

Dr Jane Thomson
Committee Secretary
Select Committee on the establishment of a National Integrity Commission
Parliament House
CANBERRA ACT

By email: nic.sen@aph.gov.au

19 April 2016

Dear Dr Thomson

I refer to your email of 10 March 2016 inviting the NSW Independent Commission Against Corruption to make a submission to the Select Committee on the establishment of a National Integrity Commission.

The Commission's submission is enclosed.

Yours sincerely

Roy Waldon
Solicitor to the Commission



**INDEPENDENT COMMISSION
AGAINST CORRUPTION**

NEW SOUTH WALES

**NSW INDEPENDENT COMMISSION
AGAINST CORRUPTION**

SUBMISSION

TO THE

**SENATE SELECT COMMITTEE ON THE
ESTABLISHMENT OF A NATIONAL
INTEGRITY COMMISSION**

APRIL 2015

Select Committee Terms of Reference

That a select committee, to be known as the Select Committee relating to the establishment of a National Integrity Commission, be established to inquire into and report, on or before 22 September 2016, on the following matters:

- a. the adequacy of the Australian Government's legislative, institutional and policy framework in addressing all facets of institutional, organisational, political and electoral, and individual corruption and misconduct, with reference to:
 - i. the effectiveness of the current federal and state/territory agencies and commissions in preventing, investigating and prosecuting corruption and misconduct,
 - ii. the interrelation between federal and state/territory agencies and commissions, and
 - iii. the nature and extent of coercive powers possessed by the various agencies and commissions, and whether those coercive powers are consistent with fundamental democratic principles;
- b. whether a national integrity commission should be established to address institutional, organisational, political and electoral, and individual corruption and misconduct, with reference to:
 - i. the scope of coverage by any national integrity commission,
 - ii. the legislative and regulatory powers required by any national integrity commission to enable effective operation,
 - iii. the advantages and disadvantages associated with domestic and international models of integrity and anti-corruption commissions/agencies,
 - iv. whether any national integrity commission should have broader educational powers,
 - v. the necessity of any privacy and/or secrecy provisions,
 - vi. any budgetary and resourcing considerations, and
 - vii. any reporting accountability considerations; and
- c. any other related matter.

Section 1: Introduction

This submission to the Select Committee is made by the NSW Independent Commission Against Corruption ("the Commission").

This submission addresses selected sections of the Select Committee's Terms of Reference. These concern the Commission's effectiveness as a state agency in preventing, investigating and prosecuting corruption in and affecting the NSW public sector and the nature and extent of the Commission's coercive powers.

The Commission does not consider that it is in a sufficiently informed position to address the adequacy of the Australian Government's legislative, institutional and policy framework in addressing all facets of institutional, organisational, political and electoral and individual corruption and misconduct. In these circumstances the Commission has not addressed whether a national integrity commission should be established. That will be a matter for the Australian Government. However, the information provided in this submission may assist in determining a model for a national integrity commission should the Australian Government decide to establish such a body.

Should a national integrity commission be established, it should be given the necessary jurisdiction and powers to enable it to successfully investigate, expose and prevent corruption in and affecting the Commonwealth public sector.

Section 2: Overview of the Commission

The Commission was established in 1988 by the *Independent Commission Against Corruption Act 1988* (the ICAC Act) and commenced operations in 1989. It is Australia's oldest dedicated anti-corruption agency.

The Commission's mandate under s 2A of the ICAC Act is to promote the integrity and accountability of public administration by investigating, exposing and preventing corruption involving or affecting NSW 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 on the community.

The Commission's overarching aims are to protect the public interest, prevent breaches of public trust and guide the conduct of public officials.

One of the Commission's strengths as an anti-corruption agency is that its roles of investigating, exposing and preventing corruption are largely complementary. This places it in a unique position among NSW law enforcement agencies which concentrate on investigation and exposure of wrongdoing. The Commission's prevention role enables it to take a holistic approach to fighting corruption. This means that the Commission is able to extend its work beyond exposing individual conduct to examine systems and procedures with a view to identifying potential and actual systemic weaknesses. The Commission can then work with relevant agencies to reduce or prevent the likelihood of corrupt conduct occurring in the future. Significant changes have been made to public agency work practices and procedures as a result of the Commission's work in exposing, preventing and educating about corrupt conduct.

