



Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption

Report

Independent Panel

The Hon. Murray Gleeson AC (Chair)

Mr Bruce McClintock SC

30 July 2015

JULY 2015

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The views expressed herein are those of the Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption and do not necessarily represent the views of the State of NSW.



30 July 2015

His Excellency General the Honourable David Hurley AC DSC (Ret'd)
Governor of New South Wales
Government House Sydney
Macquarie Street
SYDNEY NSW 2000

Your Excellency

In accordance with the letters patent issued to us on 27 May 2015, we have conducted an Inquiry to review matters relating to the jurisdiction of the Independent Commission Against Corruption and prepared our Report of the results of our Inquiry.

We are pleased to present to you our Report.

Yours sincerely

A handwritten signature in black ink that reads "Murray Gleeson".

Murray Gleeson

A handwritten signature in blue ink that reads "Bruce McClintock".

Bruce McClintock

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Terms of Reference

The Independent Commission Against Corruption (ICAC) was established by the NSW Government in 1989. The ICAC's principal functions are set out in the *Independent Commission Against Corruption Act 1988*.

Ensuring that the ICAC has the powers and resources required to fulfil its functions is a priority for the NSW Government.

In light of the decision of the High Court of Australia in *ICAC v Cunneen* [2015] HCA 14, the Panel is commissioned to consider, and report to the Governor on or before 31 July 2015 on:

- the appropriate scope for the ICAC's jurisdiction,
- any legislative measures required to provide the ICAC with the appropriate powers to prevent, investigate and expose serious corrupt conduct and/or systemic corrupt conduct involving, or affecting, public authorities and/or public officials, and
- whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC's powers,

taking into account:

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

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

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Executive Summary

Scope of jurisdiction

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

The Act does not set out to deal with corruption generally. It does not deal with corruption in private enterprise, or educational institutions, or industrial organisations, or charities, or personal behaviour unless it falls within the topic which is the focus of the Act’s attention. That topic is public administration and corruption connected with public administration. The justification that was advanced for the creation of the ICAC and the conferral of its extraordinary powers was that it was necessary to restore and maintain the integrity and reputation of public administration in this State.

Insofar as the Act’s definition of corrupt conduct applies to the conduct of public officials, or the conduct of private citizens who procure, or attempt to procure, misconduct by public officials, its practical operation has been reasonably predictable. There was, however, unpredictability in that part of the definition concerning conduct (including the conduct of private citizens) which “adversely affects” the exercise of official functions. The use of that expression in section 8(2) of the Act created uncertainty. If given its widest literal meaning it extended far beyond the ordinary understanding of the concept of corruption.

In the case of *Independent Commission Against Corruption v Cunneen*¹ (“Cunneen”), decided on 15 April 2015, the High Court of Australia interpreted section 8(2) as referring to adverse effects on the probity of the exercise of official functions.

This produces a coherent statutory policy, resting on a widely accepted understanding of corruption, and a jurisdictional foundation that would support almost all (but not all) of the investigations that the ICAC has undertaken in the past. However, the Panel accepts that it leaves beyond the scope of corrupt conduct some matters which should be covered.

The Panel does not recommend dealing with the problem by legislating to give “adversely affects” its widest literal meaning (the efficacy approach). This produces consequences that are artificial and inappropriate. Section 8(2) has now been interpreted authoritatively and the uncertainty of the expression “adversely affects” has been resolved. That provision should be left unamended and without further elaboration.

The Panel recommends adding to section 8 a new subsection which deals with conduct, not in, but connected with, public administration by reference to the rationale for making public administration the focus of the Act’s attention: the need to preserve and maintain the integrity and reputation of public administration. Certain kinds of fraudulent conduct, not necessarily involving any actual or potential wrongdoing by a public official, should be

¹ [2015] HCA 14 (15 April 2015).

treated as corrupt conduct where they impair or could impair confidence in public administration.

The Panel also recommends that the jurisdictional basis for the ICAC's advisory, educational and prevention functions should be widened so as to free them from the constraints which (properly) accompany the functions of investigating and making findings of corrupt conduct.

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

Powers and procedures

The question whether provision should be made in the Act, or in other legislation, such as the *Supreme Court Act 1970*, for general merits review of findings of corrupt conduct has been examined by the Panel. The Panel does not recommend this course, which would involve an inappropriate confusion of administrative and judicial powers.

The Panel has considered whether the ICAC's power to hold public inquiries should be removed, or limited. For reasons given in Chapter 9, it does not recommend that course.

The Panel has also considered whether there should be formal oversight or internal review of decisions to hold public inquiries or decisions as to what witnesses to call at public inquiries. It does not recommend that course.

The Panel recommends that the power to make findings of corrupt conduct should exist only in cases of serious corrupt conduct. It has proposed a legislative amendment to give effect to this recommendation.

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

Recommendations

The Panel recommends the following amendments to the Act:

Recommendation 1: Section 8

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

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

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

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

The Panel also recommends that the words “or expanding” be added to section 8(6) after the word “limiting”.

Recommendation 2: Section 13

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

Recommendation 3: Section 13

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

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

This would require a consequential amendment to section 12A.

Recommendation 4: Section 74B

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

Chapter 1 – Introduction

1.1 Constitution of the ICAC

1.1.1 The Independent Commission Against Corruption was established by the *Independent Commission Against Corruption Act 1988*. Its creation had been an election undertaking of the incoming coalition government, although the legislation received broad cross-party support when introduced.

1.1.2 In the Second Reading Speech for the Independent Commission Against Corruption Bill 1988, the then Premier, the Hon. Nick Greiner, said:²

Let me make it absolutely clear that this initiative is a component of the Government's program to restore the integrity of public administration and public institutions in this State. Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and that community confidence in the integrity of public administration is preserved and justified.

1.1.3 The Act commenced on 13 March 1989. On that date the ICAC came into existence and Mr Ian Temby AO QC's appointment as the first Commissioner took effect. Since then, there have been five Commissioners, the Hon. Barry O'Keefe AM QC, Ms Irene Moss AO, the Hon. Jerrold Cripps QC, the Hon. David Ipp AO QC and the Hon. Megan Latham, the current Commissioner.

1.1.4 The Act has been amended on many occasions since its commencement, generally for minor or consequential purposes. Some of the more significant amendments have been in relation to:

- the ICAC's powers to make and report findings (1990);³
- the ICAC's discretion to determine whether to conduct a hearing in public or in private (1991);⁴
- the ICAC's jurisdiction in relation to Ministers and Members of Parliament, specifically where there has been a substantial breach of an applicable Code of Conduct (1994);⁵
- the Principal Objects of the Act, the ICAC's intended focus on serious corrupt conduct and systemic corrupt conduct, the creation of the office of Inspector of the ICAC and other significant amendments enacted in response to the 2005 report on the independent review of the Act, which was undertaken by Mr Bruce McClintock SC ("2005 Report")⁶ (2005).⁷

1.1.5 Parliamentary oversight of the ICAC is provided by the Parliamentary Joint Committee on the ICAC ("Parliamentary Committee") which is itself established by

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 673 (Nick Greiner, Premier).

³ *Independent Commission Against Corruption (Amendment) Act 1990*. A consequence of the High Court's decision in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

⁴ *Independent Commission Against Corruption (Amendment) Act 1991*.

⁵ *Independent Commission Against Corruption (Amendment) Act 1994*.

⁶ Bruce McClintock, *Independent review of the Independent Commission Against Corruption Act 1988, Final Report* (2005) ("2005 Report").

⁷ *Independent Commission Against Corruption Amendment Act 2005*.

Part 7 of the Act. The Committee's functions are set out in section 64 of the Act and include monitoring and review of the exercise by the ICAC and the Inspector of their respective functions. In addition, section 64A gives the Committee power to veto the proposed appointment of a person as Commissioner or Inspector.

- 1.1.6 While the ICAC's operations have been subject of review by the Parliamentary Committee, the 2005 Review, which resulted in the 2005 Report referred to above, has been the only independent review of the Act and its operation since 1988. The following recommendations made in the 2005 Report are relevant to this Review.⁸

RECOMMENDATIONS

CH 2 – TERMS OF THE ACT

Objectives and principles

R2.1 That the Act be amended to specify that the objectives of the Act are:

- To promote the integrity and accountability of public administration by establishing ICAC as an independent and accountable body:
 - to investigate, expose and prevent corruption involving or affecting public authorities and public officials; and
 - to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and upon our community.
- To confer on ICAC special powers to inquire into allegations of corruption.

R2.2 That the Act be amended to provide that, in exercising its functions, ICAC is to:

- direct its attention, so far as practicable, towards corruption that is serious or systemic; and
- have regard to the responsibility that public authorities and public officials have, with the assistance of ICAC, to prevent and deal effectively with corruption.

CH 3 – FUNCTIONS

Corruption prevention

R3.1 That section 16(2) of the Act be amended to add the Ombudsman to the list of persons and organisations that ICAC is required to co-operate with in exercising its corruption prevention and education functions.

Criminal prosecutions

R3.2 That, consistent with the current practice adopted by ICAC and the Director of Public Prosecutions (DPP), the Act be amended to provide expressly that ICAC may, after considering the advice of the DPP, institute criminal proceedings arising from its investigations.

R3.3 That section 74A of the Act be amended to change the statement about prosecution that ICAC is required to include in a report under section 74 from 'whether or not in all the circumstances, it is of the opinion that consideration should be given to prosecution' to 'whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought'.

R3.4 That if administrative measures do not prove effective in reducing delay in the initiation of criminal proceedings, consideration be given to permitting ICAC to

⁸ 2005 Report, above n 6, xi-xii.

commence criminal proceedings without first seeking the advice of the DPP, where ICAC is satisfied that there are reasonable prospects of conviction of a person for offences under its own Act or under Part 4A of the Crimes Act 1900 (corruptly receiving commissions and other corrupt practices). Parliament might well regard twelve months as an appropriate period for ICAC and the DPP to address and resolve the issues in question.

CH 4 – CORRUPT CONDUCT

Definition of corrupt conduct

- R4.1 That, subject to recommendation R4.2 below, no substantial amendments to the definition of corrupt conduct in sections 7-9 of the Act be made, except to redraft the provisions to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing.
- R4.2 That consideration be given to amending section 9 so as to clarify the circumstances in which the definition of corrupt conduct applies to Ministers and Members of Parliament and in which findings of corrupt conduct may be made, and, if sub-sections 9(4) and (5) are not repealed, sub-section 9(5) be amended to clarify the meaning of the words 'a law' by limiting it to criminal law and statutory law.

Findings of corruption

- R4.3 That the power of ICAC to make findings of corrupt conduct be retained, but the Act amended to clarify that:
- (a) ICAC may only make findings of corrupt conduct where satisfied of the existence of conduct which had adversely affected, or would (if engaged in) adversely affect official functions or, similarly, was or would be a criminal offence, disciplinary offence, reasonable grounds for dismissal, or a substantial breach of an applicable code of conduct and
 - (b) ICAC has a discretion to decline to make a finding of corrupt conduct even where the relevant conduct technically amounts to corruption.
- 1.1.7 Parliament implemented recommendations 2.1, 2.2, 3.1, 3.3 and 4.3 but not 3.2, 3.4, 4.1 and 4.2. The amending legislation was the *Independent Commission Against Corruption Amendment Act 2005*.
- 1.1.8 Each of the recommendations not implemented by Parliament involves provisions of the Act or functions of the ICAC which the Panel's terms of reference require us to consider.
- 1.1.9 Of those recommendations, the most significant was to amend section 8(2), the provision considered by the High Court in *Cunneen*. The 2005 Report dealt with that issue in the following way:
- 4.3.2 Under section 8(2), corrupt conduct also includes conduct of any person that adversely affects (or could adversely affect) the exercise of official functions by any public official and which could involve bribery, blackmail, illegal drug dealings and an assortment of other criminal offences. This conduct only amounts to corrupt conduct if it could involve any of the matters listed in section 9 as referred to above.
 - 4.3.3 Section 8(2) corrupt conduct can be distinguished from section 8(1) conduct as it requires no wrongdoing on behalf of the public official. The conduct is corrupt because of its potential to adversely affect official functions, not because of any wrongdoing by the official. An example of section 8(2) corruption might be

fraudulent action by person A that caused a public official to unknowingly hand over money to which person A was not entitled. This amounts to corruption because it undermines the integrity of public administration by the wrongful payment of public monies.

4.3.4 There are two problems with this aspect of the definition. It is a different category of corruption as it requires no wrongdoing on behalf of a public official. Further, it is circular and otiose to apply section 9 to section 8(2) corrupt conduct, given the lengthy list of criminal conduct included in the latter section.

4.3.5 For these reasons, consideration should be given to re-drafting section 8 to distinguish more clearly between corrupt conduct by public officials and corruption of public administration, the latter being conduct that does not require any wrongdoing on the part of a public official. This could be achieved by section 8(2) corruption being classified as indirect corruption, placed in a separate section, and no longer being subject to the operation of section 9. Alternatively, it could be placed in a separate section, the list of items of criminal conduct deleted but remain subject to section 9.

1.1.10 Lying behind those words was a concern that in its original form section 8(2) of the Act was imprecise and required clarification.

1.2 Functions and powers of the ICAC

1.2.1 The ICAC is constituted as a corporation under the name the Independent Commission Against Corruption by section 4 of the Act.

1.2.2 The ICAC's functions are dealt with in Part 4 of the Act. Section 13 states the principal functions of the ICAC. Speaking generally, those functions are:

- to investigate any allegation, complaint or circumstance that in the ICAC's opinion may imply that corrupt conduct, conduct liable to allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct may have occurred, be occurring or be about to occur;⁹
- to investigate any matter referred by Parliament;¹⁰
- to communicate to appropriate authorities results of investigations;¹¹
- to carry out a range of educatory and advisory activities directed towards reduction and elimination of corrupt conduct.

1.2.3 The ICAC has wide coercive powers:

- to obtain by notice in writing information from a public authority or public official;¹²
- to require any person to produce any document or thing;¹³
- to enter public premises;¹⁴
- to conduct compulsory (private) examinations;¹⁵

⁹ *Independent Commission Against Corruption Act 1988 ("ICAC Act")*, section 13(1)(a).

¹⁰ *Ibid* section 13(1)(b).

¹¹ *Ibid* section 13(1)(c).

¹² *Ibid* section 21.

¹³ *Ibid* section 22.

¹⁴ *Ibid* section 23.

¹⁵ *Ibid* section 30.

- to conduct public inquiries.¹⁶
- 1.2.4 In connection with compulsory examinations and public inquiries, the ICAC has power to summon any person to give evidence and to produce any document or thing.¹⁷
- 1.2.5 Each of these powers is supported by criminal sanctions for non-compliance.¹⁸

1.3 Other agencies

- 1.3.1 The terms of reference require the Panel to take into account “the jurisdiction, responsibilities and roles of other public authorities and/or public officials in the prevention, detection, investigation, determination, exposure and prosecution of corrupt conduct”.
- 1.3.2 The relevant authorities are:
- the Crime Commission;
 - the Police Integrity Commission (“PIC”);
 - the New South Wales Police;
 - the Director of Public Prosecutions (“DPP”).
- 1.3.3 The New South Wales Crime Commission was established in 1986 and is presently regulated by the *Crime Commission Act 2012*. The principal objective of that Act is “to reduce the incidence of organised and other serious crime”.¹⁹ Its principal functions include investigation of relevant criminal activity (that is, stated generally, circumstances implying that a relevant offence, that is, one punishable by life imprisonment or for a term of three or more years, may have been, may be being, or may in the future be, committed) and serious crime concerns referred by its Management Committee, the assembly and referral of such admissible evidence to the appropriate prosecution authority and so on.²⁰
- 1.3.4 While the Crime Commission may hold hearings for the purposes of an investigation, except in relation to sittings involving a public information function, such hearings must be held in private.²¹
- 1.3.5 The PIC was established in 1996 on the recommendation of the Royal Commission into the NSW Police Service, commonly known as the Wood Royal Commission. It is governed by the *Police Integrity Commission Act 1996*.
- 1.3.6 Its principal functions are to detect, investigate and prevent police misconduct and, as far as practicable, it is required to turn its attention to serious police misconduct.²² Its functions also include detection, investigation and prevention of misconduct by officers of the Crime Commission.²³

¹⁶ Ibid section 31.

¹⁷ Ibid section 35.

¹⁸ Ibid Part 9.

¹⁹ *Crime Commission Act 2012*, section 3.

²⁰ Ibid section 10(1).

²¹ Ibid Part 2, Division 4 and section 79.

²² *Police Integrity Commission Act 1996* (“PIC Act”), section 13.

²³ Ibid sections 75A and 75C.

- 1.3.7 The office of the DPP was created by the *Director of Public Prosecutions Act 1986*. The Office of the DPP is the independent prosecuting authority for NSW. Its principal functions are to institute and conduct, on behalf of the Crown, prosecutions for indictable offences in the Supreme Court and District Court and conduct (and institute where relevant) appeals in relation to such matters.²⁴ The DPP may also exercise the same functions as the Attorney General in respect of: finding a bill of indictment, or determining that no bill of indictment be found, where a person has been committed for trial; directing that no further proceedings be taken against a person who has been committed for trial or sentence; and finding a bill of indictment in respect of an indictable offence, in circumstances where the person concerned has not been committed for trial.²⁵
- 1.3.8 While charges of criminal offences arising out of ICAC investigations are formally commenced by an ICAC officer, they are conducted by the DPP.²⁶
- 1.4 *Independent Commission Against Corruption v Cunneen [2015] HCA 14***
- 1.4.1 Chapters 5 and 6 deal with the issue that arose in this case, the judicial resolution of that issue, and its effect on the scope of the ICAC's jurisdiction.
- 1.5 *Retrospective legislation – Act No 1 of 2015***
- 1.5.1 The High Court's decision in *Cunneen* was handed down on 15 April 2015. On 20 April 2015, the ICAC released a public statement indicating that the decision would "substantially damage the Commission's ability to carry out its corruption investigation and corruption prevention functions".²⁷
- 1.5.2 In response to *Cunneen*, the Government introduced the Independent Commission Against Corruption Amendment (Validation) Bill 2015 on 6 May 2015. The Bill was passed by Parliament and received assent on that same day.
- 1.5.3 This legislation inserted a new Part 13 into Schedule 4 to the Act. That Part is entitled "Validation relating to decision on 15 April 2015 in Independent Commission Against Corruption v Cunneen [2015] HCA 14".
- 1.5.4 Clause 35 of that new Part 13 provides that anything done or purported to be done by the ICAC before 15 April 2015 that would have been validly done if corrupt conduct included "relevant conduct" (a defined term) is taken to have been validly done.
- 1.5.5 "Relevant conduct" is defined to mean conduct that adversely affects, or could adversely affect, the efficacy but not the probity of the exercise of official functions.
- 1.5.6 The terms of reference neither require nor permit the Panel to deal with the amending legislation.
- 1.5.7 It is noted, however, that the validity of the retrospective validation of actions of the ICAC which would otherwise be beyond power is itself under challenge. On

²⁴ *Director of Public Prosecutions Act 1986*, section 7(1).

²⁵ *Ibid* section 7(2).

²⁶ That is the case in respect of offences created by statute. The position is unclear in relation to common law crimes such as misconduct in public office.

²⁷ The Independent Commission Against Corruption, *Public statement regarding ICAC v Cunneen* (20 April 2015) <<http://www.icac.nsw.gov.au/media-centre/media-releases/article/4782>>.

25 May 2015, Gageler J removed into the High Court the proceedings which give rise to that challenge and they are listed for hearing in the sittings commencing 4 August 2015.²⁸

1.6 The Inspector's Report

1.6.1 Chapter 11 deals with this aspect of the terms of reference.

1.7 Scope and conduct of the Review

1.7.1 Following the passage of the validation legislation, the Government also established an Independent Panel with responsibility for reviewing the jurisdiction of the ICAC ("Panel"). The Panel was appointed on 27 May 2015 under Letters Patent issued by the Governor and comprises the Hon. Murray Gleeson AC as Chair and Mr Bruce McClintock SC.

1.7.2 The Panel's terms of reference, extracted at the beginning of this Report, require the Panel to report to the Governor on or before 31 July 2015.

1.7.3 As required by its terms of reference, the Panel has been concerned in conducting this review with:

- the appropriate scope for the ICAC's jurisdiction,
- any legislative measures required to provide the ICAC with the appropriate powers to prevent, investigate and expose serious corrupt conduct and/or systemic corrupt conduct involving, or affecting, public authorities and/or public officials, and
- whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC's powers,

taking into account those matters specified in the terms of reference.

1.7.4 In accordance with the terms of reference, the Panel has conducted targeted consultation. Appendix A to this Report contains a list of submissions received by the Panel and Appendix B outlines the consultation conducted by the Panel.

²⁸ *Duncan v Independent Commission Against Corruption*, S101 of 2015.

Chapter 2 – Statutory Provisions as to the ICAC’s Jurisdiction

2.1 Principal objects of the Act

2.1.1 Section 2A of the Act provides:

2A Principal objects of Act

The principal objects of this Act are:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
 - (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
 - (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the Commission special powers to inquire into allegations of corruption.

2.2 Principal functions of the ICAC

2.2.1 Section 13 of the Act provides:

13 Principal functions

- (1) The principal functions of the Commission are as follows:
 - (a) to investigate any allegation or complaint that, or any circumstances which in the Commission’s opinion imply that:
 - (i) corrupt conduct, or
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
 - (iii) conduct connected with corrupt conduct,may have occurred, may be occurring or may be about to occur,
 - (b) to investigate any matter referred to the Commission by both Houses of Parliament,
 - (c) to communicate to appropriate authorities the results of its investigations,
 - (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,
 - (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,
 - (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the

Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,

- (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,
 - (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,
 - (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,
 - (j) to enlist and foster public support in combating corrupt conduct,
 - (k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.
- (1A) Subsection (1) (d) and (f)-(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the *Police Integrity Commission Act 1996* .
- (2) The Commission is to conduct its investigations with a view to determining:
- (a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and
 - (b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and
 - (c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.
- (2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.
- (3) The principal functions of the Commission also include:
- (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
 - (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.
- (3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.
- (4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

- (5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:
- (a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,
 - (b) opinions as to:
 - (i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or
 - (ii) whether consideration should or should not be given to the taking of other action against particular persons,
 - (c) findings of fact.

