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Integrity Legislation Amendment Bill 2014

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Executive Summary

The Coalition Government’s Integrity Legislation Amendment Bill 2014 is designed to strengthen Victoria’s anti-corruption commission – the Independent Broad-based Anti-corruption Commission or ‘IBAC’ – and the State’s integrity framework more broadly.

The IBAC is Victoria’s first public-sector-wide anti-corruption commission and it has been subject to public comment and analysis.

In April 2014, the IBAC Commissioner published a special report following IBAC’s first year of being fully operational.

The Bill makes various amendments to Victoria’s integrity legislation largely in response to suggestions made by the special report.

Introduced: 16 September 2014

House: Legislative Assembly

2nd Reading: 17 September 2014

Commencement: The day after the day the Act receives the Royal Assent

Links to key documents including the Bill, Explanatory Memorandum, Statement of Compatibility and Second Reading Speech can be found on the Library's [New Bills Information Links](#) page for this Bill.

For further information on the progress of this Bill please visit the Victorian Legislation and Parliamentary Documents [website](#).

Introduction

The Integrity Legislation Amendment Bill 2014 ('the Bill') was introduced into the Victorian Parliament by the Napthine Coalition Government on 16 September 2014. The Bill is designed to strengthen Victoria's anti-corruption commission – the Independent Broad-based Anti-Corruption Commission or 'IBAC' – and the State's integrity framework more broadly.

The Bill makes amendments to the *Independent Broad-based Anti-Corruption Commission Act 2011* ('the IBAC Act') and to the *Ombudsman Act 1973*, the *Audit Act 1994*, and the *Public Interest Monitor Act 2011*, as well as minor amendments to various other Acts.

This Research Brief provides background information on the establishment of the IBAC and Victoria's current integrity framework, stakeholder responses to the IBAC legislation, and an overview of the special report published by the IBAC after its first year in operation.

The Research Brief then provides summaries of the Attorney-General's second reading speech for the Bill, the main provisions of the Bill itself, and stakeholder comment on the Bill.

The Research Brief concludes with some comparative information about New South Wales' Independent Commission Against Corruption or 'ICAC', including the ICAC's powers and recent high-profile investigations.

Readers are advised that the Parliamentary Library has previously published three briefing papers on key Bills establishing the IBAC, which provide further detailed information on anti-corruption commissions in general and the IBAC legislation.¹

¹ See: C. Ross, B. Merner & A. Delacorn (2011) '[Independent Broad-based Anti-corruption Commission Bill 2011](#)', *Current Issues Brief*, no. 1, Melbourne, Victorian Parliamentary Library; C. Ross, K. Richardson & B. Lesman (2012) '[Independent Broad-based Anti-corruption Commission Amendment \(Investigative Functions\) Bill 2011](#)', *Current Issues Brief*, no. 1, Melbourne, Victorian Parliamentary Library; C. Ross et al. (2012) '[Independent Broad-based Anti-corruption Commission Amendment \(Examinations\) Bill 2012](#)', *Current Issues Brief*, no. 2, Melbourne, Victorian Parliamentary Library.

I. Background

The Independent Broad-based Anti-corruption Commission was established by the Baillieu Coalition government and is Victoria's first public sector-wide anti-corruption commission. Similar bodies in other states include New South Wales' Independent Commission Against Corruption, Western Australia's Corruption and Crime Commission, Queensland's newly renamed and reformulated Crime and Corruption Commission, and Tasmania's Integrity Commission.² There is, however, significant variation across the powers and jurisdiction of these anti-corruption commissions.

In very broad terms, anti-corruption commissions are designed to expose and combat corruption in the public sector. They form part of the framework of accountability measures and independent agencies created by governments to ensure public sector integrity, which also includes Auditors-General, Ombudsmen, freedom of information legislation and whistleblower protections.

