

**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**

by

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

March 2010

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CORRUPTION OF ITS POWERS UNDER SECTIONS 21, 22, 23 AND 35 OF
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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, namely section 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 14 January 2010 I 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 April 2009 to 30 September 2009.

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 April 2009 to 30 September 2009;
- all notices pursuant to s. 22 and a description of the material, if any, produced in response during the period 1 April 2009 to 30 September 2009;
- all authorisations pursuant to s. 23 and a description of the material, if any, produced in response during the period 1 April 2009 to 30 September 2009;
- 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 of what was revealed at that examination during the period 1 April 2009 to 30 September 2009; 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 April 2009 to 30 September 2009.

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.

In reply the Commission supplied five lever arch binders containing:

- copies of 6 notices issued under section 21 of the ICAC Act and the documentation requesting the issuing of each notice together with a copy of the response to each notice.
- copies of 9 notices issued under sections 21 and 22 of the ICAC Act and the documentation requesting the issuing of each notice together with a copy of the response to the section 21 component of each notice and a printout of the property received in response to the section 22 component of each notice.
- copies of 196 notices issued under section 22 of the ICAC Act and the documentation requesting the issuing of each notice together with a printout describing the property received in response to each notice.
- copies of 43 compulsory examination summonses issued under section 35 of the ICAC Act, the documentation requesting the issuing of each summons and, where prepared, the Hearing Plan for each matter.
- a brief description of the outcome of each section 35 summons including, where a compulsory examination was conducted, a brief description of the evidence given. Some of the compulsory examinations remain subject to directions under section 112 of the

ICAC Act. The Commissioner varied those directions to permit information in relation to the evidence given by each witness (including a summary of the evidence and a copy of the transcript of evidence) to be published to me for use by me and my officers in the conduct of this audit.

No section 23 notices were requested or issued during the period covered by this audit.

In addition, the Commission supplied copies of the following sections of its Operations Manual:-

- Procedure number 2 for the use of ICAC Act powers by the Commission -- notices, summonses and interstate service, approved 16 July 2007.
- Procedure number 5 for the conduct of public enquiries and compulsory examinations, approved 7 September 2009.
- Procedure number 27 for recording exercise of ICAC Act powers, approved 7 August 2008.
- Procedure number 28 for the registration control and disposal of property, approved April 2006 and amended February 2007.

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.
- (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.
- (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

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 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, 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.

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

(3) 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 ICAC's Operations Manual, Procedure Number 2 approved 16 July 2007, sets out the procedures to be followed in relation to notices under sections 21, 22 and 23 of the ICAC Act and summonses under section 35 of that Act.

The General Considerations state:

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 goes on to point 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:

- 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 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.
- All relevant documents should be linked 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.

The procedures for service of the notice or summons as well as recording the return date is set out.

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 Commission's Procedure Number 5 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. The primary purpose of the compulsory examination is to assist the investigation process by ascertaining factual evidence of what actually occurred. 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 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.

Criteria for determining to conduct a compulsory examination in preference to a public enquiry or whether any part of a public enquiry 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.

A Hearing Plan must be prepared and approved prior to arranging for a compulsory examinations and prior to all public enquiries.

The purpose of a Hearing Plan is to identify the hearing objectives and strategies for achieving those objectives. It should also identify witnesses to be called and likely timeframes and any contentious issues.

It is the responsibility of the Case Lawyer to prepare a Hearing Plan for any compulsory examination or Public Enquiry. The Hearing Plan is to be in the approved Legal macro format.

In preparing the Hearing Plan the Case Lawyer is to consult with the Case Investigator and, if applicable, relevant Chief Investigator and any CP officer assigned to the investigation to ensure that all relevant investigation and

CP issues are covered in the Hearing Plan. 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

Six such notices were issued but only five were served. In each instance they were drawn by a case lawyer, were properly served and responses were received.

Four of the notices were addressed to a public authority requiring background information of its procedures for use by the Commission in investigations and examinations. Two were addressed to a public official requiring information directed to the activities of the target of the investigation.

2. Combined notices under sections 21 and 22

Nine such notices were issued and served. In each instance they were drawn by a case lawyer, were properly served and responses were received.

Six were addressed to a public authority requiring background information of its procedures for use by the Commission in investigations and examinations and three were addressed to a Member of Parliament to provide information of the same type.