2.3 Investigations

- 2.3.1 Section 20 of the Act empowers the ICAC to conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it.
- 2.3.2 An investigation may be in the nature of a preliminary investigation.
- 2.3.3 The Act gives the ICAC extensive investigative powers including power to obtain information, obtain documents, and enter public premises.

2.4 Compulsory examinations and public inquiries

- 2.4.1 Section 30 empowers the ICAC, for the purposes of an investigation, to conduct compulsory examinations in private.
- 2.4.2 Section 31 empowers the ICAC, for the purposes of an investigation, to conduct public inquiries.
- 2.4.3 Section 31(2) provides:
- 31 Public inquiries**
- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.
- 2.4.4 The Act gives the ICAC extensive powers for the purposes of public inquiries.

2.5 Reports

- 2.5.1 Section 74 of the Act empowers the ICAC to prepare reports in relation to any matter the subject of an investigation. Such reports must be prepared in relation to matters referred by both Houses of Parliament or in relation to matters as to which

the ICAC has conducted a public inquiry, subject to a presently immaterial qualification.

2.6 Complaints

- 2.6.1 Section 10 of the Act provides that any person may make a complaint to the ICAC about a matter that concerns or may concern corrupt conduct and the ICAC may (or may not) investigate such a complaint.
- 2.6.2 Section 74A authorises the ICAC to include in a report a statement as to any of its findings, opinions and recommendations and a statement of its reasons.
- 2.6.3 Sections 74A and 74B expressly recognise that a report may include a finding that a person has engaged in corrupt conduct.

2.7 Definition of corrupt conduct

- 2.7.1 The concept of corrupt conduct is central to the Act's specification of the ICAC's functions and powers.
- 2.7.2 Sections 7, 8 and 9 of the Act provide:

7 Corrupt conduct

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

8 General nature of corrupt conduct

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

- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
 - (b) bribery,
 - (c) blackmail,
 - (d) obtaining or offering secret commissions,
 - (e) fraud,
 - (f) theft,
 - (g) perverting the course of justice,
 - (h) embezzlement,
 - (i) election bribery,
 - (j) election funding offences,
 - (k) election fraud,
 - (l) treating,
 - (m) tax evasion,
 - (n) revenue evasion,
 - (o) currency violations,
 - (p) illegal drug dealings,
 - (q) illegal gambling,
 - (r) obtaining financial benefit by vice engaged in by others,
 - (s) bankruptcy and company violations,
 - (t) harbouring criminals,
 - (u) forgery,
 - (v) treason or other offences against the Sovereign,
 - (w) homicide or violence,
 - (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.
- (3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.
- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:
- (a) matters arising in the State or matters arising under the law of the State, or
 - (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
 - (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament-a substantial breach of an applicable code of conduct.

- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

- (3) For the purposes of this section:

applicable code of conduct means, in relation to:

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

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

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

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

2.8 Some features of the jurisdictional provisions

- 2.8.1 The power to investigate, by virtue of section 13, is based upon an allegation or complaint or opinion that corrupt conduct, or conduct liable to allow, encourage or cause corrupt conduct, or conduct connected with corrupt conduct, “may” have occurred, be occurring, or be about to occur.

- 2.8.2 When the power of investigation has been enlivened by an allegation or an opinion about a possibility of conduct of the kind referred to in section 13(1)(a), the investigation may become concerned with conduct, circumstances or events which are not covered by the definition of corrupt conduct.²⁹ The legitimate scope of an investigation is not co-extensive with the ultimate capacity to make a finding of corrupt conduct. Findings need not relate to corrupt conduct if the investigation is otherwise within power.
- 2.8.3 Section 7 brings conspiracies and attempts into the purview of corrupt conduct as defined. Thus, for example, an attempt to bribe a public official is corrupt conduct even if the public official's immediate response is to report the matter to the police.
- 2.8.4 "Public official" and "public authorities" are defined terms which embrace the whole of NSW public administration, and cover all branches of government, legislative, executive and judicial, including local government.
- 2.8.5 Although the focus of the Act is on public administration and corruption involving or affecting public authorities and public officials, it is plain that persons other than public officials can engage in corrupt conduct within the purview of the Act. Subsections (1) and (2) of section 8 refer to "any person (whether or not a public official)". The example given in paragraph 2.8.3 is an obvious example of corrupt conduct by what might conveniently be called a private person (a term that will be used to designate persons who are not public officials).
- 2.8.6 There is an overlap between subsection (1) and subsection (2) of section 8. This is recognised in subsection (6).
- 2.8.7 Leaving to one side paragraphs (b), (c) and (d) of section 9(1), which do not directly affect the main issue the subject of this report, by virtue of section 9 conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence. Similarly, the provisions of section 8(2), which list a number of matters that involve criminal offences, require that, for conduct to satisfy the definition there given, the conduct must be conduct as described in the first four lines (the chapeau) and it must also be conduct which could involve one of the listed offences. From the earliest days of the legislation courts have remarked upon a logical curiosity. A conclusion that a person has engaged in corrupt conduct is based upon a finding that the person could have committed a criminal offence. An unconditional conclusion is based upon a conditional premise.
- 2.8.8 If the person in question is later charged with the relevant criminal offence and acquitted, the finding of corrupt conduct stands. The same applies if the person is never charged with any offence.
- 2.8.9 The ordinary process of criminal justice is available in respect of all the matters referred to specifically in section 8(2), or generally in section 9(1)(a). In practice, that is the way in which these matters are dealt with in the overwhelming majority of cases.
- 2.8.10 The courts have held, and the Act is administered on the basis that, in applying sections 8 and 9 to a potential finding of corrupt conduct, and to a finding that conduct "could involve" an offence, the ICAC first finds the facts and then asks

²⁹ See *ICAC Act* section 13(3).

whether, on the basis of those facts (if established by admissible evidence), a properly instructed jury could convict of the relevant offence. This is similar to the test applied by a committing magistrate performing the function of deciding whether a person accused of an indictable offence should be sent for trial (a function traditionally regarded as administrative). Notwithstanding that similarity, the following should be observed:

- (a) the context of a committal proceeding is adversarial and the magistrate is not part of the same organisation that investigates the offence, lays the charges, and conducts the prosecution;
- (b) the magistrate applies the rules of evidence;
- (c) the proceedings before the magistrate do not result in any findings (beyond a conclusion that the case is a proper case for trial); in particular they do not conclude with a denunciation of the accused.

2.8.11 By virtue of section 13(1)(a), the power to investigate (which includes the power to conduct public inquiries, and the power to make findings and reports) extends beyond corrupt conduct, to conduct connected with corrupt conduct, or conduct liable to encourage corrupt conduct. Investigations and findings may therefore extend beyond corrupt conduct as defined provided there is a relationship to corrupt conduct of the kind specified in 13(1)(a). An investigation may have a sound jurisdictional basis even though findings of corrupt conduct could be made in relation to part only of the subject matter of the investigation, or even though the only findings ultimately made do not relate to corrupt conduct.³⁰ It would be erroneous to think that the inability to make a finding of corrupt conduct against a person involved in an investigation means that there is no power to investigate, and make findings concerning, the conduct of that person.

2.8.12 Section 8 is headed: "General nature of corrupt conduct". Although it is a definition section, because of the impossibility of giving a precise meaning to the concept of corruption, it is a description of the general nature of its subject matter rather than a categorical formulation. Similarly, the "matters" listed in subsection (2) refer to kinds of conduct that contravene the law without necessarily stipulating precise offences.

³⁰ Ibid section 13(3).

Chapter 3 – Public Inquiries and Reports

3.1 Legislative history

- 3.1.1 Matters investigated by the ICAC may never get past a preliminary stage, and such as proceed beyond that may go no further than compulsory examinations, which are conducted in private. Investigations of this kind may, or may not, result in references to the police for further investigation, or references to some disciplinary body or some other appropriate tribunal, or references to the DPP for consideration of a prosecution for an offence.
- 3.1.2 The Hong Kong Independent Commission Against Corruption, from which the ICAC took its name, is a major investigative organisation, but it does not hold public inquiries.
- 3.1.3 In the 1990 case of *Balog v Independent Commission Against Corruption* (“*Balog*”) the High Court of Australia said of the Act in its original form:³¹
- The Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour ...
- 3.1.4 In 1990, the Act was amended by the addition to section 13 of a new subsection (2) and subsections (3) to (5), and sections 74A and 74B, which authorise the ICAC to include in its reports findings of corrupt conduct (but not findings that a criminal offence *has* been committed).³²
- 3.1.5 In introducing the amending legislation, the then Attorney General said:³³
- The commission will be able to express definite conclusions as to whether or not allegations of corruption have been substantiated. It will be able to state its reasons for those conclusions and describe the respects in which conduct is corrupt. That is, the commission will have the authority to say whether a public official misused official information or acted dishonestly in carrying out official duties or has committed a breach of the public trust. It will be able to give a factual account of what occurred, including a description of the behaviour which it finds is corrupt. The amendments made by the bill will clearly allow the commission to examine in its report the evidence before it and state its opinion as to the weight which should be given to that evidence. It will be able to comment on the credibility of witnesses.
- 3.1.6 The conclusions, or findings, to which the Attorney General was referring are not binding decisions made in the course of the administration of civil or criminal justice. They are statements by an investigator of conclusions formed at the end of his or her investigation. They do not affect legal rights or obligations, although they may have far-reaching practical consequences.

³¹ *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 636.

³² See, in particular, *ICAC Act* section 13(5).

³³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 1990, 10200-10201 (John Dowd, Attorney General).

3.2 Administrative practice

- 3.2.1 The ICAC performs important work of education and prevention, but the activity of holding public inquiries and making reports along the lines envisaged by the Attorney General has now come to be regarded as its most characteristic function. It would be regrettable if the work described by the High Court in *Balog* came to be seen as of secondary importance only.
- 3.2.2 The capacity of a public finding of corrupt conduct to cause reputational damage is too obvious to require elaboration. It should be noted, also, that not all reputational damage associated with a public inquiry is the result of a considered and reasoned conclusion expressed in a report. When the case of *Cunneen* was before the New South Wales Court of Appeal,³⁴ Basten JA referred to the potential for harm that can arise from publicity associated with the conduct of proceedings even before any ultimate findings are made.³⁵
- 3.2.3 The available information as to the number of public inquiries held, and the number of findings of corrupt conduct made, year by year, since the establishment of the ICAC shows a constant development of this part of the ICAC's work. In the five years ended 30 June 2015 there were 38 reports making findings of corrupt conduct. In the five years ended 30 June 1995 (that is, the first five years post-*Balog*) there were 14.

3.3 Nature of the powers associated with public inquiries

- 3.3.1 The powers associated with public inquiries overlap with the powers associated with investigations that do not become public.
- 3.3.2 For the purposes of an investigation the ICAC may require public authorities or public officials to produce a statement of information,³⁶ it may require a person (whether or not a public authority or public official) to attend and produce of specified document or thing,³⁷ and it may enter and inspect any premises occupied by a public authority or public official in that capacity, to inspect a document or thing and take copies of a document.³⁸ Sections 24, 25 and 26 contain restrictions on the exercise of these powers, for example, when a claim of privilege is made, but not where there is an objection on the ground of public interest immunity or duties of secrecy. Section 26 deals with self-incrimination. It provides, for example, that where a person objects that a document tends to incriminate the person the document may be used for purposes of the investigation but not in other proceedings (with limited exceptions).
- 3.3.3 In the case of both compulsory examinations (in private) and public inquiries, witnesses can be compelled to give evidence and a witness is not excused from answering a question or producing a document or thing on the ground of self-incrimination or any other privilege.³⁹ A witness cannot refuse to answer a question,

³⁴ *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014).

³⁵ *Ibid* [100] (Basten JA).

³⁶ *ICAC Act* section 21.

³⁷ *Ibid* section 22.

³⁸ *Ibid* section 23.

³⁹ *Ibid* section 37.

but the answer is not admissible in evidence against the person in civil or criminal or disciplinary proceedings.

- 3.3.4 The judgment of the majority in the High Court in *Cunneen* said that the wide interpretation of corrupt conduct for which the ICAC was contending would cause the Act “to override basic rights and freedoms on . . . a sweeping scale”.⁴⁰
- 3.3.5 Proceedings at a public inquiry are not adversarial. In this aspect of its function the ICAC is like a standing royal commission. The Commissioner conducting the public inquiry will also have taken an active role in initiating and directing the investigation, perhaps presiding at compulsory examinations, and deciding what witnesses will be called.
- 3.3.6 An important legal qualification on the powers conferred upon the ICAC is that they are to be used for the purpose for which they are given. For example, the power to compel a person to give testimony is conferred for the purpose of furthering an investigation, not as a method of providing a person with an opportunity to commit an offence of giving false evidence.
- 3.3.7 What is often called the inquisitorial nature of the process at a public inquiry is a potential source of misunderstanding in at least three ways:
- (a) A distinctive feature of the adversarial process in the administration of justice is a climactic civil or criminal trial, conducted as a contest between opposing parties and presided over by a neutral judge (or judge and jury), who makes a decision affecting rights and obligations. A public inquiry held by the ICAC, on the other hand, is a further development of an investigative process that has already begun, and the outcome is a report by the investigator, not a judicial decision. The absence of features that are customary in the trial process does not, on that account alone, make it inappropriate or unfair. It is a different process.
 - (b) There are, however, some superficial similarities between a public inquiry and court process that may lead people to misunderstand its outcome as a judgment; especially where there is an exercise of a power, not only to make findings of fact, but also to characterise conduct as corrupt.
 - (c) The term inquisitorial can be misleading. It is often used to describe a judicial process in civil law jurisdictions. What occurs at a public inquiry is in no respect a judicial process, either adversarial or inquisitorial.
- 3.3.8 In a submission made to the Panel, the Rule of Law Institute of Australia referred to the fact that a public inquiry is, more often than not, presided over by a former judge sitting in court-like surroundings. This is a significant point and is relevant to 3.3.7(b). The Institute proposed that public inquiries should no longer be part of the function of the ICAC.
- 3.3.9 The Panel does not intend to recommend that the legislation should now be altered in this far-reaching manner. The subject is addressed in Chapter 9.

⁴⁰ *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (15 April 2015) [54] (French CJ, Hayne, Kiefel and Nettle JJ).

3.4 Judicial review

- 3.4.1 As an administrative body, the ICAC is subject to the supervisory role of the Supreme Court of New South Wales exercised under the *Supreme Court Act 1970*. The Supreme Court has both an inherent and a statutory jurisdiction to ensure that the ICAC carries out its functions and performs its duties in accordance with law. The decision in *Cunneen* was an exercise of that jurisdiction.
- 3.4.2 There is an important difference between the kind of judicial review referred to in paragraph 3.4.1 and an appeal of the kind that exists in respect of a judicial decision. The presently relevant grounds of potential judicial review of an ICAC report were summarised by McDougall J in *Duncan v ICAC* as follows:⁴¹
- (1) there is a material error of law on the face of the record (which includes the reasons given for the decision...);
 - (2) the reasoning is not objectively reasonable, in the sense that the decision was not one that could have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences therefrom;
 - (3) there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding;
 - (4) relevant matters have not been taken into account, or irrelevant matters have been taken into account; and
 - (5) there has been a material denial of natural justice.
- 3.4.3 What is not available as a ground of review is the most common ground in appeals from a court: that the decision was wrong because it was affected by a mistake of fact. In brief, there is no merits review of an ICAC finding.
- 3.4.4 The reason no merits review is available is the administrative nature of the process. What is involved is not a judicial decision; it is an investigator's report of his or her findings and opinions at the conclusion of the investigation.
- 3.4.5 To make merits review available in respect of ICAC reports would require either a substantial alteration to the character of the Supreme Court's jurisdiction under the *Supreme Court Act*, which, in turn, would have consequences in respect of other administrative bodies, or the creation of a new form of internal or external review.
- 3.4.6 The New South Wales Bar Association made a submission to the Panel which recognised the problem referred to in paragraphs 3.4.4 and 3.4.5. It argued that an appropriate form of review would be one analogous to that undertaken by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), with any counterpart of section 5(1)(h) framed in more expansive language such as: "the decision was not reasonably supported by the evidence or other material before the Commission".
- 3.4.7 The ground in section 5(1)(h) is "that there was no evidence or other material to justify the making of the decision". That is not merits review. What is proposed seems more like an expanded form of what is sometimes called *Wednesbury*

⁴¹ *Duncan v ICAC* [2014] NSWSC 1018 (29 July 2014) [35].

unreasonableness.⁴² It appears close to administrative oversight rather than judicial review.

- 3.4.8 In addition to the risk of confusion of judicial and administrative functions, the Panel considers that to provide for merits review would add to the problem of misunderstanding as to the ICAC's role. It would make it look even more like a court.

3.5 Decisions to hold public inquiries

- 3.5.1 A decision to hold a public inquiry is a discretionary decision of the Commission, and to that extent could be subject to judicial review.⁴³

- 3.5.2 Before amendments to the Act made following the 2005 Report, there was an Operations Review Committee ("ORC"). The principal work of that body was considering and approving decisions not to pursue investigations either at all or further. For reasons given in the 2005 Report,⁴⁴ which recommended the creation of the office of Inspector, once the Inspector came into existence the function of the ORC was no longer necessary.

- 3.5.3 The Panel has considered whether some corresponding body ought to be created for the specific purpose of providing oversight of decisions to conduct public inquiries, or decisions about public inquiries, such as what witnesses to call. The Inspector performs important functions of audit and of oversight, including examining complaints, but is at arm's length from the Commission and is not a participant in the investigative process. Decisions to hold public inquiries can, no doubt, be difficult.⁴⁵ Nevertheless, the Panel does not see merit in adding a further layer of decision-making to the process.

- 3.5.4 The New South Wales Bar Association proposed that there should be an oversight body that can review a decision to hold a public inquiry. Such a body, it was suggested, should be small, and made up of people not associated with the executive or legislative arms of government.

- 3.5.5 In the days of the ORC, it came into the process at an early stage. By the time a decision is made to hold a public inquiry, an investigation is likely to be well advanced and there will be a substantial body of material to be evaluated. To introduce an outside oversight body at that stage would not be practical. This matter is dealt with further in Chapter 9.

3.6 Findings

- 3.6.1 Section 13(1)(a) identifies the potential subject matters for investigation by reference to three categories of conduct:

- (i) corrupt conduct;
- (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct;
- (iii) conduct connected with corrupt conduct.

⁴² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁴³ Cf *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014) [97].

⁴⁴ 2005 Report, above n 6, [7.1.2]-[7.1.5], [7.3.48]-[7.3.61] and [7.5.1]-[7.5.40].

⁴⁵ See section 31 of the *ICAC Act*.

- 3.6.2 Section 13(2)(a) provides that investigations are to be conducted with a view to determining whether conduct falling within one of those three categories has occurred, is occurring, or is about to occur.
- 3.6.3 Subsections (2A) and (5) make it plain that the ICAC has a wide discretion as to how it expresses its findings and may, for example, confine its report to stating facts it has found, without attributing to them any character.
- 3.6.4 The high-impact nature of a finding that characterises conduct under (i), as compared with findings under (ii) or (iii), or bare findings of fact, is an aspect of the ICAC's work that has now come to be regarded as definitive of its role. This was not inevitable, and has its own consequences in terms of scrutiny and accountability. More significantly for present purposes, it has consequences in terms of the need to define corrupt conduct in a manner that bears a reasonable relationship to the ordinary understanding of that term. The change from what the High Court said in *Balog*, as set out in paragraph 3.1.3, to what the Attorney General foreshadowed, as set out in paragraph 3.1.5, was not accompanied by any modification or clarification of the definition of corrupt conduct.
- 3.6.5 As noted earlier, the findings in a report are an investigator's statement of the results of his or her investigation, not a judgment about the merits of a dispute, or an adjudication of criminal guilt. They are not subject to merits review. They could be wrong. They may depend upon contestable conclusions about the evaluation of evidence and the credibility of witnesses. People are free to argue about, and criticise, the quality of the investigation, or the quality of the reasoning in the report, or, for that matter, the quality of the investigator.⁴⁶ Some people are better placed than others to do that. This may be for a number of reasons including, but not limited to, resources.
- 3.6.6 The law is not so disconnected from reality as to treat an anti-corruption commission finding, after a public inquiry, that a person has engaged in corrupt conduct, as no different in its nature and effect from a police officer's report as to whether somebody was at fault in a traffic accident. This is why findings are amenable to judicial review, even though they cannot be set aside on the basis that they are simply wrong as a matter of fact.

⁴⁶ Cf *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 130 (Gleeson CJ).

Chapter 4 – The Scope of Corrupt Conduct

4.1 The nature of corruption

- 4.1.1 Corruption takes its meaning from its context. In one context it refers to a physical process. In another it refers to the meaning of a text. The context of present relevance is the characterisation of the conduct of an individual.
- 4.1.2 When used to characterise the conduct of an individual in one context, the concept of corruption may be wide enough to embrace any act or omission that constitutes a serious transgression of a moral precept. However, in a legal context it usually has a narrower meaning. The law does not seek to enforce all the requirements of morality; and not all breaches of the law involve moral turpitude. In a legal context the word corruption is often used as a general or summary description, or rubric, applied to a category of criminal offences, such as bribery, abuse of office, extortion, and others, each of which has its own established elements which include a requisite state of mind, such as knowledge or intention. It is sometimes a convenient classification of crimes which have their own individual definitions.
- 4.1.3 The unifying element of the kinds of corrupt conduct referred to in section 8(1) of the Act is deliberate misuse of power, authority or responsibility, which is given for the public benefit and is, instead, used for some extraneous and wrongful purpose, such as private advantage. This accords generally, although not completely, with Transparency International's view of corruption as the abuse of entrusted power for private gain.⁴⁷

4.2 The public element in the corruption addressed by the Act

- 4.2.1 One matter about which the Act is emphatic is that it is concerned with what section 2A describes as "corruption involving or affecting public authorities and public officials". The defined terms of public official and public authority are central to the scheme of the legislation.
- 4.2.2 When the legislation was first introduced, the then Premier, Mr Greiner, said that the ICAC "has a very specific purpose which is to prevent corruption and enhance integrity in the public sector" and that "though the commission will be able to investigate corrupt conduct of private individuals which affects public administration, the focus is public administration and corruption connected with public administration".⁴⁸
- 4.2.3 The Explanatory Note to the Bill for the ICAC legislation said:⁴⁹

The object of this Bill is to constitute an Independent Commission Against Corruption, and to confer on it wide powers, with special emphasis on –

⁴⁷ See the definition provided on Transparency International's website at <https://www.transparency.org/what-is-corruption/#define>. During the course of its review, the Panel met with the Hon. Roger Gyles AO QC, Chair of Transparency International Australia.