Since it commenced operations the Commission has conducted numerous investigations and undertaken significant corruption prevention work to strengthen NSW public administration against corruption. In this time, the Commission has made in excess of 1,200 corrupt conduct findings against over 800 individuals. As a result of its investigations the Commission has identified corruption risks and made hundreds of corruption prevention recommendations to address these risks. The Commission has published other corruption prevention material and conducted numerous corruption prevention seminars and training sessions.

While it is sometimes argued that other agencies could investigate the matters dealt with by the Commission, the Commission's experience is that they seldom do (or do so effectively). Indeed, a primary reason the Commission was established was that existing agencies had been ineffective in exposing and preventing the full extent of corruption in NSW. One reason for the Commission's unique effectiveness in exposing corruption is that the Commission has extensive statutory powers – powers that are akin to those of a standing Royal Commission and extend well beyond those powers provided to traditional law enforcement agencies such as the police. The Commission's operations have demonstrated that such powers are essential to effectively investigate and expose corruption.

The establishment of the Commission

The Commission was established by the ICAC Act which was passed by the NSW Parliament in 1988.

The comments made in the Second Reading speech of the Independent Commission Against Corruption Bill in May 1988 by the Hon Nick Greiner MP, the then NSW Premier, describes the background leading to the Commission's establishment:

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.¹

The major objectives underlining the establishment of the Commission were to:

- Restore the integrity and accountability of public administration by creating a body with responsibility to both investigate and prevent corruption in and affecting the public sector.
- Give that body extensive jurisdiction truly independent from the Executive with the discretion to decide what it will investigate, subject only to being required to investigate matters referred to it by both Houses of Parliament.
- Provide the body with extensive powers akin to the coercive powers of a Royal Commission in recognition of the secretive nature of corruption and the associated difficulty in detection.

The ICAC Act has proved remarkably robust. Although it has been amended on many occasions since its commencement, these amendments have generally been for minor or consequential purposes. More major amendments include those recently made in response to the High Court decision in *ICAC v Cunneen* [2015] HCA 14.² The Commission has also been the subject of reviews, including those conducted by Bruce McClintock SC in 2005³ and the Independent Panel of the Hon Murray

¹ NSW Hansard, 26 May 1988 (Volume 507, pp.672-678).

² *Independent Commission Against Corruption Amendment (Validation) Act 2015* and *Independent Commission Against Corruption Amendment Act 2015*.

³ *Independent review of the Independent Commission Against Corruption Act 1988, Final Report (2005)*.

Gleeson AC and Mr McClintock SC in 2015.⁴ Although each of these reviews resulted in some legislative changes, they did not fundamentally alter the way in which the Commission operates.

Staff and budget

The Commission's main source of revenue is recurrent appropriations. The recurrent appropriation for 2014–15 was \$21.15 million. A secondary source of revenue was grant income of \$2.62 million.

In 2014–15, the Commission was funded for 123.9 full-time equivalent (FTE) members of staff. These are divided among the Commission's divisions and sections as follows:

- Assessments Section – 14 FTEs
- Executive Unit – 8.4 FTEs
- Corruption Prevention Division – 20.8 FTEs
- Corporate Services Division – 19.6 FTEs
- Investigation Division – 50 FTEs
- Legal Division – 11.1 FTEs.

The complaint assessment process

The Commission receives complaints alleging corrupt conduct from members of the public and public officials and reports made by principal officers of public sector agencies and ministers of the Crown.

The Commission assesses complaints and reports to determine whether to:

- refer the matter to another agency or take no further action
- exercise the Commission's power under ss 53 and 54 of the ICAC Act to refer a matter to another agency for investigation or other action and require that agency to submit a report on what action it takes
- conduct assessment enquiries to ascertain additional information on which to base a further assessment of the matter
- provide corruption prevention advice
- undertake an investigation.

