to investigate corrupt conduct by non-public officials, in strictly defined circumstances, NSW Premier Mike Baird announced today.

Mr Baird was releasing the report of the Independent Panel Review of the Jurisdiction of the ICAC.

“I have said many times that we have zero tolerance for corruption in NSW, which means a robust ICAC,” Mr Baird said.

“That is why we are today taking significant measures to consolidate ICAC’s jurisdiction, following the High Court judgement in ICAC v Cunneen, while acknowledging that the jurisdiction is narrower than the ICAC previously understood.”

Mr Baird thanked the Independent Panel, which comprised former Chief Justice of the High Court, The Hon. Murray Gleeson AC, and Bruce McClintock SC.

The Government has accepted and will implement all of the recommendations of the Review.

The Review has rejected the ICAC’s proposal that its jurisdiction be expanded to cover the “broad” jurisdiction it thought it had prior to the High Court’s decision, and did not support a reversal of the High Court’s interpretation of the ICAC’s jurisdiction.

However, it did urge the Government to extend the ICAC’s jurisdiction in respect of “corrupt conduct” to “public administration”, such as collusive tendering for government contracts and fraudulently obtaining government mining leases.

In line with the Review’s recommendations, the Government will also:

- Limit the ICAC’s power to make findings of “corrupt conduct” to cases where the corrupt conduct is “serious”;
- Broaden the ICAC’s education, advisory and prevention functions to cover the purpose of promoting the integrity and good repute of public administration;
- Allow the Electoral Commission to refer to the ICAC for investigation possible serious breaches of electoral and lobbying laws; and
- Provide that any possible breaches of the electoral and lobbying laws already under investigation in Operations Credo and Spicer are taken to have been referred to the ICAC, so that it may complete and report on those investigations.

Mr Baird said the Inspector of the ICAC, the Hon David Levine QC, would continue to finalise his own report containing: an assessment of ICAC's conduct of past and current investigations; whether the ICAC's powers, and its exercise of its powers, are consistent with justice and fairness; the extent to which ICAC investigations give rise to prosecution and conviction; and whether any limits or enhancements should be applied to ICAC's powers.

Media

On 24 August 2015 an editorial in the *Sydney Morning Herald* supported in general terms the work of the ICAC and reviewed recent relevant developments, supporting the recommendations of the Independent Panel. It said:

“The public was entitled to be concerned that the ICAC overstepped its mark by pursuing what seemed a relatively trivial matter in the Cunneen case. The recommendation that the ICAC only be able to make findings of corrupt conduct in ‘serious’ cases should allay that concern.”

It concluded: *“The ICAC has been an enormous force for good in this state. Long may that continue.”*

ICAC INSPECTOR

On 18 June 2015 the then Inspector (The Hon. David Levine AO RFD QC) reported under section 77A of the ICAC Act on the terms of reference provided to the Independent Panel on 27 May 2015.

On 4 December 2015, after the amending legislation commenced, the Inspector reported on Operation “Hale”, the investigation into Margaret Cunneen. He described the 15 investigations ICAC had conducted in the two years before the High Court judgment in the Cunneen matter and the five that had been held since.

As to Operation “Hale” itself, he concluded that a sense of proportion should have prevailed before a decision was made to conduct the preliminary investigation. He concluded:

“...whatever it was that was said or done was neither serious nor systemic and at best could be described as trivial... Operation ‘Hale’ from my point of view as Inspector should be seen and, justifiably, can be seen, as the low point in the

history of an entity whose functions, properly exercised, constitute an essential safeguard to the integrity of the governance of this State.”

On 12 May 2016 the Inspector reported to the Premier on his review of ICAC, making 16 specific recommendations. Perhaps the most controversial were Recommendations 1 and 15.

Recommendation 1 was that all examinations (of witnesses) by ICAC should be in private. The Inspector was seeking ways of overcoming the unfair reputational damage and political grand-standing inherent in the public examination process.

Against that, however (in my view), one needs to put the benefits of publicity flowing from public examinations – the discovery of further evidence, the education of the public, the general deterrent effect, disclosure of ICAC’s processes and consequent community support.

Recommendation 15 was for an “exoneration protocol” (as the Inspector described it) for people against whom corruption findings are made, but who are not convicted of any criminal offence.

In my view this may too closely identify the ICAC investigatory function with the prosecution function, which is completely separate (and different). ICAC investigates corruption and does so primarily in an inquisitorial process that is not bound by the rules of evidence – any material and information considered reliable may be relied upon. Hearings may become adversarial. Findings are made. If the material available points to the commission of criminal offences, processes are put in place to refer matters to the ODPP.

