

**REPORT OF AN AUDIT INTO THE EXERCISE BY
THE INDEPENDENT COMMISSION AGAINST
CORRUPTION OF ITS POWERS UNDER SECTIONS
21, 22, 23 AND 35 OF THE INDEPENDENT
COMMISSION AGAINST CORRUPTION ACT 1988**

15 March 2012

by

**The Inspector of the
Independent Commission Against Corruption**

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THE PURPOSE OF THE AUDIT

In order to carry out its statutory obligation to investigate allegations of serious and systemic corrupt conduct, the Independent Commission Against Corruption (the ICAC or the Commission) is vested with compulsory powers to seek and obtain information under sections 21, 22, 23 and 35 of the *Independent Commission Against Corruption Act 1988* (the ICAC Act). It is the ICAC's use of these powers which is the subject of this audit.

Section 21 empowers the Commission, for the purposes of an investigation, by notice in writing served on a public authority or public official to require the authority or official to produce a statement of information.

Section 22 empowers the Commission, for the purposes of an investigation, by notice in writing served on a person (whether or not a public authority or public official) to require the person:

- (a) to attend, at a time and place specified in the notice, before a person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
- (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.

Section 23 provides that, for the purposes of an investigation, the Commissioner or an officer of the Commission authorised in writing by the Commissioner may, at any time enter and inspect any premises occupied or used by a public authority or public official in that capacity, and inspect any document or other thing in or on the premises, and take copies of any document in or on the premises.

Section 35 authorises the Commissioner to summon a person to appear before the Commission at a Compulsory Examination or Public Inquiry at a time and place

named in the summons to give evidence, or to produce such documents or other things (if any) as are referred to in the summons, or both.

The use of these powers can impinge upon the civil rights of those persons affected. For example, a notice under section 22 to a person requiring information about another person can have a detrimental effect on the reputation of that other person, at least in the eyes of the recipient of that notice. The obligation to attend a Compulsory Examination under section 35 requires that person to give evidence on oath or affirmation, to answer self incriminatory questions and limits her/his right to reveal the fact that she/he is under such an obligation.

However, there are circumstances in which the exercise of the compulsory powers can provide evidence which facilitates the prevention of a serious crime or aids the prosecution of a person or persons involved in serious criminal activity.

The purpose of this audit is to examine a sample of cases in which the ICAC has used these powers: --

- 1) to determine whether it has obeyed the terms of the legislation.
- 2) to examine the systems instituted and maintained by the ICAC to ensure that such use is limited to those circumstances where it is lawful and appropriate for the conduct of its statutory functions.
- 3) to determine whether such use has in fact been appropriate to the conduct of its statutory functions.

This audit will cover the following:

- 1) The Inspector's audit function
- 2) The ambit of the audit
- 3) The relevant provisions of the ICAC Act
- 4) ICAC's systems to control and regulate the application for and use of notices under sections 21 and 22 and summonses under section 35 of the ICAC Act

5) Analysis of the exercise of the powers

6) Conclusions

1 THE INSPECTOR'S AUDIT FUNCTION

Section 57B(1)(a) of the *Independent Commission Against Corruption Act 1988* (the ICAC Act or the Act) authorises the Inspector of the Independent Commission Against Corruption (the Inspector) to audit the operations of the ICAC for the purpose of monitoring compliance with the law of the State.

The Inspector's audit role must be read in the context of the Inspector's other functions prescribed under section 57B of the ICAC Act, namely sections 57B(1)(c) and (d).

Section 57B(1)(c) of the ICAC Act authorises the Inspector to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission.

Section 57B(1)(d) of the ICAC Act authorises the Inspector to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality and propriety of its activities.

Section 57B(2) states that the functions of the Inspector may be exercised on the Inspector's own initiative.

2 THE AMBIT OF THE AUDIT

By letter dated 22 September 2011 the Inspector wrote to the Commissioner in the following terms, omitting formal parts:

Pursuant to section 57B(1)(a) and (d) of the *Independent Commission Against Corruption Act 1988* (the Act), I propose to audit and assess the effectiveness and appropriateness of the procedures of the Commission in relation to the exercise of certain of its powers of compulsion (as enumerated below) during the period 1 April 2009 to 30 September 2009.