⁴⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 674, 675 (Nick Greiner, Premier).

⁴⁹ Explanatory Note, Independent Commission Against Corruption Bill 1988 (No. 2) (NSW).

- investigating corruption or possible corruption where public officials are involved, either on a complaint or reference made to it or on its own initiative; and
- educating public authorities and the community generally on the detrimental effects of public corruption and strategies to combat it.

4.2.4 Criminal offences that are commonly included under the generic term corruption are not confined to activities in and around public administration. Private enterprise, educational institutions, industrial organisations, sporting associations and even charities may provide the setting for corrupt activities. The Serious Fraud Office in the United Kingdom does not limit its concerns to corruption in or affecting the United Kingdom public sector. Nor, apparently, does the Serious Fraud Office in New Zealand.⁵⁰ The *Racketeer Influenced and Corrupt Organizations Act* (“RICO”) in the United States covers organisations in private (criminal) enterprise. The Hong Kong ICAC is not confined to dealing with corrupt conduct of or affecting public officials. Some of the most widely known instances of alleged corruption currently under investigation around the world are said to have occurred outside government. What is the rationale for the Act’s preoccupation with public administration? The most likely explanation appears to be historical.

4.2.5 In the course of the speech referred to in paragraph 4.2.2, the then Premier said:⁵¹

Before going into the details of this legislation, I want to say something about the rationale and the objectives of the independent commission. There has been considerable speculation about the Government’s reasons for setting up this body. I indicated before our being elected to Government that I was appalled by the sort of reputation this State had acquired around the country, and indeed, overseas. There was a general perception that people in high office in this State were susceptible to impropriety and corruption. In some cases that has been shown to be true.

In recent years in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.

No government can maintain its claim to legitimacy while there remains the cloud of suspicion and doubt that has hung over government in New South Wales...

Let me make it absolutely clear that this initiative is a component of the Government’s program to restore the integrity of public administration and public institutions in this State...

...This legislation is a crucial part of the Government’s long-term strategy for restoring the integrity of public administration.

4.2.6 For the reasons given in paragraph 4.2.4, an object of restoring and maintaining the integrity of public administration is much narrower than an object of combating corruption in the community. However, damage to the integrity of public

⁵⁰ It is indicated on the website of New Zealand’s Serious Fraud Office that it relies on the following definition of corruption used by the Asian Development Bank: “Behaviour on the part of officials in the public or private sector in which they improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing the position in which they are placed”. See <https://www.sfo.govt.nz/what-is-corruption>.

⁵¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 673 (Nick Greiner, Premier).

administration may come from outside as well as from within. Public administration exists to interact with the whole community. Even a specific concern with morality of public officials needs to recognise that potential sources of compromise may come from external sources; hence the references in section 8 to “conduct of any person (whether or not a public official)”. Such conduct is only relevant when it adversely affects the official conduct referred to in the section.

- 4.2.7 In the framing of the legislation, and in particular the definition of corrupt conduct, the legislative policy of taking, as the focus of the Act, “public administration and corruption connected with public administration” is given effect by having (in section 8) a definition of corrupt conduct that deals with:
- (i) conduct of a public official that is of a certain character (paragraphs (b), (c) and (d) of section 8(1)); and
 - (ii) any conduct of any person (whether or not a public official) that has or could have a specified kind of adverse effect on the exercise of official functions (paragraph (a) of section 8(1)) or any conduct of any person (whether or not a public official) that could involve one of a long list of stated offences and that has or could have an (unspecified) adverse effect on official functions.
- 4.2.8 A policy decision to limit the scope of the ICAC’s jurisdiction, through the definition of corrupt conduct, to “public administration and corruption connected with public administration” raises a question: what kind of connection with public administration is in contemplation? Two immediate problems arise. First, of the miscellany of offences listed in section 8(2), most are usually committed in circumstances that have nothing to do with the legal, and the popular, understanding of corrupt conduct. Secondly, when the phrase “adversely affects” is linked, as it is in section 8(1)(a), to honesty and impartiality, its content is reasonably clear. On the other hand, when it is left at large, as it is in section 8(2), its content becomes obscure. Common types of adverse effect on the exercise of official functions include waste, inefficiency and delay. Such effects are more often than not associated with causes that have nothing to do with corruption. What kind of adverse effect does subsection (2) have in contemplation? If the answer is “any kind” then the consequences are surprising. Some examples of this will be referred to below. The definition of corrupt conduct would extend far beyond what, in a context such as this, would ordinarily be signified by the expression.
- 4.2.9 The view may have been taken that, in the case of “an investigative body whose investigations are intended to facilitate the actions of others ... [and which] exercises no judicial or quasi-judicial function”, which also has important education and prevention functions, an extended definition of corrupt conduct is acceptable. However, when, in 1990, following amendments to the Act, it became clear that one of the primary functions of the commission was to make public findings that people had engaged in corrupt conduct, then the relationship between the definition of corrupt conduct and the legal and public understanding of that term took on a new importance. There was, however, no amendment of the definition.
- 4.2.10 From the outset, the policy decision to confine the jurisdiction of the ICAC by reference to a public element required the drawing of boundaries reflecting an understanding of what that public element was. From the earliest cases about the

Act that came to the courts there was judicial comment on the width and uncertainty of the definition of corrupt conduct, made with particular reference to the power to make and publish findings that conduct was corrupt.⁵²

- 4.2.11 Reports of the Parliamentary Committee on the ICAC have reflected concerns with the width of the definition.⁵³ There were some suggestions that, for the purpose of public findings, the expression “corrupt conduct” might be replaced by “misconduct” or “improper conduct”.⁵⁴ Suggestions such as this were never taken up, but they reflect an unease with the definition of corrupt conduct where the public would assume that a finding of corrupt conduct meant what it said, and was not based on some artificial construct.
- 4.2.12 Section 12A of the Act provides that, in exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities have in the prevention of corrupt conduct. If any of the offences listed in section 8(2), when they have any kind of adverse effect on the exercise of public functions, were within the purview of the ICAC then it would, in effect, have a mandate to deal with almost any crime of which an officer or agency of the State of NSW is directly or indirectly a victim. However, there is no sanction for failure to observe section 12A. As will appear, the Panel is of the view that this should be tightened up.
- 4.2.13 The problem of identifying with greater precision the public element in the Act’s idea of corrupt conduct was brought to a head in 2014 by *Cunneen* which, it was argued, involved conduct that was not corrupt according to the ordinary legal or popular understanding of that term, not serious, and not systemic, and that could only fit within the definition in section 8(2) if that provision were given its widest literal meaning. The question whether the case fell within section 12A was not directly justiciable. Whether the conduct alleged was corrupt depended on the meaning of section 8(2).

⁵² See, for example, *Balog v Independent Commission Against Corruption* (1989) 18 NSWLR 356, 370-372 (Mahoney JA); *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635-636; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 129 (Gleeson CJ), 167-169 (Mahoney JA), 180-181 (Priestley JA).

⁵³ See Parliamentary Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Review of the ICAC – Stage II: Jurisdictional Issues* (2001) 1-3, 15-24.

⁵⁴ *Ibid* 18-21, 57.

Chapter 5 – *Independent Commission Against Corruption v Cunneen* [2015] HCA 14

5.1 The litigation

- 5.1.1 The litigation arose out of an ICAC investigation that never reached the stage of a public inquiry, although it was intended for one. After the conclusion of the litigation, and after the constitution of this Panel, the ICAC investigation came to an end, and the matter was sent to the DPP. On 24 July 2015, the Solicitor General of New South Wales announced that no criminal proceedings would be commenced in respect of the matters referred by the ICAC to the DPP.⁵⁵
- 5.1.2 At first instance the case was heard by a judge of the Supreme Court of New South Wales, Hoeben CJ at CL.⁵⁶ The plaintiff, Ms Cunneen, was unsuccessful and she appealed to the New South Wales Court of Appeal. By majority, the appeal was allowed.⁵⁷ The ICAC then sought special leave to the High Court. Special leave was granted and, by majority, the appeal was dismissed.⁵⁸

5.2 The alleged facts

- 5.2.1 Although a number of other issues, not presently material, were raised in the proceedings, the outcome ultimately turned on a jurisdictional issue, which depended upon the meaning of the Act's definition of corrupt conduct, and in particular section 8(2). The Court of Appeal declared that the ICAC was exceeding its jurisdiction in investigating allegations which were described as:⁵⁹

...the allegations that, on 31 May 2014, the first and second appellants [Ms Cunneen and her son], with the intention to pervert the course of justice, counselled the third appellant [the son's girlfriend] to pretend to have chest pain, and that the third appellant, with the intention to pervert the course of justice, did pretend to have chest pains, to prevent investigating police officers from obtaining evidence [of] the third appellant's blood alcohol level at the scene of a motor vehicle accident.

The Court of Appeal also declared that the ICAC's decision to hold a public inquiry into the allegations was invalid and a nullity. Those declarations were upheld by the High Court.

- 5.2.2 The facts of the case have never been the subject of any finding, judicial or administrative. The motor vehicle accident mentioned involved Ms Cunneen's son and her son's girlfriend, and something allegedly said to the girlfriend after the accident. The allegations as recorded in the declarations made by the Court of Appeal do not include any alleged wrongdoing by, or any alleged attempt to procure any wrongdoing by, investigating police officers or any other public official.

⁵⁵ Department of Justice, "Statement from NSW Solicitor General regarding a referral from the Independent Commission Against Corruption" (Departmental Media Statement, 24 July 2015).

⁵⁶ *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571 (10 November 2014).

⁵⁷ *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014).

⁵⁸ *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (15 April 2015).

⁵⁹ See *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014) [207].

5.2.3 Ms Cunneen is a Deputy Senior Crown Prosecutor, and therefore a public official. Her son and her son's girlfriend are not public officials. The conduct of Ms Cunneen took place in a private capacity, and she was not exercising any official function in respect of the motor vehicle accident. The fact that she held a public office was regarded by both the Court of Appeal and the High Court of Australia as irrelevant to the question of jurisdiction. Although it could (this was the subject of an unresolved argument) possibly have been relevant to discretionary decisions by the ICAC about how to deal with the matter, it did not go to jurisdiction. A corollary is that the nature and outcome of the jurisdictional arguments were unaffected by Ms Cunneen's official status, and would have been the same had she never held such status. Another corollary is that, on the ICAC's jurisdictional argument, it would have had jurisdiction had Ms Cunneen not been involved at all, and the only conduct to be investigated was that of her son (allegedly counselling the pretence) and his girlfriend. It is improbable in the extreme that such jurisdiction would have been exercised, but the theoretical possibility illustrates the problem of the meaning of section 8(2) and its relationship to the ordinary understanding of corrupt conduct in a context such as this.

5.3 The competing possibilities

5.3.1 The essence of the problem was the meaning in section 8(2) of "adversely affects". Although another, presently irrelevant, argument was put and rejected, the case was decided by all the judges on the basis that for section 8(2) to be satisfied, two requirements need to be fulfilled: first, the conduct has the actual or potential adverse effect described in the chapeau; secondly it could involve one or more of the matters listed in paragraphs (a) to (y). It was the first requirement that was in issue. The allegations fell within (g) and (y).

5.3.2 The majority judgment commenced:⁶⁰

[2] 'Adversely affect' is a protean expression. In this context, however, there are only two possibilities. Either it means adversely affect or could adversely affect the probity of the exercise of an official function by a public official, or it means adversely affect or could adversely affect the efficacy of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision from that which would otherwise be the case.

[3] The former meaning accords with the ordinary understanding of corruption in public administration and consequently with the principal objects of the ICAC Act as set out in s 2A. The latter would result in the inclusion in 'corrupt conduct' of a broad array of criminal offences and other unlawful conduct having nothing to do with the ordinary understanding of corruption in public administration or the principal objects of the ICAC Act.

Although the words "probity" and "efficacy" were used to provide a general description of the two competing possibilities, they were not used as words of definition, and they are inappropriate for such use because of their lack of specificity.

⁶⁰ *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (15 April 2015) [2]-[3] (French CJ, Hayne, Kiefel and Nettle JJ).

5.3.3 In its written submissions to the High Court, the ICAC had argued.⁶¹

What is involved here is conduct which may have an actual or potential effect which is antagonistic or detrimental to the exercise of public powers by public officials/authorities, or which is actually or potentially contrary to the interests or desires of such public officials/authorities seeking to exercise their powers properly ... 'if the conduct in question limits or prevents the proper performance of the public official's functions, then the first limb will be satisfied'.

5.3.4 The majority, for reasons which are set out in detail in the judgment, preferred the first of the two possibilities they identified. Gageler J, dissenting, for reasons which he gave in detail, preferred the argument of the ICAC.

5.3.5 Nothing is to be served by canvassing the reasons on either side of the debate. The High Court was confronted with a difficult problem of statutory interpretation. The problem arose because of the unfortunate, but long-remarked, obscurity of section 8(2): there were two possible approaches to its meaning; on one approach it meant far too much; on the other approach it meant rather little. The meaning of the provision has now been decided authoritatively, and the Panel recommends that Parliament should make no attempt to amend it or to use it as a basis for extending the meaning of corrupt conduct in section 8(2). It is unpromising material for that purpose, in particular because of the confusing expression "adversely affects".

5.3.6 The question is whether the decision leaves a jurisdictional gap that should be filled by an addition to the definition of corrupt conduct and, if so, how. Relevant to that question are some observations made by the majority, and by Gageler J, as to the practical consequences of the competing possibilities under consideration.

5.4 Consequences

5.4.1 On both sides of the argument anomalies appeared. The majority pointed out, that, if the ICAC's interpretation prevailed, the following would be some examples of so-called corrupt conduct:⁶²

- (a) the theft of a motor vehicle used by a local council to collect refuse;
- (b) any form of revenue evasion;
- (c) bankruptcy and company offences leading to a reduced return in insolvency to a public authority;
- (d) any unlawful violence inflicted on a public official (for example, by a random act of brutality) which prevented or delayed the official's exercise of official functions even if the act was wholly unrelated to the official's status or duties.

5.4.2 Many other examples could be given. Two are referred to in paragraph 5.2.3. These examples are beyond the ordinary understanding of corrupt conduct. It may be added that, keeping in mind that judges are public officials, on the ICAC's interpretation a plaintiff in an action for damages for personal injuries who exaggerated his or her disabilities would be engaged in corrupt conduct.

⁶¹ Independent Commission Against Corruption, "Applicant's submissions", Submission in *Independent Commission Against Corruption v Cunneen*, S302 of 2014, 16 January 2015, 7.

⁶² *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (15 April 2015) [52] (French CJ, Hayne, Kiefel and Nettle JJ).

5.4.3 On the other hand Gageler J said the majority view would exclude from the scope of corrupt conduct fraud, such as:⁶³

- (a) widespread collusion among tenderers for government contracts;
- (b) serious and systemic fraud in applications for licences, permits or clearances under statutes designed to protect health or safety or designed to facilitate the management and commercial exploitation of resources.

He accepted that treating the definition as including an isolated case of telling a lie to a police officer was an “extreme consequence”, but so, in his view, was treating the definition as not covering (a) and (b).⁶⁴

5.4.4 The comments of Gageler J raise an important issue. His examples are cases of serious fraud, for private gain, practised upon public administration, which have the potential to undermine its capacity to serve or protect the public interest. Is this something that could, and should, properly be regarded as corruption? The Panel would answer that question in the affirmative, although ultimately, of course, the matter is one for Parliament. It is agreed on all sides that corrupt conduct under the Act is not limited to conduct of public officials. Insofar as it applies to conduct of public officials, it is not limited to their abuse of power for financial gain. Where section 2A refers to corruption affecting public authorities, in the context of the integrity and accountability of public administration, its meaning is wide enough to cover the examples given by Gageler J provided this is made clear in the provisions defining corrupt conduct.

5.5 Legal result

5.5.1 The case is authority for the proposition that, on the true construction of section 8(2), “adversely affects” means to adversely affect the exercise of an official function by a public official in such a way that the exercise constitutes or involves conduct of the kind identified in section 8(1)(b)-(d).

⁶³ Ibid [92] (Gageler J).

⁶⁴ Ibid.

Chapter 6 – Effect of *Independent Commission Against Corruption v Cunneen* on the ICAC’s Jurisdiction

6.1 Relevant aspects of the ICAC’s jurisdiction

- 6.1.1 It has already been noted that the ICAC’s investigative powers extend beyond the power to investigate corrupt conduct, and include, for example, the power to investigate conduct connected with corrupt conduct. Furthermore, an investigation of possible corrupt conduct may examine the conduct of persons other than the person or persons ultimately found to have engaged in such conduct, and findings about such conduct may be made.
- 6.1.2 In the case of *Cunneen*, the decision of the High Court as to the ICAC’s want of jurisdiction was based upon the premise that it was accepted that there was no question of any wrongdoing by a public official (relevantly, the police officers investigating the traffic accident). If, however, the investigation had involved the possibility of some kind of police involvement in the alleged deception then there would have been jurisdiction to investigate, and make findings (but not necessarily findings of corrupt conduct) in relation to everybody else who participated in the deception.
- 6.1.3 A finding that a person has engaged in corrupt conduct may be (and not infrequently is) based on a conclusion that the case falls within both of subsections (1) and (2) of section 8. A conclusion that reliance on subsection (2) is unwarranted does not affect the finding if subsection (1) also applies.

6.2 Analysis of the ICAC’s public inquiries and findings

- 6.2.1 For the purpose of seeking to put the effect of the *Cunneen* decision into its proper perspective, the Panel sought and obtained from the ICAC summaries of the subject matter of all its public inquiries in which corrupt conduct findings were made, and its findings, since December 1990 (after the post-*Balog* amendments).
- 6.2.2 The information the Panel received covered the period from December 1990 to 3 June 2015. Over that period, the total number of reports in which corrupt conduct findings were made was 125. These reports covered all of the ICAC’s public inquiries over the period in respect of which there were findings of corrupt conduct.
- 6.2.3 Most of the reports related to a number of persons, although some related only to one individual. In the period 2008-2009 there were 7 reports in which corrupt conduct findings were made resulting from one operation (*Operation Monto* covering RailCorp).
- 6.2.4 Of the 125 public inquiries the subject of the reports referred to in paragraph 6.2.2, the total number where the ICAC would have lacked jurisdiction to investigate based on the *Cunneen* decision was four. They will be discussed individually below.

- 6.2.5 In order to explain the pattern that emerges it is convenient to consider in more detail the 50 of the reports resulting in findings of corrupt conduct extending back from 3 June 2015 (*Operation Jarah*) to 19 November 2008 (*Operation Monto – Report 7*).
- 6.2.6 Of these 50 reports, there were two in which the ICAC would have lacked jurisdiction to investigate, conduct public inquiries, and report on the basis of the *Cunneen* decision. They were: *Operation Charity* (report 31 August 2011) and *Operation Columba* (report 9 December 2009). The other two of the four matters referred to in paragraph 6.2.4 were *Operation Bosco* (report 3 December 2003) and *Operation Squirrel* (report 6 November 2003).
- 6.2.7 Of the 50 reports referred to in paragraph 6.2.5, the number of reports in respect of which the topic the subject of the *Cunneen* decision was completely irrelevant was 28 (noting that *Operation Meeka* and *Operation Cabot* were dealt with in the one report).
- 6.2.8 Of the remaining matters, other than *Operation Charity* and *Operation Columba*, they were all operations in which there were findings against a public official based on section 8(1) (to which *Cunneen* is irrelevant) or findings under section 8(2) in relation to conduct which affected the probity of the exercise of official functions. In a number of those cases there were findings of corrupt conduct against persons where the findings against a particular person were based both on section 8(1) and section 8(2), the findings under section 8(2) being based on reasoning vitiated by *Cunneen*. The total number of cases in which the findings of corrupt conduct against one or more persons depended entirely on reasoning vitiated by *Cunneen* was 11. The total number of persons the subject of such findings was 26.

6.3 The four matters referred to in paragraph 6.2.4

- 6.3.1 *Operation Charity* (report 31 August 2011) concerned an investigation into alleged fraud on two Sydney hospitals. Two persons were alleged to have submitted requisitions and invoices and thereby misled public officials associated with the hospitals and the management of hospital funds. No impropriety on the part of any public official appears to have been in contemplation as a possibility in the inquiry. (If there had been, that would have been a basis for jurisdiction to investigate). There were findings of corrupt conduct based on section 8(2) and, apparently, on reasoning of a kind that could not now stand with *Cunneen*.
- 6.3.2 *Operation Columba* (report 9 December 2009) concerned an investigation into allegations that persons from various registered training organisations may have engaged in corrupt conduct, and/or conduct liable to allow, encourage or cause the occurrence of corrupt conduct, in relation to the delivery of training, the conduct of assessments and the issue of certificates connected with approved security industry training courses. Public officials considering security licence applications were said to have been misled. The findings of corrupt conduct were all based on section 8(2) and, apparently, on reasoning of a kind that could not now stand with *Cunneen*.
- 6.3.3 *Operation Bosco* (report 3 December 2003) concerned a person who was said falsely to have claimed certain academic qualifications when applying for various public and private sector positions between 1987 and 2002. His claims allegedly

misled the officials required to deal with his application. This was a case of a person who allegedly became a public official by fraudulent means. The findings of corrupt conduct were based on section 8(2) and, apparently, on reasoning of a kind that could not now stand with *Cunneen*.