The prosecution process then begins. It is accusatorial and adversarial. The evidence available must be evaluated and any prosecution may proceed only upon the strength of evidence that is legally admissible. This means that in many cases the informational basis for adverse findings by ICAC will not enable the prosecution test to be satisfied and prosecutions will not proceed.

That conclusion does not reflect in any way upon the validity of ICAC’s findings or its processes in pursuit of its purposes.

Consequently, to connect the validity of ICAC’s findings with the outcome of any prosecution process is deeply flawed (as then Premier Greiner noted in the Second Reading Speech). To set up the absence of a conviction (not a charge) as a basis for setting aside the ICAC findings is illogical. Even to set up the absence of a charge would be a logical *non sequitur*. The ICAC findings are in separate proceedings, based on

(usually) a different corpus of information and not subject to the vagaries of the criminal charging and trial process which can affect strong and weak cases alike.

To broaden the basis of the comparison to *“the same or similar or cognate facts as warranted the making by the ICAC of a finding”*, as the Inspector did, makes the logical link even more tenuous.

That said, there may be merit in consideration being given to the establishment of some sort of review process that would enable challenges to and review of ICAC findings by a person adversely affected, who would be required to establish sufficient grounds – and ICAC should be a party to any such proceedings. Regard would need to be had to the process that led to the findings (eg public v private hearings, publicity, etc) when deciding whether or not a review was warranted in the private and public interests.

On 12 May 2016 the ICAC posted a statement in response to the Inspector’s report. It said:

Statement regarding the Inspector of the ICAC’s report to the Premier

The Inspector of the ICAC, the Hon David Levine AO RFD QC, has today published a report to NSW Premier Mike Baird on the Inspector’s review of the NSW Independent Commission Against Corruption.

The Inspector did not undertake any consultation with the Commission on any of the important issues canvassed in the report.

The Inspector’s “principal recommendation”, that the Commission should conduct all examinations in private, is contrary to the considered conclusions reached by the 2005 Independent Review of the ICAC conducted by Bruce McClintock SC and the more recent 2015 Independent Panel Review conducted by the Hon Murray Gleeson AC and Mr McClintock. The Commission agrees with the Independent Panel Review’s assessment that public inquiries “...serve an important role in the disclosure of corrupt conduct [and] in disclosing the ICAC’s investigative processes”.

Recommendations 2, 3, 4, 8 and 16 are already largely addressed in the Independent Commission Against Corruption Act 1988 and/or in the Commission’s internal policies and procedures.

The report provides no apparent policy or practical justification for recommendations 6, 9, 10, 11, and 13.

Recommendation 15 provides that consideration be given to the introduction of an “exoneration protocol”. This recommendation ignores the basis upon which corrupt conduct findings are made under the ICAC Act. It also ignores relevant case law.

The Commission intends to make a detailed response to the premier.

Commenting on the Inspector’s report and the damage done by ICAC to the reputations of Murray Kear and Steve Pearce, former NSW State Emergency Services Commissioner and Deputy Commissioner respectively, Miranda Devine in the Sunday Telegraph of 15 May 2016 said:

“The tragic truth about ICAC is that if you are shonky you have no reputation to be sullied. But if you are a person of integrity your reputation is everything. To be named adversely is its death sentence, and ICAC does so with casual abandon, as if it has no concept of the high price to good people.”

Pearce had been dismissed and Kear had been dismissed and prosecuted but acquitted. Devine’s was only one of many comments along similar lines and that view and the Inspector’s views were worthy of consideration, even if some of the premises are not accepted.

IMPACTS OF THE CUNNEEN CASE

The Cunneen case stirred substantial controversy about the ICAC – its powers and procedures, its purpose and its very future. The High Court resolved the immediate issue, but other bodies and individuals found much more to address. In my view a deal of criticism at the time was disproportionate to the issues identified.

The Independent Panel (with input from the Inspector) reviewed ICAC and made recommendations that were all adopted. Amending legislation followed. It seems to me that the main impacts for present purposes, as recommended by the Panel, cumulatively upon the pre-existing provisions, are those that flow from the new subsection 8(2A) and sections 12A and 74BA (see **APPENDIX B**, page 33).

The broadest criterion in subsection 8(2A) of conduct that “impairs, or that could impair, public confidence in public administration” is qualified by the need for one or more of the elements in 8(2A)(a) to (e). Some relate to specific areas of conduct; all require dishonesty. Section 12A requires serious and/or systemic corruption.

So, in summary, there developed a renewed focus on the need for “serious” (not defined) and/or systemic corrupt conduct to ground ICAC’s findings and particular attention is to be paid to:

- collusive tendering;
- matters concerning health and safety, the environment and resources;
- public funds and assets going to private advantage;
- defrauding the public revenue; and
- fraud in connection with public office.

The Inspector’s report on Operation “Hale” adds further issues for consideration, including practical consequences of ICAC’s conduct for those who are caught up.

