

INVESTIGATIONS BY THE NEW SOUTH WALES INDEPENDENT COMMISSION AGAINST CORRUPTION THE LAW, PROCEDURES, PRACTICES AND JUDICIAL REVIEW

*Michael Bersten**
Lawyer
Canberra

The purpose of this paper is to describe the legal procedures and practices relating to the performance by the Independent Commission Against Corruption (ICAC or the Commission) of its investigative functions under the *Independent Commission Against Corruption Act 1988* (NSW) (*ICAC Act*).¹ So as to indicate the legal parameters within which these functions operate it is necessary to identify the application of judicial review procedures and the provisions of the ICAC governing the independence and accountability of the ICAC. An examination of the policy and historical aspects of the ICAC and the *ICAC Act* is outside the scope of this chapter.

WHAT IS THE ICAC?

The *ICAC Act* commenced operation on 13 March 1989.² Section 4(1) constitutes a statutory corporation with the name of the Independent Commission Against Corruption. Section 4(2) provides that the functions, powers, authorities and duties conferred on the ICAC are those conferred by the *ICAC Act*. The ICAC has no inherent powers or jurisdiction. Departure from the *ICAC Act* may provide grounds for judicial review of some act or omission by the ICAC. In the absence of contrary legislative provision, such review is according to the rules and remedies at common law and equity in the supervisory jurisdiction of the NSW Supreme Court.

Broadly speaking ICAC was established “to minimise corruption in the public sector of New South Wales”.³ It is designed to achieve this by performing three principal tasks — investigation of corrupt conduct, corruption prevention and anti-corruption education. In its investigative capacity ICAC may generally be characterised as a standing Royal Commission which, within the confines of the *ICAC Act*, is independent in the sense that it is free from external direction except by the NSW Parliament in limited circumstances.

* The assistance given to the author by the ICAC in the preparation of this paper is gratefully acknowledged. This paper is written in a private capacity only. It is in no way connected with, and does not necessarily represent the views of, the Commonwealth Attorney General, his Department or the Commonwealth of Australia.

1 All statutory references are to the *ICAC Act* unless otherwise stated.

2 NSW Statutory Rules 156 and 157 of 1989.

3 *ICAC Annual Report to 30 June 1989* (1989) at 12

Generally ICAC sets its own terms of reference for its investigations and has some investigative powers exceeding those of the police. ICAC is not however exercising any judicial or prosecutorial functions. Also, it is not a law enforcement agency. ICAC has stated that:

The primary objective of investigations is to seek out facts and establish truth. The primary aim of the other work of the Commission is to strengthen the ways in which corruption can be prevented.⁴

ICAC INVESTIGATIVE FUNCTIONS

Section 13 relevantly provides for the investigative functions of ICAC as follows:

- (1) The principal functions of the Commission are as follows:
 - (a) to investigate any allegations or complaint that, or any circumstances which in the Commission's opinion, imply that:
 - (i) corrupt conduct; or
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct; or
 - (iii) conduct connected with corrupt conduct;
 may have occurred, may be occurring or may be about to occur;
 - (b) to investigate any matter referred to the Commission by both Houses of Parliament.
 - ...
- (2) The Commission is to conduct its investigations with a view to determining:
 - (a) whether any corrupt conduct, or any other conduct referred to in subsection (1)(a), has occurred, is occurring or is about to occur;

ICAC has stated that the "object of any investigation is to ascertain and record the true facts."⁵ However, ICAC noted in relation to the North Coast land development investigation and presumably with general application to its investigations:

This, however was not a Royal Commission. If it had been, more leads might have been pursued, and more might have been revealed. The months of hearings would have become years. The mounds of paper would have become mountains.

The objective was more limited. It was to disclose sufficient practices, and practices conducive to corruption, to be identified. That disclosure enables the problem to be met, not only by changes to the law, as are recommended, but also by public awareness, which provides the opportunity for public attitudes to be developed, and community expectations to be made clear to all in public life.⁶

The findings ICAC may make in its reports resulting from an investigation are set out in Appendix A.

4 Id at 13.

5 Id at 38.

6 ICAC *Report on Investigation into North Coast Land Development* (July, 1990) at 661.

ICAC investigative functions do not extend to the making of determinations as to legal rights and duties. That is to say, the NSW Parliament has not conferred on the ICAC a judicial function. Nor has the ICAC been given a prosecutorial or law enforcement function.⁷

The *ICAC Act* draws an important distinction between investigative functions and investigative powers.⁸ ICAC investigative powers do not travel beyond the subject-matter of ICAC investigative functions. The incidental power conferred on the ICAC under section 19(1), a provision of great importance discussed below, is in terms incapable of extending the application of ICAC investigative powers beyond these functions.

WHAT IS AN INVESTIGATION?

Section 3(1) provides that:

“investigate” includes examine; and
 “investigation” means an investigation under the Act.

It appears that “an investigation under the Act” is one which is within the investigative functions of the ICAC, as defined principally by sections 13(1)(a)(b), (2) and (3), set out above. These provisions appear to limit an investigation to one in relation to “corrupt conduct” as defined by the Act, discussed below.

SUBJECT-MATTER UNDER INVESTIGATION: “CORRUPT CONDUCT”

ICAC investigations are in relation to “corrupt conduct”, which is broadly defined by the Act.⁹ Central to the definition of “corrupt conduct” are the terms “public official” and “public authority”, which are also broadly defined¹⁰ although there is doubt whether “public authority” extends to the Cabinet. Conduct does not amount to “corrupt conduct” unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for terminating the services of a public official.

COMMENCING OR TERMINATING AN INVESTIGATION

An ICAC investigation may be commenced in several ways. Either it is commenced pursuant to the duty of the ICAC to investigate any matter referred to it by both Houses of Parliament¹¹ or it is commenced by the ICAC on its own motion or on a complaint, report or reference to it.¹²

7 *Balog v ICAC* (1989) 18 NSWLR 356.

8 Compare section 13 relating to ICAC investigative functions and sections 14(2), 18, 20, 21, 22, 23, 27, 29, 30, 53, 74(1) relating to ICAC investigative powers.

9 Sections 7-9.

10 Section 3(1).

11 Section 73(1)(2).

12 Section 20(1).

In relation to a matter referred for investigation by both Houses of Parliament pursuant to section 73(2), ICAC is under a duty to “fully investigate” such a matter.¹³ In relation to matters not referred to it by both Houses of Parliament, the ICAC has a broad discretion as to whether it discontinues an investigation.¹⁴ Where ICAC proposes to exercise its discretion not to commence or discontinue an investigation, it must consult the Operations Review Committee or ORC.¹⁵ ICAC has not published guidelines or an exhaustive statement of its policy on the exercise of this discretion.

Some indication of the approach taken by the ICAC to the exercise of this discretion is found in the explanations for ICAC not pursuing certain matters.¹⁶ For example, ICAC decided not to investigate allegations relating to the corrupt early release of prisoners as the principal offenders had been dealt with by the courts and there were no “loose ends of significance which needed to be tied”.¹⁷ A decision was made not to investigate allegations relating to fraud on the GIO as the police investigation was making “decent progress” and ICAC is more interested in corruption in, than fraud upon, the public sector.¹⁸ A decision was made not to investigate allegations relating to the so-called “Botany Council case” due to the significant lapse in time making it “quite wrong” to further proceed against the central figure against whom allegations were made. Also, the prospects of ICAC discovering the truth were regarded as “quite remote”.¹⁹

As at the end of June 1990, ICAC had only approved 21 investigations since the *ICAC Act* commenced operation on 13 March 1989.²⁰ ICAC Commissioner Ian Temby QC stated in July 1990 that:

The ICAC adopts a very selective approach to its investigations, and seeks to do only the more difficult work that others cannot or will not do. If a matter can be dealt with by way of investigation, charge and prosecution, then ordinarily that is what should happen.²¹

OUTCOMES OF ICAC INVESTIGATIONS

Assuming that ICAC decides to commence an investigation, the *ICAC Act* provides for an investigation to have the following possible outcomes:

- it may discontinue the investigation except where the investigation was in relation to a matter referred to ICAC by both Houses of Parliament pursuant to section 73(1);²²

13 Section 73(2).

14 Section 20(3).

15 Section 20(4).

16 Above n3 at 43-49.

17 *Id* at 43-44.

18 *Id* at 44.

19 *Id* at 48.

20 *ICAC Annual Report to 30 June 1990* (1990) at 24.

21 Temby, I, “The ICAC: Individual Rights and the Public Interest”, paper delivered at the Australian Bar Association Conference, 7-12 July 1990 at 9.

22 Section 20(3).

- at any stage, ICAC may refer a matter under investigation to any person or body ICAC thinks appropriate for further investigation or other action, for example, consideration for prosecution;²³
- ICAC may and in some cases must make a report into any matter which has been the subject of investigation.²⁴

LIMITS ON ICAC INVESTIGATIONS AND INVESTIGATIVE POWERS

Two general limits on ICAC investigations and investigative powers should be noted. First, section 122 provides that:

Nothing on this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

Second, as a general proposition ICAC investigations and investigative powers do not travel beyond matters of concern to the State of NSW. ICAC recognises that “(t)he jurisdiction of the Commission must be limited because it is a creature of a State statute”.²⁵ For these reasons, quite apart from any other considerations, ICAC declined to investigate a matter involving events in at least two jurisdictions other than NSW, namely the murder of Australian Federal Police Assistant Commissioner Colin Winchester.²⁶

The *ICAC Act* was not intended to and does not in terms operate to bind the Crown other than in the right of NSW. Section 102 provides that “This Act binds the Crown”. Section 13(b) of the *Interpretation Act 1987* (NSW) provides that “a reference to the Crown is a reference to the Crown in the right of New South Wales”. The presumption that references to the Crown in an Act are references to the Crown in right of the enacting legislature only is not rebutted.²⁷ It follows that the definitions of “public official” and “public authority” under section 3(1) and the definition of “corrupt conduct” under sections 7-9 apply only to those under the Crown in the right of NSW. Provisions which rely on these definitions such as the jurisdictional requirements of an ICAC investigation and the powers under sections 21-23 do not therefore apply to the Crown in the right of a body politic other than NSW, such as the Commonwealth, or in relation to the officers of such an emanation of the Crown. As the provisions do not apply there is no obligation to obey them.