- 6.3.4 *Operation Squirrel* (report 6 November 2003) concerned the authenticity of qualifications and related documents submitted as part of certain applications to the Department of Fair Trading for building and trade licences. The public officials dealing with the licence applications were said to have been misled. The findings of corrupt conduct were based on section 8(2) and, apparently, on reasoning of a kind that could not now stand with *Cunneen*.

Chapter 7 – The Appropriate Scope for the Jurisdiction of the ICAC

7.1 The nature of the jurisdiction

- 7.1.1 Jurisdiction is the authority to exercise statutory functions and powers. Relevantly, that includes the authority to investigate (and to exercise various powers for that purpose), to hold a public inquiry as part of the investigation, and to make and report findings, which may include a finding that a person has engaged in corrupt conduct.
- 7.1.2 The Panel's terms of reference require it to consider the appropriate scope of the ICAC's jurisdiction in the light of the decision in *Cunneen*. As appears from paragraph 5.2.1, and paragraph 5.1.2, the High Court upheld the Court of Appeal's declaration that the ICAC was exceeding its jurisdiction in investigating the allegations against three persons including Ms Cunneen, and in deciding to hold a public inquiry into the allegations. Since the matter never reached the stage of a public inquiry no question of findings arose.
- 7.1.3 The want of jurisdiction resulted from the conclusion that the alleged conduct on the part of the three named persons was not within the ambit of corrupt conduct as defined in sections 7, 8 and 9 of the Act, keeping in mind that there was no allegation of any other kind of corrupt conduct, such as possible wrongdoing on the part of a police officer concerning the traffic accident in question, or a possible attempt to procure such wrongdoing.
- 7.1.4 As appears from section 13(1)(a) of the Act, the ICAC's jurisdiction to investigate (which includes holding public inquiries, and may lead to adverse findings and a report) extends beyond the investigation of possible corrupt conduct and includes the investigation of possible conduct liable to allow, encourage or cause corrupt conduct, and of possible conduct connected with corrupt conduct. However, absent any suggestion of any kind of actual, or potential, or connected corrupt conduct on the part of any person involved in the investigation, then there is no jurisdiction; hence the importance of the definition of corrupt conduct.
- 7.1.5 The ICAC's authority extends beyond the matters referred to in section 13(1)(a). It also has important advisory, educational and preventive functions as set out in paragraphs (e) to (j). These also are limited by reference to corrupt conduct as defined. This creates a certain tension. The ICAC's powers of investigation and making findings, as courts have often observed, involve substantial interference with the common law rights and freedoms of citizens and therefore the scope of that aspect of its jurisdiction might reasonably be expected to be defined with some caution. On the other hand, the functions referred to in (e) to (j) might be expected to be based on a different approach.
- 7.1.6 One appropriate response to this tension would be to loosen the connection between the formulation of the functions of advice, education and prevention, and the definition of corrupt conduct. So far as the Panel can see, there is no reason of principle, as distinct from drafting convenience, why the jurisdictional basis for

investigation and decision-making should be the same as that for these other important functions. The Panel recommends that this aspect of the legislative framework should be reconsidered.

- 7.1.7 The Panel recommends that section 13(1) be amended to add to each of paragraphs (e) to (j) a reference to promoting the integrity and good repute of public administration.
- 7.1.8 The purpose of the suggested amendments is to free the advisory, educational and prevention functions from the constraints that accompany, or should as a matter of principle accompany, the investigative jurisdiction including the power to make findings of corrupt conduct.

7.2 Previous proposals

- 7.2.1 In November 2001, the Parliamentary Committee on the ICAC published a Review which dealt, among other things, with Jurisdictional Issues.⁶⁵ The Commissioner at the time was Ms Moss.
- 7.2.2 The Review recorded Ms Moss as pointing out that the current definition of corrupt conduct was obviously an effort to be exhaustive and not to miss anything, but that the time had come to reconsider that approach and to define the expression “in such a way as to adequately cover that which is generally regarded to be corrupt, but excludes that conduct that is not ordinarily thought of in that way”.⁶⁶ She said:
- If you were to set out today to establish a new anti corruption commission, having the benefit of the lessons of our experience you may well define our terms and jurisdiction very differently. However, with an organisation that has been in operation for 12 years, it is very hard to make changes in these areas without looking like you are weakening the Commission’s jurisdiction and its ability to fight corruption.
- 7.2.3 In its account of the history of the legislation the Committee said of the definition of corrupt conduct: “Its focus was on conduct of public officials or those who, although not public officials, acted in such a way as to have an impact on public administration”.⁶⁷ Accepting that, the question is: what kind of impact? A reading of the legislative history does not support a conclusion that any kind of act or omission that caused a public official to act in a manner different from the way in which he or she otherwise acted would be taken as “having an impact on public administration” if such an impact was to be relevant to corruption.
- 7.2.4 The Committee recommended a redefinition which, in substance, retained section 8(1) and section 9, but “streamlined” section (2).⁶⁸ Unfortunately (in the light of *Cunneen*), however, the proposed redefinition did nothing to remedy the obscurity of the expression “adversely affects ... the exercise of official functions”. Would delay be an adverse effect? Or waste of money? A central problem identified by Ms Moss, and the Committee, was that the literal meaning of the definition embraced conduct that is not ordinarily regarded as corrupt. However, another problem was also

⁶⁵ Parliamentary Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Review of the ICAC – Stage II: Jurisdictional Issues* (2001).

⁶⁶ *Ibid* 2.

⁶⁷ *Ibid* 7.

⁶⁸ *Ibid* 65.

identified: people did not want to appear to be weakening the anti-corruption effort. The Committee's recommendation was never taken up by Parliament.

- 7.2.5 The 2005 Report recommended some re-structuring of sections 7, 8 and 9 in the interests of clarifying section 8(2), but that recommendation was not adopted.
- 7.2.6 Whatever past inhibitions there may have been about changing the definition of corrupt conduct because to do so might appear to manifest an attitude of insufficient firmness towards corruption, they cannot have survived *Cunneen*. If no change is made to the definition (which is one obvious possibility) then its scope is narrower than the ICAC and, perhaps, the Committee had previously thought it to be.

7.3 Public policy considerations

- 7.3.1 The problem with which the Panel is concerned would disappear if Parliament were to alter the focus of the Act's anti-corruption effort from corrupt conduct in and around public administration to corruption generally. There would then be no need to work out how to relate corruption to public administration; there would be no necessary relationship at all. There would still be a problem of defining corruption, but it would not be the same as the problem that now arises. There would, of course, be other problems as well, including issues of resources. It has been noted earlier that the Hong Kong ICAC has a general anti-corruption role and is not restricted to activities in and around the public sector. However, as has been pointed out to the Panel, its level of resources is very different from that of the NSW ICAC.
- 7.3.2 The Panel's terms of reference reflect an assumption that the policy change mentioned in paragraph 7.3.1 is not in contemplation. However, the Panel refers to it, not merely to show that the possibility has not been overlooked, but for a reason of principle. A view as to what kind of relationship ought to exist between the corruption with which the ICAC is concerned and public administration must require some consideration as to why there should be a requirement for any such relationship in the first place. If it is simply a question of resources, then that does not take the matter very far. If it is based on the historical circumstances that brought the ICAC into being in the first place, that is another matter. There is nothing in those circumstances, as outlined by Premier Greiner to Parliament, which gives any ground for thinking that the evil to be addressed by creating a new body with extraordinary powers overriding common law rights and privileges was a prevalence of administrative errors made in good faith by public officials who were being misled by private citizens who made false entries in returns or otherwise made false or misleading statements to officials.
- 7.3.3 The evil which was said to justify the creation of the ICAC and the conferral of its extraordinary powers as described to Parliament and the public was of a kind that nobody would have difficulty in identifying as corruption. What was said was that public administration in this State had been brought into disrepute. Extreme measures were said to be necessary to secure and maintain honest and reputable government. The integrity of public administration was said to be at stake.
- 7.3.4 As will appear from Chapter 10, the State of NSW is not under-supplied with agencies to fight crime, including crime which is endemic or organised. Leaving to

one side the matters mentioned in paragraphs (b), (c) and (d) of section 9 (which appear directed to public officials), since, by hypothesis, the conduct in question is a criminal offence, then there is a law against it, there are agents of the executive government to enforce those laws, and there are courts to apply them and punish offenders according to due process of law. The creation of the ICAC was not said to be justified by reason of some kind of general weakness in the criminal justice system. If there were such a general weakness then Parliament might have been expected to address it.

- 7.3.5 The need for something more was justified on the basis of a kind of sovereign risk; confidence in government was at stake. What is it that undermines confidence in government? Not any opportunistic lie told to a council inspector; or any false entry made in an application for a licence; or any non-disclosure of the value of taxable property. Conduct of that kind could occur on a scale, or in circumstances, that may bring public administration into disrepute, but that adds an element that goes beyond the bare fact of misleading a public official. The addition of that element may give rise to a kind of adverse effect on public administration that might be thought to warrant the attention of a corruption-fighting body.
- 7.3.6 As things stand at present, following *Cunneen*, the Act's definition of corrupt conduct is limited to conduct (whether of a public official or a private citizen) that touches or concerns the probity of a public official. The New South Wales Bar Association has submitted, as a preferred option, that it should be left at that.
- 7.3.7 A policy choice open to Parliament is to do nothing. The whole of section 8 would then be concerned with corruption in the sense of a form of official misconduct (whether actual misconduct or misconduct someone is seeking to procure). That undoubtedly produces a coherent statutory policy. As the analysis in Chapter 6 demonstrates, it also leaves a jurisdictional foundation that would cover almost all (but not all) of the investigations that the ICAC has undertaken in the past. It would mean that some findings of corrupt conduct of the kind made in the past would have been replaced by findings of fact and some would have been findings of conduct connected with corrupt conduct. The number of matters in the past resulting in public inquiries and reports that have not involved at least the possibility of some misconduct, or an attempt to procure some misconduct, on the part of a public official is small. This is a course open to Parliament, but it is not the course which the Panel recommends, for the reason that it would fail to bring within the scope of corrupt conduct some matters which should be there, such as the matters referred to in paragraphs 5.43 and 5.4.4.
- 7.3.8 Another course, which the Panel does not recommend, is to return the legislation to the artificially wide concept of corruption that has troubled courts, and the Committee on the ICAC, from the earliest days of the Act by reverting to the "efficacy" approach. This would be unsatisfactory. It has its foundation in one of the two choices presented by the uncertain expression "adversely affects" in section 8(2). The Panel recommends that Parliament should now rise above the constraints imposed by that expression and should re-examine, and re-express, its policy as to conduct which does not involve misbehaviour by public officials.
- 7.3.9 "Efficacy" and "probity" were terms used to describe, in a summary fashion, two competing possibilities as to the reach of "adversely affects" in section 8(2).

“Efficacy” was not used by anybody as a term of commendation of legislative policy. All the members of the High Court accepted that the expression “adversely affects” raised difficulties of interpretation. This had been remarked upon for many years.

- 7.3.10 The inescapable problem of treating section 8(2) as the source of a meaning of corrupt conduct that covers non-involvement of public officials is that damage to the “efficacy” of public administration can result from circumstances or causes that have nothing to do with even the widest possible view of corrupt conduct. This embarrassment cannot be evaded by removing some of the matters listed in the second limb of section 8(2). Reducing that list can spare a reader of the Act the necessity of having to explain some of the extreme consequences of the efficacy approach, but others remain. As noted earlier, a common form of adverse effect on public administration is delay. Why should violence that impacts on the efficacy of the exercise of official functions by causing delay in public administration be defined as corrupt? To do so distorts the meaning of corruption.
- 7.3.11 It is not a sufficient answer to a criticism of an artificial definition of corrupt conduct to say that in practice it is unlikely to be applied. People who make complaints to the ICAC, and who make allegations of corruption elsewhere, can be expected to invoke the full force of the definition. Furthermore, it is evident that the ICAC itself attaches great importance to its power to categorise conduct as corrupt. (The Panel, on asking, was informed that the ICAC has never made a finding under section 13(1)(a)(iii) (that is, of conduct connected with corrupt conduct). It would seem that such lower impact findings are simply not made when a finding of corrupt conduct is regarded as available). If the definition of corrupt conduct is artificial this undermines the educational purpose of such findings.
- 7.3.12 If Parliament considers, as a matter of policy, that the scope of the ICAC’s jurisdiction as defined by *Cunneen* is too narrow, it would be a retrograde step to seek to widen it by continued reliance on section 8(2), and the concept of “adversely affects”. A problem with the concept of efficacy is that it has now been glossed so as to refer to the occurrence of any outcome in the exercise of a power different from that which would otherwise have occurred.

7.4 The Panel’s recommendation

- 7.4.1 The Panel considers that, consistently with the reasons advanced for the establishment of the ICAC and the conferral of its extraordinary powers of investigation, the scope of the jurisdiction of the ICAC could be extended beyond that as defined by *Cunneen* by taking a fresh approach to the identification of that kind of corrupt conduct that does not involve wrongdoing on the part of a public official. This approach could be based on the concept of conduct that undermines or could undermine confidence in public administration.
- 7.4.2 The Panel does not consider that, in order to perform its functions effectively, the ICAC needs a jurisdiction based upon an artificial meaning of corrupt conduct. In particular, the Panel does not consider that there is a need for jurisdiction based on a concept of corruption that extends to any act or omission that is both illegal or a disciplinary offence or a breach of a code of conduct and that results in some kind of official outcome different from that which would otherwise have occurred. People are required to answer questions, complete returns and forms, and otherwise

provide information to officials in many different circumstances and are liable to penalties for providing misleading information. There is no reason to believe that there is, in NSW, some kind of general inadequacy in law enforcement which justifies a body armed with extraordinary investigative powers, and a function of public denunciation, to expose and deter such wrongdoing. Nor is there reason to believe that an anti-corruption body can operate successfully only if the meaning of corruption is taken to cover all such conduct.

- 7.4.3 An artificially wide definition of corrupt conduct debases the currency of language. It also creates injustice in the selectivity, or randomness, with which anti-corruption legislation is applied. It results in a large number of criminal offences, or disciplinary offences, or breaches of codes of conduct, which are all capable of being dealt with by the ordinary process of law or administration, but which become technical corruption in circumstances where very few of them will ever be treated as such. The Panel was told by the ICAC that in 2014-2015 it received 1843 complaints. Of those, only 42 were referred for preliminary investigation, representing 2.28% of the complaints. It seems reasonable to assume that most of the complaints were from people who think corruption means what it says. If the public were aware of an artificially wide meaning of corruption it seems likely that many more complaints would be made, and an even smaller percentage investigated. Furthermore, as both the Commissioner of Police and the Chairperson of the New South Wales Electoral Commission pointed out to the Panel, there are people with obligations to report corrupt conduct.⁶⁹ It does not assist if the statutory definition is much wider than ordinary understanding. Laws are meant to be of general application, and to be capable of consistent enforcement. An anti-corruption law based upon a definition that is not seriously meant to be applied according to its full potential reach, or is applied only when it is decided to make an example of someone, would be contrary to principle.
- 7.4.4 An example of the problem of treating one of the matters listed in section 8(2) as corrupt conduct every time it has an effect on the outcome of official decision-making is tax evasion. When an individual taxpayer submits a return which contains false information this leads to an erroneous assessment. It is a serious offence, and is punishable according to law. However, it is not ordinarily regarded as corrupt conduct. Yet it would clearly fall within the meaning of section 8(2) for which the ICAC unsuccessfully contended in *Cunneen*. If all tax evasion is corrupt conduct, why has it never been the subject of an ICAC investigation? No doubt some of the ICAC's investigations reveal tax evasion, and findings to that effect are presumably acted upon by the relevant authorities. However, if, according to NSW law, all tax evasion is corrupt conduct then the application of the law to that form of corruption appears at least haphazard.
- 7.4.5 On the other hand, there have been examples of widespread schemes of tax evasion, such as bottom-of-the-harbour schemes, which both involved illegality and were of such a nature and extent that they undermined confidence in public administration. Although this may be open to dispute, the Panel considers that such schemes could reasonably be characterised as corruption.

⁶⁹ ICAC Act section 11.

- 7.4.6 An individual act of forgery, causing an official to make an incorrect entry in a public register, would not ordinarily be called corrupt. However, a scheme involving forgeries may bring public administration into disrepute, and could be corruption.
- 7.4.7 In its submission to the Panel, the ICAC said: “The Commission is concerned with investigating, exposing and preventing conduct that undermines, or could undermine public confidence in public administration”. The New South Wales Bar Association, in its submission, proposed, as an alternative to doing nothing, framing a test of conduct that, as one element, undermines or could undermine, public confidence in public administration or in the administration of justice. (In view of the Act’s definitions of public official and public authority the Panel would regard the administration of justice as included in public administration). These ideas reflect the justification that has always been advanced for the creation of a body with the extraordinary powers given to the ICAC: it is there to protect and maintain the integrity and reputation of the apparatus of government.
- 7.4.8 Some forms of criminal behaviour target government in a way that impairs its integrity and reputation. Governments, like private enterprises and individual citizens, may be victims of crime, but that alone does not bring them into disrepute. That is why the example given by the High Court of stealing a council truck as corruption seems so absurd. Defrauding a government-owned insurance company is unlikely to have any moral or legal quality different from defrauding any other insurer. However, some kinds of fraudulent practice directed towards public authorities can be of such a nature as to damage confidence in the administration itself.
- 7.4.9 The law of conspiracy treats the combination itself as a threat to public security. Similarly, collusive practices and combinations to defraud can threaten public confidence. The scale on which a fraud is practised may justify its treatment as a form of corruption.
- 7.4.10 The two examples identified by Gageler J in *Cunneen* and referred to in paragraph 5.4.3 are both kinds of conduct that not only reflect serious criminal behaviour but also could impair confidence in the integrity of public administration or its capacity to serve the public interest.
- 7.4.11 Dishonestly procuring or aiding or benefiting from the wrongful use or application of public property or public funds also is conduct that, depending on the circumstances, could impair confidence in public administration.
- 7.4.12 In the practical application of any definition of corrupt conduct, section 9 must be kept in mind.
- 7.4.13 The Panel recommends that the Act be amended to include within the definition of corrupt conduct in section 8 conduct of any person (whether or not a public official) that impairs or could impair public confidence in public administration and which could involve any of the following matters:
- (a) collusive tendering;
 - (b) fraud in or in relation to applications for licences, permits or clearances under statutes designed to protect health and safety or designed to facilitate the management and commercial exploitation of resources;

- (c) dishonestly obtaining or assisting or benefiting from the payment or application of public funds or the disposition of public assets for private advantage;
- (d) defrauding the revenue;
- (e) fraudulently obtaining or retaining employment as a public official.

The nature of the matters covered in (a) to (e) should be sufficient to indicate that the confidence referred to is not confined to faith in the probity of individual public officials.

- 7.4.14 This could be done by inserting a new subsection in section 8 (perhaps subsection (2A)) and would necessitate a consequential amendment to section 7.
- 7.4.15 The expression “could impair public confidence” is intended as a reference to the tendency of the conduct arising from its nature or the circumstances in which it occurs, and not as a factual prediction of its likely consequence. The Panel takes this to be consistent with the use of the expression “could adversely affect” in section 8(1)(a). There, for example, an offer of a bribe to a public official would be something that has the tendency to adversely affect the honest or impartial exercise of official functions even though the public official in a particular case is a person of unimpeachable honesty and is in fact unlikely to accept the bribe.

7.5 Other matters

- 7.5.1 If section 8 is amended in the manner recommended, subsection (3) will give the amendment application to conduct that occurred previously, so long as the words “or, in the case of conduct falling within [the proposed new subsection] the commencement of that subsection” are added after “this subsection”. The Panel recommends that addition. The Panel also recommends that the words “or expanding” be added to section 8(6) after the word “limiting”.
- 7.5.2 The retrospective legislation that followed the decision in *Cunneen* was enacted before this Panel was constituted. The Panel’s terms of reference do not concern that legislation. The Panel makes no recommendation beyond that in paragraph 7.5.1 concerning any retrospective operation of the changes to the Act it proposes. This is in any event a matter which the High Court will be considering – see paragraph 1.5.7 above.
- 7.5.3 In the ICAC’s submission to the Panel, reference was made to several proposed changes to other legislation, as well as certain changes to the Act, which were raised by the ICAC in its July 2014 submission to the Parliamentary Committee and which were the subject of a discussion paper of November 2014. Those matters have no connection with the issue of the meaning of corrupt conduct. Reference was also made to amending the Act to allow greater flexibility in the use of information disclosed under section 111(4)(c) of the Act (which allows a person to divulge certain information despite the secrecy protections contained in section 111 in circumstances where the information is divulged “in accordance with a direction of the Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest”). It was said that the uniform application of the restriction in section 111(5) results in an inappropriate lack of flexibility in how

that information may be used. This is a topic on which none of the parties consulted by the Panel has had anything to say, probably because it was not foreseen as arising under the terms of reference, and the Panel has no recommendation to make.