The proposed audit and assessment will examine the exercise of the Commission's powers:

- under s. 21 of the Act to require production of a statement of information;
- under s. 22 of the Act to require a person to attend and produce a document or other thing;
- under s. 23 of the Act to enter and inspect premises occupied or used by a public authority or public official in that capacity;
- under s. 35 of the Act to summon a person to appear before the Commission to give evidence at a Compulsory Examination. This does not include a Public Inquiry;

during the period 1 September 2010 to 31 March 2011.

In the course of this Audit I will examine:-

- the Commission's compliance with the formal and procedural requirements of these sections;
- the reasons behind the Commission's decisions to exercise these powers;
- the manner in which the Commission exercised these powers; and
- any other matters set out in section 57B of the Act.

For the purposes of this exercise, I would in the first instance like to review the Commission's files and records relating to:

- all notices pursuant to s. 21 and statements of information produced in response during the period 1 September 2010 to 31 March 2011;
- all notices pursuant to s. 22 and a description of the material, if any, produced in response during the period 1 September 2010 to 31 March 2011;
- all authorisations pursuant to s. 23 and a description of the material, if any, produced in response during the period 1 September 2010 to 31 March 2011;

- all summonses pursuant to s. 35 to appear at a Compulsory Examination to give evidence and/or produce documents or other things and a brief summary or what was revealed at that examination during the period 1 September 2010 to 31 March 2011; and
- all Policy and Procedure manuals relating to the exercise of powers under ss. 21, 22, 23 and 35 of the Act in force during the period 1 September 2010 to 31 March 2011.

Upon reviewing the materials identified above, I may request further information from the Commission and/or its officers for the purpose of completing my audit and assessment.

I welcome any comments you may have on the proposed ambit of this audit and assessment.

By letter dated 28 September 2011 the Commission advised that during the relevant period, it issued:

- no section 23 notices
- 38 section 21 notices
- 333 section 22 notices; and
- 48 section 35 summonses

The Commission also provided copies of the two versions of procedure 2 of its Operations Manual (dealing with the issue of section 21, 22 and 23 notices and section 35 summonses) operative during the audit period. It also enclosed a copy of procedure 5 which deals with Compulsory Examinations as well as providing for completion of Hearing Plans.

Copies of the section 21 and 22 notices and the section 35 summonses were received on 18 October 2011 contained in eight lever arch binders.

3 THE RELEVANT SECTIONS OF THE ICAC ACT

21 Power to obtain information

- (1) For the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to produce a statement of information.
- (2) A notice under this section must specify or describe the information concerned, must fix a time and date for compliance and must specify the person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) to whom the production is to be made.
- (3) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the public authority or public official and may, but need not, specify the person or class of persons who may so act.

22 Power to obtain documents etc

- (1) For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person:
 - (a) to attend, at a time and place specified in the notice, before a person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
 - (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.
- (2) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the person on whom it was imposed and may, but need not, specify the person or class of persons who may so act.

24 Privilege as regards information, documents etc

- (1) This section applies where, under section 21 or 22, the Commission requires any person:
 - (a) to produce any statement of information, or
 - (b) to produce any document or other thing.

- (2) The Commission shall set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.
- (3) The person must however comply with the requirement despite:
 - (a) any rule which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
 - (b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or
 - (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official.

26 Self-incrimination

- (1) This section applies where, under section 21 or 22, the Commission requires any person:
 - (a) to produce any statement of information, or
 - (b) to produce any document or other thing.
- (2) 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 against this Act).
- (3) They may however be used for the purposes of the investigation concerned, despite any such objection.

30 Compulsory Examinations

- (1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a Compulsory Examination.
- (2) A Compulsory Examination is to be conducted by the Commissioner or by an Assistant Commissioner, as determined by the Commissioner.
- (3) A person required to attend a Compulsory Examination is entitled to be informed, before or at the commencement of the Compulsory Examination, of the nature of the allegation or complaint being investigated.

(4) A failure to comply with subsection (3) does not invalidate or otherwise affect the Compulsory Examination.

(5) A Compulsory Examination is to be conducted in private.

[Note: Section 17(2) requires the Commission to conduct Compulsory Examinations with as little emphasis on an adversarial approach as possible.]