Only a relatively small portion of matters are made the subject of a Commission investigation. In 2014–15, only 42 matters were retained by the Commission for preliminary investigation. This represents 2.28% of the 1,843 complaints, s 11 reports and public interest disclosures received by the Commission in that period.

⁴ *Independent Panel – review of the jurisdiction of the Independent Commission Against Corruption, Report (2015).*

The investigation process

Most Commission investigations commence as preliminary investigations.⁵ A preliminary investigation may be conducted for the purpose of discovering or identifying conduct that might be made the subject of a more complete investigation (an “operation”) or deciding whether to make particular conduct the subject of a more complete investigation.

Preliminary investigations and operations may focus on both historic and current activities. Methods of investigation will vary depending on the nature of the conduct under investigation.

As with most law enforcement agencies, the Commission deploys overt and covert investigation techniques. Compulsory examinations or a public inquiry may be conducted as part of an investigation;⁶ however, not all investigations require compulsory examinations or involve a public inquiry. The power to conduct compulsory examinations and public inquiries is discussed in more detail in Section 3 of this submission.

At the commencement of the 2014-15 reporting period the Commission had on hand nine preliminary investigations and ten operations. During the 2014-15 reporting period the Commission commenced 42 new preliminary investigations and 14 new operations. A total of 40 preliminary investigations and 11 operations were completed in that period.

Table 1 below shows the source by sector of preliminary investigations commenced in 2014-15. This provides a general indication of the areas subject to investigation during that period.

Table 1: Source of preliminary investigations by sector in 2014–15*

Sector	Number of preliminary investigations	% of preliminary investigations
Local government	13	31%
Aboriginal affairs and services	6	14%
Transport, ports and waterways	5	12%
Natural resources and environment	4	10%
Law and justice	3	7%
Government and financial services	2	5%
Land, property	2	5%

⁵ Section 20A ICAC Act.

⁶ Sections 30 and 31 ICAC Act.

and planning		
Education (except universities)	2	5%
Parliament	2	5%
Universities	1	2%
Custodial services	1	2%
Tourism, sport, recreation and gaming	1	2%
Community and human services	1	2%

*One preliminary investigation examined allegations concerning two sectors.

The conclusion of an investigation may result in no further action or a number of different actions. These may include referral to another agency of information that is relevant to the exercise of its functions (such as information for consideration of disciplinary action or system changes to reduce the likelihood of corrupt conduct), the dissemination of intelligence and other information, a brief of evidence for referral to the NSW Director of Public Prosecutions (DPP) or the furnishing of a report on the investigation to the presiding officers of the NSW Parliament. The Commission is required to prepare reports where it has conducted a public inquiry and where matters are referred to the Commission by both Houses of Parliament.⁷

Corruption prevention

The Commission's corruption prevention work is focused on assisting public sector agencies to identify ways to create a corruption-resistant environment at a lower overall cost by examining the design of their operations. The aim is to enable opportunities and incentives for corruption are designed out of their systems.

The Commission identifies and analyses corruption risks of sector-wide significance. Projects are selected on the basis of the degree of public concern and the extent of corruption risks.

In 2014-15 the Commission conducted six major projects examining corruption risks in the following areas:

- invoice payments in the public sector⁸
- political donations, disclosure and expenditure⁹
- corruption risks associated with dealing with international students¹⁰
- employment screening
- public sector facilities management
- change management.

⁷ Section 74, ICAC Act.

⁸ *Safeguarding public money: the importance of controlling invoice payments*, November 2014.

⁹ *Election funding, expenditure and disclosure in NSW: strengthening accountability and transparency*, December 2014.

¹⁰ *Learning the hard way: managing corruption risks associated with international students at universities in NSW*, April 2015.

The need for these projects was identified as a result of investigation work conducted by the Commission.

The Commission provides advice on ways in which corrupt conduct can be prevented or detected or its frequency and effects reduced and the integrity and good repute of public administration promoted. In 2014-15 a total of 134 advice requests were received.