Chapter 8 – Elections

8.1 *Operation Spicer: An investigation into alleged electoral misconduct*

- 8.1.1 The ICAC has suggested that it is precluded from continuing to investigate and conclude an aspect of a particular investigation because of the High Court's construction of section 8(2) in *Cunneen*. The investigation is *Operation Spicer* and the relevant allegation is that certain members of Parliament and others solicited and failed to disclose political donations from companies, including prohibited donors, contrary to the *Election Funding, Expenditure and Disclosures Act 1981* ("the *EFED Act*").
- 8.1.2 The "Amended Scope and Purpose" for *Operation Spicer* issued on 12 September 2014 refers to the following matters, among others:
- Whether certain members of Parliament solicited, received and failed to disclose political donations from companies, including prohibited donors contrary to the *EFED Act*.
 - The circumstances in which the 2011 election campaign for the seat of Newcastle was funded by the Liberal Party and whether funds were solicited and received from prohibited donors.
 - Whether certain members of Parliament solicited and received donations from prohibited donors for use in the Liberal Party 2011 State election campaign, including in the seat of Newcastle.
 - Whether members or associates of the Liberal Party used or attempted to use the Free Enterprise Foundation (an "associated entity" within the meaning of the *Commonwealth Electoral Act 1918* – the "association" is with the federal Liberal and National parties) as a means of receiving and disguising donations from prohibited donors in the lead up to the 2011 State election campaign.
 - Whether two named individuals, one of whom was a member of Parliament, but the other whom was not, agreed to make false or inaccurate electoral funding disclosures in 2007 and 2011 and whether the disclosures were made for the purpose of concealing benefits already exchanged or to be exchanged with persons alleged to be property developers.
- 8.1.3 On 5 December 2014, following the decision of the Court of Appeal in *Cunneen*,⁷⁰ the ICAC announced that it would not complete the report on *Operation Spicer*.⁷¹ That remains the position following the High Court's affirmation of the Court of Appeal decision.
- 8.1.4 *Operation Spicer* may also be affected by proceedings commenced by one of the persons whose conduct was under investigation. Mr Jeffery McCloy commenced proceedings against the State of NSW and the ICAC in the High Court seeking declarations that section 96E and Divisions 2A and 4A of Part 6 of the *EFED Act* are

⁷⁰ *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014).

⁷¹ The Independent Commission Against Corruption, *Statement regarding Operations Credo and Spicer* (5 December 2014) <<http://www.icac.nsw.gov.au/media-centre/media-releases/article/4707>>.

constitutionally invalid.⁷² Part 6 of the *EFED Act* regulates political donations and electoral expenditure in relation to State elections and local government elections. Division 2A of Part 6 imposes caps on political donations in relation to State elections and makes it unlawful for anyone to accept a donation that exceeds a prescribed cap. Division 4A of Part 6 of the Act prohibits the making and acceptance of political donations by certain classes of person, including property developers. Section 96E (in Division 4 of Part 6 of the Act) prohibits the making of certain indirect campaign contributions, such as waiving payments for advertising and the provision of equipment in return for inadequate payment. The High Court heard argument in the matter on 10 and 11 June 2015 and reserved its decision. The practical effect of a declaration of invalidity would be to prevent continuation of a substantial part of *Operation Spicer*.

8.1.5 *Operation Spicer* involves conduct of varying degrees of seriousness, some of which if established as fact may come within the definition of corrupt conduct stated in section 8(1) of the Act. That aspect of the investigation is unaffected by *Cunneen* although it may be affected by the decision in *McCloy*.

8.1.6 In relation to other aspects of the investigation, the position is not so clear – some of the conduct under investigation in *Operation Spicer* could have been “corrupt conduct” if the ICAC’s pre-*Cunneen* view of section 8(2), that is, the construction adopted by Gageler J, had prevailed. On the other hand, there was a third category of conduct which, while constituting breaches of the NSW electoral laws (subject to the High Court’s decision in *McCloy* and if found to have taken place), may not have been within the ICAC’s jurisdiction because it did not fall within any aspect of section 8’s definition of “corrupt conduct”. The ICAC has itself pointed out to the Panel that:

There are offences under the *Parliamentary Electorates and Elections Act 1912* (See Part 5, Division 1), Part 5 of the *Lobbying of Government Officials Act 2011* and under the [*EFED Act*] (see Division 4 and 4A of Part 6) that do not constitute conduct that affects the exercise of official functions, either by misleading a public official or by involving a public official in any wrong-doing.

The explanation of this is in the matters discussed in Chapter 4.2.

8.1.7 A question arises whether the Act should be amended so that the ICAC has jurisdiction to investigate and make findings about breaches of the electoral laws, whether or not they constitute corrupt conduct and, if so, how that change should be implemented.

8.2 Relevant electoral legislation

8.2.1 There are three relevant items of legislation:

- the *Parliamentary Electorates and Elections Act 1912* (“the *PE&E Act*”);
- the *EFED Act*;
- the *Lobbying of Government Officials Act 2011* (“the *LOGO Act*”).

8.2.2 Division 17 of Part 5 of the *PE&E Act*, “Bribery, treating, intimidation etc”, deals with conduct which would affect and, indeed, corrupt the electoral process. Section 147

⁷² *McCloy & Others v State of New South Wales and Anor*, S211/2014.

creates a criminal offence of bribery in connection with voting or refraining from voting at any election. Section 149 creates an offence of electoral treating, constituted by a candidate at an election offering food, drink, entertainment, transport and certain other inducements with the intention of corruptly influencing a person's election conduct, that is, whether the person votes at all or whether the person votes for the candidate. Section 149(5) declares that an elector who corruptly accepts such inducements, or an offer of such inducements, is incapable of voting at the election. Section 151 deals with intimidation and, in summary, imposes criminal liability on the use of, or threatened use, of various means including force, violence, restraint, abduction, duress or fraud to interfere with an elector's decision to vote or refrain from voting. Each of these offences is punishable by a fine (100 penalty units) or three years' imprisonment or both. Clearly and correctly, Parliament regards such conduct as serious, as the prescribed penalty indicates.

- 8.2.3 There are other criminal offences in connection with elections and the electoral process set out in the *PE&E Act*, but it is unnecessary to refer them specifically.
- 8.2.4 Two aspects of the *EFED Act* should be mentioned. The first is Part 5, which establishes a scheme for the public funding of electoral communication expenditure incurred by parties and candidates. Division 2 of Part 5 establishes an Election Campaigns Fund to be kept by the Electoral Commission in respect of State elections and regulates payment from the Fund to parties and candidates. Section 75, which appears in Division 3 of Part 5, amongst other things, creates a criminal offence of making a false statement in a claim submitted to the Electoral Commission punishable by fine (400 penalty units) or two years' imprisonment, or both.
- 8.2.5 Part 6 of the *EFED Act* regulates political donations and electorate expenditure. Division 2 of Part 6 requires disclosure of political donations received or made and electoral expenditure incurred by or on behalf of a party, elected member, a group, a candidate and certain other individuals and entities. Division 2A (under challenge in the *McCloy* litigation) imposes caps on political donations for State elections⁷³ and makes it unlawful for a person to accept a political donation to a party, elected member, group, candidate or third party campaigner if the donation exceeds the applicable cap.⁷⁴ Division 2B imposes caps on electoral communication expenditure for State election campaigns and makes it unlawful for a party, group, candidate or third party campaigner to incur electoral communication expenditure in excess of the applicable cap. Division 3, "Management of donations and expenditure", imposes various requirements on parties, groups, elected members, candidates and third party campaigners relating to political donations and expenditure. An example is section 96:

96 Requirements for parties

- (1) It is unlawful for political donations to a party to be used otherwise than for the objects and activities of the party, including the administration of the party and community activities.

⁷³ *Election Funding, Expenditure and Disclosures Act 1981* ("*EFED Act*"), section 95A.

⁷⁴ *Ibid* section 95B.

- (2) In particular, it is unlawful for political donations to be used for the personal use of an individual acting in a private capacity.
- (3) It is unlawful for a party to make payments for electoral expenditure for a State election campaign unless the payment is made from the State campaign account of the party kept in accordance with this section.
- (4) The State campaign account of a party is to be a separate account with a bank, credit union, building society or other entity prescribed by the regulations.
- (5) The following may be paid into the State campaign account of a party:
 - (a) political donations made to the party after 1 January 2011 (including the proceeds of the investment or disposal of any political donation of property after that date that is held as an asset of the account),
 - (b) payments made to the party under Part 5 at any time,
 - (c) money borrowed by the party at any time,
 - (d) a bequest to the party,
 - (e) money belonging to the party on 1 January 2011 (including the proceeds of the investment or disposal of any other property belonging to the party on or before that date),
 - (f) any other money of a kind that is prescribed by the regulations for the purposes of this subsection.
- (6) However, the following may not be paid into the State campaign account of a party:
 - (a) a party subscription referred to in section 95D, other than any amount that exceeds the maximum subscription referred to in that section and that constitutes a political donation to the party,
 - (b) any amount of a political donation to the party that exceeds the applicable cap on political donations to the party under Division 2A,
 - (c) any money paid to the party under Part 6A,
 - (d) any other money of a kind that is prescribed by the regulations for the purposes of this subsection.
- (7) This section does not prevent payments being made out of the State campaign account that are in addition to the payments for electoral expenditure referred to in subsection (3).

Division 4, “Prohibition of certain political donations”, makes unlawful the acceptance of political donations to a party, elected member, group, candidate or third party campaigner unless certain requirements to do with the identification of a donor are met. The purpose is to create certainty about who is making a political donation by requiring the donor to be properly identified and, by requiring a donor to have a legitimate link to Australia, to remove a perception that foreign donors could exert influence over the Australian political process.⁷⁵ Division 4A, “Prohibition of donations from property developers or tobacco, liquor or gambling industries” (also under challenge in *McCloy*) renders unlawful donations by such prohibited donors.

8.2.6 The prohibitions stated in Part 6 of the *EFED Act* and referred to in the preceding paragraph are rendered criminal offences by a series of provisions in Division 5, “Miscellaneous”. Section 96H deals with offences relating to disclosures. False

⁷⁵ Ibid section 96D(4).

statements, for example, in required disclosures are punishable by a fine (400 penalty units) or imprisonment for two years, or both.⁷⁶ A person who does any act that is unlawful under Division 2A or 2B is also guilty of an offence, if the person was aware of the facts that result in the act being unlawful, punishable by a fine (400 penalty units) or imprisonment for two years, or both.⁷⁷

- 8.2.7 One of the offences, entry into a scheme for the purpose of circumventing a prohibition or requirement of Part 6 with respect to political donations or political expenditure, is punishable by imprisonment for 10 years.⁷⁸
- 8.2.8 The *Lobbying of Government Officials Act*, as its name suggests, is intended to regulate the activities of lobbyists. It establishes a Lobbyists Code of Conduct,⁷⁹ a Register of Third Party Lobbyists⁸⁰ and bans success fees for lobbying.⁸¹ A criminal sanction is imposed for giving or receiving or agreeing to give or receive a success fee, punishable by a fine.⁸²

8.3 Role and powers of the New South Wales Electoral Commission

- 8.3.1 The New South Wales Electoral Commission is constituted by section 21A of the *PE&E Act*. Section 21C provides that the Electoral Commission has the functions conferred on it by the *PE&E Act*, the *EFED Act*, the *LOGO Act* or any other Act. Section 21C(2) empowers it to institute proceedings for offences under each of the above-named Acts.
- 8.3.2 Among the functions conferred by the *EFED Act* on the Electoral Commission is the power, exercisable by an Inspector, to inspect, make copies or take extracts from records kept by or on behalf of, or any bankers' books so far as they relate to, any party, elected member, group or candidate etc and bankers' books.⁸³ Section 110A empowers the Electoral Commission by notice in writing to require a person to provide information, produce documents, to answer questions for the purposes of enforcement of the *EFED Act* and to attend at a specified place to answer questions. Failure to comply is punishable by fine (200 penalty units). The provision of documents, information or answers to questions which are knowingly false in any material particular is punishable by fine (400 penalty units), or two years' imprisonment or both.

8.4 Jurisdiction of the ICAC in relation to electoral and lobbying matters

- 8.4.1 At this point a number of comments may be made.
- 8.4.2 First, the legislative schemes established by the *EFED Act*, the *PE&E Act* and the *LOGO Act* and set out above are intended to maintain and enhance the integrity and transparency of the electoral process and the activities of lobbyists. The activities which are prohibited or regulated are central to the democratic system.

⁷⁶ Ibid section 96H(2).

⁷⁷ Ibid section 96HA.

⁷⁸ Ibid section 96HB.

⁷⁹ *Lobbying of Government Officials Act 2011*, Part 2.

⁸⁰ Ibid Part 3.

⁸¹ Ibid Part 5.

⁸² Ibid section 15.

⁸³ *EFED Act* section 110. See also *Parliamentary Electorates and Elections Act 1912*, section 184A.

Candidates for office are people who seek to become public officials, but most of them never attain that status.

- 8.4.3 Much of the proscribed conduct does not fall within the definition of “corrupt conduct” in section 8 of the Act. An example would be payment of a bribe by a party officer to induce an elector to vote for his party. Another example would be payment of a success fee to a lobbyist by a successful client, say, a mining company for obtaining a grant of a mining lease.
- 8.4.4 While the Electoral Commission does have some compulsory investigative powers as set out at paragraph 8.3.2 above, they are not as extensive, nor as likely to be effective in revealing electoral or lobbying misconduct, as the powers which the ICAC possesses.

8.5 Should the ICAC have jurisdiction over electoral and lobbying matters?

- 8.5.1 The Panel consulted with the Hon. Keith Mason AC QC, the Chairperson of the Electoral Commission who, in a submission to the Panel, supported amendment of the Act. He said:

I can confirm that the Commission would propose the insertion of a new subsection into section 8 of the *Independent Commission Against Corruption Act 1988* to the effect that ICAC has authority to investigate alleged breaches of the three statutes for which the Electoral Commission has regulatory oversight. These are the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* and the *Lobbying of Government Officials Act 2011*.

... The Electoral Commission’s interest is that there will be a standing body possessed of royal commission powers and adequate resources to investigate types of misconduct that have the capacity to [wreak] direct evil upon our democratic system and the capacity for it to function openly and fairly. Investigating isolated, let alone systemic, issues touching electoral probity has proved entirely beyond the resources or interest of the police force; and, to date, the Electoral Commission has not been given the resources to do this either.

- 8.5.2 The ICAC has responded to Mr Mason’s submission in the following terms:

The Commission agrees with Mr Mason's submission that it should have jurisdiction to investigate conduct involving alleged breaches of election funding laws and conduct breaching the *Parliamentary Electorates and Elections Act 1912* and the *Lobbying of Government Officials Act 2011*. Conduct that breaches these laws may have serious consequences not only for public administration but also for public confidence in our system of government. As Mr Mason has pointed out, conduct involving breaches of these Acts has ‘...the capacity to [wreak] direct evil upon our democratic system and the capacity for it to function openly and fairly’.

There are offences under the *Parliamentary Electorates and Elections Act 1912* (see Part 5, Division 17), Part 5 of the *Lobbying of Government Officials Act 2011* and under the *Election Funding, Expenditure and Disclosures Act 1981* (see Division 4 and 4A of Part 6) that do not constitute conduct that affects the exercise of official functions, either by misleading a public official or by involving a public official in any wrong-doing. Mr Mason's proposal represents an extension to the Commission's jurisdiction which is a matter of policy. The Commission is of the view that the extension of its jurisdiction in this way is only justified if all of the breaches to which Mr Mason refers are brought within the ambit of corrupt conduct. Otherwise, the Electoral Commission itself is better placed to investigate such breaches.

Given the direct and serious consequences of offences against election funding laws, it is difficult to understand why the Commission ought not be able to label that conduct 'corrupt', particularly in circumstances where the legislature regards some breaches as so serious that they warrant penalties of imprisonment.

For the reasons given in the Commission's submission, the Commission submits that any legislative change to enable the Commission to make corrupt conduct findings with respect to conduct involving election funding offences should be given retrospective operation so that the Commission can complete its Operation Spicer public report.

The Commission notes Mr Mason's concern that any changes to the ICAC Act preserve and maintain the Commission's capacity to keep the Electoral Commission informed of relevant matters in a timely manner. The Commission considers that current provisions of the ICAC Act enable the Commission to meet this concern and no additional provision is required.

8.5.3 The issues which arise are:

- Whether the ICAC should be given power to investigate, and make findings as to, breaches of the *EFED Act*, the *PE&E Act* and the *LOGO Act*.
- If so, what form that grant of power should take and, specifically, whether (as the ICAC suggests) such breaches should be brought within the ambit of corrupt conduct.

8.5.4 The Act is premised on a distinction between corruption in or around public administration and other corruption. Thus, both subsections (1) and (2) of section 8 (whichever of the competing constructions under consideration in *Cunneen* had been adopted) require an impact on public administration, whether the impact be on probity or efficacy. A policy choice was made in 1988 that the Act would not deal with corruption generally, but only with corruption connected to public administration.

8.5.5 While the Panel does not take a final position on this matter – it is uniquely one for Parliament – there is a case to be made that the ICAC should be given jurisdiction to investigate and make findings in such matters. Many but not all breaches of the legislation referred to above strike at the heart of the democratic process and for that reason have a connection with public administration that may be regarded as warranting special treatment. The Panel suggests a method of investing the ICAC with such power that is different both from that suggested by the Electoral Commission and from that suggested by the ICAC. However, while the Panel has had the benefit of the views of the ICAC and the Electoral Commission, there are other important stakeholders whose views would also need to be taken into account. This issue only arose because the *Cunneen* decision came down at a time when the ICAC was in the course of a particular investigation and was not addressed by most of those with whom the Panel consulted.

8.5.6 An apparently strong reason for giving the ICAC power to investigate electoral and lobbying misconduct is that, as Mr Mason points out, it presently has both the resources and the willingness to undertake this task. To that may be added the ICAC's operational experience.

8.5.7 In addition, as is noted above, the powers the ICAC already has to carry out investigations exceed those of the Electoral Commission. The alternative appears to

be to increase the resources of the Electoral Commission and to give it more extensive powers to investigate.

- 8.5.8 The question would then become whether, if such power is granted, it should, as the ICAC suggests, be brought within the ambit of section 8 as corrupt conduct. In the Panel's view, it should not. Many electoral offences may well constitute corrupt conduct within the present meaning of section 8 of the Act. An obvious example would be a Minister who solicits a donation to his campaign for an upcoming election in return for favourable consideration of some application made by a prospective donor. On the other hand, many types of conduct amounting to breaches of the electoral and lobbying laws are very far away from what would ordinarily be regarded as corrupt conduct and which do not involve any moral turpitude. There are, for example, offences where it is unnecessary to prove a mental element to establish breach. Between the two extremes there is a range of conduct.
- 8.5.9 The Panel has already indicated that it does not accept that any misleading of an official in filling in a form, failing to make a return or failing to keep records ought automatically be regarded as corrupt conduct. In addition, findings of corrupt conduct which are distant from the ordinary conception of corruption would ultimately have the effect of damaging public confidence in the ICAC.
- 8.5.10 The Panel does not consider that the ICAC's position on this issue, that is, to include these matters within the definition of "corrupt conduct" is one which should commend itself to Parliament. The idea that the ICAC should only investigate matters which will or may conclude with a finding of corrupt conduct is one which the Panel rejects. Labelling conduct as corrupt ought not to be regarded as the definitive function of the ICAC, especially when the label is artificial. The Act confers important powers of investigation which can be exercised in the public interest without the need for the investigation to culminate in a public denunciation. The Panel does not support the ICAC's suggested inclusion of all these matters within the definition of corrupt conduct.
- 8.5.11 If Parliament wishes to give the ICAC jurisdiction, it could do so by inserting a subsection in section 13(1) to the following effect:
- (ba) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that there has been a breach of the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011*.
- 8.5.12 The effect of adopting this mechanism would be to enable the ICAC to investigate allegations or complaints about breach of the legislation referred to, make findings of fact under subsections (2) and (3) of section 13 of the Act, and formulate recommendations for appropriate action, including consideration of prosecution. It would not, of itself, enable a finding of corrupt conduct to be made unless the conduct in question otherwise came within subsection (1), (2) or the proposed (2A) of section 8. This in turn would mean that the reporting obligations imposed by section 11 of the Act would not apply. Those obligations would be very onerous because they would require every breach of the electoral laws, no matter how trivial, to be reported to the ICAC. The Panel sees no reason why this is either necessary or desirable.

- 8.5.13 The Panel makes no recommendation about whether this amendment, if Parliament sees fit to make it, should be retrospective.
- 8.5.14 An amendment of the kind proposed would require a consequential amendment to section 12A to reflect the fact that the ICAC would have a function not tied to the concept of corrupt conduct.

Chapter 9 – Powers of the ICAC

9.1 Introduction

- 9.1.1. The terms of reference require the Panel to consider the Report of the Inspector which includes consideration of “whether the ICAC’s powers, and its exercise of its powers are consistent with principles of justice and fairness”.
- 9.1.2. The Inspector deals with this aspect of the terms of reference at pages 7-12 of his 18 June 2015 Report. He notes a number of matters, including that:
- The ICAC is an inquisitorial body, not an adversarial one, a distinction that many people, including members of the legal profession, do not appreciate. He refers to section 17 of the Act.
 - He had received a large number of communications relating to Operations *Jasper* and *Acacia* (which have been the subject of published reports) and *Spicer* and *Credo* (which have not for the reasons mentioned in Chapter 8 above).
 - Because of the bulk of the material received, he had been unable to resolve the complaints he had received in relation to those matters.
 - As a result he could deal only with what others perceive as the exercise by the ICAC of its powers and its alleged lack of justice and fairness.
 - The communications he had received conveyed a number of “themes”, that is, concerns as to the unfairly damaging effect of public hearings and the conduct of some people engaged in them, media coverage of public hearings and the possibility that the ICAC was “leaking” to the press, objections to findings by various Commissioners that conduct had been corrupt, concerns that hearings had not been conducted fairly, restrictions on the type of evidence counsel for witnesses were permitted to elicit on behalf of their clients, concerns about a supposed communication between a former Commissioner and former Premier (while in office) about the subject matter of an investigation, and concerns that the ICAC has not finalised its reports in Operations *Spicer* and *Credo*.
 - In addition, the Inspector indicates that he had received complaints made by Nippon Gas Co Limited about *Jasper* and *Acacia*, from private shareholders in Cascade Coal Pty Ltd (about *Jasper*) and from Nucoal Resources Ltd. He notes a call for judicial inquiry into *Jasper* and *Acacia* made by Mr John McGuigan as well as (apparently) a reference to him by the DPP of a complaint concerning the Press Release issued by the ICAC on 27 May 2015 when it announced it had referred the papers in the *Cunneen* matter to the DPP.

