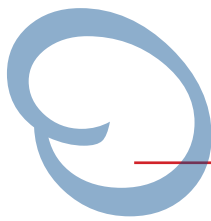




New South Wales



Office of the Inspector

**of the Independent Commission
Against Corruption**

**Report of an audit of the
ICAC's compliance with sections
21, 22, 23, 35 and 54
of the ICAC Act 1988**

28 June 2007

Mr Peter Primrose MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Richard Torbay MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Mr Speaker,

In accordance with section 77A of the *Independent Commission Against Corruption Act 1988* ("the Act"), I, as the Inspector of the Independent Commission Against Corruption ("the ICAC"), hereby furnish to each of you for presentation to the Parliament the report on an audit undertaken by the Inspector on the ICAC's compliance with the exercise of its compulsory powers under sections 21, 22, 23, 35 and 54 of the Act.

The report has been prepared in accordance with the requirements of the Act.

Pursuant to section 78(1A) of the Act, I recommend that the report be made public forthwith.

Yours sincerely,



Graham Kelly
Inspector

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1. INTRODUCTION

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” and “the Commission” or “the ICAC”) to “audit the operations of the Commission for the purpose of monitoring compliance with the law of the State.”

This is a report of an audit of the Commission’s compliance with sections 21, 22, 23, 35 and 54 of the Act.

2. THE AUDIT PLAN AND PROCESS

On 20 September 2006 the Inspector wrote to the Commissioner of the ICAC (“the Commissioner”) enclosing the draft terms of an audit plan. The Inspector invited the Commissioner to comment on the draft terms prior to the plan being finalised.

On 26 September 2006 the Commissioner advised that he noted the objectives of the audit and the draft terms but did not wish to make any comment on the draft terms.

The final terms of the audit plan were:

2.1 The Purpose of the Audit

Under s. 57B (1) (a) of the Act the Inspector is authorised:

to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State.

The purpose of the audit is to examine the ICAC’s compliance with the laws of the State when exercising their “compulsory powers.”

In the context of this audit, compliance with the laws of the State means compliance with the Act, other relevant laws, and the principles of natural justice and procedural fairness that apply in the circumstances.

2.2 Definition of the term “compulsory powers”

The term “compulsory powers” refers to the use of powers by the ICAC, or its officers, as prescribed under the Act or other authorising legislation which compels another person or agency to co-operate with the ICAC in the course of its operations.

The ICAC exercises its compulsory powers under the following provisions of the Act:

Part 4, Division 2 – Investigations:

- the power to obtain information – s. 21;
- the power to obtain documents – s. 22; and
- the power to enter public premises – s. 23.

Part 4, Division 3 – Compulsory Examinations and Public Inquiries:

- the power to summon witnesses and take evidence – s. 35;
- the power to compel witnesses to give evidence on oath and produce any document or thing before the Commission – s. 37; and
- attendance of prisoner before the Commission – s. 39.

Part 5 – Referral:

- the power to require an authority, where a matter has been referred to it, to submit a report to the Commission including the action taken by the Commission – s. 54(1), (2) & (3); and
- the power to compel an authority to comply with the requirements and recommendations of the Commission – s. 56.

2.3 Scope of the Audit

- 1) Review of any documented ICAC procedures, guidelines and/or other literature concerning the exercise of the ICAC's compulsory powers;
- 2) Review a sample of past notices, summonses and other documentation concerning the exercise of the Commission's compulsory powers;
- 3) Meet with relevant officers of the ICAC, where necessary, to identify and understand policies and procedures adopted in the exercise of compulsory powers; and
- 4) Identify and meet with selected persons or agencies who have been the subject of the ICAC's exercise of compulsory powers in order to identify the extent to which the ICAC has complied with the law in compelling co-operation.

2.4 Methodology

The methodology used in the audit was to examine a sample of the Commission's notices and summonses issued in the period between 1 July 2003 and 30 June 2006. Minutes and any other supporting documentation attached to draft notices and summons were also examined in order to assess the ICAC's justification for the issue of each process. Relevant ICAC policies and procedures concerning the exercise of its compulsory powers were also examined to assess the extent to which they supported compliance with the law.

3. THE SAMPLE OF FILES AUDITED

A sample of 115 notices and summonses from the period 1 July 2003 to 30 June 2006 were audited. Details of the number of notices and summonses audited under various provisions of the Act are provided below.

PROVISION	NO. OF FILES NOMINATED TO BE INSPECTED	ACTUAL NO. INSPECTED	% OF FILES INSPECTED OF THE TOTAL NO. ISSUED
S. 21 Notices	14	10	36%
S. 22 Notices	50	57	6%
S. 23 Notices	16	11	61%
S. 35 Notices	20	25	5%
S. 54 Notices	12	12	19%

4. DOCUMENTS AND INFORMATION PROVIDED

The notices and summonses inspected were contained in investigation files provided by the Commission to the Office of the Inspector. In a number of cases paper copies of the notices or summonses were not located on the relevant file. In these instances, where possible, electronic copies of the relevant notices and summonses, located on the Commission's database system, were examined.