The Commission also delivered briefings to 27 executive leadership groups and conducted five workshops for NSW public sector executives. The Commission also delivered 82 other speaking engagements, 22 of which were delivered in regional NSW. The topics dealt with included the use of operational effectiveness as a corruption control, procurement safeguards, managing risk during change and effective management of accounts payable.

Section 2: Jurisdiction

The effectiveness of any anti-corruption agency will depend on its jurisdiction and powers. Jurisdiction is concerned with the authority to exercise statutory functions and powers. This section of the submission deals with the Commission's jurisdiction. The next section deals with the Commission's statutory powers.

The Commission has extensive jurisdiction to investigate corrupt conduct involving NSW public officials and public authorities.¹¹ The Commission also has jurisdiction with respect to the conduct of persons who are not public officials where their conduct could adversely affect the honest or impartial exercise of official functions. As a result of recent amendment to the ICAC Act,¹² the Commission now has jurisdiction to investigate conduct involving possible criminal offences under specified NSW legislation referred to the Commission by the NSW Electoral Commission even though that conduct may not involve corrupt conduct.¹³

The definition of "public official" in the ICAC Act includes "an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs".¹⁴ This generally brings within the Commission's jurisdiction a number of outsourced government functions. Where there has been doubt as to the extent of the Commission's jurisdiction over particular functions, legislation has been enacted to make clear the position.¹⁵

The definition of "corrupt conduct" is central to the Commission's jurisdiction and its ability to make corrupt conduct findings at the conclusion of its investigations.

Definition of corrupt conduct

"Corrupt conduct" is defined in the ICAC Act as any conduct that falls within the description of corrupt conduct in s. 8 of the ICAC Act but that is not excluded by s 9.

Section 8(1) provides that 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

¹¹ Since the establishment of the Commission, jurisdiction over sworn NSW Police officers and administrative officers and officers of the NSW Crime Commission was passed to the Police Integrity Commission.

¹² *Independent Commission Against Corruption Amendment Act 2015*.

¹³ S. 13A ICAC Act.

¹⁴ Section 3, ICAC Act.

¹⁵ For example, see s 245 of the *Crimes (Administration of Sentences) Act 1999*, which brings privately managed correctional centres and their staff within the Commission's jurisdiction.

- (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.

Section 8(2) provides that:

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.

Section 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

- (a) collusive tendering,
- (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

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

Section 9 of the ICAC Act imposes a limitation on the nature of corrupt conduct. It provides that despite s. 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.

Examples of past investigations

The Commission's jurisdiction has enabled it to investigate a wide range of activity affecting public administration. The sample of investigations set out below gives some indication of the extent of the conduct dealt with by the Commission. Details of other investigations conducted by the Commission can be found on the Commission's website: www.icac.nsw.gov.au.

Operations Jasper¹⁶ and Acacia¹⁷

The Operation Jasper investigation concerned the circumstances surrounding a decision made in 2008 by the then NSW minister for primary industries and minister for mineral resources, to open a mining area in the Bylong Valley for coal exploration. This was a complex investigation which involved a public inquiry conducted over 45 days with 86 witnesses. The Commission found that the former minister had entered into an agreement with others to act contrary to his duty as a minister of the Crown by arranging for the creation of a mining tenement for the purpose of benefitting those others. The benefits obtained involved tens of millions of dollars. Corrupt conduct findings were made against a number of people including the former minister and another former member of Parliament.

The Operation Acacia investigation arose as a result of a referral to the Commission by both Houses of the NSW Parliament. It concerned the circumstances surrounding the issue of an invitation to Doyles Creek Pty Ltd to apply for, and allocation of, a mining exploration licence. This was also a complex investigation involving a public

¹⁶ *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, 31 July 2013.

¹⁷ *Investigation into the conduct of Ian Macdonald, John Maitland and others*, 30 August 2013.

inquiry conducted over 37 days and involving 52 witnesses. A number of corrupt conduct findings were made, including against a former minister.

In its corruption prevention report concerning operations Jasper and Acacia, released on 30 October 2013, the Commission made 26 recommendations to reduce opportunities and incentives for corruption in the state's management of coal resources.