(6) The Commission may (but is not required to) advise a person required to attend a Compulsory Examination of any findings it has made or opinions it has formed as a result of the Compulsory Examination.

35 Power to summon witnesses and take evidence

(1) The Commissioner may summon a person to appear before the Commission at a Compulsory Examination or Public Inquiry at a time and place named in the summons:

(a) to give evidence, or

(b) to produce such documents or other things (if any) as are referred to in the summons,

or both.

(2) The person presiding at a Compulsory Examination or Public Inquiry before the Commission may require a person appearing at the Compulsory Examination or Public Inquiry to produce a document or other thing.

(3) The Commission may, at a Compulsory Examination or Public Inquiry, take evidence on oath or affirmation and for that purpose:

(a) the person presiding at the Compulsory Examination or Public Inquiry may require a person appearing at the Compulsory Examination or Public Inquiry to give evidence either to take an oath or to make an affirmation in a form approved by the person presiding; and

(b) the person presiding, or a person authorised for the purpose by the person presiding, may administer an oath or affirmation to a person so appearing at the Compulsory Examination or Public Inquiry.

(4) A witness who has been summoned to attend before the Commission shall appear and report himself or herself from day to day unless the witness is excused from attendance

or until the witness is released from further attendance by the person presiding at the Compulsory Examination or Public Inquiry.

- (4A) The Commissioner may, by notice in writing, excuse a person who has been summoned to appear before the Commission and produce documents or other things from the required appearance on condition that the person (or a person acting on the person's behalf) produces those documents or things in accordance with any directions given by the Commissioner before the time of the required appearance.
- (5) A person who, without being so excused or released, fails to appear and report shall be taken to have failed to appear before the Commission in obedience to the summons.
- (5A) A person who, after being excused under subsection (4A) from the required appearance, fails to produce the documents or things concerned in accordance with the Commissioner's directions is taken to have failed to appear before the Commission in obedience to the summons.
- (6) A Judge or Magistrate may, on the application of the Commissioner, issue any summons that the Commissioner is authorised to issue under this section.
- (7) The purpose of subsection (6) is to enable the summons to be given the character of a summons issued by a judicial officer, for the purposes of the *Service and Execution of Process Act 1901* of the Commonwealth and any other relevant law.

37 Privilege as regards answers, documents etc

- (1) A witness summoned to attend or appearing before the Commission at a Compulsory Examination or Public Inquiry 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 Compulsory Examination or Public Inquiry, or
 - (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 Compulsory Examination or Public Inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may

incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

(3) An answer made, or document or other thing produced, by a witness at a Compulsory Examination or Public Inquiry before the Commission or in accordance with a direction given by the Commissioner under section 35 (4A) 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), or

(c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

(5) Where:

(a) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at a Compulsory Examination or Public Inquiry before the Commission or in accordance with a direction given by the Commissioner under section 35 (4A), and

(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a Compulsory Examination or Public Inquiry before the Commission, the Australian legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

38 Declaration as to objections by witness

The Commissioner or person presiding at the Compulsory Examination or Public Inquiry 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 by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing.

82 Offences relating to obtaining information

A person shall not:

- (a) without reasonable excuse, fail to comply with a notice served on the person under section 21, or
- (b) in purported compliance with a notice served on the person or some other person under that section, knowingly furnish information that is false or misleading in a material particular.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

83 Offences relating to obtaining documents etc

A person shall not, without reasonable excuse, refuse or fail to comply with a notice served on the person under section 22.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

86 Failure to attend etc

- (1) A person summoned to attend or appearing before the Commission at a Compulsory Examination or Public Inquiry shall not, without reasonable excuse, fail:
 - (a) to attend before the Commission in accordance with the summons, or
 - (b) to be sworn or to make an affirmation, or
 - (c) to answer any question relevant to an investigation put to the person by the Commissioner or other person presiding at the Compulsory Examination or Public Inquiry, or

(d) to produce any document or other thing in the person's custody or control which the person is required by the summons or by the person presiding to produce.

Maximum penalty: 20 penalty units or imprisonment for 2 years, or both.