Were the *ICAC Act* in terms purporting to bind another State, a Territory or the Commonwealth, such legislation would in any event be invalid as it would be beyond the legislative power of the State of NSW.²⁸ The Act does not in terms so extend and has been held to be within the legislative power of the NSW Parliament.²⁹

23 Section 53(1).

24 Section 74.

25 Above n3 at 62.

26 Lagan, B and Kingston, M, “Winchester: new mafia link claim” *Sydney Morning Herald* 23 March 1990 at 3.

27 *Commonwealth v Bogle* (1953) 89 CLR 229, 259.

28 *Uther v FCT* (1947) 74 CLR 508. See also, above n16; *Commonwealth v Cigamic Pty Ltd (in liq)*

As there is no general immunity from the laws of NSW for the officers of another State, a Territory and the Commonwealth even in relation to acts performed in the course of their official duties³⁰ the compulsory or coercive powers of the ICAC, other than under sections 21-23, could apply to such officers. It may be however be arguable that although the officer as a person is amenable to the compulsory, as an officer the person is not bound to comply.

The practical extent of such an application of the *ICAC Act* would appear however to be limited. It is arguable that the *ICAC Act* was not intended to and does not in terms over-ride provisions of other Australian legislatures which would require from their officers secrecy, non-disclosure, confidentiality,³¹ observance of the requirements of public interest immunity and legal professional privilege and observance of public service legislation and decisions made thereunder such as with respect to duties and leave or refusal of leave. It is also arguable that were the ICAC to purport to over-ride such requirements, the Act would to that extent be invalid as it would be beyond the legislative power of the State of NSW. Even if the terms of the *ICAC Act* purported to over-ride such provisions of the Commonwealth, where there was an inconsistency between the requirements of the *ICAC Act* and a Commonwealth Act, the Commonwealth Act would prevail to the extent of the inconsistency by virtue of section 109 of the Constitution.

It is noteworthy however that the *ICAC Act* has now been amended to provide that a summons under section 35 for a person to appear or produce documents, if issued by a judge or a magistrate, is a summons for the purpose of the *Service and Execution and Process Act 1901* (Cth) and hence can be served and executed throughout Australia. This amendment has not been tested but the author has doubts about its application for the following reasons. Service of a writ of summons pursuant to section 4 of the *Service and Execution of Process Act* does not seem applicable to a summons issued pursuant to section 35 of the *ICAC Act* as section 4 requires appearance before a court in relation to a "suit" but:

- (a) section 35(1) of the *ICAC Act* requires appearance before the Commission, which is not appearance before a court; and
- (b) a proceeding before ICAC is not a "suit" within the meaning of section 3 of the *Service and Execution of Process Act*.

Service pursuant to section 14 of the *Service and Execution of Process Act* also seems inapplicable to a summons issued pursuant to section 35 of the *ICAC Act* as it also relates to service of process (other than a writ of summons) in relation to a "suit". Service pursuant to section 15 of the *Service and Execution of Process Act*, being service other than pursuant to sections 4 and 14 of that Act, requires a person to appear before a court, a term not including ICAC. Section 16 of the *Service and Execution of Process*

(1962) 108 CLR 372.

29 *Dainford v ICAC* (1990) 20 ALD 207; *Dainford v ICAC* NSW Supreme Court, 31 July 1990, per Needham J, unreported.

30 *Pirrie v McFarlane*(1925) 36 CLR 170; *A v Hayden*(1984) 156 CLR 532.

31 But see *FCT v Nestle Australia Ltd* (1986) 69 ALR 445.

Act only relates to summonses issued “in any civil or criminal trial or proceeding”, an ambit not including an ICAC proceeding. In view of the inapplicability of the relevant service provisions of the *Service and Execution of Process Act* to summonses under section 35 of the ICAC possible constitutional problems associated with the amendment purporting to extend Commonwealth legislation beyond the legislative power of the Federal Parliament do not arise for consideration.

It would appear that conduct of a public official of a State other than NSW, a Territory or the Commonwealth could be examined in the context of an investigation otherwise within the jurisdiction of the ICAC. An example of such an investigation was that into North Coast land development where the conduct of a federal public official, Mr Michael Ross, was considered ³² At 635 of the report of that investigation, ICAC stated that:

There are also a number of matters relating to Mr Ross which relate to a period when he was working in Canberra either with a Minister or as a member of the public service. These matters are not mentioned specifically here, and they are not the subject of any finding related to a specific offence. That is because they are Federal matters, and will be the subject of a report to the Attorney General under s14(1)(b).

Section 14(1)(b) confers on ICAC the function of referring to the Attorney General evidence that may be admissible in the prosecution of a person for an offence against a law of the Commonwealth, another State or a Territory. ICAC may also make recommendations as to what action should be taken in relation to that evidence.

GENERAL INVESTIGATIVE POWERS

Read as a whole, it is plain that the *ICAC Act* confers on the ICAC at least the power to undertake in pursuit of its investigative functions all the routine investigative tasks of a character not involving interference with the liberty of the subject.³³ These tasks would presumably include the establishment and maintenance of an investigative staff, systems of work for investigative purposes and operations thereunder such as record keeping, analysis and communications.

It should be noted that such a general investigative power would not of itself authorise interference with the liberty of the subject. It is an ordinary principle of statutory interpretation that express statutory provision is required to authorise such interference.³⁴ The incidental power under section 19(1), considered below, would not suffice. Accordingly, where the NSW Parliament has considered that the ICAC should have a power which would interfere with the liberty of the subject, such a power must be enumerated in legislation. These are considered variously, below.

The interviewing of witnesses is amongst the most important of all general investigative operations. The ICAC has stated that where it believes a witness to have

32 Above n6.

33 See sections 13, 17(1), 19(1), 20(1)(2).

34 Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (3rd edn, 1988) pars 5.10-5.15.

committed an offence “the usual practice is for the witness to be cautioned”. Sometimes the ICAC will permit the legal representative of a witness to be present at the interview or have been given an opportunity to advise their client before an interview. The ICAC has also identified two methods to deal with reluctant witnesses. The first is by encouraging the witness to take objection to giving the evidence at a hearing, thereby making the evidence inadmissible in most court proceedings.³⁵ The second is to take a statement without giving a caution on the basis that the statement will not be used against the witness under section 410 of the *Crimes Act* 1900 (NSW). This may be followed by an application under section 49 to the Attorney General for indemnification of the witness.³⁶

THE INCIDENTAL POWER

Section 19(1) provides that:

The Commission has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of its functions, and any specific powers conferred on the Commission by this Act shall not be taken to limit by implication the generality of this section.

Section 19(1) appears to be intended to avoid a view of ICAC powers which would be so strict as to have the effect of frustrating the performance of ICAC statutory functions. It is well established that:

... such a power does not enable the authority ... to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.³⁷

It follows, that section 19(1) is not capable in terms of conferring:

- an authority upon ICAC to interfere with the liberty of the subject, otherwise than as enumerated under provisions of the *ICAC Act*;
- substantive powers apart from those enumerated in the *ICAC Act*, such as the power to tap telephones;
- a power to do more than facilitate that which is elsewhere regulated under the Act such as search and seizure; or
- a power to do that which is elsewhere prohibited, directly or indirectly, by the Act such as to report a finding that a person is guilty of an offence.³⁸

35 Sections 37 and 38, set out in Appendix C.

36 *ICAC Report on Witnesses for the Committee on the Independent Commission Against Corruption* (December, 1989) at 8.

37 *Shanahan v Scott* (1957) 96 CLR at 250; also *Utah Construction and Engineering Pty Ltd v Pataky* [1966] AC 629, 640.

38 See section 74B, set out in Appendix A. Prior to the introduction of section 74B see *Balog v ICAC* (1989) 18 NSWLR 346 (NSW Supreme Court); (1989) 18 NSWLR 356 (NSW Court of Appeal);

Only a case by case analysis would disclose the practical application of section 19(1). Noteworthy is the decision in *NCA v A, B & D*³⁹ where the Full Federal Court considered section 19 of the *National Crime Authority Act 1984* (Cth), in terms similar to section 19 of the *ICAC Act*. The Court stated that “whether something is necessary to be done for any of (the purposes set out in section 19) requires the Authority to exercise a judgment”.⁴⁰ This appears to suggest that in the absence of a positive judgment that something is “necessary to be done” for one of the purposes set out in section 19(1) of the *ICAC Act*, this provision cannot be relied upon to retrospectively facilitate that which would otherwise be beyond the powers of the ICAC. Nothing in the *ICAC Act* however requires that such a judgment be of a formal character.

THE POWER TO INVESTIGATE BY A HEARING

ICAC may in its discretion hold a hearing “for the purposes of an investigation”.⁴¹ Accordingly ICAC has stated that hearings “should be regarded as an aid to, or part of, the investigation process”.⁴² There is, however, no requirement that ICAC must hold a hearing in relation to any of its investigations.

CONTROL AND CONDUCT OF A HEARING

Section 30(2) provides:

A hearing shall be conducted by the Commissioner or by an Assistant Commissioner, as determined by the Commissioner.

This provision implies that the person conducting the hearing has the power to control and regulate the hearing. This would include fixing the time and place of a hearing, determining the order of witnesses, maintaining order and making rulings in the course of the hearing. The incidental power under section 19(1) would cure any doubt about the existence of such powers.

As to the manner in which hearings are conducted, the following comments of Commissioner Temby are instructive:

I have or assume a general supervisory responsibility with respect to strategy. I approve the investigation, I set its scope and purpose, and amend the scope and purpose if necessary, so that in the level of strategy and direction the responsibility is mine. I do not attend team meetings. I generally do not see witness’s statements in advance, although there might be some special reason why I should go to extreme lengths to get the person to come along, or something of that sort. I see some key documents in advance, but not the majority of them.

(1989) 93 ALR 469 (High Court).

39 (1988) 78 ALR 707.

40 Id at 715.

41 Section 30(1).

42 See Appendix A.

It is to be remembered that we are conducting an investigation and in the end I am the investigator, although there are others who do the work. In the end I have to describe my role as being that of strategic direction, and the operations are left to others...