9.2 The ICAC's powers

9.2.1 Under the Act, the ICAC has power to:

- obtain information from a public authority or public official by notice in writing;⁸⁴
- obtain documents by notice in writing (whether or not a public authority or public official);⁸⁵
- enter and inspect any premises occupied or used by a public authority or public official in that capacity, to inspect any document or thing on the premises and take copies thereof;⁸⁶
- conduct compulsory examinations;⁸⁷
- conduct a public inquiry;⁸⁸
- summons a witness to attend and give evidence and/or produce documents or other things at a compulsory examination or public inquiry;⁸⁹
- arrest a witness who fails to attend in answer to a summons or who is unlikely to comply with a summons;⁹⁰
- issue or apply for the issue of a search warrant;⁹¹
- prepare reports as to its investigations.⁹²

9.2.2 In addition, while section 13 describes the principal functions of the ICAC, it operates as a grant of power. Examples are the powers to investigate contained in section 13(1)(a) and (b) and section 13(3):

(3) The principal functions of the Commission also include:

- (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
- (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

Section 13(5) provides examples of findings permissible under subsection 13(3):

- (5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:
 - (a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,
 - (b) opinions as to:

⁸⁴ *ICAC Act* section 21.

⁸⁵ *Ibid* section 22.

⁸⁶ *Ibid* section 23.

⁸⁷ *Ibid* section 30.

⁸⁸ *Ibid* section 31.

⁸⁹ *Ibid* section 35.

⁹⁰ *Ibid* section 36.

⁹¹ *Ibid* section 40.

⁹² *Ibid* section 74.

- (i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or
- (ii) whether consideration should or should not be given to the taking of other action against particular persons,
- (c) findings of fact.

9.2.3 The ICAC can also:

- apply for warrants to use the various surveillance devices referred to in the *Surveillance Devices Act 2007* to a Supreme Court Judge;⁹³
- apply for a telecommunications interception warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth), to a member of the Administrative Appeals Tribunal;
- obtain approval for the conduct of operations that would otherwise be unlawful under the *Law Enforcement (Controlled Operations) Act 1997*. Such approval is granted by the Commissioner;⁹⁴
- obtain approval to use false identities under the *Law Enforcement and National Security (Assumed Identities) Act 2010*. That approval is also granted by the Commissioner.⁹⁵

9.2.4 ICAC officers also have power to commence criminal proceedings, at least where the offence in question is a statutory offence. This is a result of the combined effect of sections 14, 48 and 173 of the *Criminal Procedure Act 1986*, the definition of “public officer” in section 3(1) of that Act, and clause 101 of the *Criminal Procedure Regulation 2010*. The position is less clear in relation to common law offences and the Panel has been informed that the Local Court has recently held that an ICAC officer does not have power to commence proceedings to prosecute such an offence. In practice, what occurs is that proceedings are commenced in the name of an ICAC officer but are actually conducted by the DPP.

9.2.5 The ICAC has informed the Panel that the powers referred to in the table below have been used on the specified number of occasions:

Power	1/7/13 to 30/6/14	1/7/14 to 30/6/15
Notice to produce a statement (s 21)	18	16
Notice to produce a document or thing (s 22)	609	879
Notice authorising entry to public premises (s 23)	0	3
Summons (s 35)	448	308
Arrest warrant (s 36)	0	0
Order for prisoner (s 39)	0	0

⁹³ Ibid section 19.

⁹⁴ *Law Enforcement (Controlled Operations) Act 1997*, sections 5 and 6.

⁹⁵ *Law Enforcement and National Security (Assumed Identities) Act 2010*, sections 5 and 6.

Search warrant (s 40)	33*	17*
Assumed identity approvals	3	0
Controlled operation approvals	0	0
Surveillance device warrants	4	1
Telephone interception warrants	21	5
Stored communications warrants	3	0
Number of compulsory examinations	203	143
Number of public inquiries	9	7**
Number of public inquiry days	84	77
Investigation reports	12	4***

* All search warrants were issued by an external authority.

** Operations *Verdi*, *Spicer*, *Jarah*, *Misto*, *Tunic*, *Vika* and *Yancey*.

*** Operations *Spector*, *Verdi*, *Jarah* and *Misto*. Completion of reports for operations *Credo* and *Spicer* has been delayed due to the High Court decision in *Cunneen*.

9.3 The 2005 Report

9.3.1 The extent to which the ICAC's powers were appropriate was the subject of a consideration in the 2005 Report (Chapter 6). At that time, the issues were whether the ICAC's powers should be reduced or increased and the extent of such reduction or increase.

9.3.2 The respects in which it had been suggested that the ICAC's powers should be lessened or controlled were:⁹⁶

- repeal of the ICAC's power to issue its own search warrants;
- restrict certain of the ICAC's powers so that they could only be exercised with the concurrence of a majority of three judges;
- a specific matter concerning an alleged breach of parliamentary privilege and, specifically, of the immunities of the Legislative Council. This arose out of the execution of a search warrant on the parliamentary offices of a Member of the Legislative Council.

9.3.3 The areas in which it had been suggested the ICAC's powers be extended (all by the ICAC itself) were:⁹⁷

- to confer certain police powers on civilian ICAC officers (who had previously been police officers);

⁹⁶ 2005 Report, above n 6, Chapter 6.2.

⁹⁷ Ibid Chapter 6.3.

- to grant power to the ICAC to obtain by telephone an urgent listening device warrant under the (now-repealed) *Listening Devices Act 1984*;
- to grant power to the ICAC to dispose of unclaimed property in accordance with the directions of a court;
- to extend to non-public officials the ICAC's powers to require public officials to provide information by written notice;
- to remove certain restrictions on the ICAC's powers to enter and inspect premises under sections 23 and 25 of the Act.

9.3.4 The conclusion reached by the 2005 Review was in the following terms:

6.4 Coercive Powers – Conclusion

6.4.1 The potential for misuse of the coercive powers granted to ICAC under the Act was a major focus of the Parliamentary debates on the establishment of ICAC.¹⁷¹ In 1993, the Parliamentary Committee concluded that:

*'It is generally accepted that the grave concerns about ICAC's possible misuse of its coercive powers have been proved to be groundless.'*¹⁷²

6.4.2 Little appears to have occurred in the eleven years that have elapsed that would warrant a revision of the Parliamentary Committee's conclusion. Relatively few submissions to the review complained about misuse of investigative powers by ICAC. I am satisfied that ICAC's powers are appropriate to meet its objectives.

6.4.3 However, should there have been undetected misuses of power in the past, the establishment of an Inspectorate as proposed in Chapter 7, should significantly reduce the possibility of such misuse not being detected in the future.

¹⁷¹ See, for example, Hansard Legislative Assembly 31 May 1998 at page 822.

¹⁷² Review of ICAC Act, Parliamentary Committee, May 1993 at paragraph 5.1.3

9.3.5 Three further aspects of the 2005 Report are relevant for consideration of whether the ICAC's powers and its exercise of those powers are consistent with principles of justice and fairness. The first is the concern that led to the recommendation to include what became section 12A in the Act, which was expressed in the following terms:

2.8 Serious corruption

2.8.1 Many submissions to the review emphasised the importance of ICAC directing its attention to investigating serious and systemic corruption. ICAC itself recognised that it has responsibility for:

*'targeting serious and systemic corruption and corruption opportunities in the NSW public sector.'*¹⁹

2.8.2 The Act does not explicitly confer on ICAC responsibility for targeting the investigation of serious and systemic corruption, although this is implicit in the regime established by the Act.

2.8.3 The Act gives ICAC a broad discretion to conduct an investigation on its own initiative or on complaint, report or reference made to it.²⁰ In deciding whether or not to investigate a matter, ICAC may have regard to such matters as it thinks fit, including whether or not:

- The subject-matter of the investigation is trivial;

- The conduct concerned occurred at too remote a time to justify investigation; or
 - The complaint was frivolous, vexatious or not in good faith.²¹
- 2.8.4 The purpose of the investigation is to ascertain the truth of the allegations of corruption and make recommendations for systemic reform. The investigative function of ICAC is essentially inquisitorial, not adjudicative.
- 2.8.5 In exercising its functions, ICAC is to regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.²²
- 2.8.6 Under Part 5 of the Act, ICAC may at any time refer a matter for investigation by another person or body. ICAC is able to monitor and control the investigation conducted by the other person or body. ICAC conducts its investigation function in co-operation with law enforcement agencies and oversight bodies.²³
- 2.8.7 As ICAC complements, rather than replaces, the role performed by criminal justice institutions, oversight bodies, and agencies, its particular focus should be the matters for which there is no other remedy – where there are serious allegations of corruption that may not be amenable to ordinary policing methods, where there are systemic corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.
- 2.8.8 In my view, the policy objectives to be achieved by the Act could be strengthened by providing guidance to ICAC in the exercise of its functions. This guidance would not seek to limit the jurisdiction of ICAC to investigate corrupt conduct, nor would it undermine the primary responsibility of ICAC to have regard to the public interest in the exercise of its functions. A statement of principles to be applied by ICAC in the exercise of its functions may assist ICAC to explain its decisions as to whether or not it will investigate particular conduct, especially when subject to pressure from complainants, the media or high profile personalities.
- 2.8.9 The principles to be applied by ICAC might include an acknowledgement that public authorities have, with the assistance of ICAC, a responsibility to deal effectively and appropriately with corruption, and that ICAC's investigation powers should, as far as practicable, be directed towards serious and systemic corruption.
- 2.8.10 In submissions to the review there was widespread support for including these principles in the Act.

Recommendation R2.2. That the Act be amended to provide that, in exercising its functions, ICAC is to:

- direct its attention, so far as practicable, towards corruption that is serious or systemic; and
- have regard to the responsibility that public authorities and public officials have, with the assistance of ICAC, to prevent and deal effectively with corruption.

¹⁹ ICAC Strategic Plan 2003-2007.

²⁰ Section 20(1) of the Act.

²¹ Section 20(3) of the Act.

²² Section 12 of the Act.

²³ Section 16(1) of the Act.

- 9.3.6 The second aspect of the 2005 Report referred to above which is now relevant involved criminal prosecution. Two matters were then (and remain) of concern. The first was delay in the commencement of criminal proceedings following ICAC

investigations. The second was the perception that the rate of conviction of persons against whom a finding of corrupt conduct had been made was low.

- 9.3.7 The 2005 Report made recommendations intended to deal with the issue of delay.⁹⁸
- 9.3.8 As to the rate of conviction, the 2005 Report agreed with a submission put by the ICAC that “there is no justification to change or modify its principal functions as a fact-finding investigative body to one where its primary or principal functions are directed more to securing criminal convictions”.⁹⁹
- 9.3.9 The third aspect is the recommendation which resulted in the creation of the Inspector.¹⁰⁰

9.4 Public inquiries

- 9.4.1 As noted in paragraph 9.2.1 above, a significant power granted to the ICAC is the power to continue or conduct its investigations in public by a public inquiry under section 31 of the Act.
- 9.4.2 It is apparent from the submissions to the Panel and the complaints made to the Inspector (as stated in his Report) that there are two general concerns:
- That a decision to hold a public inquiry may be wrong or inappropriate.
 - That the conduct of some public inquiries may be unfair or unjust.

These issues will be addressed separately. In doing so, it should be borne in mind that the Panel’s terms of reference direct attention to the adequacy of the legislation rather than to the conduct of any particular ICAC investigation or public inquiry.

Decision to hold a public inquiry

- 9.4.3 This issue was live at the time of the 2005 Review. At that time the issues were whether to remove the power to hold public inquiries, whether, if the power were retained, the circumstances in which a public inquiry might be held should be defined and whether the term previously in use – “public hearing” – should be changed to “public inquiry” to emphasise the investigative, as distinct from adversarial, nature of such an inquiry.
- 9.4.4 This issue was dealt with in the 2005 Report in the following manner:

6.5.25 I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.

6.5.26 Rather than the power to hold a public hearing, it may be more accurate to empower ICAC to hold a ‘public inquiry’. At one level this is merely a change of nomenclature to reflect more accurately the role and nature of ICAC’s hearing function.

⁹⁸ Ibid Recommendation R3.4 and [3.4.34]-[3.4.63].

⁹⁹ Ibid [3.4.25]-[3.4.26].

¹⁰⁰ Ibid Recommendations R7.1-R7.4.

- 6.5.27 It is hoped, however, that the change will achieve more than that. The change in nomenclature emphasises the inquisitorial nature of the investigation. It may, over time, encourage those involved in such inquiries, such as counsel assisting and other legal practitioners, to discard inappropriate adversarial tactics and techniques.
- 6.5.28 The hearing is the culmination of the investigation. The presiding Commissioner is the chief investigator. The point being to determine whether corrupt conduct has occurred and, if so, what needs to be done about it, not whether ICAC can prove beyond reasonable doubt that a person is guilty of a corruption offence.
- 6.5.29 If it is accepted that ICAC's powers to conduct public and private hearings should be replaced with the power to conduct public inquiries and private examinations, consideration needs to be given to the circumstances in which these powers may be exercised.
- 6.5.30 Consistent with the provisions applying to private hearings, ICAC might be empowered to hold a private examination for the purposes of an investigation and when it is in the public interest to do so.
- 6.5.31 I have given careful consideration to whether the Act should define the circumstances in which a public inquiry might be held. Undoubtedly, this is one of the most controversial decisions that ICAC may make. Once ICAC holds its investigation in public, it must prepare a report to Parliament on the matter.¹⁷⁸
- 6.5.32 Once the power to conduct a private interview is separated from the power to hold a public inquiry, it may be appropriate for the Act to provide guidance on when a public inquiry may be held. This will avoid creating a return to the presumption that all investigations should be conducted in public.
- 6.5.33 I do not recommend that an exhaustive list of considerations be included in the Act on the basis that this would be an unnecessary fetter on ICAC's discretion. Such a prescriptive list may prove inadequate and may invite litigation (which would be undesirable given the purpose and role of the hearings).
- 6.5.34 In my view, public inquiries should only be held for the purpose of an investigation where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. This is in general agreement with what I understand to be ICAC's current practice in holding public hearings, and reflects similar provisions that apply to the Corruption and Crime Commission in Western Australia.

¹⁷⁸ See section 74 of the Act.

9.4.5 As a consequence of this recommendation, the previous section 31 was repealed and a new section 31, substantially in its current form, was inserted. The relevant controls are contained in section 31(1) and (2):

31 Public inquiries

- (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 public inquiry.
- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
 - (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that

might arise from not holding an inquiry),

- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

9.4.6 The views expressed in paragraph 9.4.4 above are the views of the current Panel. In particular, the Panel accepts that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private. Should there be any different or additional requirements which it is necessary to satisfy before the ICAC makes a decision to hold a public inquiry? The New South Wales Bar Association suggests "the establishment of a scheme under which an independent (perhaps ad hoc) body could review a decision by ICAC to hold a public hearing in any given matter, guided by well defined criteria". Its submission is in the following terms:

Whether there should be an oversight body that can review a decision to hold a public inquiry

16. The Bar Association submits that there should be such an oversight body.
17. Particularly in recent times, ICAC hearings have sometimes seemed to be like 'show trials' and to involve 'trial by media'. By reason of questions and answers given, and comments made, at public hearings, often parties and witnesses' names and reputations are irreparably harmed by the inevitable ensuing media coverage.
18. In the Bar Association's submission, given ICAC's extensive investigative and evidence-gathering powers and its extensive powers in respect of conducting private hearings, the gathering or obtaining of evidence at public hearings is not as important as in other forms of inquiry or judicial proceedings.
19. It is true that public hearings do contain elements which are for the public benefit. First, the public exposure of evidence of malpractice and the subsequent 'naming and shaming' in the media may act as a significant deterrent to others who might be tempted to engage in corrupt conduct in the future. Secondly, and at least as importantly, public dissemination of what occurs at ICAC hearings may enable other potential witnesses to come forward to confirm allegations of corruption or to provide information about further instances of such corrupt conduct (although we have no information about how often, or how usefully, this occurs).
20. These undoubted public benefits must be balanced against the public benefit in fairness. Unlike a court of law, suggestions of corruption or malpractice in a public hearing in ICAC may be based upon questions which would not be permissible or upon evidence which would not be admissible in a court of law. There is no presumption of innocence or right of silence in ICAC, nor do the rules of evidence (including various privileges) apply automatically there. People giving evidence, therefore, in a public hearing at ICAC may be subject to a whole series of leading or provocative questions which can be just as damaging as the answers themselves. Moreover, the answers themselves are often ones which cannot be used in a court of law and which have been obtained by use of powers not available in connection with a criminal prosecution.
21. A question would arise as to the criteria which the oversight body must take into account in determining whether to review a decision to hold a public inquiry. A further question may arise as to the timing of any such a review. Finally, the question will arise as to the composition of the oversight body.

22. So far as the **criteria** which the oversight body should consider is concerned, the Bar Association suggests a broad 'in the public interest' approach, analogous to the discretion often afforded to a court to re-open a case 'in the interests of justice', would be appropriate. The potential circumstances in which it may be appropriate or inappropriate to review a decision to hold a public hearing are so diverse that the Bar Association does not consider it easy to circumscribe further, or more closely, the discretion of the oversight body.
23. So far as the **timing** of the review is concerned, it is obvious that mechanisms should be put in place which enable a prompt, efficient and fair review of the decision to hold a public hearing as soon as possible after that decision is made and before the intention to hold such a public hearing in respect of a particular individual is made public.
24. The Bar Association considers that ICAC should ordinarily be required to notify affected parties promptly of a decision or a proposal to have a public inquiry so as to allow those parties adequate opportunity to initiate the review process. The period given to such parties to make such an application should, however, be necessarily short (as should be the time for the oversight body to review the decision) so as not to delay unduly, or interfere with, the ICAC's investigation and report.
25. So far as the composition of the oversight body is concerned, it should represent the spectrum of typical stakeholders. It should be a small body. The Bar Association recommends that it be comprised of three reputable and reliable individuals, nominated by independent figures or bodies in the community who are not associated with the executive or legislative arms of government. One such body might be the St. James' Ethics Centre.
26. Moreover, once more there are numerous ancillary issues to consider if such a review is to be provided. For instance, there will be a need to put in place a procedure for ICAC to provide confidential material to the oversight body relevant to the case for or against the desirability of such a public hearing. It may well be that such material needs to be kept confidential from affected parties even in respect of such an application for a review. The Bar Association refrains from making specific submissions to the Independent Panel as to the nature and form of such ancillary measures, but would be happy to do so if requested.

9.4.7 The ICAC's response to the Bar Association's proposal was as follows:

The NSW Bar Association has also submitted there should be an oversight body able to review a decision to hold a public inquiry.

For the reasons set out in its submission, the Commission does not support the creation of another oversight body.

The Bar Association has suggested the oversight body should consider whether it is in the public interest to hold a public inquiry. This is the test which the ICAC Act requires the Commission to apply. The Commission must be satisfied that it is in the public interest to conduct a public inquiry. The factors that must be taken into account when determining whether or not to conduct a public inquiry are set out in s 31 of the ICAC Act. The considerations taken into account by the Commission in applying the criteria under s 31 are set out at page 12 of the Commission's submission. The decision to hold a public inquiry is one made by the Commissioner (unless the Commissioner has a conflict of interest, in which case the decision may be made by an Assistant Commissioner).

The decision whether to conduct a public inquiry is an operational decision made for the purposes of the particular investigation. It is a decision best made by the Commissioner who is apprised of all the relevant facts and in the best position to weigh the public interest. It appears from the Bar Association's submission that it is suggesting the

oversight body should be able to substitute its decision for that of the Commissioner. This would be an unjustified interference with the Commissioner's discretion. It would interfere with an operational decision and could prejudice the effective conduct of the investigation.

- 9.4.8 There has, in fact, been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted.
- 9.4.9 The exception is, of course, the decision to hold the public inquiry in *Cunneen*. That is an insufficient basis to recommend a change.
- 9.4.10 Both because it is impractical to introduce a single purpose oversight body at a point where an investigation is sufficiently advanced that a public inquiry is under consideration, and because the present scheme and the requirements of section 31 of the Act appear adequate, the Panel does not consider any change to or further restrictions upon the ICAC's powers to hold a public inquiry should be introduced.

Conduct of public inquiries

- 9.4.11 It is widely known that there have been complaints made about the conduct of both private examinations and public inquiries. Such complaints have been received by the Panel and it is apparent from his Report that many such complaints have been made to and are being investigated by the Inspector. Criticism has also been made publicly of the conduct of inquiries.
- 9.4.12 Submissions received by the Panel have raised a number of matters concerning private examinations and public inquiries, frequently in forceful terms. Examples include a requirement in one inquiry that each member of a particular board of directors have separate legal representation, with a resulting significant increase in legal costs. A further expressed concern is the ICAC's practice of routinely making a suppression order under section 112 of the Act in respect of written submissions both of counsel assisting and of witnesses, including those against whom a finding of corrupt conduct is a possibility. One submission in particular raised issues concerning the failure on the part of the ICAC (and counsel assisting) to deal fairly with exculpatory material, failure to give fair notice of the allegations to be put to witnesses, failure to supply individual witnesses with transcripts of that witness's private examination and failure to apply fairly and consistently the ICAC's policy concerning announcing an affirmative case before being permitted to cross-examine. The Panel sought the ICAC's response to these matters and the ICAC disputes each of these allegations.
- 9.4.13 The merits of a number of such complaints are being investigated by the Inspector. The concern of the Panel is the adequacy of the legislation. It is material for the Panel to be aware of the nature of the complaints that are being made in order to consider the adequacy of the legislation, but the Panel has not undertaken to assume the role of the Inspector.
- 9.4.14 It is important to keep in mind the role of the Inspector and the functions and powers granted by Part 5A of the Act. Misconduct in the conduct of a public inquiry could, if sufficiently serious to be "unreasonable, unjust, oppressive or improperly discriminatory" within the meaning of section 57B, enliven the powers of section 57C.