Anti-corruption commissions have coercive powers similar to those of a royal commission. For example, they have the ability to conduct hearings and compel testimony from witnesses at compulsory examinations. Accordingly, sometimes they are criticised for abrogating civil liberties.³

Anti-corruption commissions, like royal commissions, are inquisitorial, rather than adversarial like the Australian courts. In other words, anti-corruption commissions are intended to find out 'the truth' or the facts of the matter rather than determine which of two litigants has the better case. Anti-corruption commissions are also generally not bound by the rules of evidence and procedure applying in the courts.⁴

Importantly, anti-corruption commission findings have no binding legal effect. Their purpose is to ascertain the facts, expose corruption and report their findings and recommendations to the parliament. When a commission uncovers sufficient evidence of criminal offences it refers the matter to an appropriate prosecutorial body such as the Director of Public Prosecutions.⁵

Establishment of the IBAC and Other Integrity Reforms

The Liberal Nationals Coalition went to the 2010 Victorian state election with the policy to establish an independent broad-based anti-corruption commission based on

² South Australia established an Independent Commissioner Against Corruption in 2013, who is supported by the Office for Public Integrity, and is yet to issue an annual report. For further information see: Independent Commissioner Against Corruption (South Australia) (2014) '[ICAC](#)', South Australia Office of Public Integrity website.

³ See Ross et al. (2012) '[Independent Broad-based Anti-corruption Commission Amendment \(Examinations\) Bill 2012](#)', op. cit., p. 11.

⁴ *ibid.*, p. 7; S. Prasser (2006) *Royal Commissions and Public Inquiries in Australia*, Chatswood, LexisNexis Butterworths, pp.186-187.

⁵ *ibid.*

the model of those in other jurisdictions. The Coalition policy was to establish a 'one stop shop' anti-corruption body that would have jurisdiction across the entire public sector, as opposed to the then Labor policy for an integrity framework consisting of a number of different bodies.⁶ Coalition policy documents stated that the 'the independent broad-based anti-corruption commission to be known as IBAC will be modelled most closely on New South Wales' Independent Commission Against Corruption' except that the IBAC would also have jurisdiction over police and take over the functions of the Office of Police Integrity (NSW has a separate police oversight body).⁷ The Coalition also stated that the IBAC would have prevention and education functions, and be subject to strong oversight in the form of an independent inspector and a Parliamentary Joint Committee.⁸

The Coalition's success in the November 2010 state election ensured that the IBAC model became Victorian state government policy. In October 2011, the Government introduced the first of a number of Acts to establish the IBAC. The first piece of legislation created the Independent Broad-based Anti-corruption Commission Act 2011, and established the role of the IBAC Commissioner, the Parliamentary Committee to oversee the IBAC, and the IBAC's prevention and education functions.⁹

The *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2011* then provided the IBAC with the definition of 'corruption' it could investigate, its jurisdiction, and investigative powers.¹⁰ The *Independent Broad-based Anti-corruption Commission Amendment (Examinations) Act 2012* provided the IBAC with the power to conduct hearings and examine witnesses, as well as the mechanisms for the IBAC to refer matters to other bodies.¹¹ The IBAC was then formally established in July 2012 and, following the introduction of further legislation and the commencement of relevant provisions, became fully operational in February 2013.¹²

⁶ The Labor integrity policy for the 2010 election was based on the recommendations of the Proust Review, which had proposed a model that extended the powers of existing integrity bodies and established new bodies including the 'Victorian Integrity and Anti-corruption Commission'. See Ross, Merner & Delacorn (2011) *op. cit.*, pp. 7-8.

⁷ Victorian Liberal Nationals Coalition (2010) [The Victorian Liberal Nationals Coalition Plan for Integrity of Government](#), Coalition policy document, Election 2010, pp. 3-4; Liberal Victoria (2010) *IBAC: An Independent Broad-based Anti-corruption Commission for Victoria*, Coalition policy document, Election 2010, p. 24.

⁸ Victorian Liberal Nationals Coalition (2010) *op. cit.*, pp. 6-7.

⁹ See the Parliamentary Library's briefing paper on the Bill that became this Act: Ross, Merner & Delacorn (2011) ['Independent Broad-based Anti-corruption Commission Bill 2011'](#), *op. cit.*

¹⁰ See the Parliamentary Library's briefing paper on the Bill that became this Act: Ross, Richardson & Lesman (2012) ['Independent Broad-based Anti-corruption Commission Amendment \(Investigative Functions\) Bill 2011'](#), *op. cit.*

¹¹ See the Parliamentary Library's briefing paper on the Bill that became this Act: Ross et al. (2012) ['Independent Broad-based Anti-corruption Commission Amendment \(Examinations\) Bill 2012'](#), *op. cit.*

¹² C. Newton-Brown & P. Davis (2013) ['Victoria's New Integrity System'](#), Paper presented at the Australasian Study of Parliament Group Annual Conference, October 2013, Parliament House, Perth, p.1; Independent Broad-based Anti-Corruption Commission (2014) [Special Report Following IBAC's First Year of Being Fully Operational](#), Melbourne, IBAC, p. 6.