(2) It is a defence to a prosecution for failing without reasonable excuse to produce a document or other thing if the defendant establishes that the document or other thing was not relevant to an investigation.

(3) A person who without reasonable excuse fails to comply with a condition to which the release of the person under section 36(6) or 100A is subject, is guilty of an offence.

Maximum penalty: 20 penalty units or imprisonment for 2 years, or both.

87 False and misleading evidence

(1) A person who, at a Compulsory Examination or Public Inquiry conducted by the Commission, gives evidence that is false or misleading in a material particular knowing it to be false or misleading, or not believing it to be true, is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

(2) Sections 331 and 332 of the *Crimes Act 1900* apply to proceedings for an offence against this section in the same way as they apply to proceedings for an offence under section 330 of that Act.

4 ICAC'S SYSTEMS TO CONTROL AND REGULATE THE APPLICATION FOR AND USE OF NOTICES UNDER SECTIONS 21 AND 22 AND SUMMONSES UNDER SECTION 35 OF THE ICAC ACT

The procedures to be followed in relation to notices under sections 21, 22 and 23 and summonses under section 35 of that Act during the period under review are set out in the ICAC's Operations Manual, Procedure Number 2 approved 16 July 2007, as varied by the ICAC'S Operations Manual Procedure No. 2 approved 2 December 2010.

The two versions are substantially similar. Variations relevant to this audit are set out later.

Under the heading "General Considerations" the manual states:

Issuing of ICAC Act notices and summonses must proceed on the basis of legally sound documentation and the provision of relevant and accurate information. In all cases consideration should be given to whether or not a coercive power need be exercised. These powers should be used with restraint and with an awareness of their effect on the work and lives of individuals and companies who must comply with such notices.

The manual points out that it is a fundamental requirement that the reason for each exercise of a formal power as well as the actual exercise of the power be legally and soundly based and recorded. To ensure this is done, the following mandatory process is prescribed:

- The July 2007 version states:

Where the Case Officer is seeking the issuing of a notice or summons, the Case Officer will contact the Case Lawyer (if no lawyer is assigned to the matter the Executive Director, Legal will assign a lawyer) and brief the Case Lawyer in the matter. If necessary, the Case Lawyer may require a written minute setting out the reason for the request.

- The December 2010 version states:
 - Where the Case Officer seeks the issuing of notice or summons, he/she will raise the task in MOCCA and send a written minute (or email) to the Case/Team Lawyer through the relevant Chief Investigator. The task entered in the ICAC database (MOCCA) will include timeframes for completion. The timeframe will generally be two working days.
 - The Case Lawyer will be responsible for the preparation of all notices and summonses using the relevant legal macro.
 - The Case Lawyer will submit the relevant documents to the relevant Commissioner or Assistant Commissioner through the Executive Director, Legal, under cover of a minute setting out the justification for the issue of the notice or summons, identifying any likely contentious issues and, in the case of a summons, addressing the matters set out under point 3 of this Procedure. In case of urgency, an oral briefing may be provided in lieu of a written minute, however, the Case Lawyer should subsequently prepare a file note as a record of the reasons for issuing the notice on summons.
 - The December 2010 Procedure requires that all documents should be linked to the relevant task in Trim/MOCCA. Previously the link was to the ICS.
 - Once signed, the notice or summons together with the supporting minutes(s) is to be given to the Property Manager. The Property Manager will register the notice or summons and retain the supporting minute(s) on file with a copy of the notice or summons.

A person required to attend a Compulsory Examination pursuant to section 30 of the ICAC Act is entitled to be informed, before or at the commencement of the examination, of the nature of the allegations or complaint being investigated. In each case in preparing the relevant summons and covering minutes, the Case Lawyer should give consideration and provide advice as to whether the

information required should be provided in or with the summons. As a general rule such information should be included unless to do so might prejudice the investigation.

The procedures go on to specify:

- the requirements for service of the notice or summons
- recording the return date
- the custody of documents obtained as a result of the exercise of these powers
- the summoning of members of parliament and of prisoners
- the method of dealing with claims of privilege under sections 24, 26 and 37(5) of the ICAC Act
- interstate service under the *Service and Execution of Process Act 1992 (Cwth)*

The Commission's procedure number 5 (approved 7 September 2009 and updated 2 December 2010) states that the Commission may conduct a Compulsory Examination for the purpose of its investigations if it is satisfied it is in the public interest to do so. A Compulsory Examination must be conducted in private. A Public Inquiry is conducted in public but the Commission may determine to hold part of the inquiry in private if it considers it to be in the public interest to do so.