Lessons

IN THE BEGINNING

ICAC began with broad powers to investigate public corruption in NSW. It was (quoting then Premier Greiner) to *“prevent corruption and enhance integrity in the public sector”*. It was given power *“to refer matters to other investigatory agencies to be dealt with... The commission will monitor those investigations and will retain only the most significant and serious allegations of corruption.”*

It was given power to give information and advice directed towards the prevention of public corruption. *“In preventing corruption in the long term, the educative and consultancy functions of the commission will be far more important than its investigatory functions.”*

“For those sorts of reasons it would also be crass and naive to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this State.”

ICAC has the coercive powers of a Royal Commission and for that reason needs to be conscious of the protection of human rights (civil liberties) in its processes. It may override the right to silence and the privilege against self-incrimination on terms; but there is no prohibition on the derivative use of information that is then given. Thought may be given to that in the establishment of a NIC.

For very many years the model worked with minimal general public concern and with many successes (which it is still enjoying). The broad definition of corrupt conduct served it well. Public hearings during investigations ensured that the public was aware of ICAC’s work. Any federal proposal should embrace those two features. It must always be remembered that ICAC is an investigator. Its hearings are not trials and there is a very significant difference in the incidentals to each form of procedure.

Balance

Broad consultation and careful drafting of the legislation are necessary for the establishment of a NIC. With the benefit of the experience of other jurisdictions, especially the NSW ICAC, it is possible to create the right model for effective and

acceptable protection against corruption in federal public administration, balancing the competing considerations.

Care must be taken to describe the NIC's establishment, jurisdiction, powers, its relationships, contributors to transparency and its accountability mechanisms.

Nature of corruption

Corruption may take many forms, from crude bribery or misappropriation of funds to corruption in appointments to office to rorting of allowances to misinformation to and manipulation of agencies, the media and the public and so on. One should not lose sight of the need for an anti-corruption agency to be able to address more subtle but also more damaging forms of corruption in public administration generally. It is about more than just money.

Parliamentary Investigator

In 2013 ICAC put forward a suggestion for the creation of an independent Parliamentary investigator to inquire into lower level dishonest transgressions by Members and to have the power to penalise those it finds guilty. This may well have been done in order to seek to relieve ICAC of some of the burden of such investigations which, nevertheless, it had an obligation to pursue.

ICAC had found that a former State Labor MP had wrongly claimed \$4,500 in staff entitlements. That sort of matter could readily be dealt with in-house – but not so in-house as a Parliamentary standing committee. Some independence was required.

Then Premier O'Farrell referred the suggestion to the Legislative Assembly Privileges Committee and the Legislative Council equivalent. They proposed in 2014 different models. The Legislative Council committee recommended a commissioner for standards, whose decisions would be public. The Legislative Assembly committee recommended an ethics commissioner with *"discretion to keep findings confidential or report findings to the House with recommended sanctions for breaches"*.

In 2016 the process of drafting legislation to finalise a model was begun. It can only be hoped that it will include a new, independent office with power to investigate Members and issue sanctions, the capacity to receive complaints from the public, powers to force apologies, reimburse expenses, order proper disclosure, recommend fines and refer findings to ICAC and/or the police. This would relieve ICAC of some of its work on *"misconduct of a less serious kind"* by Members of Parliament.

But if such investigation is to remain with ICAC or to be given to a NIC, thought could be given to enabling it to impose administrative or civil penalties in appropriate cases, to obviate the need for criminal prosecution. There is also a continuing need for any such body to identify desirable legislative changes and bring those matters to the attention of the appropriate bodies – sometimes the reporting is within the strict rules, but still not publicly acceptable.

THE ICAC MODEL

There are issues with the model created for ICAC in NSW that would need to be addressed in any national proposal. ICAC decides what to investigate, how that investigation will be conducted (especially private v public hearings), what evidence will be called, what findings will be made and how those findings will be communicated (eg by publication). It is arguable that there are too many different powers concentrated in the one body, especially one that has continuity of senior staffing that outlives the term of any Commissioner. Corporate culture – the collective outlook – may become significant in directing the organisation’s conduct and it may lose sight of its intended purpose and some of the internal boundaries that should be enforced. Perhaps the Inspector is intended to provide the necessary level of transparency and accountability, but he (or she) can only ever come along after the event.

Counsel assisting ICAC should be independent and act independently, not a mere mouthpiece for the Commissioner and/or the organisation.

To address these issues and still enable a commission to conduct meaningful investigations with the confidence of the public, there may be scope for an independent officer, for example a retired judge, to be engaged to appoint counsel assisting, to review proposed findings and the material supporting them and to provide appropriate endorsement before any public announcement is made with the potential for reputational damage that entails.