On 18 December 2013, the Commission released a separate report dealing with certain matters identified in the parliamentary terms of reference for Operation Acacia and similar matters identified in the letter of 30 January 2013 from the then Premier of NSW in relation to Operation Jasper. The Commission's recommendations in this report included that the NSW Government consider enacting legislation to cancel the coal exploration licences for Doyles Creek, Mount Penny and Glendon Brook. The government accepted this recommendation and enacted relevant legislation.¹⁸

In addition, the conduct uncovered by the Commission has led to the Australian Taxation Office taking action against a number of people and to the Australian Competition and Consumer Commission commencing proceedings against 11 respondents for alleged bid-rigging conduct involving the public tender processes for mining exploration licences in the Bylong valley.

Operation Tunic¹⁹

This matter is a recent example of the many matters investigated by the Commission involving a public official soliciting and receiving corrupt benefits from contractors. It concerned a former NSW Mine Subsidence Board (MSB) district manager who, the Commission found, had received almost \$400,000 in corrupt payments between 2008 and 2014.

The Commission also made seven corruption prevention recommendations to the MSB to help prevent the recurrence of the conduct exposed in this investigation.

Operation Sonet²⁰

This is a recent example of one of many investigations involving fraud by a public official. The Commission found that in 2014 an Acting Information and Communication Technology Manager dishonestly obtained over \$1.7 million from the Department of Education and Communities TAFE South Western Sydney Institute.

The Commission also made three corruption prevention recommendations to TAFE NSW to help prevent the recurrence of the conduct exposed in this investigation.

¹⁸ *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014.*

¹⁹ *Investigation into the conduct of a Mine Subsidence Board district manager*, 23 March 2016.

²⁰ *Investigation into the conduct of a TAFE NSW ICT manager*, 4 March 2016.

Operation Verdi²¹

This investigation concerned a university chancellor who provided confidential and/or sensitive information that he acquired in the course of his official functions to his business associate or otherwise made use of the information for the benefit of himself and his business associate.

Operation Drake²²

This is one of a number of investigations involving NSW correctional centre staff. The Commission found that a correctional officer had, in return for payment, trafficked contraband, including food, clothing, shoes, mail, mobile telephones, chargers, SIM cards, steroids and a plunger for steroid injection into a correctional centre for the use of inmates.

The Commission made five corruption prevention recommendations to Corrective Services NSW to help minimise and prevent the recurrence of such behaviour.

Operation Nickel²³

This investigation related to road safety and concerned the conduct of a NSW heavy vehicle competency assessor who, in return for payment, exercised his official functions to make false entries in learner drivers' log books that he had assessed them as competent to drive heavy vehicles. This then allowed them to obtain a heavy vehicle licence. He was found to have engaged in corrupt conduct.

Operation Atlas²⁴

This is an example one of a number of investigations into corruption involving local council officials and developers. Apart from uncovering significant corruption, the investigation resulted in a proclamation under the *Local Government Act 1993* that all civic offices in relation to Wollongong City Council be declared vacant and the suspension of the development consent granted by the Council for a proposed \$100 million development with a view to its revocation because of serious corrupt conduct in connection with the grant of the consent.

The Commission made 27 corruption prevention recommendations – two to the Minister for Planning, four to the Department of Planning, one to all NSW local councils and 20 to the council.

²¹ Investigation into the conduct of John Cassidy, then chancellor of the UNE, in relation to the sale of the Tattersalls hotel, 30 October 2014.

²² Investigation into the smuggling of contraband into the Metropolitan Special Programs Centre at the Long Bay Correctional Complex, 25 January 2013.

²³ Investigation into false certification of heavy vehicle competency-based assessments by a Roads and Maritime Services accredited assessor, 24 January 2014.

²⁴ Report on an investigation into corruption allegations affecting Wollongong City Council (Parts 1, 2 & 3), 2008.

Operation Ambrosia²⁵

This investigation uncovered a range of improper conduct associated with the issue of NSW contractor building and building trades licences. It is one of a number of investigations conducted by the Commission which concerned fraudulent certification of qualifications.