The primary purpose of a Public Inquiry or Compulsory Examination is to assist the investigation process by ascertaining factual evidence of what actually occurred.

They also have a wider purpose in examining how corrupt conduct occurred with a view to identifying any systems weaknesses which may lead to recommendations for change. Such material can be an important part of the Commission's corruption prevention work.

Generally, the decision whether an investigation should proceed to Compulsory Examination will be made by the Commissioner.

Recommendations to conduct a Compulsory Examination can be made through the Strategic Investigation Group (SIG) or by a minute to the Commissioner or Deputy Commissioner from the Case Lawyer submitted through the Executive Director, Legal and after consultation with the relevant investigation team of members.

The criteria for determining to conduct a Compulsory Examination in preference to a Public Inquiry or whether any part of a Public Inquiry should be conducted in private may include:

- maintaining the integrity of the investigation (it may be prejudicial to the investigation to publicly divulge the fact that the Commission is conducting an investigation, to identify the witnesses or make known the extent of evidence obtained);
- protection of reputation from anticipated but untested or unverified evidence;
- whether information is being sought at a preliminary stage to define the issues for investigation and determining whether further investigative effort is required;
- the need to protect the identity of a witness or an informant;
- the requirements of section 18(2) of the Act which requires that where there are proceedings for an indictable offence conducted by or on behalf of the Crown, in order to ensure that the accused's right to a fair trial is not prejudiced, the Commission must, to the extent it thinks necessary, ensure that, as far as practicable, the investigation is conducted in private during the currency of the proceedings;

- any application made by, or on behalf of, those appearing before the Commission that it is in the public interest for the evidence to be taken in private; and
- whether the hearing involves closing submissions. Section 31(2) of the Act provides that the Commission may decide to hear closing submissions in private.

Section 31 of the ICAC Act requires the Commission to consider the following:-

- The benefit of exposing to the public, and making it aware, of corrupt conduct
- The seriousness of the allegation or complaint being investigated
- Any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry)
- Whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

A Hearing Plan (in the approved format) must be prepared by the Case lawyer prior to arranging for a Compulsory Examinations and prior to all public enquiries.

It should identify the instances of alleged corrupt conduct and details of how each witness is relevant to that conduct. It should also identify any contentious issues.

In preparing the Hearing Plan, the Case Lawyer is to consult with the Case Investigator and, if applicable, relevant Chief Investigator and any Corruption Prevention officer assigned to the investigation to ensure that all relevant investigation and corruption prevention issues are covered in the Hearing Plan. Where Counsel Assisting has been engaged he/she should also be consulted.

The plan is to be submitted to the presiding Commissioner through the Executive Director, Legal for approval.

A Hearing Security Report is to be prepared for each Compulsory Examination where any risk is identified by the Case lawyer and updated on a daily basis.

It is the responsibility of the Case Lawyer to provide the presiding Commissioner with a brief of evidence.

5 ANALYSIS OF THE USE OF THE POWERS

To prevent publication of any information which could prejudice ongoing investigations, the description of the facts of each case has been considerably abbreviated.

1 Notices under section 21

A total of thirty eight such notices were issued of which six were not served. In each instance they were drawn by a case lawyer, (excluding the six) were properly served and responses were received.

The reasons for non-service were, in one case the respondent lived interstate, in one case the respondent was terminally ill, in two cases the respondent took part in an interview and in two cases the respondent was no longer a public officer.

Thirty five of the notices related to the same investigation which related to allegations that named officers of named local government bodies had, in some instances, engaged in corrupt conduct by authorising payment of fraudulent invoices issued by suppliers to those bodies and, in other cases, had accepted benefits in various forms from suppliers as incentives for favourable business relationships.

The material sought was likely to assist the Commission by confirming the identity of the persons who had engaged in the alleged corrupt activity.

Two of the notices related to an allegation that a Councillor had accepted a bribe and sought financial information regarding him as preliminary to determining whether to proceed to a Public Inquiry.