Cunneen Case - Scope of ICAC - Jurisdiction

The need for an independent legislated body has survived the Cunneen case and amendments to the ICAC Act with the focus now on “serious” and/or systemic corruption, rather than on individual low level defalcations and transgressions in the public arena. It seems that those events have opened up a gap in the coverage of ICAC (of individual corrupt transactions that are not “serious” or systemic) and any federal

proposal would need to ensure that such a gap was covered, by the NIC or by other mechanisms.

There is also an issue about whether or not the conduct under scrutiny is confined to that in the public service or whether it should extend to other entities performing public services – including the Parliament and the Executive (Ministers and their staff).

Another issue is whether or not the jurisdiction of such a body should extend to other than public officials where there is a possible impact on public administration.

The threshold to be set for ICAC/NIC engagement and its declarations may also require attention. A recent Acting Inspector of the NSW ICAC (John Nicholson SC) has reported (in his report into Operation “Vesta”, 4 July 2017) that its powers should not extend to labelling people as corrupt, because that undermines the presumption of innocence. Only people who are guilty should be so labelled, not people who could be guilty. It might be argued that Mr Nicholson too closely identifies corruption with crime – because there may be corruption without a criminal offence being committed – and investigation with trial. I disagree with the point about the presumption of innocence, but general fairness might otherwise provide some support it. ICAC makes findings after investigation, not after a trial. A finding (and declaration) of corruption does not affect the presumption of innocence that any such person carries into any criminal proceedings that may follow. It may, however, affect the conduct of those proceedings, in that it may be necessary for steps to be taken to mitigate the effect of any public declaration in order to ensure a fair trial (eg by postponement of trial or trial by judge alone).

Mr Nicholson also considered Sections 8(2) and 2A of the Act. Section 8(2) provides that [emphasis added] *“Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and...”* Section 2A was added after the Cunneen case: *“Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve...”* Mr Nicholson recommended that the use of “could” in each case sets the bar too low and a better test would be to enable a finding of corruption to be made only if it was reasonable for the Commission to expect that a properly instructed reasonable tribunal of fact would come to a conclusion on admissible evidence that the opinion or finding of the Commission would be sustained. He said: *“The problem with the ‘could’... approach is that it undermines the presumption of innocence, which is supposed to apply to all those who remain unconvicted of an offence”*. While not agreeing with that conclusion, there may still be

a need to carefully consider the limits to be set on the scope of any definitions of corrupt conduct.

One issue to be addressed in any case is whether a prime purpose of the NIC is to investigate and expose corruption or to investigate so as to gather evidence for prosecutions. If it is both, then a balance needs to be struck between them and care needs to be taken to identify and understand the different imperatives and underlying principles that apply to an investigator and a prosecutor. The means by which a commission gathers evidence (including by compulsory examination) will impact upon the admissibility of the evidence in criminal proceedings. There should also be a mechanism established for timely communication between the NIC and the DPP to assist in pursuing matters of mutual interest. That would help to avoid some of the misunderstandings that have arisen in the NSW context, at least.

To assist with prosecutions that would undoubtedly be recommended by a NIC, attention should be given to assisting the NIC at a practical level to sort the material on which it acts into that which would be admissible in a criminal trial and that which would not. In NSW the Office of the DPP seconded lawyers into ICAC to assist with that process.

An investigatory body should not also have the power to prosecute, other than perhaps for offences of false evidence and non-appearance and the like. Once the DPP has instituted proceedings, the commission should not have the power to conduct a compulsory examination on matters connected with the prosecution.

There remains the issue of the extent to which a NIC should have an educative function. In then Premier Greiner's words, *"In preventing corruption in the long term, the educative and consultancy functions of the commission will be far more important than its investigatory functions."* There is an important role in educating both public agencies and the community about corruption and its resistance. There is also a role in recommending appropriate legislative attention to matters that arise.

Commissioners

Commissioner Latham's statutory independence and tenure were ignored in the legislative aftermath of the Cunneen case. Part way through her term she was invited to apply for her own position (in effect) in a newly constituted ICAC. The presumed independence of the position, thought to have been akin to that of a judge, was cast aside. In order to attract and hold the best applicants for such positions, that level of independence is required for the work of the Commission to be done effectively, frankly and fearlessly. Government should not be able to intervene in the way it did

and dismissal from office should be available only on grounds similar to those applying to the bench. That is another lesson for a federal proposal.

Coercive Powers

From the prosecutor's point of view, subsequent to any ICAC investigation, whether or not "evidence" referred derives from compulsory processes will impact on its admissibility in criminal proceedings and consequently the viability of any prosecution. A NIC needs to be aware of that and make careful and considered decisions about when and in what circumstances to use coercive powers and other means of obtaining evidence that might be regarded in the trial context as unfair.