- 9.4.15 The practice at public inquiries is for counsel assisting to open by stating, sometimes in terms that attract extensive publicity, the allegations the subject of the investigation. The responses which are contained in the written submissions on behalf of persons whose conduct is in question are made the subject of suppression orders. Their counsel do not ordinarily have an opportunity to make oral responses to the opening address of counsel assisting. The result is an imbalance which may be both unfair and inconsistent with the public nature of the hearings. This does not appear to the Panel to be a matter to be dealt with by legislation, but the ICAC's practices in relation to suppression orders are worthy of reconsideration by the Commission.
- 9.4.16 Further, there is judicial review, considered in paragraph 3.4 above. If the conduct of a hearing was such as to amount to a denial of procedural fairness, the Supreme Court could intervene.
- 9.4.17 The Panel has considered the provisions of the legislation concerning the conduct of public inquiries in the light of the kinds of complaint that are made and does not conclude that there is a case for legislative change. There is a limit to the extent to which legislation can provide the solution to criticisms of the kind that have been made of the procedures of the ICAC. The very fact that inquiries are held in public with the obvious potential for reputational damage arising not only from considered findings at the end of an inquiry, but also from publicity associated with the course of the inquiry, creates a risk of serious unfairness. At the same time, publicity itself is a source of protection against administrative excess.
- 9.4.18 It has been suggested that the Act be amended to provide that counsel assisting be included within the definition of "officer of the Commission" within section 3. Counsel assisting may be appointed by the Commissioner under section 106 of the Act and, at present, are not relevantly officers of the ICAC. The consequence of such an amendment would be to render counsel's conduct the subject of section 57B(1)(b) so that the Inspector has power to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of counsel. The implicit suggestion is that the Inspector's powers are presently inadequate in this respect. Another proposal is that counsel assisting be a statutory appointment.
- 9.4.19 It is plain that the responsibilities of the ICAC and of the Commissioner include appropriate supervision and control of any person engaged by the ICAC to assist its investigations. That responsibility extends to supervision of counsel assisting generally and during the conduct of any public inquiry. It follows that the role of the Inspector in an appropriate case extends to examining complaints about alleged shortcomings in the ICAC's or the Commissioner's discharge of its responsibility for the management of all aspects of its investigation. It should also be kept in mind that counsel are subject to professional rules and oversight. The Panel has noted the provisions of the Legal Profession Uniform Conduct (Barristers) Rules 2015, and in particular rules 96-100, which came into force on 1 July 2015.

9.5 A further issue concerning public inquiries

- 9.5.1 A number of submissions have raised a specific concern about public and media perceptions regarding the nature of public inquiries. That concern is expressed in a submission from the Rule of Law Institute:

In exercising its power, ICAC appears to be a court.

The setting very much resembles a court and a judge usually presides. But it is not. Its powers far exceed any court and it provides none of the normal protections provided by a court to witnesses. The fact that a judge may preside does not make it a court nor that it will act like a court. It is part of the executive, not part of the judiciary.

But the media and public naturally treat ICAC as a court and the allegations made by ICAC as true, and the findings, and recommendations made by ICAC as true ... whereas all they are is the product of a one-sided executive investigation.

Public examinations by ICAC have become a major media event in which ICAC is the star and the witnesses the villains. Media grabs from the examinations have been the order of the day. Examinations have become the modern day equivalent of watching Christians being thrown to the lions.

- 9.5.2 A consequence of constituting a body like the ICAC, that is, a standing royal commission, empowered to conduct public hearings and to make findings that corrupt conduct has occurred, is the danger that such proceedings will be misunderstood and misrepresented as if they were in the nature of judicial proceedings.
- 9.5.3 In truth, they are not. The ICAC is an arm of the Executive created to investigate certain kinds of conduct. Its findings, although capable of doing enormous harm, have no effect on the legal rights and liberties of any person. One submission received by the Panel was that the “normal” rules of evidence should apply to ICAC hearings and that questioning should not be conducted or limited in a manner different from a normal court. Investigation proceedings before the ICAC, both in private and in public, are not court proceedings of any kind and it is fundamentally wrong to think of them as some kind of abnormal judicial process.
- 9.5.4 This was a concern at the time of the 2005 Review and led to the recommendations which were adopted by Parliament to amend sections 30 and 31 to make as clear as possible that both “compulsory examinations” and “public inquiries” were an aspect of an investigation not a hearing at the culmination of a judicial process.
- 9.5.5 It is regrettable that this misperception and misunderstanding still appears widespread. That said, the Panel does not believe it is amenable to further legislative change.

9.6 The power to make findings of corrupt conduct

- 9.6.1 A significant aspect of the 2005 Review was the introduction of what is now section 12A of the Act:

12A Serious corrupt conduct and systemic corrupt conduct

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

The reasoning behind the recommendation that this provision be included in the Act is set out in paragraphs 2.8.7-2.8.8 of the 2005 Report:

- 2.8.7 As ICAC complements, rather than replaces, the role performed by criminal justice institutions, oversight bodies, and agencies, its particular focus should be

the matters for which there is no other remedy – where there are serious allegations of corruption that may not be amenable to ordinary policing methods, where there are systemic corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.

- 2.8.8 In my view, the policy objectives to be achieved by the Act could be strengthened by providing guidance to ICAC in the exercise of its functions. This guidance would not seek to limit the jurisdiction of ICAC to investigate corrupt conduct, nor would it undermine the primary responsibility of ICAC to have regard to the public interest in the exercise of its functions. A statement of principles to be applied by ICAC in the exercise of its functions may assist ICAC to explain its decisions as to whether or not it will investigate particular conduct, especially when subject to pressure from complainants, the media or high profile personalities.
- 9.6.2 A further recommendation (which was not adopted) was that consideration be given to establishment of a Parliamentary investigator or Parliamentary Committee to investigate minor matters involving Members of Parliament so as to permit the ICAC to focus on allegations of serious and systemic corruption.
- 9.6.3 As is outlined in paragraph 2.8.8 of the 2005 Report extracted above, the recommendation that led to the inclusion of section 12A in the Act, and the instruction to the ICAC to focus on serious corrupt conduct and systemic corrupt conduct, was not intended to limit the jurisdiction of the ICAC to investigate corrupt conduct, nor to limit its powers to make findings of corrupt conduct, but merely to give guidance as to how these powers should be exercised.
- 9.6.4 The question which now arises is whether any aspect of the ICAC's power should be limited so that it can only be exercised in circumstances where, objectively, there has been serious or systemic corrupt conduct.
- 9.6.5 The Panel does not believe it is appropriate to limit the ICAC's general powers to investigate, or the particular power to hold public inquiries, in this manner – the purpose of an investigation, and the public inquiry which is part of the investigation, is to determine what happened and it would be wrong to impose any form of *a priori* restraint on the power to investigate.
- 9.6.6 On the other hand, the Panel considers that the ICAC's power to make findings of corrupt conduct should be so limited. The Panel recommends that the Act be amended so that the Commission's power to make findings of corrupt conduct may be exercised only in the case of serious corrupt conduct. This could be achieved by the insertion of a new section 74B(1A) to that effect. (A number of other corresponding amendments would need to be made to section 74B to conform to the proposed new subsection.)
- 9.6.7 If the conduct investigated ultimately is found to be other than serious it should not be stigmatised as corrupt. A power which has such obvious capacity to harm individuals should be reserved only for cases where the misconduct in question is serious.

9.6.8 The ICAC resists this proposal:

4. **Whether power to make a corrupt conduct finding should be limited to where the conduct is serious or systemic**

As the Commission has noted in the course of its submissions, s 12A directs the Commission to exercise its functions under the Act in pursuit of the exposure and prevention of serious or systemic corrupt conduct. Section 13(3) allows the Commission to make findings and form opinions in respect of any conduct, whether or not the findings relate to corrupt conduct. These provisions recognise that there is a broad range of behaviour that contributes to the existence of corrupt practices.

The qualification of conduct as 'serious' occurs in a range of statutory contexts. In the criminal law (a serious indictable offence), employment law (serious misconduct) and discrimination law (serious racial vilification), there are legislative criteria, either by reference to maximum penalties or objective features of the conduct. These are findings that have a legal effect in the respective jurisdiction.

The Commission's findings have no legal effect. The principal complaint is that the Commission's findings may give rise to reputational damage. However, the Commission doubts that a finding to the effect that a person's conduct is corrupt, albeit not seriously corrupt, is less productive of reputational damage. There have been debates in the past that have canvassed the nomenclature of corruption. Whether the labels 'misconduct', 'impropriety', 'corrupt conduct' or 'serious corrupt conduct' are applied, they are all simply gradations of corrupt behaviour. One is either corrupt or not corrupt. The Commission ought to be able to make a finding either way.

The restriction of the Commission's findings to serious instances of corrupt conduct would damage the public's confidence in the ability of the Commission to expose and address corruption in all its forms. An investigation into a number of public officials who were all engaged in a corrupt scheme to secure 'kickbacks' from government contractors could well result in findings of serious corrupt conduct against some, but not all participants, depending on the duration of their participation and the amounts of money involved. From the public's perspective, that would be a highly undesirable and illogical outcome.

Most importantly, this proposal would encourage a form of merits review of the Commission's findings. The Commission's findings of fact and the inferences drawn from them towards a finding of 'serious corrupt conduct' would necessarily be scrutinised in the course of judicial review. Even where the evidence supports an inference of corrupt conduct, the construction of the term 'serious' in the context of corruption is potentially so wide that it would invite judicial review in a significant number of cases.

I appreciate that the Panel has considered the formulation of a number of objective criteria that would inform the meaning of 'serious'. However, the difficulty lies in determining at what point and in what context does corrupt conduct qualify as 'serious'. The satisfaction of one criterion may not be sufficient, yet the satisfaction of every criteria will exclude too much. Any formulation that fixes upon an arbitrary number of criteria will also exclude instances of serious corrupt conduct.

The Commission accepts there may be limited occasions during an investigation where the conduct of a particular individual might technically come within the definition of corrupt conduct but might not warrant a corrupt conduct finding, either because the conduct itself might not be considered particularly serious or because there are mitigating circumstances against making a finding. In these circumstances the Commission may exercise its discretion not to make a corrupt conduct finding (s

13(2A)), and has done so in the past. Whether a corrupt conduct finding should be made is a matter that should be left to the discretion of the Commission.

- 9.6.9 The Panel does not find these arguments convincing. For example, in the “kickbacks” illustration given, there is no reason why findings of corrupt conduct should be made against some but not all participants in the scheme if the facts warranted it.
- 9.6.10 The complaint of the ICAC that construction of the word “serious” is so wide as to invite judicial review, and so encourage challenges to its decisions, is also unconvincing. First, there is nothing inherently objectionable if a citizen questions a questionable decision. Secondly, the problem will only arise if the ICAC makes a finding of corrupt conduct in a case of doubtful seriousness. If it does, the ICAC itself should not have exclusive capacity to resolve the doubt. That is what lies behind the principles of judicial review applied by the Supreme Court and mentioned above. Put another way, a person who has been the subject of such a finding should have the right to argue that it should not have been made, because there was not, viewed objectively, serious corrupt conduct.
- 9.6.11 The Panel is not unaware of the possibility that the proposed restriction might influence decisions of the ICAC which precede a decision to make a finding of corrupt conduct such as the decision to hold a public inquiry under section 31. The Panel does not regard that as any bad thing nor any impediment to the proper performance of the ICAC’s functions. Indeed, the ICAC is already required to consider the seriousness of the allegation of corruption or complaint being investigated before deciding to conduct a public inquiry.¹⁰¹
- 9.6.12 The recommendation is confined to serious conduct. Systemic conduct may warrant investigation but if an individual is caught up in it what matters for the purpose of a finding is whether the individual’s conduct is serious.
- 9.6.13 On this point, the Panel repeats that the ICAC is capable of undertaking very valuable and important work, even when it does not make findings of corrupt conduct. The power to investigate, and the power to describe and reveal the results of that investigation by making findings of fact and recommendations for taking action as a result of such findings under section 13(3) of the Act is a powerful and beneficial one, not necessarily or in every case enhanced by an additional declaration that a particular person has engaged in corrupt conduct.

9.7 Should “serious corrupt conduct” be defined?

- 9.7.1 The question arises whether such conduct should be defined. The Panel does not consider it should be the subject of definition where used in the existing section 12A and in the proposed section 74B(1A).
- 9.7.2 The Inspector suggests that it would be a desirable outcome of the Panel’s review that the definition of “serious corrupt conduct” and “systemic corrupt conduct” be clarified. The ICAC itself considers it appropriate that these terms remain undefined saying:

¹⁰¹ ICAC Act section 31(2)(b).

The degree of seriousness of conduct or whether it raises systemic issues will not always be apparent from the information initially provided to the Commission. Only further investigation may establish the degree of seriousness and whether the conduct raises systemic issues. In many cases, the full extent of the conduct under investigation may be established only during a public inquiry (which is part of the investigation).

...

Any attempt to provide a prescriptive definition of these terms is likely to lead to claims at an early stage by those involved in investigations that their conduct does not come within the relevant definitions. This will encourage challenges to the Commission's exercise of its powers, which will undermine the Commission's ability to effectively investigate, expose and prevent corrupt conduct.

9.7.3 The Panel considers the term should not be defined. It is unnecessary and, as the ICAC points out, and as indicated above, it is undesirable to impose an *a priori* restraint on the ability to investigate. Many matters may change and develop as the investigation develops and appear very much more (or less) serious as more is learned.

9.7.4 One suggestion considered by the Panel is that the seriousness of the conduct should be determined by reference to the penalty imposed for the crime in question. It has been suggested:

...Usually the control is specify particular criminal offences which, if proved, provide the basis for the exercise of power:

- This leads back to the problem of maintaining an extended jurisdiction only in respect of *serious* corruption, because some offences can involve trivial circumstances and attract trivial penalties;
- One means of doing this would be by specifying that ICAC could only look at a matter if the offence carried a maximum penalty of gaol (say two or five years) or a heavy fine (say \$500,000). You would need to include the fine if you are going to catch the corporate villains. In the case of fraud you could specify a sum – such as \$100,000.

9.7.5 Definition of the seriousness of the corruption involved by reference to the penalties provided for it is common. An example is *R/CO*. Nevertheless, the Panel does not consider it appropriate to define “serious corrupt conduct” in this manner. Maximum penalties normally address the worst conduct by the worst offender and while, as stated, are often used as an arbitrary measure of the seriousness of the conduct, they are not always a reliable indicator. Furthermore, the common law offence of misconduct in public office does not have a maximum penalty. That offence is at the centre of the ICAC's jurisdiction.

9.8 The power to make recommendations

9.8.1 Section 13(3)(b), set out above, includes as a function of the ICAC the power to formulate recommendations for action in relation to its findings or opinions, or the results of its investigations.

9.8.2 One of the submissions made to the Panel complained of the manner in which that power was exercised in a particular case, and the Panel understands that complaint to have been included in the matters that are before the Inspector. The relevant recommendation was acted on by the Parliament and the making of the

recommendation, and Parliament's response to it, has been the subject of public criticism. That does not affect the Panel's view of the adequacy of the legislation.

- 9.8.3 From the point of view of the terms of the legislation, the Panel does not consider that amendment or qualification is required. In particular cases the practical content of the requirement of procedural fairness may require consideration, both by the ICAC and by the person or body to whom any recommendations are made. Just as adverse findings, although they have no direct legal consequences, may have a serious effect on reputations, recommendations may have important practical and, perhaps, political consequences. This is not, however, a reason for modifying or removing the power to make recommendations, but, rather, it is a consideration which goes to the manner in which the power is exercised.

9.9 Trivial and vexatious complaints

- 9.9.1 A number of submissions have raised the perceived problem of trivial or vexatious complaints.
- 9.9.2 The Panel has also had the benefit of reading Chapter 7 of the *Review of the Crime and Misconduct Act and Related Matters – Report of the Independent Advisory Panel*, which was provided on 28 March 2013. That Review of the Queensland Act was conducted by the Hon. Ian Callinan AC and Professor Nicholas Aroney.
- 9.9.3 Undoubtedly an agency such as the ICAC will receive vexatious and trivial complaints and complaints motivated by spite or desire to do harm or create mischief. The Inspector has said that, numerically, the overwhelming number of complaints he receives concern the ICAC's refusal to investigate complaints.
- 9.9.4 The Panel has considered whether some form of restriction or gateway should be imposed on the complaints process, for example, by requiring complaints to be verified on oath by statutory declaration. The Panel does not consider any such mechanism to be necessary. The legislation provides sufficient power to reject trivial and vexatious complaints, and the figures show that the power is exercised robustly.

Chapter 10 – Other Agencies

10.1 Introduction

10.1.1. The terms of reference require the Panel to take account of: “The jurisdiction, responsibilities and roles of other public authorities and/or public officials in the prevention, detection, investigation, determination, exposure and prosecution of corrupt conduct”.

10.1.2. As the Panel points out above, NSW is by no means undersupplied with agencies whose responsibilities include dealing with conduct which might be, or might reveal aspects of, corrupt conduct. These are the agencies referred to in paragraph 1.3.2 above:

- the Crime Commission
- the PIC
- the NSW Police
- the DPP

10.1.3. By section 12A of the Act, as well as requiring the ICAC to direct its attention as far as practicable to serious corrupt conduct and systemic corrupt conduct,¹⁰² Parliament also directs the ICAC: “to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct”.

10.1.4. This provision resulted from the 2005 Report. The reasons were stated at paragraph 2.8.7 which is set out at paragraph 9.3.5 above:

As ICAC complements, rather than replaces, the role performed by criminal justice institutions, oversight bodies, and agencies, its particular focus should be the matters for which there is no other remedy – where there are serious allegations of corruption that may not be amenable to ordinary policing methods, where there are systemic corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.

10.1.5. In addition, section 16 of the Act provides:

16 Co-operation with other agencies

- (1) In exercising its principal functions relating to the investigation of conduct, the Commission:
 - (a) shall, as far as practicable, work in co-operation with law enforcement agencies, and
 - (b) may work in co-operation with the Auditor-General, the Ombudsman, the Australian Crime Commission, the Australian Bureau of Criminal Intelligence and such other persons and bodies as the Commission thinks appropriate.
- (2) In exercising its other principal functions, the Commission shall, as far as practicable, work in co-operation with the Auditor-General, the Ombudsman, educational institutions, management consultants and such other persons and bodies as the Commission thinks appropriate.

¹⁰² As to which, see Chapter 9.

- (3) The Commission may consult with and disseminate intelligence and information to law enforcement agencies, the Australian Crime Commission, the Australian Bureau of Criminal Intelligence and such other persons and bodies (including any task force and any member of a task force) as the Commission thinks appropriate.
- (4) If the Commission disseminates information to a person or body under this section on the understanding that the information is confidential, the person or body is subject to the secrecy provisions of section 111 in relation to the information.
- (5) In this section:
 - law enforcement agency** means:
 - (a) the NSW Police Force, or
 - (b) a police force of another State or Territory, or
 - (c) the Australian Federal Police, or
 - (d) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of the State, another State or a Territory.

10.2 Role of the ICAC and other relevant authorities

- 10.2.1 Section 2A of the Act specifies the principal objects of the Act and includes amongst those objects the promotion of the integrity and accountability of public administration by constituting the ICAC as an independent and accountable body to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and the conferral on the ICAC of special powers to inquire into allegations of corruption.
- 10.2.2 It is those principal objects which distinguish both the Act and the ICAC itself from the legislation which constitutes other authorities, such as the Crime Commission, and those authorities themselves. The ICAC is a special purpose corruption investigator and is the only such body in NSW. While other authorities inevitably will come across evidence of corrupt conduct, its discovery and exposure is only incidental to their principal functions.
- 10.2.3 Thus, each of the bodies mentioned in paragraph 1.3.2 has functions distinct from the ICAC. The Crime Commission's mandate is to reduce the incidence of organised and other serious crime. The DPP is the prosecuting authority for NSW. The NSW Police Force's functions and duties are obvious and well known.
- 10.2.4 The PIC is in a different position from the agencies so far mentioned. Its role is to investigate "police misconduct" which its Act defines to include "corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer".¹⁰³ The *Independent Commission Against Corruption Act* includes "a member of the NSW Police Force" within the definition of "public official" in that Act.¹⁰⁴
- 10.2.5 Section 129(1) of the *Police Integrity Commission Act* provides that the ICAC cannot investigate or otherwise deal with a matter involving the conduct of police officers, Crime Commission officers or administrative officers¹⁰⁵ if the matter does not also involve the conduct of public officials who are not within those categories. Section

¹⁰³ *PIC Act* section 5.

¹⁰⁴ *ICAC Act* section 3(1), definition of "public official", paragraph (k).

¹⁰⁵ That is, members of the NSW Police Force, other than police officers: *PIC Act* section 4.

129(2) provides that the ICAC may investigate and otherwise deal with a matter involving the conduct of such persons in the context of matters that also involve public officials who are not police officers, Crime Commission officers or administrative officers. Section 131 empowers the respective Commissioners of the PIC and the ICAC to enter into arrangements for mutual notification of matters within the jurisdiction of the other and matters where there may be coordinate jurisdiction.¹⁰⁶

- 10.2.6 The PIC and the ICAC Commissioners have entered into a Memorandum of Understanding dated 21 October 2008 which deals with the matters referred to in section 131 of the *Police Integrity Commission Act*.

10.3 Relations with other agencies

- 10.3.1 The Panel has received written submissions from the PIC, the DPP and the Commissioner of Police and consulted with Mr Peter Hastings QC, the Commissioner of the New South Wales Crime Commission.
- 10.3.2 The Commissioner of the PIC supports the continuation of the current legislative arrangements for demarcation between the PIC and the ICAC, as does the ICAC itself. Nothing in the submission from the Commissioner of Police or the Panel's consultation with the Commissioner of the Crime Commission suggests any current problems in the matters the subject of the Panel's terms of reference. There are issues in the relationship between the ICAC and the DPP in relation to prosecutions which are dealt with specifically in Chapter 12 below.
- 10.3.3 The Panel makes no recommendation of legislative change in respect of this matter.

¹⁰⁶ Note also section 132 of the *PIC Act* which preserves the ICAC's educational role even when involving the Police Force or Crime Commission.