One notice related to access to an email account.

It is interesting to note that my report of an audit into the use of compulsory powers published in March 2010 reveals that only six section 21 notices were

issued during the six month period 1 April 2009 to 30 September 2009 compared with 38 during the six months period 1 September 2010 to 31 March 2011.

2 Notices under section 22

During this reporting period a total of 336 such notices were issued and served. (In the six month period 1 April 2009 to 30 September 2010 it was 196).

In each instance the Case Officer sent a written minute or email to the Case/Team Lawyer through the relevant Chief Investigator. The Case Lawyer prepared the notice and submitted the relevant documents to the Commissioner or Assistant Commissioner through the Executive Director, Legal, together with a minute setting out the justification for the issue of the notice or summons.

It is not proposed to detail the circumstances of each individual notice, but rather to give an overall view of the use to which such notices were applied.

In many instances reports had been received alleging that a public official had received corrupt payments. As part of the preliminary investigations notices would be served on financial institutions where the subject of investigation was known to have an account. The notice would seek details of the funds held on that persons behalf to ascertain whether there was evidence of unexplained wealth.

One investigation arose out of allegations that public officials had received gifts, including gift vouchers in return for corrupt benefits. This led to 62 notices under section 22 being issued and served on the entities providing the gifts and on the companies issuing and redeeming the gift vouchers.

A further investigation arose out of an allegation that public officials had engaged in corrupt transactions with suppliers to their employer. This led to the issue and service of 21 notices.

A large number of notices were directed to financial institutions (including banks and credit unions), in effect, following the money trail of suspected corrupt transactions.

One investigation related to allegations that Michelle and Sandra Lazarus had obtained money by means of false invoices from two public hospitals. The Commission's *Report of Investigation into Corrupt Conduct Involving Alleged Fraud on Two Sydney Hospitals* published in August 2011 states:

During the course of the investigation, the Commission:

- obtained documents from various sources by issuing 40 notices under section 22 of the ICAC Act (requiring production of documents)
- lawfully executed one search warrant to obtain information relevant to the investigation
- interviewed and/or obtained statements from a number of persons
- conducted four Compulsory Examinations.

Those 40 Notices contributed to the Commission making findings that Sandra Lazarus and Michelle Lazarus engaged in corrupt conduct. As well as investigating those allegations, the Commission also examined the practices and procedures relating to research governance and the processing of invoices within the health system with a view to identifying what improvements are needed to minimise the risk of fraud occurring. The Commission was of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Sandra and Michelle Lazarus for nominated criminal offences.

A further investigation arose out of allegations that an officer of Willoughby City Council had corrupt dealing with developers and business owners in the Chatswood area.

In its report on the *Investigation into the Corrupt Conduct of a Willoughby City Council Officer* published in June 2011 the Commission states:

During the course of the investigation, the Commission:

- obtained documents from various sources by issuing 54 notices under section 22 of the ICAC Act (requiring production of documents)
- lawfully executed three search warrants to obtain information relevant to the investigation
- undertook physical surveillance of persons suspected of being involved in corrupt conduct
- interviewed and/or took statements from a number of persons
- obtained three warrants under the relevant legislation to enable the interception of telecommunications
- conducted one Compulsory Examination.

Those notices assisted the Commission to examine a wide range of allegations that Edward Karkowski, a building surveyor with Willoughby City Council (“the Council”), corruptly exercised his official functions to favour various business owners in the Chatswood area in return for benefits, such as cash, gifts, free meals and free massages and sexual services.

An important part of the investigation was to examine the management system in place at the Council, with a view to identifying the extent to which this system contributed to the conduct uncovered by the Commission and a view to identifying what improvements are needed to ensure such conduct does not recur.

Findings were made in the report that Mr Karkowski engaged in corrupt conduct. The Commission was of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Karkowski for nominated criminal offences.

A further investigation by the Commission concerned allegations of fraud on the former NSW Department of Education and Training (DET) by David Johnson, a contractor who worked at the DET between November 2007 and April 2009. David Johnson was employed as a project manager on an information technology (IT) project known as the SMART2 (School Measurement and Assessment Reading Toolkit) project. The principal allegation of corrupt conduct concerned the recruitment by David Johnson of five employees of his private company, Ogawie Pty Ltd (“Ogawie”), as contractors to work on the SMART2 project. It was alleged that David Johnson had manipulated the recruitment process and arrangements for the payment of contractors to obtain a financial benefit for himself of approximately \$350,000.