Corrupt conduct findings were made against over 30 people in relation to the provision of false information (including, in some cases, false references and fraudulent TAFE qualifications) concerning an applicant's building experience in support of, or as part of a, building licence application to the NSW Office of Fair Trading (OFT) or assessment portfolio to the Building Industry Skills Centre (BISC). Conduct examined included creating false documentation asserting that persons had fulfilled the requirements for the diploma of structural engineering, knowing the documentation would be used in support of applications to the OFT for building licences, creating false "Statements of Practical Experience" to be used in support of building licence applications and arranging for building licence applicants to obtain false documentation indicating that they had fulfilled the requirements for the diploma of structural engineering.

The Commission made a total of 24 corruption prevention recommendations to the OFT, the BISC, the NSW Department of Education and Training in relation to TAFE and TAFE Plus, the minister for education and training, and the Vocational Education and Training Accreditation Board.

²⁵ *Investigation into schemes to fraudulently obtain building licences*, 20 December 2005.

Section 3: The Commission's powers

The success of any anti-corruption agency will, to a significant extent, depend on its powers. The secretive nature of corruption means that extraordinary powers are needed to effectively investigate and expose such conduct.

The Commission has been entrusted with significant powers under the ICAC Act and other legislation. While the Commission's powers are extensive, they are not unique when compared to powers provided to other agencies, including the NSW Police Integrity Commission, the NSW Crime Commission, the Australian Crime Commission, other state-based anti-corruption commissions, Special Commissions of Inquiry and Royal Commissions.

The Commission's experience over the past 26 years is that these powers are necessary and appropriate to effectively investigate and expose corrupt conduct and to enable it to identify weaknesses in NSW public sector procedures and practices with a view to working with the relevant public authorities to reduce the opportunities for corrupt conduct.

Overview of powers

Under the ICAC Act, the Commission has power to:

- obtain information from a public authority or public official (s 21)
- obtain documents (s 22)
- enter public premises to inspect and take copies of documents (s 23)
- conduct compulsory examinations (s 30)
- conduct a public inquiry (s 31)
- summons a witness to attend and give evidence and/or produce documents or other things at a compulsory examination or public inquiry (s 35)
- arrest a witness who fails to attend in answer to a summons (or is unlikely to comply with the summons) (s 36)
- issue or apply for the issue of a search warrant (s 40)
- prepare reports on its investigations (s 74).

In addition to these powers, the Commission can:

- apply for telecommunications interception warrants under the *Telecommunications (Interception and Access) Act 1979*
- obtain approval under the *Law Enforcement (Controlled Operations) Act 1997* for the conduct of operations that would otherwise be unlawful
- obtain authorisation to use false identities under the *Law Enforcement and National Security (Assumed Identities) Act 2010*
- apply for warrants to use listening devices, tracking devices, optical surveillance devices and/or data surveillance devices under the *Surveillance Devices Act 2007*.

Statistical information on the use of some of these powers in the 2013–14 reporting period and the 2014-15 reporting period are set out below.

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
Search warrant (s 40)	33	17
Assumed identity approvals	3	0
Controlled operation approvals	0	0
Surveillance device warrants	4	2
Telephone interception warrants	21	5
Stored communications warrants	3	0
Number of compulsory examinations	203	127
Number of public inquiries	9	7
Number of public inquiry days	84	64
Investigation reports published	12	4

Compulsory examinations and public inquiries

One of the most significant powers of the Commission is to conduct compulsory examinations and public inquiries. These are conducted as part of an investigation. These powers are set out in Division 3 of Part 4 of the ICAC Act.

The Commission is not bound by the rules or practice of evidence.²⁶ A person attending a compulsory examination or public inquiry is not entitled to refuse to answer questions or produce documents relevant to the investigation on the grounds that the answer or production may incriminate the witness, or on any other ground of privilege, or the ground of any duty of secrecy or other restriction on disclosure, or on any other ground.²⁷ If a witness objects to giving the answer or producing the document, they must still give the answer or produce the document but the answer or document will not then be admissible against them in any civil, criminal or disciplinary proceedings (except for proceedings for an offence under the ICAC Act).²⁸ The purpose of these provisions is to enable the Commission to get to the

²⁶ Section 17 ICAC Act.

