THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION (IBAC)

THE GOVERNMENT'S PROPOSED AMENDMENTS

Before the last election in 2010, Victorians were promised an IBAC that would be closely modelled on the NSW Independent Commission Against Corruption (ICAC). The Accountability Round Table (ART) among many others has contended that the *Independent Broad-based Anti-corruption Act* 2011 is seriously defective (see, *inter alia*, the ART's letter attached to the email to the parties dated 23 September 2014 and Appendix A of the other attachment to that email)..

The *Legislation Amendment Bill* 2014 includes proposals that –

(a) The offence of misconduct in public office be included in the definition of "relevant offence" in s.3;

(b) A new Division 3A be inserted, the effect of which is to permit the IBAC to conduct preliminary investigations to determine whether to investigate a matter under the Act;

(c) For the purpose of conducting a preliminary inquiry it be no longer necessary to satisfy the test in s.4(1) of the Act that requires the IBAC to articulate a state of facts which, if found proved beyond reasonable doubt at a trial, would constitute a relevant offence.

The proposed amending legislation, and the Explanatory Memorandum make it explicit that in a preliminary investigation, the IBAC is not entitled to use the powers granted by Part IV of

the IBAC legislation, i.e. that the IBAC cannot then use the powers of entry, search and seizure, the power to use a search warrant, or the power to seek a surveillance device warrant under the *Surveillance Devices Act* 1999.

A significant advance in the amending legislation is the inclusion of "misconduct in public office" in the definition of "relevant offence," an amendment which was sought by the IBAC Commissioner in the IBAC Special Report of April 2014.

While it is desirable that the IBAC be formally authorised to make preliminary investigations, this amendment is of little real consequence since the IBAC was already acting on the assumption that it had the right to make such investigations, although without using the coercive powers granted by Part IV of the Act. The *ICAC Act* plainly entitles the ICAC to use the coercive powers given by the legislation even when the ICAC is making preliminary investigations. It is clear that the ICAC's ability to do so was essential to the success of *Operation Jasper*, the investigation by the ICAC of the granting of mining licences in the Bylong Valley; and, since corruption is usually hidden, the ability to use coercive powers during preliminary investigations is essential to the IBAC's ability to function properly in uncovering corruption.

The IBAC will by virtue of the amendments be able to make preliminary inquiries into matters which include misconduct in public office. When, however, the IBAC has no more than a suspicion that some unidentified corruption may be occurring, it will remain unable to use the coercive powers granted in particular by Part IV of the IBAC legislation, since it will continue to be unable to identify facts which if found proved at trial beyond reasonable doubt would amount to a relevant offence.

Even if the legislation is amended as proposed, it will still fall far short of the ICAC model, and the IBAC will continue to be inadequately armed to expose corruption and severely constrained in its efforts. The ART contends that the legislation would remain defective, and that at least the following amendments to the *IBAC Act* are necessary – .

(a) the present definition of "corrupt conduct" is far too narrow and a much broader definition should be introduced, for example along the lines of s.8 of the *ICAC Act* 1988. Furthermore it should be for the IBAC Commissioner to determine what corruption is significant, and the IBAC should not be required by s.60(2) to investigate only "serious corrupt conduct." If any conduct is "corrupt" the IBAC should have the discretion to investigate it;

(b) the thresholds which presently prevent IBAC investigating any state of affairs which gives rise to a suspicion of corrupt conduct should be removed. See, for example, s.13 of the *ICAC Act,* which entitles the ICAC to investigate (*inter alia*) "any allegation or complaint that, or any circumstances which, in the Commissioner's opinion imply that … corrupt conduct … may have occurred, may be occurring or may be about to occur." . Removing these barriers would also require the removal of s.60(2) of the *IBAC Act,* and the passage in s.4 in the definition of "corrupt conduct" which stipulates "being conduct that would, if the facts were found proved beyond reasonable doubt at a trial constitute a relevant offence";

(c) if it be thought necessary a section such as s.12A of the *ICAC Act* could be introduced requiring the IBAC, as far as practicable, to direct its attention to serious and systemic conduct, but leaving it to the discretion of the IBAC Commissioner to determine the practicalities.

In other words, the narrow and constricted definition of corruption is wholly inappropriate to the IBAC's proper function. Secondly the IBAC should be entitled to use the full coercive powers of the legislation in conducting preliminary investigations, and will be unable to detect and expose hidden corruption without such powers. Thirdly the thresholds in s.4 and s.60(2) of the *IBAC Act* prevent the IBAC from conducting a full and proper investigation of any corruption unless the IBAC can articulate facts which, if found proved beyond

reasonable doubt at a trial would constitute a relevant offence. This threshold also is completely inappropriate if the IBAC is to have the ability to investigate corruption.

The ART seeks from each of the parties in the Parliament a statement of the commitments they are prepared to give to amend the IBAC legislation and provide the people of Victoria with an IBAC properly modelled on the N.S.W. ICAC, and able to function effectively in fighting and exposing corruption.

Hon Tim Smith QC

Chair; Accountability Round Table

9 October 2014