Chapter 11 – The Report of the Inspector

- 11.1.1 The office of Inspector of the ICAC was created following recommendations made in the 2005 Report. It is governed by Part 5A of the Act and also by Division 2 of Part 8 and Schedule 1A to the Act. The principal functions of the Inspector are set out in section 57B(1) as follows:
- (1) The principal functions of the Inspector are:
 - (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
 - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
 - (c) 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, and
 - (d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.
- 11.1.2 The Inspector is empowered to exercise his or her functions on the Inspector's own initiative, or at the request of the Minister (the Premier) among others.
- 11.1.3 As at the date of the Panel's terms of reference, as appears from those terms, it was foreseen as possible that there may be available a completed report of the Inspector into matters of the kind set out in paragraphs 2 (a) to (d).
- 11.1.4 The Inspector, the Hon. David Levine AO RFD QC, made a Special Report dated 18 June 2015 which explains that, by reason of the volume of material with which he had to deal, he had not yet formed any conclusions on the matters which he has currently under consideration and which raised issues of the kind mentioned in the Panel's terms of reference.
- 11.1.5 The Panel, at a meeting with the Inspector, confirmed that no substantive report on such issues would be available by 31 July 2015, and had a helpful discussion with the Inspector about matters of the kind discussed in Chapter 7.
- 11.1.6 Although, naturally, complaints about the operations of the ICAC are likely to come to the Inspector, the Inspector does not function as some kind of appellate tribunal whose role is to reconsider decisions of the ICAC. The Special Report of 18 June 2015 indicates the nature of the task on which the Inspector is presently engaged, as well as the magnitude of that task, and, apart from the analysis of information about prosecutions, does not bear upon the Panel's terms of reference.
- 11.1.7 The Special Report's concluding reference to clarification of corrupt conduct is addressed in Chapter 7. The references to clarification of serious corrupt conduct and systemic corrupt conduct are addressed in Chapter 9.
- 11.1.8 The Panel notes that the Inspector, in his Special Report, indicates that he will examine how it came about that the investigation in the matter of *Cunneen* was initiated.

- 11.1.9 This may be a convenient place to mention an issue raised by both Mr Ipp and the ICAC concerning the jurisdiction of the Inspector. They suggest that there is an anomaly in Part 5A of the Act with respect to the Inspector's powers under section 57C. They point out that the section does not expressly assert that the powers there stated are to be exercised for the purposes of the Inspector's functions. They draw a contrast with section 57D which includes a reference to "for the purposes of the Inspector's functions". They suggest consideration should be given to amending section 57C to make clear that the powers can only be exercised for the purpose of the Inspector's functions. The Panel does not consider the suggested changes necessary. It appears obvious that the powers of the Inspector under section 57C are given for the purpose of the exercise of the Inspector's functions under the Act. It is difficult to envisage what might be the competing possibility.
- 11.1.10 The Panel received a submission that the role of the Inspector should be expanded substantially by increasing the Inspector's budget and establishment, and by empowering the Inspector to conduct public and private hearings. Under the Act, the Inspector has important and extensive powers, and the adequacy of the Inspector's budget and establishment at any time is a subject for administrative consideration rather than legislative remedy. The Inspector is not intended to act as a general review authority with a function of reconsidering all operational decisions of the Commissioner, let alone all findings of the Commission. If that were the legislative intention, then of course the Inspector's present establishment would be totally inadequate. The reasons behind the setting up of the office of Inspector in the first place appear from the 2005 Report, and they have not been overtaken by subsequent events. One submission received by the Panel was to the effect that a decision to conduct a public inquiry should require the approval of the Inspector. The Panel considers that this would be an inappropriate involvement of the Inspector in operational decision-making and would not be consistent with the statutory functions presently exercised by the Inspector.

Chapter 12 – Prosecution and Delay

12.1 Introduction

- 12.1.1. The terms of reference require the Panel to consider any available Report of the Inspector which includes consideration of “the extent to which ICAC investigations give rise to prosecution and conviction”.
- 12.1.2. The Inspector appended to his Special Report of 18 June 2015 an analysis of certain information relating to prosecutions, which was prepared by the ICAC. It is appropriate that the Panel deal with this issue and the related issue of delay between the time at which the ICAC makes a recommendation pursuant to section 74A(2)(a) of the Act that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of a person for a specified criminal offence, the date upon which such advice is obtained and the date upon which criminal proceedings (if any) are actually commenced.

12.2 Extent to which ICAC investigations give rise to prosecutions and convictions

- 12.2.1 There is unquestionably a disparity between the number of findings of corrupt conduct made by the ICAC and the number of section 74A(2)(a) recommendations on the one hand and the number of prosecutions actually commenced and convictions obtained on the other.
- 12.2.2 This has been the cause of concern for some considerable period of time. It was a matter considered by the Parliamentary Committee in 2004.¹⁰⁷ It was a matter considered in some detail in the 2005 Review. More recently, in 2014 the Parliamentary Committee commenced an inquiry into the following matters, amongst others:
- Whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence should be a principal function of the ICAC.
 - The effectiveness of relevant ICAC and DPP processes and procedures, including alternative methods of brief preparation.

This inquiry had not been completed before the 2015 State election, but the Committee did publish a discussion paper *Prosecutions Arising from Independent Commission Against Corruption Investigations* in November 2014.

- 12.2.3 Some discrepancy between the number of findings of corrupt conduct and the number of successful prosecutions is unavoidable. There are two reasons for this, one general, one particular to the ICAC as an investigative body. The general reason is inherent in the criminal justice system and is simply that some people who stand trial on criminal charges are acquitted.

¹⁰⁷ See Parliamentary Committee on the Independent Commission Against Corruption, Parliament of New South Wales, *Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials* (2004) 7.

12.2.4 The particular reason arises from the ICAC's role as a special purpose investigative body, which has been given coercive powers to enable it to carry out that purpose, that is, to investigate the possibility that corrupt conduct may have occurred.

12.2.5 Thus, the 2005 Report said:

- 3.4.21 Some submissions to the review have expressed concern that there are insufficient criminal convictions arising from findings of corrupt conduct by ICAC. This is said to reflect either the inappropriateness of ICAC's findings and recommendations, or that public officials are not being properly brought to account for their corrupt activities.
- 3.4.22 The number of criminal prosecutions is, however, an imperfect indicator of the performance of ICAC. The principal function of ICAC is to investigate and expose corrupt conduct, not to obtain criminal convictions. ICAC was established because of the difficulties with obtaining criminal convictions for corruption offences. Its focus generally will, and should be, on those matters where it is more important to ascertain what happened than to obtain a criminal conviction.
- 3.4.23 The exposure of corruption by ICAC serves an important deterrent and educative purpose. Importantly, ICAC's investigations are conducted with a view to ascertaining whether any laws, policies, practices or procedures require change in order to minimise opportunities for corruption. ICAC's investigations are designed to modify systems as well as behaviour. For this reason, implementation of ICAC's corruption resistance strategies and corruption prevention recommendations may be considered a key indicator of the performance of ICAC.
- 3.4.24 ICAC reports that the majority of corruption prevention recommendations made in investigation reports have been implemented in some form by the public sector organisations concerned, and that a wide range of public sector organisations have, or are, implementing a range of corruption resistance strategies promoted by ICAC.
- 3.4.25 ICAC submitted to the review *'that there is no justification to change or modify its principal functions as a fact-finding investigative body to one where its primary or principal functions are directed more to securing criminal convictions.'*
- 3.4.26 I agree with ICAC's submission. I do not propose to recommend any changes to the Act to make it a primary function of ICAC to obtain criminal convictions.

At that time, enquiries made by the Parliamentary Committee indicated that only approximately 42% of the persons the subject of a finding of corrupt conduct were subsequently convicted while 58% were either not prosecuted at all or acquitted. The Committee noted that some of the convictions related to matters that arose during the ICAC investigation itself, for example, false swearing.¹⁰⁸

12.2.6 The ICAC's position is set out in its submission to the Panel:

The Commission's position is that it is not appropriate to regard the rate of criminal prosecutions and convictions arising from Commission investigations as a measure of the Commission's performance.

It has been previously suggested by some commentators that the rate of criminal convictions following Commission investigations should be the measure against which the Commission's success should be assessed and, consequently, that the Commission should focus its efforts towards achieving criminal convictions.

¹⁰⁸ 2005 Report, above n 6, [3.4.28].

This argument appears to be based on the erroneous belief that corrupt conduct is commensurate with criminal conduct and that a finding of corrupt conduct without a commensurate conviction for a criminal offence lacks legitimacy or meaning.

Advocating the use of prosecutions and conviction rates to measure the effectiveness of the Commission demonstrates a failure to understand the role of the Commission. In this respect, it is relevant to have regard to the principal objects of the ICAC Act, which are set out in s 2A as being:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
 - (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
 - (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the Commission special powers to inquire into allegations of corruption.

The gathering of admissible evidence for the prosecution of criminal offences is, rightly, a secondary function of the Commission. The Commission's primary function is to investigate and expose corrupt conduct. While ample evidence, including evidence by way of admissions, may be obtained to make factual and corrupt conduct findings, there are many factors that affect whether or not the Commission is able to obtain sufficient evidence in admissible form to warrant prosecution.

The Commission has extensive powers to investigate and expose corrupt conduct. The use of these powers, however, does not necessarily result in evidence that is admissible in a criminal prosecution. For example, the Commission has power to summons a witness to give evidence or produce a document in a compulsory examination or public inquiry. Such a witness is required to answer relevant questions and produce relevant documents even if the answer or document may incriminate the witness. If the witness objects, the effect of the objection is that the answer or document is not admissible in evidence against the person in any subsequent criminal prosecution (except for a prosecution for an offence under the ICAC Act). Other witnesses may give evidence about a person but not agree to provide a statement in admissible form for the purpose of a criminal prosecution of that person.

There are many cases where admissions made by witnesses provide the basis for a finding of corrupt conduct. As the admissions are made under objection, they are not available to be used for the purpose of a prosecution.

The Commission's investigative processes are not necessarily concerned with the admissibility of evidence in judicial proceedings (deliberately so). It is imperative to the work of the Commission that lines of enquiry are pursued regardless of their potential to result in a successful prosecution. A change of emphasis, which required the Commission to focus on prosecutions by assessing the potential admissibility of evidence, might well influence a decision to follow a particular line of enquiry in circumstances where the resources of the Commission have to be allocated in accordance with its principal functions. Such a constraint could compromise the capacity of the Commission to fully expose corruption.

The Commission considers that its investigations, and findings of corrupt conduct, are an important deterrent in themselves to corrupt conduct. In addition, the identification of system weaknesses resulting in the making and implementation of corruption prevention recommendations designed to prevent corrupt conduct can have a more lasting and

effective impact on reducing corrupt conduct than criminal prosecutions, which necessarily focus on past rather than prospective conduct.

- 12.2.7 There is force in this submission. Parliament has granted the ICAC wide coercive powers so as to enable it to carry out its functions. A consequence of the grant of such coercive powers is that longstanding and valued rights which most people think are fundamental to our society and to the operation of our criminal justice system, such as the privilege against self-incrimination, are, to some extent, abrogated. But few would think it right that admissions obtained by the use of such coercive powers should be admissible in criminal proceedings. This Panel itself does not.
- 12.2.8 Thus, section 37(2) of the Act abrogates the privilege against self-incrimination in respect of answers to questions and the production of documents at compulsory examinations and public inquiries. Section 37(3) prohibits the use of such answers and documents in any civil, criminal or disciplinary proceedings (subject to a limited exception).¹⁰⁹
- 12.2.9 In addition, the ICAC is not bound by the rules of evidence – see section 17(1) which provides: “The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate”. Obviously, criminal trial courts are bound by the rules of evidence.
- 12.2.10 The result of the matters mentioned in paragraphs 12.2.8 and 12.2.9 above is that the ICAC may well be making its findings, including those of corrupt conduct under section 13 of the Act, on material different from that which will be available to a criminal court subsequently determining the guilt or innocence of the person in question. It is obvious that the results must, in some circumstances, be different and that there will be fewer findings of guilt than there will be of corrupt conduct.
- 12.2.11 The discrepancy between convictions and findings of corrupt conduct, in fact, provides an eloquent demonstration of the fundamental distinction between an ICAC investigation and its function and the criminal justice system and its purpose and that of the criminal trial. The observations in paragraph 2.8.8 also are of relevance to this point.
- 12.2.12 The Panel does not recommend any legislative change in relation to this matter.

12.3 Delay

- 12.3.1 There has been equally longstanding concern over the delay between the time at which the ICAC concludes an investigation and recommends consideration be given to seeking the DPP’s advice and the initiation of criminal proceedings. Such delay as there has been results from two separate issues:
- Delay between consideration of the ICAC investigation and the despatch of a brief of evidence by the ICAC to the Office of the DPP for its consideration.
 - Delay between receipt of the brief and decision by the DPP as to whether or not to advise the commencement of criminal proceedings.

¹⁰⁹ See *ICAC Act* section 37(4) and section 114A(5).

12.3.2 These were matters of concern at the time of the 2005 Review. It had been a concern of the Parliamentary Committee:

3.4.34 Both ICAC and the DPP acknowledge that the initiation of criminal proceedings following an ICAC investigation has been adversely affected by delay.

3.4.35 Delay between the commission of a criminal offence and its prosecution is a significant problem. Convictions may be more difficult to obtain as witnesses disappear and memories fade. The affected person's reputation, employment, and family suffer while awaiting the exercise of prosecutorial discretion.

...

3.4.37 The Parliamentary Committee has expressed concern about the delay between the provision of briefs of evidence to the DPP and the initiation of criminal proceedings. Following its recent examination of ICAC's 2002-2003 annual report, the Parliamentary Committee recommended that:

*'The Commission hold discussions with the DPP to examine practical steps to remedy inordinate delays between the date briefs are received and the date a decision is made on whether or not to initiate proceedings.'*⁵⁴

3.4.38 The review has held discussions with ICAC and the DPP about the issue of delay. Both ICAC and the DPP acknowledge that there have been delays associated with the laying of charges following ICAC investigations. ICAC, in particular, asserts that it is striving to address this delay. There is some evidence of this. For example, criminal proceedings against the Honourable JR Face following the June 2004 investigation report⁵⁵ have already concluded, and in one investigation involving a former correctional services officer, the officer was convicted of corruption offences (uncovered as a result of ICAC's investigation) prior to the publication of ICAC's report.⁵⁶

⁵⁴ Parliamentary Committee Report on Examination of the 2002-2003 Annual Report of the Independent Commission Against Corruption (September 2004) recommendation no 3 page xi.

⁵⁵ ICAC Report on the investigation into the conduct of the Hon J Richard Face.

⁵⁶ ICAC Report on investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater.

12.3.3 The 2005 Review made a number of recommendations to address this problem. One such recommendation was that, if administrative measures did not prove effective in remedying delay, consideration be given to permitting the ICAC to commence criminal proceedings without seeking the advice of the DPP.¹¹⁰ That recommendation was not adopted by Parliament and the Panel would not now support it.

12.3.4 The Panel has examined and analysed prosecution timescales for outstanding matters for the period 1 July 2012 to 30 June 2015 supplied to the Panel by the ICAC.

12.3.5 The early figures set out in the prosecution timescales appear less than satisfactory. One case involved periods of between 1,669 days (i.e. more than 4½ years) and 2,104 days (i.e. more than 5½ years) from the date of delivery of the brief to the DPP in respect of a particular individual to the date of the final DPP advice.

12.3.6 It does, however, appear that the delays have been reduced.

¹¹⁰ 2005 Report, above n 6, Recommendation R3.4.

- 12.3.7 A number of suggestions were made to the Parliamentary Committee as to methods by which this problem might be addressed. They are set out in paragraphs 2.93-2.123 of that Committee's Discussion Paper.
- 12.3.8 Ultimately, these problems cannot be solved by legislative change. They involve questions of resources and institutional willingness (on the part of both the ICAC and the DPP) to take steps to deal with the issues and reduce and keep delays in prosecution within acceptable limits. To the extent that the ICAC does not do so it is a matter within the functions of the Inspector under section 57B of the Act and as to which he may take appropriate action.
- 12.3.9 The Panel makes no recommendation as to legislative change.

12.4 Miscellaneous

- 12.4.1 There is one final matter relating to prosecution which Parliament might well consider dealing with by amendment to the Act. It is the question whether the ICAC should be given express power to commence court proceedings.
- 12.4.2 The position is accurately stated by the DPP, Mr Lloyd Babb SC, in his submission to the Panel:

Under the existing MOU between the ODPP and the ICAC regarding potential charges arising out of the ICAC investigations, the ODPP provides advice to the ICAC in relation to appropriate charges to lay and whether a prosecution has reasonable prospects. If that advice is accepted those charges are commenced by the ICAC and the prosecution of the charges is taken over by the ODPP.

An officer of the ICAC acting in their official capacity is a public officer for the purpose of the *Criminal Procedure Act 1986*: s 3, *Criminal Procedure Act 1986* and s 101(1), *Criminal Procedure Regulation 2010*. As a consequence an officer of the ICAC has power to commence proceedings by issuing a Court Attendance Notice for a statutory offence: ss 14 and 48, *Criminal Procedure Act 1986*.

However, as identified by Bruce McClintock, SC in the 2005 review of the *ICAC Act 1988*, 'The current statutory regime does not recognise, in an open and transparent manner, the actual position in relation to criminal prosecutions arising from ICAC investigations.' Unfortunately the corresponding recommendation (R3.2) has not subsequently been adopted in amendments to the *ICAC Act 1988*.

It is recommended that it be expressly stated within the *ICAC Act 1988* that the ICAC may, after considering advice of the ODPP, institute criminal proceedings arising from its investigations.

- 12.4.3 There is force in the DPP's recommendation. If Parliament thought it appropriate to make such a change, it might also consider it appropriate to include common law offences within the criminal proceedings in respect of which the ICAC can institute proceedings so as to deal with the problem identified in paragraph 9.2.4 above.

Appendix A – List of Submissions Made to the Panel

1. Anonymous submission
2. Mr Lloyd Babb SC, Director of Public Prosecutions
3. Mr Bart Bassett (submission made to the Inspector of the Independent Commission Against Corruption and copied to the Independent Panel)
4. Mr John F. Eades, President, the Law Society of New South Wales
5. Mr Gordon Galt, Chairman, NuCoal Resources Ltd
6. Ms Anne Goonan
7. Professor Bruce Hall
8. Mr Ron Heinrich AM (submission made on behalf of Mr John McGuigan, Mr Richard Poole, Cascade Coal Pty Limited, Mt Penny Coal Pty Limited and Glendon Brook Coal Pty Limited; submission made to the Inspector of the Independent Commission Against Corruption and copied to the Independent Panel)
9. The Independent Commission Against Corruption
10. The Hon. Bruce James QC, Commissioner, Police Integrity Commission
11. Mr Adam Johnston
12. Mr Duncan Kennedy
13. Ms Ingrid King, Mr Jonathan Milner and Mr Robert Newlinds SC (submission made on behalf of Senator the Hon. Arthur Sinodinos AO)
14. Mr Robert Mangioni, Watson Mangioni Lawyers (submission made on behalf of Dr Andrew Cornwell and Ms Samantha Brookes)
15. The Hon. Keith Mason AC QC, Chairperson of the New South Wales Electoral Commission
16. The New South Wales Bar Association
17. Peter Evans and Associates Solicitors (submission made on behalf of Mr Hilton Grugeon)
18. Mr A P Scipione APM, Commissioner of Police
19. Mr Robin Speed, President of the Rule of Law Institute of Australia
20. Mr Richard Tripodi
21. Mr Geoffrey Watson SC

Appendix B – Consultation Conducted by the Panel

1.	The Hon. Megan Latham, Commissioner, Independent Commission Against Corruption	Thursday, 28 May 2015, 4:00pm
2.	Mr Michael Sexton SC, Solicitor General of New South Wales	Tuesday, 2 June 2015, 10:30am
3.	The Hon. Jerrold Cripps QC, Former Commissioner of the Independent Commission Against Corruption (2004-2009)	Wednesday, 3 June 2015, 2:15pm
4.	The Hon. David Ipp AO QC, Former Commissioner of the Independent Commission Against Corruption (2009-2014)	Thursday, 11 June 2015, 10:00am
5.	Ms Irene Moss AO, Former Commissioner of the Independent Commission Against Corruption (1999-2004)	Thursday, 11 June 2015, 3:30pm
6.	Mr Ian Temby AO QC, Former Commissioner of the Independent Commission Against Corruption (1989-1994)	Friday, 12 June 2015, 10:30am
7.	The Hon. Keith Mason AC QC, Chairperson of the New South Wales Electoral Commission	Friday, 12 June 2015, 2:15pm
8.	Mr Philip Boulten SC, New South Wales Bar Association	Friday, 12 June 2015, 4:00pm
9.	Mr Laurence Glanfield AM, Former Director General of the NSW Department of Attorney General and Justice and former member of the Independent Commission Against Corruption's Operations Review Committee	Thursday, 18 June 2015, 2:00pm
10.	The Hon. Roger Gyles AO QC, Chair, Transparency International Australia	Friday, 19 June 2015, 2:00pm
11.	Mr Peter Hastings QC, Commissioner, New South Wales Crime Commission	Friday, 19 June 2015, 3:00pm
12.	The Hon. Tom Bathurst AC, Chief Justice	Thursday, 25 June 2015, 3:30pm

	of the Supreme Court of New South Wales	
13.	The Hon. David Levine AO RFD QC, Inspector of the Independent Commission Against Corruption Ms Susan Raice, Principal Legal Advisor, Office of the Inspector of the Independent Commission Against Corruption and the Police Integrity Commission	Friday, 26 June 2015, 10:30am
14.	Mr Roy Waldon, Solicitor to the Independent Commission Against Corruption	Friday, 26 June 2015, 2:00pm
15.	The Hon. Megan Latham, Commissioner, Independent Commission Against Corruption Mr Roy Waldon, Solicitor to the Independent Commission Against Corruption	Wednesday, 1 July 2015, 2:15pm
16.	Mr Don Colagiuri SC, Parliamentary Counsel of New South Wales	Wednesday, 15 July 2015, 10:30am