²⁷ Section 37(2) ICAC Act.

²⁸ Sections 37 & 38 ICAC Act. Section 114A(5) allows the evidence of a public official to be used in disciplinary proceedings against the public official where the Commission has made a finding that the public official has engaged in corrupt conduct or has attempted to engage in corrupt conduct.

truth of what happened. The trade-off is that admissions of wrongdoing and other evidence will not be admissible against the witness in subsequent criminal proceedings. The Commission's primary function however is to expose corrupt conduct. The requirement that a witness must answer questions and produce documents, even where the answer or document cannot be later used in a prosecution, is a vital tool in unlocking the secrecy surrounding corruption.

Before conducting a public inquiry, the Commission must be satisfied that it is in the public interest to do so and must consider:

- 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 persons concerned.²⁹

Public inquiries are a significant mechanism for exposing truth and encouraging high standards of behaviour in public officials and others. Public inquiries provide transparency in the way in which the Commission operates and promotes public confidence in those operations. They may also result in people with relevant information becoming aware of the Commission's interest in a particular matter and coming forward with that information. A public inquiry may also be used to "clear the air" where public attention has been drawn to significant allegations which, upon investigation, are found to be baseless.

The issue of whether the Commission should conduct its hearings in public was examined as part of the 2005 review conducted by Bruce McClintock SC.³⁰ He dealt with the issue in the following manner:

*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 publically determined.*³¹

The issue was again considered by the Independent Panel comprising the Hon Murray Gleeson AC and Mr McClintock SC which conducted the 2015 review of the Commission's jurisdiction. The Panel supported the above views and went on to say:

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

²⁹ Section 31(2), ICAC Act.

³⁰ Independent review of the Independent Commission Against Corruption Act 1988, Final Report (2005).

³¹ Ibid paragraph 6.5.25.

*not attracted to the idea that the powers of the ICAC should all be exercised in private.*³²

Corrupt conduct findings

In addition to making factual findings, the Commission may make findings that a person has engaged in corrupt conduct if it is satisfied that the conduct is serious corrupt conduct. The power to make such a finding is an important part of the Commission's role.

Given that the Commission must conduct its investigations with a view to determining whether corrupt conduct has occurred, is occurring or is about to occur, it is appropriate that, at the conclusion of an investigation, the Commission state whether or not such conduct has actually occurred. A finding of corrupt conduct provides a succinct statement of the improper conduct engaged in by the affected person. There will be cases where it is clear that a person has acted corruptly, even though there may be insufficient admissible evidence to warrant a criminal prosecution or the taking of other action. If a person is charged with a criminal offence and acquitted, any finding of corrupt conduct stands. In such cases a finding of corrupt conduct may be the only adverse consequence the person incurs.

The ability to make findings of corrupt conduct is also relevant to the Commission's deterrence and education roles.

It may assist the Select Committee to understand the approach adopted by the Commission in determining whether to make a corrupt conduct finding.

First, the Commission makes findings of relevant facts on the balance of probabilities.

The Commission then determines whether those facts come within the terms of s 8(1), s 8(2) or 8(2A) of the ICAC Act.

If they do, the Commission then considers s 9 of the ICAC Act and the jurisdictional requirements of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of s 9(5).

In the case of s 9(1)(a) and s 9(5), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

In the case of s 9(1)(b), s 9(1)(c) and s 9(1)(d), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has

³² Independent Panel – review of the jurisdiction of the Independent Commission Against Corruption, Report (2015).

engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

The Commission appreciates that a finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. The availability of judicial review also serves to ensure that findings are only made within jurisdiction after affording procedural fairness and on a rational and logical basis.

Commission investigations, including hearings, are inquisitorial, not adversarial or criminal in their nature. Hearings are neither trials nor committals.