In addition to establishing the IBAC and the Parliamentary Committee to oversee it, the Government also introduced legislation to reform Victoria's integrity system more broadly. This has included the establishment of the Public Interest Monitor, the Freedom of Information Commissioner, the Victorian Inspectorate and the Parliamentary Accountability and Oversight Committee, and the amendment of powers of existing integrity entities such as the Ombudsman and the Auditor-General.¹³ Additionally, *Protected Disclosure Act 2012*, repealed and replaced the *Whistleblower Protection Act 2001*, and established the IBAC as the 'clearing house' for protected disclosures (previously the role of the Ombudsman).¹⁴

Stakeholder Comment on the IBAC Legislation

A number of stakeholders, including but not limited to anti-corruption commission experts the Hon. Tim Smith QC, the Hon. Stephen Charles QC and Adjunct Professor Colleen Lewis, as well as the Law Institute of Victoria, have published analysis and made submissions to the Government about the IBAC Act.¹⁵ Some of the main points articulated by this commentary are summarised below.

This stakeholder comment states that the scope of the IBAC, provided by the legislation, is relatively narrow in comparison to other Australian anti-corruption commissions, and particularly in comparison to New South Wales' ICAC.¹⁶ The functions of the IBAC are set out in section 15 of the IBAC Act and include identifying, exposing and investigating serious corrupt conduct and police misconduct, as well as assessing police conduct. Hence, the IBAC has a mandate to address 'serious corrupt conduct' across the public sector. In regard to police, it has greater powers and can also address 'misconduct' and assess police conduct.

The definition of 'corrupt conduct' is set out in section 4 of the IBAC Act (see Appendix A for the section in full) and is limited to conduct that would, if the facts were found proved beyond a reasonable doubt at a trial, constitute a relevant offence. The term 'relevant offence' is defined in section 3 of the IBAC Act as an indictable

¹³ Newton-Brown & Davis (2013) op. cit., p. 1.

¹⁴ T. Bailleu & A. McIntosh (2012) [New Bills Cap Coalition's Historic Integrity Reforms](#), media release, 13 November, p. 2.

¹⁵ See: S. Charles (2013) '[A Sheep in Wolf's Clothing? A Look at the Independent Broad-based Anti-corruption Commission \(and other commissions of inquiry\)](#)', *Victorian Bar News*, iss. 153, pp. 29-32; T. Smith (2012) '[The Victorian Independent Broad-based Anti-Corruption Commission \(IBAC\): A Toothless Tiger?](#)', Working Paper No. 1, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Melbourne; I. Killey (2014) '[Empower IBAC for the Good of Victoria](#)', *The Age*, 7 October; Law Institute of Victoria (2012) '[Legislation Creating the Independent Broad-based Anti-Corruption Commission](#)', Submission to Members of Parliament, 9 May, Melbourne; Law Institute of Victoria (2012) '[Independent Broad-based Anti-Corruption Commission- November 2012 Reforms](#)', Letter to Members of Parliament, 6 December, Melbourne; C. Lewis (2014) '[IBAC, Victoria's anti-corruption body, cannot investigate corruption in public office](#)', *The Age*, 9 July; C. Lewis (2014) '[Latest IBAC Incarnation is still not Roadworthy](#)', *The Age*, 24 September.

¹⁶ *ibid.*

offence against an Act or the common law offences in Victoria of attempting to pervert the course of justice; bribery of a public official; and perverting the course of justice.