This is not an argument for not giving a NIC coercive powers, without which it would be unlikely to enjoy significant success in exposing and dealing with corruption.

Public Hearings

The NSW legislation now requires the (new) Chief Commissioner and at least one Commissioner (of the total three officers) to agree to a public hearing, otherwise (with a limited exception) hearings are to take place in private. It is acknowledged that a balance must be drawn between the legitimate objectives of public hearings (transparency and accountability of the conduct of the body, public confidence in its operations, the discovery of further evidence, the education of the public, the general deterrent effect) and the possibility of undeserved reputational damage in some cases.

The President of the Rule of Law Institute of Australia, in an opinion piece in *The Australian* on 28 April 2017, railed against public hearings, stating: *"The real issue is why should any Australian be subject to a public hearing by a government investigating agency which they are obliged to attend, be examined, forced to answer questions and have no privilege against self-incrimination?"* This in a context where the agency determines what and how it will investigate and what material it will consider and publish. Presumably he meant to include also any *corrupt* Australian.

Transparency International, Australia on the other hand, has put forward arguments in favour of public hearings including: the existence of adequate legal safeguards against an abuse of power; and the danger of investigations being conducted underground and in secret.

Hannah Aulby, in a paper the Australia Institute published in June 2017 *"Shining Light on Corruption: the power of open and transparent anti-corruption investigations"*, notes that the ICAC with the greatest "run rate" in Australia, the NSW ICAC, is the one

that has most often used public hearings. She reports that the SA ICAC Commissioner, who is currently the only commissioner who is not able to open hearings, has made a recommendation to the SA State Government to allow the commission to hold public hearings to ensure transparency. The Victorian IBAC Commissioner has said that openly examining cases of alleged serious corruption and misconduct in public hearings has encouraged and empowered people to come forward and report suspected wrongdoing. Former assistant NSW ICAC Commissioner Anthony Whealy QC has said *“there are many people out there in the public arena who will have information that’s very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.”* Former NSW ICAC Commissioner David Ipp QC has said that *“Its main function is exposing corruption; this cannot be done without public hearings.”*

Ms Aulby states: *“The role of anti-corruption commissions is to investigate and expose corruption. Public hearings are critical to fulfilling both of these roles. Apart from investigation reports, public hearings are the only way an anti-corruption commission can expose corruption investigations to members of the public. They also make the investigations themselves more effective, as members of the public can come forward with information about a case. At the end of an investigation that is held openly and transparently, the public may also oversee that the findings of the investigation are acted upon. This public scrutiny of investigation outcomes is lost if investigations and findings are hidden from public view, behind closed doors in private hearings.”*

Section 31 of the ICAC Act now provides some guidelines for public hearings. The danger of guidelines is the risk they present, if too particular, of decisions being challenged on the basis that the guidelines are inadequate in some respect or the decision was not in accordance with the guidelines. It also seems unnecessary to have to put it to a vote of Commissioners. A NIC might consider the formulation of only broad guidelines and leaving it to the discretion of the relevant Commissioner to decide. Perhaps this might also be a task for the independent officer, suggested above, who might sign off on the findings and publication at the end of an investigation.

Options include mandating public or private hearings, providing a default model one way or the other, providing for elections of some sort, enacting presumptions one way or the other or calling in an independent party. My own view is that the preferable course is to leave it as a question for the Commissioner to decide *ad hoc*, without any presumption either way, but with broad guidelines in place.

Evidence Gathering - Calling Evidence

Another aspect that has received attention from commentators is that in NSW only the counsel assisting ICAC at a hearing may put material before the Commission. If a person involved in an investigation wishes to put information before the inquiry, he or she must convince counsel assisting to do so. If possibly exculpatory material is known to the Commission but withheld from a hearing – or, as happened in the Kear case, from the DPP when a matter is referred for consideration of prosecution – a person affected may be rightly indignant. More than that, serious arguments of impeding the course of justice may arise. In any event, there can be consequences for any subsequent prosecution.

It seems logical to leave the decision as to the material to be brought forward in a hearing (public or private) to counsel assisting the Commission. He or she knows what the Commission is investigating and why and how the investigation is progressing. If other parties were enabled to produce material to a hearing, without the Commission's concurrence, there would be great potential for investigations to be diverted and obfuscated. Nevertheless, I think consideration should be given to some way of enabling other parties to present material and to have that done in an accountable fashion.

Protection of Informants

Whistleblower protections (protected disclosure provisions) should be available to persons providing information to a NIC. Section 50 of the NSW ICAC Act enables the Commission to take steps to protect the safety of anyone providing assistance to the Commission or anyone consequently at risk. Similar or enhanced provisions should be provided for a NIC.

The *Public Interest Disclosures Act 1994* (NSW) also applies to both the ICAC and the ICAC Inspector.