I ought to remain a bit distant because in the end I have to hear the witness and try to make a judgment about the matter.⁴³

The *ICAC Act* also provides for the ICAC to appoint a counsel to assist it in the conduct of a hearing.⁴⁴ In so far as it is “(a)n article of faith with the Commission ... that counsel assisting has the responsibility of what closing submissions to make”, Commissioner Temby regards that contribution as also distancing the commissioner presiding at a hearing from the operations of an ICAC investigation.⁴⁵

To back up the general power of ICAC to conduct a hearing, ICAC has broad contempt powers available to it,⁴⁶ discussed below.

THE GENERAL SCOPE AND PURPOSE OF A HEARING

Section 30 provides:

- (3) At each hearing, the person presiding shall announce the general scope and purpose of the hearing.
- (4) A person appearing before the Commission at a hearing is entitled to be informed of the general scope and purpose of the hearing.

This is the extent of any statutory requirement that ICAC specifically define the matters to be considered in a hearing. No system akin to pleadings as found in judicial proceedings is required.

ICAC has stated:

The Commission has adopted a practice of using a document to record the general scope and purpose of an investigation as the means of formally recording the commencement of an investigation. This approach has a number of advantages. First, it imposes a discipline on the organisation of the investigation, so that all Commission officers know what the investigation is about and have some guide as to what is, and is not, relevant.

Secondly, the “scope and purpose” is incorporated into search warrants (section 21), notices to produce documents (section 22) and notices of authorisation to enter public premises (section 23). this helps those affected to know what is happening, and to put their legal rights and obligations in a context.

Thirdly, the scope and purpose document in relation to the investigation forms the basis for the scope and purpose of a hearing. As noted above, the scope and purpose of a hearing is included in all summonses. The only real limit on questions that can be

43 Committee on the ICAC *Openness and Secrecy in Inquiries Into Organised Crime and Corruption: Questions of Damage to Reputations* (August 1990) at 9.

44 Sections 33(3), 106.

45 Above n43 at 1, 9.

46 Sections 97-101.

put to witnesses at a hearing is that they must be relevant (section 37 (1)(b)). Advance notice of what is relevant and of what the Commission is investigating is designed to prevent the Commission simply bringing witnesses in and asking them questions at large.⁴⁷

As to the machinery provisions relating to publication of the “scope and purpose document” at a public hearing, see below, Appendix B, paragraphs 1-3.

Appearance Of A Person Before A Hearing

Section 32 provides:

Right of appearance of affected person

If it is shown to the satisfaction of the Commission that any person is substantially and directly interested in the subject-matter of a hearing, the Commission may authorise the person to appear at the hearing or a specified part of the hearing.

The heading for this section is incorrect. Section 32 provides for no right of appearance. It confers on ICAC a discretion to authorise the appearance of a person of a particular class at the hearing. As to the machinery provisions relating to appearance before an ICAC public hearing, see below, Appendix B, paragraphs 3, 6-8.

The express provision for who may appear at an ICAC hearing excludes any common law rights or duties which might otherwise require that ICAC permit a person to appear. It may however be a reviewable error of law for ICAC to authorise or refuse to authorise the appearance of a person at a hearing where there is no reasonable basis for the ICAC to be “satisfied” for the purposes of section 32.

Indicative of the operation of section 32 was the handling of the application by a well known journalist, Mr Bob Bottom, to appear at the hearings in the course of the Hakim investigation. Although ultimately it was not necessary for Commissioner Temby to rule on whether to authorise the appearance of Mr Bottom as Mr Bottom did not persist in the application,⁴⁸ Commissioner Temby stated that the investigation was not into Mr Bottom and there was no evidence concerning Mr Bottom. In relation to a particular reference to Mr Bottom in an anonymous letter, Commissioner Temby stated:

That’s not something upon which the commission will be reporting, because if we don’t investigate and we don’t have evidence, then we can’t report, I mean you can’t report on a matter until you’ve looked into it and got to the truth of the matter ... So putting the matter fairly bluntly, it seems to me that the commission is not interested in Mr Bottom, and therefore it’s no easy thing to see what justification there is for enabling him to become a player in the matter as he would be if he was granted leave to appear.⁴⁹

Commissioner Temby went on to indicate a willingness to receive from Mr Bottom either written submissions on the issues before the Commission or a statement on the

47 Above n36 at 9.

48 Transcript of Hearing of Investigation relating to the raid on Frank Hakim’s Office, 3 October 1989, 175.

49 Id at 164-165.

facts. He also invited Mr Bottom to provide counsel assisting the commission or those instructing counsel assisting with material which could be used for the examination or cross-examination of witness.⁵⁰

LEGAL REPRESENTATION OF A PERSON IN A HEARING

Section 33 provides in part:

- (1) The Commission may, in relation to a hearing, authorise —
 - (a) a person giving evidence at the hearing; or
 - (b) a person referred to in section 32,

to be represented by a legal practitioner at the hearing or for a specified part of the hearing;
- (2) The Commission is required to give a reasonable opportunity for a person giving evidence at the hearing to be legally represented.

Although the obligation under section 33(2) does not extend to persons referred to in section 32, it is likely that a decision to refuse legal representation under section 33(1) which was unreasonable may be subject to judicial review. The express provision for legal representation at an ICAC hearing, however, excludes any common law rights which might otherwise require that legal representation be permitted to facilitate an opportunity to be heard.

It would appear, however, that the Commissioner presiding at a hearing could refuse to permit a particular legal practitioner to represent a person at a hearing. Such a refusal would be based on a combination of the discretionary terms of section 33, the general power to control the conduct of a hearing under section 30(2) and the incidental power under section 19(1). An example where such a refusal might take place is where a particular legal practitioner intended to represent a number of persons at a hearing but the Commissioner reasonably believed that such a course would lead to a conflict of interest for the practitioner and harm to the conduct of the investigation in which the hearing was to occur.⁵¹

Another important limitation on legal representation is contained in ICAC's statement of "Procedure at Public Hearings". Paragraph 7 provides that a legal representative of a person appearing or a witness before the Commission shall not "give advice to the person represented while he or she is in the course of giving evidence".

Section 51 provides for the payment to a "witness before the Commission ... in respect of the witness's attendance" according to a prescribed scale or in the absence of a scale by such amount as ICAC determines.

⁵⁰ Id at 175-176.

⁵¹ Above n25; *Glynn v ICAC* (1990) 20 ALD 214.

The *ICAC Act* does not, however, provide for ICAC to have the power to meet the costs of legal representation or other costs of a witness not being “witness before the Commission ... in respect of the witness’s attendance” within the meaning of section 51. An application for such costs may be made to the Attorney General under section 52, by a person who is or is about to appear before ICAC, seeking the authorisation of the Attorney General to pay out of money provided Parliament for “legal or financial assistance in respect of the appearance of that person before the Commission as the Attorney General determines”.

PROCEDURE IN A HEARING

Express statutory provision has been made in relation to certain procedures for hearings such as the announcement of the general scope and purpose of a hearing and the entitlement of a person appearing before the hearing to be informed of it, provisions as to appearance at hearings, legal representation, examination and cross-examination of witnesses.⁵²

Section 17 (2) however provides:

The Commission shall exercise its functions with as little formality and technicality as is possible, and in particular, the Commission shall accept written submissions as far as possible and hearings shall be conducted with as little emphasis on an adversarial approach as is possible.

ICAC Assistant Commissioner, the Hon Adrian Roden QC has stated:

The only reasons for requiring that there be rules of procedure, in the sense of who does what, and when, can be that lawyers are accustomed to working with them, and that it is feared that without guidance from such rules, injustice might be done. There is no identifiable right of the individual that requires that enquiries have procedural rules imposed upon them. Of course, procedural abuses can work injustice; but rules do not necessarily provide protection. And it is difficult to see how rules could be devised to meet all cases, without impeding the search for the truth. Once again, reliance must be placed on the wisdom and integrity of the person conducting the enquiry.⁵³

The *ICAC Act* does not require the establishment or observance of procedures in the nature of pleadings in a judicial proceeding as to formalise the ambit of the investigation, amendment of the scope of the investigation or notifying affected or interested persons of the investigation, save for the requirements which apply to a hearing established for the purpose of an investigation, discussed above, under section 30.

Nonetheless ICAC hearings do not proceed without some measures intended to provide expedition, order and justice. The Commission has stated:

52 Section 30(3)(4), 32, 33, 34.

53 Roden, A, “A Delicate Balance; A Paper on the Place of Individual Rights in Corruption Investigations”, 4th International Anti-Corruption Conference, Sydney, 16 November 1989 at 21.

The appearance of Commission hearings is not very different from court hearings. There is a bench and a bar table, and the usual courtesies on interaction between lawyers, witnesses and the person presiding are observed.

From a witness's point of view, the main difference between Commission hearings and ordinary court proceedings is that often the questioning of them is in a leading form, akin to cross-examination in the courts. This is consistent with a direct approach designed to get to the essence of a matter as quickly as possible.⁵⁴

ICAC has also published a statement entitled "Procedure at Public Hearings",⁵⁵ reproduced as Appendix B to this chapter. Much of the statement either recites provisions of the *ICAC Act* or sets out machinery provisions. Of special note are paragraphs 13 and 14. Paragraph 13 deals with how ICAC will generally handle hearsay and other inadmissible evidence as well as prohibiting certain lines of questioning. Paragraph 14 embodies the commitment of ICAC to providing an opportunity for any person against whom corrupt conduct is alleged to answer such an allegation. It is also noteworthy that this statement only applies to public hearings. The policies and procedures of ICAC in the conduct of its private hearings are necessarily unknown to those without access to them.

As to the order in which witnesses are called, Assistant Commissioner Roden refused in the North Coast land development investigation to give priority to prominent identities such as Ministers to put their cases. He is reported to have stated that the Commission would call witnesses in the order which best served the objective of ascertaining the truth.⁵⁶ More generally, Assistant Commissioner Roden has stated:

Corruption commissions can call witnesses in any order and at any time. This can be of great benefit to the inquiry, without affecting any real individual right.⁵⁷

ICAC has installed video equipment in its hearing rooms so as to enable it to record the evidence given by witnesses.⁵⁸ Commissioner Temby has stated that:

What we propose to record on video is a few minutes of film of each witness. That will aid recollection, especially in long matters. It should lead to better reports to the Parliament. None of this is contentious.⁵⁹

PRIVATE OR PUBLIC HEARINGS

Section 31 provides:

- (1) A hearing shall be held in public, unless the Commission directs that the hearing be held in private.
- (2) If the Commission directs that a hearing be held in private, the Commission may give directions as to the persons who may be present at the hearing.