The stakeholder comment has emphasised that the indictable common law offence of 'misconduct in public office' is not included within the IBAC's definition of corrupt conduct. The commentary says that misconduct in public office is included within the mandate of best-practice anti-corruption commissions, and that the IBAC's ability to combat corruption in Victoria will be limited if it cannot investigate misconduct across the public sector.¹⁷

The stakeholder comment has also emphasised that 'serious' corrupt conduct is not defined by the legislation. It states that leaving the term undefined could mean that people subject to IBAC investigations may try to challenge the validity of the investigation in court. The Law Institute of Victoria writes that:

'Serious' corrupt conduct is not defined and is left to be determined by the IBAC Commissioner with no guidance or parameters to help the Commissioner, other integrity bodies or the public understand where the threshold for 'serious' corrupt conduct should be drawn. It is possible that the Supreme Court will ultimately provide guidance in the context of any judicial review of the Commissioner's decisions.¹⁸

Stakeholder comment has also centred on the IBAC Act's provisions relating to IBAC's ability to commence an investigation. Section 60(2) of the IBAC Act provides that the IBAC must not conduct an investigation in accordance with its corrupt conduct investigative functions unless it is reasonably satisfied that the conduct is serious corrupt conduct. Lewis states that this limits the ability of the IBAC to begin an investigation because it cannot act unless it has evidence that a proscribed indictable offence might have been committed.¹⁹

Concerns have also been expressed that the restriction of the IBAC's investigative powers to 'serious' corruption means that misconduct and non-serious corruption will then need to be investigated by other bodies, such as the Ombudsman, and as to whether they will be equipped with the necessary powers and resources to deal with those matters.²⁰

¹⁷ *ibid.*

¹⁸ Law Institute of Victoria (2012) '[Legislation Creating the Independent Broad-based Anti-Corruption Commission](#)', *op. cit.*, p. 7.

¹⁹ Lewis (2014) '[IBAC, Victoria's anti-corruption body, cannot investigate corruption in public office](#)', *op. cit.*

²⁰ M. Pottenger & O. Monaghan (2012) '[Watchdogs with teeth: What Victoria can learn about fighting corruption](#)', *The Conversation*, 12 December.

Special Report Following IBAC's First Year of Being Fully Operational

In April 2014, the IBAC published a special report following its first year of being fully operational ('the special report').²¹ The special report provided an overview of IBAC's performance of its functions in its first year, including: investigations in the police and general public sector jurisdictions; reviews of internal police investigations and recommendations for reform; IBAC's prevention and education initiatives; and IBAC's interpretation and application of the IBAC Act.²²

The special report stated that from 10 February 2013 to 10 February 2014, 24 new cases were taken up for investigation by the IBAC. The IBAC's Annual Report for 2012-13 (the 2013-14 Annual Report is yet to be published) also provided details of IBAC's activity, a summary of which is reproduced in Appendix B.

In regard to the IBAC's interpretation and application of the IBAC Act, the special report noted that the IBAC and other Victorian integrity agencies are navigating new and complex legislation. The special report stated that IBAC's Annual Report for 2012-13 expressed confidence that 'the IBAC Act provided a solid initial framework for Victoria's new integrity regime and that, as with any such legislation, it would not be until it was applied in practice that areas for improvement would be identified'.²³ The special report also referenced an IBAC report published in November 2013 which had explained IBAC's role as being 'to implement the legislation and engage Parliament and the government on any proposed refinements and amendments, based on a body of work made up of experience and caseload'.²⁴

The special report then stated that now, following IBAC's first year of being fully operational, it 'highlights areas that may benefit from amendment, and identifies some aspects of the legislation that restrict the performance of IBAC's investigative functions'.²⁵ The special report then listed the matters below (notably it states that, in some of these situations, the IBAC has adopted a practical approach and acted by reference to good practice in other jurisdictions):²⁶

²¹ Independent Broad-based Anti-Corruption Commission (2014) [Special Report Following IBAC's First Year of Being Fully Operational](#), op. cit.

²² *ibid.*, p. 5.

²³ *ibid.*, p. 23. Also see: Independent Broad-based Anti-Corruption Commission (2013) [IBAC Annual Report 2012-13](#), Melbourne, IBAC.

²⁴ Independent Broad-based Anti-Corruption Commission (2014) op. cit., p. 23. Also see: Independent Broad-based Anti-Corruption Commission (2013) [Special Report Concerning Certain Operations in 2013](#), November, Melbourne, IBAC.

²⁵ Independent Broad-based Anti-Corruption Commission (2014) op. cit., p. 23.

²⁶ The following matters are quoted directly from the special report but with some detail omitted for the sake of brevity as indicated by the use of ellipses (...). Please see the report itself for the text in its entirety.