Measurement (and Prosecutions)

The conduct of any public agency must be measured, of course (in accordance with the expanding phenomenon of pantometry, identified and described by former Chief Justice Spigelman of NSW in published articles). It would be a grave mistake to measure the conduct of an ICAC or a NIC by reference to criminal prosecutions/charges, not to mention convictions. So other criteria of success need to be identified: the level of corrupt conduct in public administration or the public sector;

perhaps Australia's rating on the Transparency International index of corruption perception. Other benchmarks could be devised.

Resourcing

NSW ICAC has been faced this year with a funding cut. It is an easy way for government to impair the effectiveness of such a body and steps would need to be taken to ensure that adequate resources continued to be allocated to a NIC.

Sufficient resources are also required to subsequently enable the prosecution to fulfil its obligations of disclosure to the defence. A regime and allocation of resources are required to ensure that the commission discloses to the prosecution all relevant material known to exist (whether it points towards or away from guilt of any criminal offence). Disclosable material is a wider category than admissible material. (Cf the Kear case.) Perhaps legislation (cf section 15A of the *Director of Public Prosecutions Act 1986* (NSW)) should require compliance by any commission.

Exoneration

Mr Levine's "exoneration protocol" did not find favour with the legislators. However, there should be no impediment to a federal proposal incorporating some mechanism for the public acknowledgement of the exoneration or clearance of any person if corruption is not found after the person's reputation has been attacked publicly. Suitable guidelines could be drawn up to govern such a process.

Mr Nicholson SC, in the report referred to above, asked that an "exoneration protocol", if considered to be in the public interest, should be able to be accessed and, if so, in what circumstances and by what means an affected person could pursue exoneration. He recommended that the question be examined by the Parliamentary Joint Committee.

Oversight and Support

Once the chosen model of a NIC has been determined, it is vital that it receive political and public support. Its structure and procedures must be made resistant to gaming – to persons of interest manipulating it to their own ends. Its mission is too important for that. A robustly established independent Inspector (or similar) helps to ensure that it succeeds.

Timeline

August 1988	Independent Commission Against Corruption Act 1988
March 1989	ICAC established
10 November 2014	Supreme Court decision in <i>Independent Commission Against Corruption v Cunneen</i> [2015] HCA 14
5 December 2014	Court of Appeal decision in <i>Cunneen</i>
15 April 2015	High Court decision in <i>Cunneen</i>
6 May 2015	<i>Independent Commission Against Corruption (Validation) Act 2015</i> in force
27 May 2015	Independent Panel established
18 June 2015	<u>ICAC Inspector's Report under s77A</u>
30 July 2015	Independent Panel reported
9 September 2015	High Court decision in <i>Duncan v Independent Commission Against Corruption</i> [2015] HCA 32
28 September 2015	Independent Commission Against Corruption Amendment Act 2015 in force
4 December 2015	<u>ICAC Inspector's report on Operation "Hale"</u>
12 May 2016	<u>ICAC Inspector's Report to the Premier: The Inspector's Review of the ICAC</u>

Information about these events is available on the websites of the ICAC, the Inspector, the High Court, Supreme Court of NSW and media.

The ICAC also reports on its website referrals to the DPP and prosecution outcomes.

Appendix A

Senate Select Committee on a National Integrity Commission, 2017

Terms of Reference

The establishment of a national integrity commission, with particular reference to:

- a. the adequacy of the Australian government's legislative, institutional and policy framework in addressing all facets of institutional, organisational, political and electoral, and individual corruption and misconduct, with reference to:
 - i. the effectiveness of the current federal and state/territory agencies and commissions in preventing, investigating and prosecuting corruption and misconduct,
 - ii. the interrelation between federal and state/territory agencies and commissions, and
 - iii. the nature and extent of coercive powers possessed by the various agencies and commissions, and whether those coercive powers are consistent with fundamental democratic principles;
- b. whether a federal integrity commission should be established to address institutional, organisational, political and electoral, and individual corruption and misconduct, with reference to:
 - i. the scope of coverage by any national integrity commission,
 - ii. the legislative and regulatory powers required by any national integrity commission to enable effective operation,
 - iii. the advantages and disadvantages associated with domestic and international models of integrity and anti-corruption commissions/agencies,
 - iv. whether any national integrity commission should have broader educational powers,
 - v. the necessity of any privacy and/or secrecy provisions,
 - vi. any budgetary and resourcing considerations, and
 - vii. any reporting accountability considerations; and
- c. any related matters.

Appendix B

ICAC Act, as amended

[In the sections below, yellow shaded text is for emphasis, green shaded text indicates additions made by the amending legislation and red shaded text indicates deletions made by the amending legislation.]