54 Above n36 at 13.

55 Above n3, Appendix II; ICAC In Practice" (1989) 27 *Law Society Journal* 16.

56 "Ministers not given priority by the ICAC" *Canberra Times* 28 July 1989 at 2.

57 Above n53 at 20-21.

58 Lagan, B, "ICAC filmed witnesses, admits Temby" *Sydney Morning Herald* 31 March 1990 at 3.

59 *Sydney Morning Herald* 2 April 1990 at 14.

Aw-
199

-
- (3) At a hearing held in public, the Commission may direct that the hearing or part of a hearing be held in private and give directions as the persons who may be present at the hearing.
- (4) The Commission shall not give a direction under this section that hearing or part of a hearing be held in private unless it is satisfied that it is desirable to do so in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given.

The importance of the “public interest” factor is reinforced by section 12, which provides:

In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as paramount concerns.

As at 30 June 1990, Commissioner Temby stated that of the 21 investigations approved⁶⁰ to the year ending 30 June 1990, ICAC had conducted 265 days of investigative hearings, 235.5 being held in public.⁶¹

When asked to set out the criteria applicable to a decision as to whether a hearing should be held in private or public, Commissioner Temby has referred to two ICAC reports where he was at pains to explain such decisions in particular cases.⁶² In the Park Plaza Report, Commissioner Temby set out the main justifications he saw for the general requirement that ICAC hold its hearings in public. In his view however this was a case where “unusual circumstances made the present case” an exception to the general rule. He stated:

I decided that the public interest would be best served by holding the hearing in private, but making the report public. In that way all would know of the Commission’s investigation and its findings, but harm to individuals would be avoided in the situation — likely to be unusual — that the Commission did not need assistance from the public relative to the particular matter. It cannot be in the public interest to do harm — in this case to Kumagai Gumi — which is both gratuitous and avoidable in circumstances where no compensating benefits flow.⁶³

In the Hakim Report, Commissioner Temby stated:

I think the arguments are nicely balanced. I have given due weight to such of them as were put forward ...

In such circumstances one is inevitably thrown back to the general statutory rule. In the absence of facts and circumstances that fit the requirements of section 31 (4), there must be a public hearing.

The Act imposes an overriding obligation on the Commission to conduct hearings in public. The public have a right to know what the Commission is doing and how it is doing it. Public hearings are a means of creating a bond of trust between the

60 Above n20 at 24.

61 Id at 28-29.

62 Above n43 at 7; ICAC *Report on Investigation Relating to the Park Plaza Suite* (October 1989) at 15-16; ICAC *Report on Investigation Relating to the Raid on Frank Hakim’s Office* (December 1989) at 48-50.

63 ICAC *Report on Investigation Relating to the Park Plaza Suite* (October 1989) at 16.

Commission and the public, and of ensuring that the Commission is accountable and judged by the public it serves.⁶⁴

In the Carpets Report, ICAC declined to proceed in private at one stage but made a suppression order pursuant to section 112 of the *ICAC Act* so as to avoid damage to the interests of certain parties.⁶⁵

Although ICAC has supported the call for a legislative amendment enabling the televising of its public hearings, such a proposal has as yet not been acted on by the NSW Parliament. The Parliamentary Committee on the ICAC recommended in a report dated June 1990 that ICAC hearings not be televised. The Committee favoured this issue being considered within a general review of the present arrangements relating to the media coverage of court proceedings in NSW.⁶⁶

In the course of conducting an Inquiry into ICAC procedures and the rights of witnesses, the ICAC Parliamentary Committee published a discussion paper by former Royal Commissioner and President of the NSW Court of Appeal, the Hon. Athol Moffitt QC as a basis for considering whether the Act should be amended to better protect interests at risk from public hearings such as an individual's interest in his/her reputation and fair trials. Amongst other things, the Moffitt paper favoured amendment of the *ICAC Act* so that ICAC would be required to have private hearings when such interests were put at risk.⁶⁷ In its First Report on the above Inquiry, the Committee supported the Moffitt proposals in principle by recommending a range of measures which should be tried first so as to deal with the perceived damage to reputation and other interests that may arise out of ICAC hearings in public. These included amendment of section 31 of the *ICAC Act* so as to give ICAC greater discretion in determining whether a hearing be held in private or in public and a call on ICAC to make greater use of its power pursuant to section 112 of the *ICAC Act* to suppress publication of material so as to better protect the reputation of individuals.⁶⁸

FINDINGS BY ICAC

When read as a whole, the *ICAC Act* envisages that ICAC must make findings as a result of its investigations in order to fulfil its functions under sections 13 and 14 unless ICAC decides, where it has the discretion to do so, to not investigate a matter or to discontinue an investigation. It appears that findings which result from investigations may, and in some cases must, take the form of reports under sections 74, 74A and 74B, the material parts of which are set out in Appendix A.⁶⁹

64 *ICAC Report on Investigation Relating to the Raid on Frank Hakim's Office* (December 1989) at 50.

65 *ICAC Report on Investigation into Dealings Between Homfray Carpets and the Department of Housing* (September 1990) at 79-80.

66 Committee on the ICAC *Report of an Inquiry into a Proposal for the Televising of Public Hearings of the Independent Commission Against Corruption* (June 1990) at 32.

67 Above n43.

68 Committee on the ICAC *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations* (Inquiry into Commission Procedures and the Rights of Witnesses: First Report) (November 1990) pars 5.3.4, 6.4.2.

69 See also above n24.

THE DUTY TO ACCORD PROCEDURAL FAIRNESS

Failure to observe the duty to accord procedural fairness could make the ICAC subject to the supervisory jurisdiction of the Supreme Court of NSW. The usual range of judicial review remedies would be available such as declarations, injunctions and mandamus. It would however depend on the facts of each case and the perceived needs of the applicant as to which remedy might be sought.

Commissioner Temby has stated in relation to ICAC investigations "there is a clear obligation to be fair".⁷⁰ This has also been conceded by ICAC in litigation.⁷¹

According to the NSW Supreme Court in *Glynn*, ICAC is bound to observe the rules of natural justice or procedural fairness in the conduct of ICAC hearings.⁷² The legal requirement that ICAC is under a duty to accord procedural fairness, even though ICAC may not make determinations as to the rights, duties or liabilities of any person, depends upon well established general principles, most recently stated by the High Court as follows:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intentment.⁷³

The *ICAC Act* does not expressly oust judicial review of the ICAC. Also, it is apparent from the parliamentary debates of the ICAC Bill, to which regard may be had in interpreting the Act pursuant to section 34 of the *Interpretation Act 1987* (NSW), that the Parliament did not intend the bill "to oust the supervisory jurisdiction of the Supreme Court"⁷⁴ or "to affect the residual powers of the Supreme Court to exercise accepted judicial review over the exercise by the commission of its jurisdiction or powers".⁷⁵ The *ICAC Act* itself provides ample indications that the NSW Parliament intended that persons affected by an ICAC investigative hearing be treated fairly.⁷⁶ It is also notable that Commissioner Temby has made assurances that ICAC will act fairly.⁷⁷ ICAC has also made assurances that those subject to a possible adverse finding will be given a right to reply to it.⁷⁸

ICAC may make findings or undertake action in pursuance of its powers and functions under the Act which may adversely impact upon the rights or interests of a person, thereby attracting the duty.⁷⁹ Such rights or interests "must be understood as

70 Above n21 at 6.

71 *Anthony Aristodemou v Ian Douglas Temby and ICAC* Supreme Court of NSW, 14 December 1989, per Grove J, unreported, 7-8; *Dainford v ICAC* (1990) 20 ALD 207.

72 Above n51: *Glynn* at 215.

73 *Annetts v McCann* High Court, 20 December 1990, unreported, 1.

74 Parliamentary Proceedings, NSW Leg Ass, 31 May 1988, 843, Hon N Greiner, Premier, 2nd reading, in reply.

75 Parliamentary Proceedings, NSW Leg Counc, 1 June 1988 at 981, Hon E P Pickering, Minister for Police and Emergency Services, 2nd reading speech.

76 Sections 30, 32-34.

77 Above n21 at 6.

78 Appendix B par 14; above n6 at 4; above n43 at 8, 10, 11; Roden, above n53 at 27, 29.

relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests".⁸⁰ In certain circumstances, it seems clear that findings by the ICAC may adversely impact upon such rights or interests, especially status, livelihood and reputation.

ICAC findings may have legal consequences such as requiring that consideration be given to prosecution of an individual for an offence or the disciplining or dismissal of a public official.⁸¹ Also, ICAC may refer of a matter for action by another person or body where such action may have an effect on the rights or liabilities of an individual.⁸² Such circumstances may, according to the High Court, of themselves attract the duty.⁸³

The fact that ICAC may make findings adverse to a legitimate expectation may also attract the duty.⁸⁴ According to the High Court, "a legitimate expectation may take the form of an expectation of a substantive right, privilege or benefit or of a procedural right, advantage or opportunity".⁸⁵ Provided the expectation is reasonable, it may be based on "some statement or undertaking on the part of the authority that makes the relevant decision".⁸⁶ The circumstances under which a legitimate expectation may arise in relation to the ICAC are many and would probably include assurances and conduct by the ICAC providing a reasonable basis for an expectation that particular procedures will be followed in a hearing or that all persons affected by the hearing will be treated fairly by the ICAC.