It was also alleged that David Johnson falsely represented to the DET that two of those contractors had provided services to the DET when, at David Johnson’s direction, they had actually provided services to Ogawie, resulting in a benefit to David Johnson. In addition, it was alleged that David Johnson falsely represented to the DET that another IT company, Catalina IT, was a preferred supplier, and recommended that Catalina IT be engaged to provide services in order to benefit from the payments made to Catalina IT.

As well as investigating those allegations, the Commission also examined the general risks associated with an extensive reliance by public sector bodies on contractors. The Commission also considered the specific corruption risks that occurred at the DET in relation to the engagement and management of contractors. Since the investigation, the NSW Department of Education and Communities (DEC), which incorporates the former DET, has taken steps to address those risks and the Commission has reviewed the changes made.

In its report on its investigation into allegations of fraud by former Department of Education contractor David Johnson published in January 2012, the Commission revealed during the course of the investigation, that it:

- obtained documents from various sources by issuing 19 notices under section 22 of the ICAC Act (requiring production of documents)
- interviewed and/or obtained statements from a number of persons, including DET employees and contractors
- conducted three Compulsory Examinations.

The notices contributed to the Commission’s findings that David Johnson engaged in corrupt conduct. The Commission was of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with regard to charging Johnson with nominated criminal offences.

Another investigation related to the allegation that one of the Land and Property Management Authority contractors who provided property valuation had downloaded information in excess of its authority for its own benefit or for the benefit of one or more of its companies. ICAC had identified that a person possibly being a new UNSW staff member or a student was linked to the downloads which had significant commercial value. (Approximately 70,000 records had been accessed during 2009).

The Commission’s report on its *Investigation into the Misuse of Access Rights to a Land and Property Management Authority Database* published in November 2011 related to allegations that:

- between 1 August 2006 and 6 November 2009, Ms Kim Hildebrand obtained property-related information from a database administered by the Land and Property Information (LPI) section of the Land and Property Management Authority (LPMA) without paying the prescribed fees and without being otherwise entitled to it
- on 20 April 2009 and 4 September 2009, Ms Hildebrand provided Angus Algie, a co-director and shareholder of Addisons Valuation Services (“Addisons”), and Greg Hildebrand, her father, with access details to the

database, knowing that such access would be used to obtain property-related information without paying the prescribed fees

- between 1 May 2009 and 6 November 2009, staff of Addisons used the access details that Ms Hildebrand had provided to Mr Algie to obtain copies of approximately 74,000 strata plans from the database without paying the prescribed fees
- between 1 August 2006 and 6 November 2009, Mr Hildebrand used the access details Ms Hildebrand had provided to him to obtain strata plans and other property-related information relevant to his business from the database without paying the prescribed fees.

The Report discloses that during the course of the investigation, the Commission:

- obtained documents from various sources by issuing 24 notices under section 22 of the ICAC Act (requiring production of documents)
- executed three search warrants to obtain information relevant to the investigation
- undertook physical surveillance of persons suspected of being involved in corrupt conduct
- interviewed and/or took statements from a number of persons
- obtained three warrants under the relevant legislation to enable the interception of telecommunications
- conducted nine Compulsory Examinations.

These all contributed to findings that persons had engaged in corrupt conduct.

A further investigation involved allegations that Michael Chau, an officer of Strathfield Municipal Council, had engaged in corrupt conduct.

In May 2011 the Commission published its report into the investigation into the solicitation of a corrupt payment by a Strathfield Municipal Council Officer. This report concerned an investigation into an allegation that Michael Chau, Manager

of Community Services at Strathfield Municipal Council (“the Council”), solicited a payment of \$10,000 from Phillip Armstrong, NSW Business Development Manager of Tenix Solutions. At the time of the alleged solicitation Tenix Solutions was negotiating with the Council in respect of a business proposal.