2A Principal objects of Act

The principal objects of this Act are:

- (a) *to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:*
 - (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, and*
- (b) *to confer on the Commission special powers to inquire into allegations of corruption.*

That section remains unaltered by the amending legislation.

7 Corrupt conduct

- (1) *For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.*
- (2) *Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).*
- (3) *Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.*

The amending legislation deleted the **red shaded** text.

8 General nature of corrupt conduct

(1) *Corrupt conduct is:*

- (a) *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
- (b) *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- (c) *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- (d) *any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

(2) *Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:*

- (a) *official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),*
- (b) *bribery,*
- (c) *blackmail,*
- (d) *obtaining or offering secret commissions,*
- (e) *fraud,*
- (f) *theft,*
- (g) *perverting the course of justice,*
- (h) *embezzlement,*
- (i) *election bribery,*
- (j) *election funding offences,*
- (k) *election fraud,*
- (l) *treating,*
- (m) *tax evasion,*
- (n) *revenue evasion,*

- (o) currency violations,
 - (p) illegal drug dealings,
 - (q) illegal gambling,
 - (r) obtaining financial benefit by vice engaged in by others,
 - (s) bankruptcy and company violations,
 - (t) harbouring criminals,
 - (u) forgery,
 - (v) treason or other offences against the Sovereign,
 - (w) homicide or violence,
 - (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.
- (3) Conduct may amount to corrupt conduct under **subsection (1), (2) or (2A)** **this section** even though it occurred before the commencement of **that this** subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official. **This subsection extends to a person seeking to become a public official even if the person fails to become a public official.**
- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) **or (2A)** refer to:
- (a) matters arising in the State or matters arising under the law of the State, or
 - (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting **or expanding** the scope of any other provision of this section.

The amending legislation added the **green shaded** text, deleted the **red shaded** text and inserted also subsection 2A:

(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

- (b) *fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,*
- (c) *dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,*
- (d) *defrauding the public revenue,*
- (e) *fraudulently obtaining or retaining employment or appointment as a public official.”*

9 Limitation on nature of corrupt conduct

- *Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:*
 - (a) *a criminal offence, or*
 - (b) *a disciplinary offence, or*
 - (c) *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
 - (d) *in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.*
- *It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.*
- *For the purposes of this section:*

Applicable code of conduct means, in relation to:

- (1) *a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or*
- (2) *a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.*

Criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

Disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
- (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.
- (6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the Local Government Act 1993, but does not include a reference to any other breach of such a requirement.

That section remains unaltered by the amending legislation.

10 Complaints about possible corrupt conduct

- (1) Any person may make a **complaint to the Commission about a matter that concerns or may concern corrupt conduct.**
- (2) The Commission may investigate a complaint or decide that a complaint need not be investigated.
- (3) The Commission may discontinue an investigation of a complaint.

That section remains unaltered by the amending legislation.

12A Serious corrupt conduct and systemic corrupt conduct

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

That added section is a direct consequence of the Cunneen case.

The amending legislation deals also with section 13, adds 13A (relating to electoral matters), adds to sections 14 and 16 and adds section 74BA. There are some consequential provisions made.

Notably, new section 74BA provides that ICAC may only include in a report (under section 74) a specific finding or opinion of corrupt conduct if it is “serious” corrupt conduct. “Serious” is not defined.

Appendix C

Independent Panel Inquiry, 2015

Terms of Reference

The Independent Commission Against Corruption (ICAC) was established by the NSW Government in 1989. The ICAC's principal functions are set out in the Independent Commission Against Corruption Act 1988. Ensuring that the ICAC has the powers and resources required to fulfil its functions is a priority for the NSW Government. In light of the decision of the High Court of Australia in *ICAC v Cunneen* [2015] HCA 14, the Panel is commissioned to consider and report to the Governor on or before 31 July 2015 on:

- the appropriate scope for the ICAC's jurisdiction,
- any legislative measures required to provide the ICAC with the appropriate powers to prevent, investigate and expose serious corrupt conduct and/or systemic corrupt conduct involving or affecting public authorities and/or public officials, and
- whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC's powers, taking into account:
 1. the jurisdiction, responsibilities and roles of other public authorities and/or public officials in the prevention, detection, investigation, determination, exposure and prosecution of corrupt conduct, and
 2. any report of the Inspector of the ICAC completed and available during the course of this inquiry which includes consideration of:
 - (a) the conduct of past and current investigations of the ICAC,
 - (b) whether the ICAC's powers, and its exercise of its powers, are consistent with principles of justice and fairness,
 - (c) the extent to which ICAC investigations give rise to prosecution and conviction, and (d) whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC's powers.

The Panel may conduct targeted consultation at its discretion to inform its inquiry.