Generally the existence of the duty would be strengthened in the case of an application for judicial review in relation to a finding by a person who is "substantially and directed interested in any subject-matter of a hearing" within the meaning of section 32 of the *ICAC Act* or who is an "affected" person within the meaning of section 74A of the Act. The High Court however noted in one case that the fact that ICAC may have failed to comply with the "scope and purpose" requirements of section 30(3) does not of itself entail that any subsequent hearing or ICAC report involves a denial of natural justice.⁸⁷

Also favouring the existence of the duty is the lack of provision in the *ICAC Act* for any form of review of or appeal against ICAC findings, including by the Ombudsman⁸⁸ and the immunity from civil action under section 109 of the *ICAC Act*, the Commissioner or any person acting at his direction for a matter or thing done in good

79 *Kioa v West* (1985) 159 CLR 550, 582-583 per Mason J.

80 *Id* at 582 per Mason J.

81 Sections 14(1), 74A(2).

82 Sections 53-57.

83 *R v Collins ; Ex parte ACTU-SOLO Enterprises Pty Ltd* (1976) 8 ALR 691, 695-6; *Mahon v Air New Zealand Ltd* (1984) AC 808; Aronson, M and Franklin, N, *Review of Administrative Action* (1987) at 139-140.

84 Above n47: *Kioa* at 582-583 per Mason J; *Attorney General (NSW) v Quin* (1990) 93 ALR 13-14; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 93 ALR 51, 52 per Deane J, 72 per McHugh J.

85 *Quin* 14 per Mason CJ, above n52.

86 *Kioa* 583 per Mason J, above n47.

87 *Dainford v ICAC* High Court(special leave application), 6 August 1990, unreported.

88 Section 118.

faith under any Act and the provision for a defence of absolute privilege for a publication to or by ICAC or an ICAC officer.⁸⁹

THE REQUIREMENTS OF THE DUTY TO ACCORD PROCEDURAL FAIRNESS GENERALLY

It is well established that the requirements of the duty to accord procedural fairness, sometimes referred to as the duty to act judicially or fairly or to observe the principles of natural justice, depend on the circumstances. These include the rules under which the authority acts, rights, interests or legitimate expectations that may be affected and the particular facts of the case.⁹⁰

As the Parliament has expressly provided for who may appear at a hearing⁹¹ and legal representation of such persons,⁹² the common law requirements of the duty to accord procedural fairness appear to be excluded with respect to these matters. However, failure to comply with these provisions may give rise to a reviewable error of law.

Where the *ICAC Act* is silent, the requirements of the common law apply. Such requirements are generally dealt with in treatises on administrative law.⁹³ Of fundamental significance is that:

An erroneous ruling on a point of evidence or procedure is not in itself a denial of natural justice. To be reviewable on grounds of natural justice, the error must have the effect of depriving a person of a fair opportunity to present his or her case.⁹⁴

Of specific interest are the right to reply to adverse findings, the operation of the duty to accord procedural fairness in relation to matters of evidence generally and in particular judicial review on the ground that a finding was made on the basis of no evidence. These will be dealt with in the following paragraphs.

THE REQUIREMENTS OF THE DUTY TO ACCORD PROCEDURAL FAIRNESS: THE RIGHT OF REPLY

In *Mahon v Air New Zealand Ltd*⁹⁵ Lord Diplock stated that one of the rules of natural justice or procedural fairness is that a commissioner conducting an inquiry:

89 Section 17K *Defamation Act* 1974(NSW); *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

90 *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, 46 per Deane J; above n52: *Haoucher*, 52 per Deane J, 58 per Dawson J, 67 per Gaudron J; *NCSC v News Corporation Ltd* (1984) 156 CLR 296, 319-320 per Mason, Wilson and Dawson JJ.

91 Section 32.

92 Section 33.

93 For example, Aronson, N and Franklin, N, *Review of Administrative Action* (1987) ch 6.

94 *Id* at 176.

95 (1984) AC 808.

... must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including the term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made ... (the) rule requires that any person represented at the hearing who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had the result.⁹⁶

I should add that there is no reason why this should not in some cases extend to where an adverse finding may be made against a person not appearing or represented at the hearing. The reason such a person failed to appear or be represented at a hearing may however be a circumstance weighing against there being a duty to accord them procedural fairness. Such a reason might be that they declined an invitation from ICAC to appear or chose to ignore notification by ICAC of a current or pending investigation or hearing.⁹⁷

ICAC policy is consistent with the legal requirement as stated by the Privy Council in *Mahon*. As noted earlier, ICAC has established as an invariable policy that no finding will be made against those anybody except after they have had a proper opportunity to be heard. This involves in effect a right of reply to both an adverse finding and the material upon which it is based. It should be noted that, depending on the circumstances, it would not always be necessary for ICAC to conduct a hearing so as to comply with the requirement as stated by the Privy Council in *Mahon*, noted earlier. What would be required would depend on the facts of each case. Where the reply would not involve giving or testing evidence it may be sufficient to satisfy the requirements for ICAC to put the possible findings in writing and seek a written response within a reasonable period.

The NSW Court of Appeal has ruled that the right of reply does not extend to ICAC being required to produce its reports in draft form for comment by those entitled to be heard on possible adverse findings.⁹⁸ What is however required is that a person against whom an adverse finding may be made will have an appropriate opportunity to reply by the end of the hearing.⁹⁹

The ICAC Parliamentary Committee has recommended that *ICAC Act* provide a right of reply to persons against whom allegations are made "even though there is no statutory requirement for the provision of such a right". The Committee has also endorsed the practice of prior notification, where possible, of persons against whom allegations may be made in public hearings. It has also called upon ICAC to "(w)herever possible" provide a person with an opportunity to reply to an adverse allegation on the

96 Id at 820.

97 For example, under Appendix A, pars 1-3.

98 *Dainford v ICAC* (1990) 20 ALD 233.

99 Above n51: *Glynn*.

same day that the allegation is made. Where that is not possible a suppression order under section 112 of the *ICAC Act* should be made in relation to the adverse material.¹⁰⁰

THE REQUIREMENTS OF THE DUTY TO ACCORD PROCEDURAL FAIRNESS: EVIDENCE

Section 17 (1) provides:

The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

In terms the relaxation provided by this sub-section does not authorise ICAC to deal with evidence in an arbitrary manner. The Commission has stated

The Commission uses those court methods for dealing with evidence that are logical and permit an orderly disposition of matters before the Commission. Documentary evidence is still tendered and numbered and oral evidence is still by question and answer.¹⁰¹

An example of a rule of evidence which may have no “logical” application in an ICAC proceeding would be one which finds its rationale only in the context of a jury trial.¹⁰²

A general requirement is implied under the *ICAC Act* that the Commissioner presiding at a hearing, as far as possible, exclude and not take account of irrelevant evidence or material. This requirement is implied by the qualification on the power to “inform itself” under section 17(1). The qualification is that for ICAC to inform itself it must be in relation to the subject-matter of the investigation within scope and purpose of the hearing as under section 30. Section 37(1)(b) also requires that a witness summoned to attend at a hearing is not entitled to refuse to answer “any question relevant to an investigation”.

The general requirements of the duty to accord procedural fairness with respect to evidentiary matters applicable to ICAC would appear to require that ICAC use the rules of evidence as a guide to what constitutes a fair treatment of evidentiary questions.¹⁰³

To the extent that there are provisions similar to section 17, most noticeably section 33 of the *Administrative Appeals Tribunal Act 1977* (Cth), some assistance in ascertaining the specific evidentiary requirements upon the ICAC may be gained.¹⁰⁴ However, to the extent that the AAT is involved in an adversarial proceeding where it may remake the decision of a decision-maker and thereby affect the rights and liabilities of the parties and ICAC is not, it is likely that the requirements of procedural fairness would generally demand that the AAT adhere more closely to the rules of evidence than ICAC.

100 Committee on the ICAC *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations* (Inquiry into Commission Procedures and the Rights of Witnesses: First Report) (November 1990) pars 6.4.2, 7.4.1, 8.4.1, 8.4.2.

101 Above n36 at 11.

102 Above n93 at 175-176.

103 *R v War Pensions Entitlement Appeals Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 per Evatt J.

104 Pearce, D, *The Australian Administrative Law Service* (Butterworths) pars 248-253.

Although section 34 of the *ICAC Act* provides that ICAC may give leave to a person or legal representative authorise to appear at a hearing, the terms of the section do not, as is the case with sections 32 and 33, exclude the requirements of the duty to accord procedural fairness. Consequently, ICAC is under a duty to exercise its discretion under section 34 so as not to deprive any person with a right to appear of an opportunity to be heard by way of examination and cross-examination of witnesses. As a general proposition this requires that in addition to a right to reply to adverse findings, ICAC must accord a person within the meaning of section 32 an opportunity to meet adverse evidence upon which a finding may be made with examination or cross-examination of witnesses, as appropriate. This opportunity is of special significance in relation to traditionally vexed areas of evidence such as hearsay¹⁰⁵ or uncorroborated evidence or evidence from a witness of poor credit or evidence which is otherwise unreliable or of questionable weight. Whether crucial evidence that cannot be subjected to cross-examination should be excluded is, however, debatable. It has been said in the context of the AAT that hearsay evidence of this sort should be excluded.¹⁰⁶ A more likely course in an ICAC hearing is that crucial evidence not capable of being tested by cross-examination may be received subject to ICAC taking into account this factor when making its findings. In an extreme case there may be grounds for requiring that ICAC should exclude such material altogether.

ICAC appears to have taken a cautious approach to receiving hearsay and otherwise inadmissible evidence in its public hearings.¹⁰⁷ Further, Commissioner Temby has stated:

It would not make difference to our deliberations if we could not receive hearsay evidence, because we receive very little of it, and for my part I would wish to challenge the assertion that hearsay evidence is reported everyday.¹⁰⁸

Also, in one instance Assistant Commissioner Roden criticised the media for its reporting of hearsay evidence and warned the public not to draw conclusions from such reports.¹⁰⁹ ICAC has also adopted the civil standard of proof for the purpose of making findings in the course of its hearings.¹¹⁰

THE REQUIREMENTS OF THE DUTY TO ACCORD PROCEDURAL FAIRNESS: NO EVIDENCE TO SUPPORT A FINDING

The common law principles in Australia as to judicial review on the basis of the state of the evidence has been stated authoritatively by the High Court in *Bond*.¹¹¹ The making

105 *Id* at par 250, citing *Re Saverio Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1, 5; *Barbaro(Saverio) v Minister for Immigration and Ethnic Affairs* (1982) 4 ALN N219.