Good practice powers not found in the IBAC legislation

Some powers commonly found in equivalent legislation in other jurisdictions are not found in the IBAC legislation. There is nothing, for example, in the IBAC Act which expressly permits preliminary enquiries or preliminary investigation. However, these are often necessary in deciding whether or not a matter should be investigated by IBAC, referred to another body for investigation or dismissed... Accordingly, IBAC undertakes preliminary enquiries and investigations, without using coercive and some other powers. Other examples of powers not found expressly in the IBAC Act relate to notifying persons of interest who are exonerated or cleared by an investigation, or reviewing its own prior decisions...²⁷

Dismissing complaints

It is unclear whether complaints and notifications can be dismissed by IBAC on discretionary grounds other than the sole one prescribed in the IBAC Act... The legislation effectively provides that complaints or notifications stand dismissed following a decision by IBAC that a matter does not warrant investigation, as distinct from any IBAC decision to dismiss matters on more general discretionary grounds.²⁸

Coercive examinations

The IBAC Act also lacks clarity in relation to coercive examinations, which are an important part of IBAC's investigative functions... [Particularly in regards to who may conduct examinations, and whether a non-IBAC officer who views an examination live on a remote monitor is 'present' at the examination].²⁹

Confidentiality notices

An important investigative tool is the ability to bind persons who have provided certain information to ongoing confidentiality, and thereby reduce the risk of prejudicing an investigation. The IBAC Act provides for confidentiality notices in respect of 'restricted matters', defined as including inter alia evidence 'given' or the contents of documents 'produced' to IBAC. The IBAC Act, however, is not clear whether documents or evidence provided voluntarily (as opposed to under compulsion) to IBAC would constitute a 'restricted matter'. If not, then a confidentiality notice cannot be issued by IBAC...³⁰

Threshold for corrupt conduct investigations

Concerns have been raised publicly that the legislative threshold for IBAC to commence an investigation in its public sector jurisdiction is vague, too high and therefore liable to challenge in the Supreme Court. Parliament has clearly sought to balance the need for an effective integrity system against the need to protect individuals and public sector entities from arbitrary invasions of their privacy and property...

[However, there] have been corrupt conduct allegations where IBAC has not felt able to commence investigations because of threshold restrictions in the IBAC Act. Not all of these were suitable for referral elsewhere. This constraint has possibly undermined

²⁷ Independent Broad-based Anti-Corruption Commission (2014) op. cit., p. 23.

²⁸ *ibid.*

²⁹ *ibid.*, p. 24.

³⁰ *ibid.*

IBAC's ability to perform and achieve its principal objects and functions. Whilst the balance between an effective integrity system and civil liberties is quite properly a matter for the Parliament to determine, this constraint should be a matter of concern and further consideration.³¹

Misconduct in public office

The IBAC Act does not include the common law offence of misconduct in public office (MIPO) as something IBAC can investigate in its corrupt conduct jurisdiction. This contrasts with other integrity regimes in Australia, and has been criticised publicly... [Although, the IBAC is intended to investigate only serious corrupt conduct, the offence of MIPO can be serious] ...and less serious instances of possible MIPO could still be referred by IBAC to other prescribed bodies for investigation. Once this is appreciated, it must follow that a body like IBAC, whose primary functions include the exposure of serious corrupt conduct within the public sector, should be able to investigate allegations of serious MIPO.³²

Protected disclosures – Notifications and protected disclosure status

The new whistleblower protection regime, which IBAC now principally administers, raises issues concerning the intended threshold for disclosures to qualify for relevant protections... there are situations where persons who have disclosed information appear not to qualify for protection. IBAC interprets the PD Act [Protected Disclosure Act 2012] such that persons cannot be considered for protected disclosure status if they first make a disclosure to another public sector entity, and where IBAC is not notified under the PD Act by an entity that is prescribed for the purpose of receiving such a disclosure. As a result, whistleblowers who desire the protections offered by the PD Act may in some cases be deterred from coming forward with valuable information about corrupt conduct, a matter that also calls for further consideration.³³

Protected disclosures – Investigating Members of Parliament

There seems to be a misconception that because potential protected disclosures about Members of Parliament can only be made to Parliament's Presiding Officers, IBAC can only investigate possible serious corrupt conduct by a Member once notified by a relevant Presiding Officer. IBAC does not read the relevant legislation in that way. Upon such a complaint being made directly to it, IBAC will inform the complainant of the need to direct the complaint to the relevant Presiding Officer should PD Act protections be sought. IBAC otherwise regards itself as able to investigate such matters (ie. whether or not IBAC is subsequently notified of a possible protected disclosure by a Presiding Officer).³⁴

Protected disclosures – Limitations on referrals of protected disclosure complaints

Under section 73 of the IBAC Act, IBAC can only refer protected disclosure complaints to a limited number of entities, being the VO [Victorian Ombudsman], Victoria Police, and the VI [Victorian Inspectorate]. In some cases, it has been that the

³¹ *ibid.*, p. 25.