The report states that the Commission’s investigation involved obtaining information and documents from the Council by issuing notices under section 22 of the ICAC Act as well as interviewing and obtaining statements from a number of witnesses. The notices contributed to the Commission finding that Mr Chau engaged in corrupt conduct by soliciting a payment of \$10,000 from Mr Armstrong. The ICAC also expressed the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Chau for criminal offences.

3 Summonses under section 35

During the period under review 53 summonses were issued. Of these ten were not served.

In each case the Executive Director, Legal, presented a written submission to the Commissioner or Deputy Commissioner setting out the reasons for the request to sign a section 35 Summons.

In addition there was a Compulsory Examination Hearing Plan comprising the following:

- The nature of the allegations (s. 30(3))
- The public interest criteria (s. 30 (1))
- Investigation context
- Name or names of the witness or witnesses
- Matters to be established
- Hearing strategies

- Documents to be provided to the witness
- Other issues (if known)
- Estimate of costs
- The name of the Case lawyer submitting the Hearing Plan with his/her signature and date
- The name of the ID Chief Investigator agreeing to the plan with his/her signature and date
- On occasions, the name of the Corruption Prevention Education & Research Officer agreeing to the plan with his/her signature and date
- The name of the Executive Director Legal reviewing the plan with his/her signature and date
- The approval of the Commissioner or Deputy Commissioner noted by his/her signature and the date

The reasons for not serving the summonses were:

- The witness has moved interstate
- Information came to light indicating the need for further inquiries before conducting the examination
- Illness of the witness
- In four instances the witness had been interviewed and sufficient information obtained
- The witness could not be located
- In two instances the reasons do not appear on the material furnished

Twenty nine of the summonses related to the one investigation in respect of which no report has been published as at the date of writing.

The results of three Compulsory Examinations contributed to the findings in three separate reports published 7 December 2010, 12 May 2011, and 22 June 2011. In all cases relevant evidence was obtained in furtherance of the investigation then under way.

6 CONCLUSION

As pointed out in Part 3, the powers vested by the ICAC Act in the Commission under consideration in this Report are wide ranging and extensive and supported by significant sanctions.

These powers impinge upon what are generally considered to be the normal civil rights of the members of our society. However they are considered necessary to combat the evils arising from the presence of corrupt conduct on the part of public officials or authorities.

Accordingly in conducting this audit I have looked at each exercise of the powers to determine whether it has been taken for the purposes of an investigation into suspected corruption on the part of a public official or authority and, whether it was reasonable in all the circumstances balancing on the one hand the rights of the individual and, on the other hand, the need to protect society from the damage which results from corruption on the part of public officials or authorities.

The Commission has instituted and maintained a detailed and impressive system of controls designed to achieve this balance in its procedures.

It achieves this goal by requiring the participation of a number of its officers in the approval process and the need for the facts and reasons supporting the request for the exercise of the power to be clearly documented.

Examination of the documentation indicates that each exercise of the powers has been appropriate and well founded.

Pursuant to section 57B(2) of the ICAC Act, I have looked to see if there are grounds for reporting the existence of evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission.

Pursuant to section 57B(1)(b). I have also looked to see if there were grounds for reporting the existence of evidence of maladministration including unreasonable invasions of privacy and action or inaction of a serious nature that is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives under section 57B(1)(c).

In addition I have attempted to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities (section 57B(1)(d)).

Examination of the exercise of each of the powers examined reveals the following:

- Each of the notices under sections 21 and 22 and the summonses issued under section 35 of the ICAC Act were applied for and used as one of the tools authorised by the Act to enable the Commission to carry out its statutory functions.
- Each notice and summons was issued only in circumstances where a belief was reasonably formed in the light of information available from other sources that its issue was soundly based.
- In all cases it was appropriate to issue and act upon the notice or summons in the light of the information then available.
- Apart from those cases where a summons was not served, the issue and service of each notice or summons was effective in obtaining information which contributed to the investigations of the Commission.
- There was no evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission.

- There was no evidence of maladministration, including unreasonable invasions of privacy, or of any action or inaction of a serious nature that was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives.

A handwritten signature in blue ink, appearing to read "H Cooper", with a long horizontal stroke extending to the right.

Harvey Cooper AM
Inspector

15 March 2012