106 Pearce, *id* at par 250, citing *Re Pettifer and Director-General of Health*(1982) 4 ALD 517.

107 See Appendix B par 13.

108 Committee on the ICAC, above n43 at 8.

109 Hogarth, M, "Stern warnings bring abrupt end to ICAC hearing" *Sydney Morning Herald* 24 June 1989 at 7; Deegan, L, "ICAC warns on hearsay" *Weekend Australian* 24 June 1989 at 9.

110 Above n64 at 6-8; above n6 at xxv; Temby, above n21 at 5.

of findings and the drawing of inferences in the absence of evidence is an error of law. The making of findings which simply involve a wrong finding of fact or illogicality in reasoning do not of themselves give rise to an error of law. Insufficiency of the evidence is not an error of law under Australian law and English authorities for this proposition have been rejected by the High Court.¹¹²

It follows that as the ICAC is under a duty to accord procedural fairness in making its findings, those findings may be reviewed where there is no evidence to support them.

ICAC COMPULSORY AND COERCIVE POWERS IN HEARINGS

As noted above, in the absence of statutory provision, ICAC has no power to interfere with the liberty of the subject. The NSW Parliament has conferred certain powers with this effect. Those to be discussed in this section are commonly characterised as akin to the powers of a Royal Commission. Statistics as to their use are found in ICAC Annual Reports.¹¹³

ICAC has the power to summons a witness and the production of documents or other things.¹¹⁴ ICAC may cause such a person to be arrested and brought before the Commission where either the person fails to attend in answer to the summons or the Commission is satisfied that the person will not attend or is making preparations to or is about to leave NSW with the effect that the required evidence will not be obtained.¹¹⁵ ICAC may also order that a prisoner attend before the Commission.¹¹⁶

The powers to over-ride the privilege against self-incrimination and duties of secrecy and other restrictions on disclosure are broad and are set out in sections 37 and 38 which are reproduced in Appendix C. The following points are noteworthy:

Answers given or documents or other things produced are not inadmissible in any civil, criminal or disciplinary proceeding unless the witness makes an objection to so answer or so producing,⁷

Section 37(4)(b) and (c) when read together seem to provide that even if a witness objects to the production of a document it is not inadmissible "in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing." It is not clear what such a proceeding might be but perhaps it is one relating to civil asset recovery.

Section 38 provides the power to the Commissioner or person presiding at a hearing to declare that all or any classes of answer or documents or other thing are given or produced on objection by the witness. ICAC has ruled that such a declaration is only prospective in effect and therefore cannot apply to answers already given.¹¹⁸

111 *Bond*, above n90.

112 *Id per Mason CJ at 38; Brennan J concurring at 45; Deane J, contra at 47.*

113 Above n20 at 28.

114 Section 35.

115 Section 36.

116 Section 39.

117 Section 37(4)(b).

It is an offence for a person subject to a summons under section 35 which specifies that information about the summons should not be disclosed to disclose information about the summons that is likely to prejudice the investigation to which it relates.¹¹⁹

WITNESS INDEMNITIES AND PROTECTION

The ICAC has no power as such to grant witness indemnities or to enter into undertakings not to use certain matters in evidence against a person. Section 49 only provides that ICAC may recommend to the Attorney General that such indemnities and undertakings be entered into. An example of such an indemnity is found in the Driver Licensing Report.¹²⁰

Section 50 provide for broad powers to enter arrangements for the protection of a witness.¹²¹ To the year ending 30 June 1990, ICAC has only made witness protection arrangements in one case.¹²²

ICAC AND COURT PROCEEDINGS

Section 18 of the *ICAC Act* provides in effect that despite any other judicial or quasi-judicial proceeding, ICAC may pursue an investigation under the Act and furnish reports in connection with any investigation. Should however the ICAC pursue such courses, the section requires ICAC to undertake measures to prevent the concurrent judicial or quasi-judicial proceeding from being prejudiced. These measures are, as appropriate, to conduct hearings in private, to make directions restricting publication of certain matter pursuant to section 112 or to defer reporting to Parliament on an investigation. These measures do not apply, in the case of committal proceedings, before the commencement of the committal hearing and, in any other case, after the proceedings cease to be proceedings for the trial of a person before a jury. To date section 18 has only once. In that case the applicant sought to obtain an injunction on the basis that an ICAC report in the Waverley Council investigation would prejudice certain proceedings to which the applicant was a party in the District Court. The application failed.¹²³

The existence of this provision would appear to oust the jurisdiction of a court to make an order in the nature of an injunction restraining ICAC from continuing a hearing or an investigation. Such an injunction has been contemplated by the High Court in relation to a Royal Commission where further hearings by the Royal Commission would create a real risk of perverting the course of justice in another proceeding and thereby constituting a contempt of court.¹²⁴ It is nevertheless arguable that judicial review may

118 Above n65 at 82-84.

119 Section 114.

120 *ICAC Report on Investigation into Driver Licensing* (December 1990) at 82-84.

121 Above n36 at 16.

122 Above n20 at 29.

123 *Balog v ICAC* Supreme Court of NSW, 8 August 1990 per Cohen J, unreported.

124 *State of Victoria v The Australian Building Construction Employees' and Builders Labourers'*

be available where ICAC fails to properly exercise its discretion under section 18(2) of the *ICAC Act* — that is where it fails to take measures necessary to ensure that the accused's right to a fair trial is not prejudiced.

Section 113 provides that where a person has been charged with an offence before a court of a state, a court may require ICAC to make available to it evidence or information subject to a non-publication direction under section 112. In certain circumstances, the court may be able to make that material available to either or both the prosecution and the legal practitioner representing the person charged.

POWERS OF SECONDED POLICE

Section 105 provides that:

While a member of the Police Force is a member of the staff of the Commission, the member may continue to act as a constable.

The effect of section 105 is that in addition to the benefit ICAC investigations gain from the experience and expertise of seconded police, ICAC gains the benefit of their powers as constables.¹²⁵ The most significant of these are the powers of arrest conferred on a constable, which exceed those of an ordinary citizen.

Use of seconded police by ICAC contrasts with the position taken in the United Kingdom that the secondment of police to the Serious Fraud Office may produce constitutional problems.¹²⁶

SEARCH AND SEIZURE

Sections 40-48 provide for ICAC powers of search and seizure. Search warrants under the *ICAC Act* are subject to Part 3 of the *Search Warrants Act 1985* (NSW). A search warrant under the Act may be issued by a justice or the ICAC Commissioner.¹²⁷

TELECOMMUNICATIONS INTERCEPTION

An officer of the ICAC may apply for a warrant authorising the interception of telecommunications under the *Telecommunications (Interception) Act 1979* (Cth). Complementary legislation required to give effect to this power has been enacted (*Telecommunications (Interception) (New South Wales) Amendment Act 1989*, amending the *Telecommunications (Interception) (New South Wales) Act 1987*).

Federation (1981-1982) 152 CLR 25; *Huston v Costigan* (1982) 45 ALR 559; *Sharpe v Goodhew* (1989) 90 ALR 21; *Cooke v Goodhew* (1989) 91 ALR 447.

125 *Ryder v Morley* (1987) 76 ALR 329.

126 Wood, J, "The Serious Fraud Office" [1989] *Criminal Law Review* 175-184 at 176.

127 Sections 40 (1)(4).

LISTENING DEVICES

Section 19 (2) provides that:

The Commission or an officer of the Commissioner may seek the issue of a warrant under the *Listening Devices Act 1984*.

A warrant under that Act permits the use of a listening device where otherwise it is prohibited. ICAC has on at least one occasion ruled that a videotape made pursuant to a warrant under the *Listening Devices Act* is admissible in an ICAC proceeding.¹²⁸

SURVEILLANCE

Although surveillance is sometimes regarded as an invasion of privacy, no legal power is required to conduct surveillance unless that surveillance is otherwise illegal, for example, when surveillance requires entry onto private property without the authority of the occupier.

COMPULSORY AND COERCIVE POWERS RELATING TO PUBLIC AUTHORITIES AND PUBLIC OFFICIALS

For the purposes of an investigation, ICAC has special powers in relation to public officials and public authorities as defined under the *ICAC Act*:

- by notice ICAC may require production of a statement of information;¹²⁹
- by notice ICAC may require the attendance of a person production of a document or other thing specified in a notice;¹³⁰
- ICAC may enter and inspect premises and take copies of documents; the authority or official shall make available such facilities as are necessary to enable ICAC to exercise these powers; the powers under this section do not apply to the State Bank, the GIO or a client of either institution;¹³¹

In exercising the powers under sections 21-23, ICAC may in certain circumstances over-ride any privilege or duty of secrecy or restriction on disclosure that might otherwise apply to a public official or public authority.

Where ICAC requires a person under sections 21 or 22 to produce any statement of information or document or other thing section 26(2) provides that:

If the statement, document or other thing tends to incriminate the person and the person objects to production at the time, neither the fact of the requirement nor the statement, document or thing itself (if produced) may be used in any proceedings against the person (except proceedings for an offence under this Act).

128 Above n120 at 251-2.

129 Section 21.

130 Section 22.

131 Section 23.

It is an offence for a person subject to a notice under sections 21 or 22 which specifies that information about the notice should not be disclosed to disclose information about the notice that is likely to prejudice the investigation to which it relates.¹³²

INJUNCTIONS

Sections 27 and 28 provide:

27. The Supreme Court may, on application made by the Commission, grant an injunction restraining any conduct in which a person (whether or not a public authority or official) is engaging or in which such a person appears likely to engage, if the conduct is the subject of, or affects the subject of, an investigation or proposed investigation by the Commission.
28. (1) The Supreme Court shall not grant an injunction under section 27 unless it is of the opinion that —
 - (a) the conduct sought to be restrained is likely to impede the conduct of the investigation or proposed investigation;
 - (b) it is necessary to restrain the conduct in order to prevent irreparable harm being done because of corrupt conduct or suspected corrupt conduct.
- (2) The Commission shall not be required, as a condition for the granting of an injunction under section 27, to give any undertaking as to damages.