5. RELEVANT ICAC PROCEDURES

For the period 1 July 2003 to 30 June 2006 the relevant policies and procedures, as set out in the ICAC's Operations Manual, were:

- Procedure No. 6B, "Procedures for the Use of Formal Powers by the Commission – Notices & Summonses"; issued on November 1999 ("the 1999 Procedures"); and

- Procedure No. 2, “Procedures for the Use of ICAC Act Powers by the Commission – Notices and Summonses & Interstate Service”; issued on April 2005 (“the 2005 Procedures”).

Key compliance issues covered in the 1999 and 2005 Procedures were:

- Drafting and approval of process;
- Service and return;
- Claims of privilege;
- Execution of interstate service;
- Application for leave to the Supreme Court;
- Execution and copying;
- Recording of copied documents;
- Summoning of Members of Parliament;
- Summoning of police officers;
- Summoning of prisoners; and
- Advising nature of allegations and scope and purpose.

Both the 1999 and 2005 Procedures require ICAC officers to consider whether or not a coercive power need be exercised. They stated that such powers should be used with restraint and with an awareness of the effect of such powers on the work and lives of individuals and companies who must comply with such notices. Both the 1999 and 2005 Procedures require that the reason for the exercise of a formal power as well as the actual exercise of the power be soundly based and recorded.

6. THE EXERCISE OF THE ICAC’s COMPULSORY POWERS

During the course of the audit the Commission advised that it exercises its compulsory powers:

“Whenever it is thought appropriate to do so for the purposes of an investigation, having regard to the particular facts of each case and relevant provisions of the ICAC Act.”

7. THE RESULTS OF THE AUDIT

7.1 Compliance

The notices and summonses audited showed compliance with the legal requirements of the relevant provisions in the ICAC Act. For example notices issued pursuant to s. 21 met the legal criteria articulated in that provision, i.e., to:

- be served in writing;
- specify or describe the information required;
- fix a time and date for compliance; and
- specify to whom production was to be made.

Minutes and other documentation attached to the notices and summonses audited showed that the ICAC had considered issues of natural justice and procedural fairness and complied with the law as far as these legal considerations were concerned.

7.2 Issues

While there were no substantive issues of concern, the audit revealed a lack of completeness of records with respect to some of the notices and summonses in the sample. In particular:

- records concerning service of some of the notices were missing from the file; and
- other records, for example, in some instances, notices or summonses, and in other instances, the Minutes, could not be located on file.

7.2.1 Service

The lack of complete documentation as to the service of some notices and summonses meant that it has not been possible to verify that they were validly served. The Commission has advised, however, that it is not aware of any instances in which a purported service of a notice or summons has been invalid or a person has claimed that the service was invalid.

7.2.2 Documents unable to be located

The Commission acknowledged that not all of the relevant documents for notices and summonses issued were available in paper copy. The Commission further advised that it believes all relevant documentation relating to the issue of notices and summonses exists in electronic form, however, due to upgrading of database systems from 2004, such documents are distributed across various document management systems. The Commission advised it would require considerable effort to locate all documents requested for the purpose of this audit. The Inspector did not require the Commission to locate the missing documents given that, where all documents were able to be located, the Commission had complied with the law. In both of the instances mentioned, however, it would have been preferable to have been able to examine complete records concerning the exercise of the Commission's compulsory powers.

8. APPENDICES: THE RELEVANT PROVISIONS

The provisions of the ICAC Act in which this audit was based are set out below:

8.1 Section 21:

Power to obtain information

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.

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.

The notice may provide that the requirements 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.

8.2 Section 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.

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.

8.3 Section 23:

Power to enter public premises

- 1) For the purposes of an investigation, the Commissioner or an officer of the Commission authorised in writing by the Commissioner may, at any time:
 - (a) enter and inspect any premises occupied or used by a public authority or public official in that capacity, and
 - (b) inspect any document or other thing in or on the premises, and
 - (c) take copies of any document in or on the premises.
- 2) (Repealed)
- 3) The public authority or public official shall make available to the Commissioner or authorised officer such facilities as are necessary to enable the powers conferred by this section to be exercised.

8.4 Section 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 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 the 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 purposes of the *Service and Execution of Process Act 1901* of the Commonwealth and any other relevant law.

8.5 Section 54:

Report to Commission

- 1) The Commission may, when referring a matter under this Part, require the relevant authority to submit to the Commission a report or reports in relation to the matter and the action taken by the relevant authority.

- 2) A report shall be of such a nature as the Commission directs.

- 3) A report shall be submitted to the Commission within such time as the Commission directs.

Table 1: ICAC use of statutory powers between 1 July 2003 to 30 June 2006:

POWER	2003 - 2004	2004 - 2005	2005 - 2006	TOTAL ISSUED
Notice for public authority/official to produce a statement of information under s. 21 of the ICAC Act	10	11	7	28
Notice requiring production of documents under s. 22 of the ICAC Act	314	378	242	934
Notice authorising ICAC officers to enter premises occupied by a public authority/official and inspect any document or thing and copy any document under s. 23 of the ICAC Act	7	5	6	18
Summonses to give evidence or produce documents or both at a hearing under s. 35 of the ICAC Act	147	240	123	510
Report to Commission relating to matters and action taken by the relevant authority under s. 54 of the ICAC Act	31	18	15	64



New South Wales

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