Executive Summary

Scope of jurisdiction

The Independent Commission Against Corruption Act 1988 (“the Act”) established a Commission (“the ICAC”) upon which it conferred extraordinary powers to investigate, expose and prevent corruption. The powers of investigation, which may override common law rights and privileges extensively, include the holding of public inquiries, and the making of findings including findings of corrupt conduct. Of central importance to the scope of the ICAC’s jurisdiction is the Act’s definition (by way of description of the general nature) of corrupt conduct.

The Act does not set out to deal with corruption generally. It does not deal with corruption in private enterprise, or educational institutions, or industrial organisations, or charities, or personal behaviour unless it falls within the topic which is the focus of the Act’s attention. That topic is public administration and corruption connected with public administration. The justification that was advanced for the creation of the ICAC and the conferral of its extraordinary powers was that it was necessary to restore and maintain the integrity and reputation of public administration in this State. Insofar as the Act’s definition of corrupt conduct applies to the conduct of public officials, or the conduct of private citizens who procure, or attempt to procure, misconduct by public officials, its practical operation has been reasonably predictable. There was, however, unpredictability in that part of the definition concerning conduct (including the conduct of private citizens) which “adversely affects” the exercise of official functions. The use of that expression in section 8(2) of the Act created uncertainty. If given its widest literal meaning it extended far beyond the ordinary understanding of the concept of corruption. In the case of *Independent Commission Against Corruption v Cunneen* (“Cunneen”), decided on 15 April 2015, the High Court of Australia interpreted section 8(2) as referring to adverse effects on the **probity** of the exercise of official functions. This produces a coherent statutory policy, resting on a widely accepted understanding of corruption, and a jurisdictional foundation that would support almost all (but not all) of the investigations that the ICAC has undertaken in the past. However, the Panel accepts that it leaves beyond the scope of corrupt conduct some matters which should be covered. The Panel does not recommend dealing with the problem by legislating to give “adversely affects” its widest literal meaning (the **efficacy** approach). This produces consequences that are artificial and inappropriate. Section 8(2) has now been interpreted authoritatively and the uncertainty of the expression “adversely affects” has been resolved. That provision should be left unamended and without further elaboration.

The Panel recommends adding to section 8 a new subsection which deals with conduct, not in, but connected with, public administration by reference to the rationale for making public administration the focus of the Act's attention: the need to preserve and maintain the integrity and reputation of public administration. Certain kinds of fraudulent conduct, not necessarily involving any actual or potential wrongdoing by a public official, should be created as corrupt conduct where they impair or could impair confidence in public administration. The Panel also recommends that the jurisdictional basis for the ICAC's advisory, educational and prevention functions should be widened so as to free them from the constraints which (properly) accompany the functions of investigating and making findings of corrupt conduct.

Electoral and lobbying laws raise a particular question. Some breaches of those laws, including some very serious examples of conduct that would ordinarily be regarded as corrupt, are not within the definition of corrupt conduct, either as it presently stands, or as it would have stood on the interpretation advanced by the ICAC in Cunneen, or as it will stand if the Panel's recommendation as to a new subsection in section 8 is adopted. This is for the reason identified above. The Act does not address, and has never attempted to address, corruption unconnected with public administration. Other breaches of those laws could easily involve conduct which no-one could regard as corrupt. Some conduct could constitute a breach of one or other of the laws and could also fall within the Act's definition of corrupt conduct. It would be open to Parliament to take the view that the ICAC should have the jurisdiction to investigate all conduct involving possible breaches of the electoral and lobbying laws, whether or not they constitute corrupt conduct, but that the definition of corrupt conduct should not be expanded in consequence. The result would be that findings of fact and recommendations for prosecution could be made, but any findings of corrupt conduct would have to be based on the definition in sections 7, 8 and 9 of the Act.

Powers and procedures

The question whether provision should be made in the Act, or in other legislation, such as the Supreme Court Act 1970, for general merits review of findings of corrupt conduct has been examined by the Panel. The Panel does not recommend this course, which would involve an inappropriate confusion of administrative and judicial powers. The Panel has considered whether the ICAC's power to hold public inquiries should be removed, or limited. For reasons given in Chapter 9, it does not recommend that course. The Panel has also considered whether there should be formal oversight or internal review of decisions to hold public inquiries or decisions as to what witnesses

to call at public inquiries. It does not recommend that course. The Panel recommends that the power to make findings of corrupt conduct should exist only in cases of serious corrupt conduct. It has proposed a legislative amendment to give effect to this recommendation.

The Panel has considered the issue of the proportion of corrupt conduct findings that are ultimately reflected in criminal convictions. It is relatively low and underlines the differences between an investigative process and the administration of criminal justice. The Panel has also considered the time involved in commencement of prosecutions. The Panel does not recommend any legislative change to address these matters.