The statutory injunction is a relatively modern addition to the powers of an investigative or regulatory agency.¹³³ In the case of the ICAC it is broadly framed and could conceivably be a powerful aid to its investigations such as preventing a person from fleeing the jurisdiction or from making potentially important material unavailable to the Commission. The power could also be used to prevent media publication where, for example, the publication “affects the subject of, an investigation or proposed investigation by the Commission” within the meaning of section 27.

RESTRICTING PUBLICATION

Section 112 provides that the Commission may direct that certain material, such as evidence and documents before the Commission, not be published or only published in such manner as the Commission directs. Contravention of such a direction is an offence.

132 Section 114.

133 Duns, J, “The Statutory Injunction: An Analysis” (1989) 17 *Melbourne University Law Review* 56-71; Duns, J, “Enjoining Breaches of the Criminal Law” (1990) 14 *Criminal Law Journal* 5-22.

CONTEMPT

The *ICAC Act* provides for the Commissioner to certify the contempt of a person to the Supreme Court. The certificate is prima facie evidence of the matters certified. The Supreme Court decides if a punishable contempt has occurred and, if so, what penalty should be ordered.¹³⁴ The matters which may constitute a contempt under the *ICAC Act* are broad, covering not only those matters which would constitute contempt of court but also where a person "wilfully threatens or insults" a range of people including the ICAC Commissioner or an Assistant Commissioner.¹³⁵ So far, ICAC has commenced proceedings in relation to at least two cases of possible contempt under the *ICAC Act*.

In *Aristodemou*¹³⁶ the Court found the defendant guilty of contempt under section 98(c) in relation to refusal to answer a question when so ordered by the Commissioner presiding at a hearing. The defendant was fined \$500 by the Supreme Court and ordered to pay the costs of the proceeding. The defendant also agreed to answer the question which he had originally refused to answer.¹³⁷

The other case, which did not proceed to judgment in the Supreme Court, involved an allegation of contempt under section 98(h) against Mr Douglas Moppett, Chairman of the National Party of Australia, NSW. On 29 December 1989, Commissioner Temby certified under section 99(2) that Mr Moppett had committed a contempt under the *ICAC Act*:

...in that he made publications calculated to

- (i) lower the authority and standing of the Commission in the eyes of the public;
- (ii) reduce the confidence of the public in the Commission's reports to the Parliament; and
- (iii) cause misgivings about the impartiality brought by the Commission to the exercise of its functions.

On 9 April 1990, ICAC discontinued the contempt proceeding against Mr Moppett as he apologised in court in terms acceptable to ICAC and agreed to pay the costs of the matter.¹³⁸

Commissioner Temby publicly stated that ICAC would not commence contempt proceedings against the NSW Deputy Premier, Hon. W Murray MP in relation to his various public comments on the ICAC report on the investigation into North Coast land development principally for the reason that the comments were made after the report was released. In the Moppett case, above, the comments were made before a report had been handed down.¹³⁹ The essence of Mr Murray's comments was that the ICAC

134 Section 99.

135 Section 98.

136 *Aristodemou*, above n72; see also, above n120 at 16-17.

137 Falvey, J, "Witness at ICAC guilty of contempt" *Daily Telegraph* 15 December 1989 at 17; "Man fined over ICAC contempt" *Canberra Times* 16 December 1989 at 4.

138 Falvey, J, "Nats chief apologises for attack on ICAC" *Australian* 10 April 1990 at 6; Fife-Yeomans, J, "Moppett apologises in court for ICAC 'McCarthyism' tag" *Sydney Morning Herald* 10 April 1990 at 4.

conducted its investigations in a manner repugnant to individual rights. Mr Murray was especially concerned about the statement in the report of the ICAC investigation into North Coast land development that:

Although there is no proper basis for a finding involving dishonesty on the part of Mr Murray, so far as that matter is concerned, the haste with which the release and disposal of the Crown land was handled, created a climate conducive to corrupt conduct.¹⁴⁰

Mr Murray is reported to have said amongst other things that this statement was in effect meaningless and unfair. He likened ICAC to the "Spanish Inquisition" and said that ICAC had thrown out "the rule book".¹⁴¹ Commissioner Temby noted that these comments were made notwithstanding that Mr Murray had agreed that on each occasion he had appeared before ICAC he had received a fair hearing.¹⁴²

ASSET RECOVERY

Section 121 provides for the ICAC to be able to apply for asset recovery orders under the Confiscation of Proceeds of *Crime Act* 1989 (NSW), subject to the requirements that ICAC consult the DPP and considers whether the function is better exercised by the DPP.

INFORMATION EXCHANGE AND CO-OPERATION WITH LAW ENFORCEMENT AGENCIES

The *ICAC Act* contemplates the ICAC working with law enforcement agencies in a number of ways. Section 11 provides that the Ombudsman, the Commissioner of Police, the principal officer of a public authority and an officer who constitutes a public authority are under a duty to report to ICAC "any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct". This duty applies despite

139 7.30 Report, ABC Television, 2 August 1990; Cooper, J, "Murray escapes contempt charges" *Australian* 3 August 1990, 3; Moore, M, "Temby: no action against Murray" *Sydney Morning Herald* 3 August 1990 at 2; Moore, M, "ICAC's law impartial — for some" *Sydney Morning Herald* 4 August 1990 at 24.

140 Above n6 at 574.

141 Editorial "The Nationals are wrong" *Sydney Morning Herald* 16 July 1990 at 10; Editorial "Wal Murray: the lame duck" *Sydney Morning Herald* 24 July 1990 at 10; "Several in for Murray job: Greiner" *Canberra Times* 24 July 1990 at 4; Cooper, J, "Nats turn attack ICAC on findings" *Australian* 25 July 1990 at 3; Moore, M, "Murray outburst at ICAC" *Sydney Morning Herald* 25 July 1990 at 1, 8; Moore, M, "Greiner defends Murray tirade" *Sydney Morning Herald* 26 July 1990 at 1; Editorial "Mr Murray and the ICAC" *Sydney Morning Herald* 26 July 1990 at 10; "Greiner moves to curtail ICAC comments" *Canberra Times* 26 July 1990 at 4; Cooper, J, "Greiner refuses to carpet Murray over ICAC" *Australian* 26 July 1990 at 4; Moore, M, "Murray lashes out again at ICAC" *Sydney Morning Herald* 27 July 1990 at 3; McGuinness, P, "Fair comment is not contemptible" *Australian* 27 July 1990 at 11; Cooper, J, "ICAC methods infected with vices, says Murray" *Australian* 27 July 1990 at 3; Editorial "Greiner's lack of guts may cost him next poll" *Australian* 27 July 1990 at 10; Mitchell, A, "Murray faces contempt charge" *Sun Herald* 29 July 1990 at 1; Anderson, P, "Greiner in hotseat as ICAC considers charging Murray" *Australian Financial Review* 30 July 1990 at 4.

142 Ibid.

any duty of secrecy or other restriction on disclosure. Guidelines of general application under section 11(3) have been issued by ICAC setting out what matters need or need not be reported.¹⁴³

Section 13(1)(c) provides that one of the principal functions of the ICAC is “to communicate to appropriate authorities the results of its investigations”.

Section 14(1)(a) confers on ICAC the function of assembling and referring to the DPP evidence that may be admissible in a prosecution for an offence against the law of NSW. Even if material ICAC passed to the DPP was unlawfully produced, the NSW Supreme Court has refused an application to stop the DPP considering such material in the exercise of its functions.¹⁴⁴ Section 14(1)(b) confers on ICAC the function of referring to the Attorney General evidence that may be admissible in the prosecution of a person for an offence against a law of the Commonwealth, another State or a Territory. ICAC may also make recommendations as to what action should be taken in relation to that evidence. Section 14(2) confers on ICAC the function of furnishing, in appropriate cases, information arising out of its investigations relating to the exercise of the functions of a public authority to the Minister responsible for that authority, together with such recommendations as ICAC considers appropriate.

Section 15 provides for the Commission to establish or involve itself in task-forces involving Commonwealth, State or Territorial authorities in connection with the exercise of ICAC’s principal functions under section 13.

Section 16(1) requires ICAC, in connection with the exercise of ICAC’s principal functions relating to the investigation of conduct under section 13, to co-operate as far as possible with all law enforcement agencies, defined primarily as the various police forces in Australia. Also under section 16(2), in the exercise of such functions, ICAC may co-operate with the Auditor-General, the National Crime Authority, the Australian Bureau of Criminal Intelligence and such other persons or bodies as ICAC thinks appropriate. Under section 16(3) has a broad power to consult with and disseminate intelligence and information, subject to confidentiality requirements, to law enforcement agencies, the NCA, the ABCI, task forces and such other persons or bodies as ICAC thinks appropriate.

Commonwealth legislation has not been amended to enable ICAC to receive taxation information from the Australian Taxation Office or information collected by the Cash Transactions Reports Agency, although ICAC has sought such amendments.¹⁴⁵

REFERRAL OF MATTERS TO OTHER PERSONS OR BODIES

The ICAC has a broad power to refer matters “for investigation or other action to any person or body considered by the Commission to be appropriate in the circum-

143 Above n6 at 127-134.

144 *Cassell v ICAC* NSW Supreme Court, 10 August 1990, per Hodgson J, unreported.