³² *ibid.*, p. 26.

³³ *ibid.*

³⁴ *ibid.*, p. 27.

matters would be better referred to another more specialist integrity body or to the head of the relevant public sector entity. Consideration therefore should be given by Parliament to broadening the choices available to IBAC for its referrals of such matters. At the very least, it seems desirable the VO should have that choice for such referrals from IBAC.³⁵

IBAC or police to investigate?

Another area of uncertainty concerns whether or not Victoria Police may investigate police misconduct or unlawful conduct without reference to IBAC. Under current legislative arrangements, some of which predate the new integrity scheme legislation, the circumstances in which police must notify IBAC (and await referral) are unclear.³⁶

Corrupt conduct notifications – Mandatory reporting

Mandatory reporting of apparent corrupt conduct contributes to the integrity system... However, public sector body heads and CEOs of local councils, whilst having the power to report, are not obliged to notify IBAC of corrupt conduct they become aware of. IBAC believes that the Parliament should consider whether such reporting by principal officers of public sector and local government entities – as is the case in other Australian jurisdictions – should be mandatory, at the very least for more serious matters within the public sector.³⁷

Corrupt conduct notifications – Dismiss, investigate or make referral – another category

In receiving complaints and notifications, IBAC must dismiss, investigate or make a referral to another body. There are practical issues, however, that warrant consideration of a fourth option... that would permit IBAC, at its discretion, to suspend its decision and monitor progress, seek information as necessary, review the outcome, or even call in the investigation when appropriate.³⁸

Corrupt conduct notifications – Confidentiality restrictions and notifying entities

A final issue arising in relation to corrupt conduct notifications is whether the confidentiality restrictions set out in section 184 of the IBAC Act are intended to apply to notifying entities as well as to complainants... [At present, the language of section 184 suggests] that confidentiality restrictions are intended only to apply to complainants (and persons to whom they are permitted to divulge the otherwise restricted information to) rather than to notifying entities...³⁹

³⁵ *ibid.*

³⁶ *ibid.*, p. 27. The special report further states that: 'Nevertheless IBAC reads the relevant legislation as requiring Victoria Police not only to notify IBAC promptly of possible protected disclosures, but also to await a referral from IBAC before commencing any investigation. In the past, Victoria Police has taken a different view regarding its ability to commence such investigations without such a referral. This issue was discussed constructively in late 2013 between the IBAC Commissioner and the CCP. As a consequence, new procedures are being implemented to ensure a consistent approach between the two agencies.'

³⁷ *ibid.*, p. 28.

³⁸ *ibid.*

³⁹ *ibid.*, pp. 28-29.

Issues around referrals

IBAC may refer certain complaints or notifications to a public sector body head for investigation. Issues have arisen between IBAC and other statutory body heads concerning these provisions. One involved a statutory body that had previously decided itself that the referred matter did not warrant investigation. In that case, IBAC had not been made aware by the complainant before its referral of the complaint that the referral body had already looked into the matter and reached that conclusion. IBAC is proceeding on the basis that referral entities are to consider the matter referred to them in good faith, but are not required to undertake a fresh investigation... In circumstances where a complainant is not satisfied with a decision by an entity not to investigate a matter, IBAC can withdraw a referral and investigate the matter itself.⁴⁰

On 16 September 2014, the day the Integrity Legislation Amendment Bill was introduced, the Government issued a media release announcing the reforms to strengthen Victoria's integrity regime. The Premier stated that 'the changes deliver on the Coalition Government's commitment to consider and respond to a range of suggestions put forward by IBAC and other integrity bodies arising from their experience of the initial operation of the Coalition's integrity reforms.'⁴¹ The Attorney-General said that the 'IBAC has already demonstrated its valuable role in educating about, preventing and investigating possible corruption.' He further said that: 'This legislation builds on what IBAC has described as the solid initial framework for Victoria's new integrity regime and makes a range of improvements based on experience and feedback from the operation of the new regime'.⁴²

⁴⁰ *ibid.*, p. 29.