3. Notices under section 22

One hundred and ninety six such notices were issued and served. In each instance they were drawn by a case lawyer, were properly served and responses were received. There was one further notice issued but not served.

The categories of recipients of the notices are:

| Recipients | |
|----------------------|------------|
| Company | 62 |
| Public Official | 40 |
| Bank | 35 |
| Public Authority | 35 |
| Individual | 11 |
| Council | 5 |
| Credit Union | 3 |
| Lawyer | 2 |
| Medical Practitioner | 1 |
| Building Society | 1 |
| Association | 1 |
| Total Notices | 196 |

In its *"Report On Corruption In The Provision And Certification Of Security Industry Training"* published in December 2009, the Commission states:

“In the course of its investigation the Commission conducted a controlled operation, executed search warrants on the business premises of Roger, obtained documents and information by issuing notices under sections 21 and 22 of the ICAC Act, made use of lawful covert physical and electronic surveillance including lawful telecommunication intercepts and interviewed

and took statements from a large number of people involved in the security industry.”

Of the 196 section 22 notices, 45 contributed to this report.

The Commission’s *“Report of its investigation into the misuse of Sydney Ferries corporate credit cards”* published 4 November 2009 states:

“The Commission used its statutory powers to obtain relevant documentation from Sydney Ferries and other sources and two statements of information from Mr Smith concerning his use of the corporate credit card issued to him. A number of former and current employees of Sydney Ferries were interviewed and made statements.”

Eleven of the section 22 notices contributed to this report.

Information received as a result of thirteen of the notices contributed to the Commission’s *“Report of its Investigation into the Solicitation and Receipt of Corrupt Payments from a RailCorp Contractor”* published in September 2009.

Information received as a result of eight of the section 22 notices contributed to the Commissioner’s oral findings and summary of reasons in relation to public inquiry into corrupt conduct allegations involving Michael McGurk and others published 5 February 2010.

As the investigations utilising other section 22 notices are not in the public domain at the time of writing this report no details of them can be given.

4. Summonses under section 35

During the period under review 43 summonses were issued. Of these 7 were not served and 6 compulsory examinations were cancelled.

In each case the Lawyer presented a minute to the Commissioner setting out the reasons for the request to sign a section 35 Summons. In addition there is a Hearing Plan which identifies the Case Lawyer, counsel assisting and the case investigator. It then sets out the public interest criteria (that is why it is in the public interest to conduct a compulsory examination), the hearing objectives, the hearing strategies and provision for the Commissioner to sign his approval or disapproval.

With two exceptions all requirements of the Act and Procedures were complied with in the 30 cases which did proceed to compulsory examination.

Those two exceptions arose during the same investigation and involved the non preparation of a Hearing Plan. This was due to the lack of time caused by rapidly moving events. The information obtained during these two Examinations plus a further one did contribute to the findings in the Commission's "*Report of its Investigation into the Solicitation and Receipt of Corrupt Payments from a RailCorp Contractor*" published in September 2009.

Nine of the compulsory examinations contributed to the Commission's "*Report of its investigation into the misuse of Sydney Ferries corporate credit cards*" published 4 November 2009 and to the Commissioner's oral findings and summary of reasons in relation to public inquiry into corrupt conduct allegations involving Michael McGurk and others published 5 February 2010.

In the remaining cases, the summaries of outcomes of compulsory examinations reveal that relevant and cogent evidence was obtained in furtherance of the investigation then under way.

6 CONCLUSION

The powers vested by the ICAC Act in the Commission are wide ranging and extensive.

For the purposes of an investigation the Commission can require a public authority or public official to produce a statement of information (section 21) and require a person, whether or not a public official or public authority, to attend and produce a document or other thing (section 22).

In addition, it may summon a person to appear before the Commission at a compulsory examination to give evidence or produce documents or things or both (section 35). That person is not entitled to refuse to be sworn or make an affirmation or to answer any question. He or she 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 him or her or on the ground of privilege or duty of secrecy or other restriction on disclosure. Such an answer, however, is not admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings (section 37).

Failure to attend without reasonable excuse is punishable by a maximum penalty of 20 penalty units or imprisonment for two years or both (section 86). The giving of 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 an indictable offence punishable by a maximum penalty of 200 penalty units or imprisonment for five years or both (section 87).

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 to our society 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.
- In all but those cases where a summons was not served, the issue and service of the notice or summons were 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.

Harvey Cooper AM
Inspector