145 Above n3 at 67.

stances".¹⁴⁶ Such referral shall not occur without appropriate consultation having taken place and ICAC considering the views of the person or body to whom it desires to make the referral.¹⁴⁷ Such referral may include a recommendation for the action to be taken and a time limit within which the action should be taken.¹⁴⁸ ICAC may require a report a report from the person or body to whom referral is made.¹⁴⁹ Where ICAC is not satisfied with the action of the person or body to whom referral is made, ICAC may undertake certain follow-up action.¹⁵⁰

Clearly the referral powers under the *ICAC Act* have the potential creating or contributing to hostility between ICAC and the person or body to whom referral is made. In particular there may be concern that the referral powers may be exercised in such a way as to unduly affect or interfere with the exercise of powers which are at law intended to be exercised without external direction. Examples include the discretion to prosecute, certain police powers, action by the Ombudsman and numerous statutory powers and discretions.¹⁵¹

SECRECY

Section 111 provides for a broad secrecy provision applicable to ICAC officers, a legal practitioner assisting the Commission, a person who is or was a member of the Operations Review Committee and a person or body referred to in section 14(3), 16(4) or 53(6). Except in certain circumstances, it is an offence for a person to whom section 111 applies to make a record of any information or divulge or communicate any information, being information acquired in pursuance of the person's functions under the Act.¹⁵² Such a person is not required to divulge such information to a court except for the purposes of a prosecution arising out of an investigation by ICAC in the exercise of its functions.¹⁵³

INDEPENDENCE

The *ICAC Act* does not provide for ICAC to be subject to the direction of any person or body, including the Executive Government of NSW, except for the NSW Parliament. This exception only applies to a reference by both Houses of Parliament to ICAC requiring it to conduct an investigation relating to alleged corrupt conduct and a requirement that ICAC make a report to the Parliament in relation to such a matter.¹⁵⁴ Complaints about the conduct of the ICAC are outside the investigative jurisdiction of the Ombudsman.¹⁵⁵

146 Section 53(1).

147 Section 53(5).

148 Section 53(3).

149 Section 54.

150 Section 55.

151 NSW Ombudsman *Annual Report for the Year Ended 30th June 1989* at 54-56.

152 Section 111(2).

153 Section 111 (3).

154 Section 73(1), 74(2).

ACCOUNTABILITY

The *ICAC Act* provides for ICAC to be directly accountable in three ways:

1. ICAC must produce an Annual Report to the Parliament covering specified matters.¹⁵⁶
2. A Parliamentary Committee on the ICAC has been established, drawn from both Houses of Parliament.¹⁵⁷ Its functions are essentially to monitor and review the ICAC and its legislation and to report thereon to the Parliament.¹⁵⁸ Nothing in the *ICAC Act* however authorises the Committee to investigate a matter relating to particular conduct, reconsider a decision by the ICAC to investigate, not to investigate or discontinue an investigation or to reconsider ICAC findings, recommendations, determinations or other decisions by ICAC in relation to a particular investigation.¹⁵⁹
3. An Operations Review Committee has been established,¹⁶⁰ constituted by eight members, consisting of the ICAC Commissioner and an Assistant Commissioner, the Commissioner of Police, a person appointed by the Governor on the recommendation of the Attorney General and four persons representing community views, the latter five being appointed only with the concurrence of the ICAC Commissioner.¹⁶¹ The functions of the Committee are to advise the ICAC on whether the ICAC should investigate a complaint under the Act or discontinue an investigation of such a complaint and to advise the ICAC Commissioner on any matter upon which he seeks the advice of the Committee.¹⁶² Before ICAC can decide not to investigate a complaint or to discontinue an investigation it must consult the Committee.¹⁶³ As at 30 March 1990, ICAC appears to have followed the advice of the Committee on every occasion.¹⁶⁴

The *ICAC Act* also provides that unless otherwise directed by ICAC, hearings will be in public¹⁶⁵ and that a report must be prepared for the NSW Parliament on any matter where ICAC has conducted a public hearing.¹⁶⁶ Both these requirements provide for accountability in as much as public proceedings provides the public at large, usually through the media, an opportunity to see what ICAC does and evaluate for itself the quality of ICAC's performance.

As noted above, ICAC is also subject to accountability by way of judicial review in some cases.

155 Section 118.

156 Section 76.

157 Section 63.

158 Section 64(1).

159 Section 64(2).

160 Section 58.

161 Section 60.

162 Section 59.

163 Section 20(4).

164 Above n 43 at 29.

165 Section 31(1).

166 Section 74(3).

APPENDIX A

Sections 13(3)(4)(5), 74(1)(2)(3), 74A, 74B

13. (3) The principal functions of the Commission also include:
- (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct; and
 - (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.
- (4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc. of guilt or recommending prosecution) prevents the Commission from including in a report, but this section is the only restriction imposed by this Act on the Commission's powers under subsection (3).
- (5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:
- (a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct;
 - (b) opinions as to whether consideration should not be given to the prosecution or the taking of other action against particular persons;
 - (c) findings of fact.
74. (1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.
- (2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.
- (3) The Commission shall prepare reports in relation to a matters as to which the Commission has conducted a public hearing, unless the Houses of parliament have given different directions under subsection (2).
- 74A. (1) The Commission is authorised to include in a report under section 74:
- (a) statements as to any of its findings, opinions and recommendations; and
 - (b) statements as to the Commission's reasons for any of its findings, opinions and recommendations.
- (2) The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

-
- (a) the prosecution of the person for a specified criminal offence;
 - (b) the taking of action against the person for a specified disciplinary offence;
 - (c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.
- (3) An “affected person is a person described as such in a reference made by both Houses of Parliament or against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.
- (4) Subsection (2) does not limit the kinds of statement that a report can contain concerning any such “affected” person and does not prevent a report from containing a statement described in that subsection in respect of any other person.
- 74B. (1) The Commission is not authorised to include in a report under section 74 a statement as to:
- (a) a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence); or
 - (b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).
- (2) A finding or opinion that a person has engaged, is engaging or is about to engage:
- (a) in corrupt conduct (whether or not specified corrupt conduct); or
 - (b) in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),
- is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal or disciplinary offence.
- (3) In this section and section 74A, “criminal offence” and “disciplinary offence” have the same meanings as in section 9.

APPENDIX B

“Procedure at public hearings” (reproduced from ICAC *Annual Report to 30 June 1989*, Appendix II)

The Commission’s power to hold hearings is conferred by section 30(1) of the *ICAC Act 1988*. Such hearings may only be held “for the purposes of an investigation”. They should accordingly be regarded as an aid to, or part of, the investigation process.

As a general rule, hearings will be conducted in public. The Act provides that the Commission may direct that a hearing or part of a hearing be conducted in private, but stipulates that such direction may only be given if the Commission is satisfied “that it is desirable ... in the public interest for reasons connected with the subject matter of the investigation or the nature of the evidence to be given”. (s31)

The following procedure will be followed in respect of public hearings.

1. When, for the purposes of an investigation, the Commission decides to hold a public hearing, the Commission will generally give notice of that intention, both publicly and to such persons as the Commission believes are substantially and directly interested in any subject matter of the hearing.
2. The notice will state the general scope and purpose of the proposed hearing, and the date, time and place of the first sitting.
3. One purpose of the notice will be to enable those persons who may wish to appear and be represented to arrange for their applications to be made on the first sitting day.
4. As provided by the Act, hearings will be conducted and presided over by the Commissioner or an Assistant Commissioner (s30(2)), presently Temby QC or Roden QC.
5. The courtesies which are customary in courts of law will be observed. Robes will not be worn. The person presiding may be addressed as “Commissioner” whether he be the Commissioner or an Assistant Commissioner.
6. The first day of a public hearing will generally be limited to the formal announcement of the general scope and purpose of the hearing, applications for persons to appear and be represented, and settling arrangements for the hearing.
7. Leave to appear for a person substantially and directly interested in the subject matter of the hearing or for a person who will be giving evidence at the hearing, will generally entitle the legal representative to ask questions of witnesses and to make submissions, but not to give advice to the person represented while he or she is in the course of giving evidence. Leave to appear may however be subject to limitations particularly when the person represented has an interest in part only of the subject matter of the hearing.
8. Leave to appear may be granted in respect of a hearing generally, or in respect of a specified part of a hearing.

-
9. The hearings will be conducted with due regard to the provisions of section 17 of the Act, which provides:
 - (1) The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.
 - (2) The Commission shall exercise its functions with as little formality and technicality as is possible, and in particular, the Commission shall accept written submissions as far as possible and hearings shall be conducted with as little emphasis on an adversarial approach as is possible.
 10. In the case of witnesses who have furnished statements to the Commission, such statements may, in the discretion of the person presiding, be read in lieu of examination-in-chief.
 11. In the case of a person seeking to give evidence, or of a person proposed as a witness by any person appearing or represented at a hearing, the Commission will generally require that a statement of the proposed evidence be provided to counsel assisting the Commission.
 12. In view of the provisions of section 17 of the Act the Commission may accept signed statements from persons not called as witnesses, or other informal proof, in relation to matters it considers not to be contentious.
 13. Hearsay and other legally inadmissible material will generally only be received insofar as it appears to the person presiding that it may further the investigation for the purposes of which the hearing is being held. The Commission will not permit public hearings to become vehicles for the purveying of gossip, rumour or speculation. Questions must not be asked of, or propositions put to, a witness, without justification on the basis of knowledge of, or instructions given to, the person asking the question.
 14. Persons against whom corrupt conduct is alleged, will generally be called and given an opportunity of answering the allegations, but will generally only be called after the evidence of such alleged conduct has been led.
 15. As required by section 74 of the Act, all public hearings will be the subject of report to Parliament.

APPENDIX C

CPP: ss. 24 & 25

Sections 37 and 38 of the ICAC Act

- 37 (1) A witness summoned to attend or appearing before the Commission at a hearing is not entitled to refuse —
- (a) to be sworn or to make an affirmation; or
 - (b) to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a hearing;
 - (c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.
- (2) A witness summoned to attend or appearing before the Commission at a hearing is not excused from answering any question or producing any document or thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or any the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.
- (3) An answer made, or document or other thing produce, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.
- (4) Nothing in this section makes inadmissible —
- (a) any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act; or
 - (b) any answer, document or other thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2);
 - (c) any document in any civil proceedings for in respect of any right or liability conferred or imposed by the document or other thing.
- (5) Where —
- (a) legal practitioner or other person is required to answer a question or produce a document or other thing at a hearing before the Commission; and
 - (b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between a legal practitioner (in his or her capacity as a legal practitioner) and a person for the purpose of providing or reviving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person before the Commission,

the Priv-
as in reg-ment

but use
immunity

the legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having the authority to do so.

- (6) A member of the clergy of any church or religious denomination, if required to answer a question or produce a document or other thing at a hearing before the Commission, is entitled to refuse to divulge any confession made to the member of the clergy in his or her professional capacity, unless —
- (a) the person who made the confession agrees to the requirement being complied with; or
 - (b) the communication involved in the confession was made for a criminal purpose.
38. The Commissioner or person presiding at the hearing may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced will be regarded as having been produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each answer, document or other thing.