⁴¹ D. Napthine & R. Clark (2014) [Reforms to Further Strengthen Victoria's Integrity Regime](#), media release, 16 September.

⁴² *ibid.*

2. Second Reading Speech

The Attorney-General, the Hon. Robert Clark, provided the Legislative Assembly with the second reading speech for the Integrity Legislation Amendment Bill on 17 September 2014. He opened the speech by stating that the Bill makes important reforms to the IBAC Act and other Acts to improve the operation of Victoria's integrity legislation. He provided an overview of the establishment and purpose of the IBAC before referring to the special report published by the IBAC after its first 12 months in operation. He said that, in the report, the IBAC made 'suggestions for possible improvements, based on its experience of interpreting and applying the legislation'. He then said that the Bill responds to a number of those suggestions.⁴³

The Attorney-General stated that the Bill will modify the threshold that must be met before the IBAC can commence an investigation into public sector corruption in order to make clear that the IBAC can investigate a matter whenever it is: 'satisfied that the matter, if established, would constitute serious corrupt conduct and IBAC suspects on reasonable grounds that the conduct involved has in fact occurred and is occurring.'⁴⁴

He said that additionally, the Bill will amend the IBAC Act to grant the IBAC the explicit power to 'undertake preliminary investigations before determining whether to dismiss, investigate, or refer a complaint or notification'. He said that a preliminary investigation will not involve the use of coercive powers but that heads of public sector bodies will be required to assist the IBAC as needed.⁴⁵

Notably, the Attorney-General said that the Bill will amend the definition of 'relevant offence' in the IBAC Act to include the offence of misconduct in public office.⁴⁶

He then stated that the Bill will also amend the requirements that apply to public sector bodies to notify the IBAC of possible instances of corruption, so that all public sector body heads are required to notify the IBAC of 'any matter where they suspect on reasonable grounds that corrupt conduct has occurred or is occurring'. He said that the IBAC will 'be empowered to issue directions on what matters need or need not be disclosed under the requirement, and how notifications should be made.'⁴⁷

The Attorney-General continued on to discuss the IBAC's referral of protected disclosure complaints to the Ombudsman. He said that the Bill will give express power to the Ombudsman to undertake preliminary enquiries into protected disclosure complaints and will also clarify that the Ombudsman can discontinue investigating complaints, including protected disclosure complaints, for certain reasons. He said that these 'changes will ensure that the Ombudsman is not unduly burdened by the

⁴³ Victoria, Legislative Assembly (2014) [Debates](#), 17 September, Book 13, p. 3354.

⁴⁴ *ibid.*, pp. 3354-3355.

⁴⁵ *ibid.*, p. 3355.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

obligation to investigate the high volume of protected disclosure complaints it receives from IBAC.⁴⁸

He further stated that, in response to a recommendation by the Legislative Assembly Privileges Committee, the Bill also provides that when a House of Parliament refers an Ombudsman or IBAC report to a Parliamentary committee to determine if there has been a breach of privilege or contempt of Parliament, the Ombudsman or the IBAC can be required to provide the committee with information or evidence collected during the preparation of the report. They are not required or permitted, however, to disclose information that could lead to the identification of a person who has made an assessable disclosure.⁴⁹

In conclusion, the Attorney-General stated that the Bill also makes a range of technical amendments to the IBAC Act and to other Acts in the integrity framework, which he summarised as follows:

Among other matters, the bill will clarify and expand IBAC's powers of delegation; allow IBAC to appoint suitably qualified persons to preside at an examination; add to the list of bodies to which IBAC may disclose information; allow IBAC to apply to the Magistrates Court for a search warrant, as an alternative to applying to the Supreme Court; provide that a Public Interest Monitor need not hold a current legal practice certificate; and, allow a Public Interest Monitor to disclose information to staff working for them without unnecessary restriction.⁵⁰

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*, p. 3356.

3. The Bill

This section of the Research Brief provides an overview of some of the main provisions of the Integrity Legislation Amendment Bill 2014. For a description of the Bill in its entirety, readers are directed to the Explanatory Memorandum.