The standard of proof in Commission proceedings is the civil standard; that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. However, because of the seriousness of the findings which may be made, the Commission bears in mind what was said by Dixon J in *Briginshaw v Briginshaw*:

*...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*³³

As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, this formulation is to be understood as:

*...merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*³⁴

³³ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

³⁴ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

Section 4: Prosecutions and convictions

The Terms of Reference require the Select Committee to inquire into and report on the effectiveness of current state agencies in prosecuting corruption and misconduct.

The number of prosecutions commenced or convictions recorded is an imperfect indicator of success in the fight against corruption.

While there have been a significant number of criminal prosecutions and convictions arising from the Commission's investigations, the Commission does not consider it is appropriate to regard the rate of criminal prosecutions and convictions as a measure of its success. The degree to which such a performance measure should be applied to any anti-corruption agency will depend to a significant extent on the role and jurisdiction of the particular agency.

The argument that successful prevention of corrupt conduct requires, in every case, a criminal conviction, 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. As the definition of corrupt conduct in the ICAC Act demonstrates, corruption may occur where the conduct does not involve a criminal offence but could constitute or involve a disciplinary offence, grounds for dismissal or, in the case of a Minister of the Crown or a member of Parliament, a substantial breach of an applicable code of conduct. In many cases the conduct investigated and exposed may be capable of constituting or involving a criminal offence but there may be insufficient evidence admissible in court proceedings to warrant a prosecution or, if a prosecution is commenced, it may not succeed for a variety of reasons.

In this regard it is relevant to consider comments made in May 1988 by then NSW Premier, the Hon Nick Greiner, in his second reading speech of the Independent Commission Against Corruption Bill:

*...it would be crass and naïve to measure the success of the ... Commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and most importantly of community confidence in public administration in this State.*³⁵

This issue was considered in the review of the ICAC Act conducted by Mr McClintock SC:

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

³⁵ Hansard, 26 May 1988, p. 675.

*where it is more important to ascertain what happened than to obtain a criminal conviction.*³⁶

While these comments apply to the Commission, they are of wider applicability and should be considered in the context of the role of any national integrity commission.

Ample evidence, including evidence by way of admissions, may be obtained to make factual and corrupt conduct findings, however there are many factors that affect whether or not there will be sufficient evidence in admissible form to warrant prosecution.

While the Commission has extensive powers, these do not necessarily result in evidence that is admissible in a criminal prosecution. For example, if a witness gives evidence under objection that evidence is not admissible in evidence against the person in any subsequent criminal prosecution (except for a prosecution for an offence under the ICAC Act). A person may make admissions which disclose serious corrupt conduct but which are simply unavailable to be used in any prosecution. Other witnesses may give evidence to the Commission but not agree to provide a statement in admissible form or give oral evidence in court for the purpose of a criminal prosecution of that person. Critical witnesses may die or not otherwise be available.

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.

An emphasis on criminal prosecutions would require an integrity agency to primarily focus on obtaining evidence admissible in a court. This would inevitably influence a decision to follow a particular line of enquiry in circumstances where resources need to be allocated in accordance with the agency's principal functions. Such a constraint could compromise the capacity of the agency to fully investigate and expose corruption.

In the case of the Commission, 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.

Nevertheless, the Commission does work towards obtaining admissible evidence as far as possible during the course of its investigations.

Section 74A(2) of the ICAC Act requires the Commission to include in its investigation reports, in respect of each "affected" person, a statement as to whether or not, in all the circumstances, the Commission is of the opinion that consideration

³⁶ Ibid, paragraph 3.4.22.

should be given to, inter alia, obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence.

An “affected” person is someone described as such in a reference made by both Houses of Parliament or against whom, in the Commission’s opinion, substantial allegations have been made in the course of, or in connection with, the relevant investigation.

Work is undertaken within the Commission to prepare briefs of evidence for the DPP in a timely manner and to ensure that they are comprehensive so as to avoid the need for the DPP to have to request additional material.

As a matter of transparency, the Commission publishes on its website (www.icac.nsw.gov.au) and in its annual reports information concerning which briefs have been provided to the DPP, which prosecutions have been commenced, and the results of those prosecutions.