Part I—Commencement

Purpose

Clause 1 of the Bill states that the purpose of the proposed Act is to amend the Independent Broad-based Anti-corruption Commission Act 2011, the Ombudsman Act 1973 and the Public Interest Monitor Act 2011 to improve the operation and effectiveness of those Acts; and to make amendments to certain other Acts.

Commencement

Clause 2 of the Bill provides that the Act will come into operation on the day after the day it receives Royal Assent.

Part 2—Independent Broad-based Anti-corruption Commission Act 2011

Amendment of section 3 – Definitions

Clause 3 of the Bill amends a number of definitions in section 3 of the IBAC Act. Notably, the definition of ‘relevant offence’ is amended so that it includes the common law offence of ‘misconduct in public office’ thereby including it within IBAC’s corrupt conduct jurisdiction.

Amendment of section 4 – Corrupt conduct

Clause 4 of the Bill amends section 4 of the IBAC Act which sets out the definition of ‘corrupt conduct’ and currently states that it is ‘conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence’ (s 4(1)).

Clause 4 inserts a new subsection 4(1A) which relates to the new Division 3A of Part 3 (that provides for preliminary investigations) and the amended section 60(2) (which provides for IBAC’s ability to commence an investigation).

The new subsection 4(1A) provides that, for the purposes of the Division 3A of Part 3 and section 60(2), the definition of corrupt conduct in subsection 4(1) applies as if the words ‘if the facts were found proved beyond a reasonable doubt at a trial’ were omitted. Hence, it is sufficient for commencing investigations and preliminary investigations for the conduct to ‘constitute a relevant offence’.

Amendment of section 41 – Disclosure or provision of information by the IBAC

Clause 9 of the Bill inserts into the IBAC Act a new section 41(5) which provides that if an IBAC report is referred to a Parliamentary committee to determine whether there has been a breach of parliamentary privilege or contempt of Parliament, the IBAC is required to provide information acquired during the preparation of the report, if the committee requests it (as long as the information is not likely to lead to the identification of a person who has made an assessable disclosure).

Amendment of section 57 – Notifications to the IBAC

Clause 11 of the Bill amends section 57 of the IBAC Act to provide that the relevant principal officer (the head of a public sector body) *must* notify the IBAC of any matter which the person suspects on reasonable grounds involves corrupt conduct. At present, section 57 provides that principal officers *may* notify the IBAC of any matter that the person believes on reasonable grounds constitutes corrupt conduct.

New Division 3A inserted – Preliminary Investigations

Clause 14 of the Bill inserts new Division 3A into Part 3 of the IBAC Act. The new Division 3A provides for preliminary investigations and consists of new sections 59A - 59F:

- The IBAC may conduct a preliminary investigation for the purpose of determining whether to dismiss, refer or investigate a complaint or notification (s 59A).
- The IBAC may conduct a preliminary investigation in relation to an own motion investigation (s 59B).
- A principal officer must assist the IBAC in the conduct of a preliminary investigation (s 59C).
- Part 4 of the Act which provides for the IBAC's investigatory powers does not apply to or in respect of a preliminary investigation (s 59D). The Explanatory Memorandum to the Bill states that this means that coercive powers that would otherwise be available to the IBAC in conducting an investigation cannot be used in conducting a preliminary investigation.⁵¹
- Unless otherwise expressly provided, a reference in this Act to 'an investigation' does not include a preliminary investigation (s 59E).
- A preliminary investigation is not an investigation for the purposes of making an application for the issue of a surveillance device warrant (s 59F).

Amendment of section 60 – Conducting investigations about corrupt conduct

Clause 15 of the Bill removes the current section 60(2) – which provides that the IBAC must not conduct an investigation into corrupt conduct unless it is reasonably satisfied that the conduct is serious corrupt conduct – and replaces it with new section 60(2) and (2A).

⁵¹ Explanatory Memorandum, Integrity Legislation Amendment Bill 2014, p. 5.

The new section 60(2) provides that the IBAC must not conduct an investigation in accordance with its corrupt conduct investigation functions unless the IBAC is satisfied that the conduct would, if proven, constitute serious corrupt conduct; and suspects on reasonable grounds that the conduct is occurring or has occurred.

New section 60(2A) then provides that for the purposes of subsection (2) the IBAC may have regard to the following: the alleged conduct as specified in the complaint or notification; any information obtained by the IBAC by holding a preliminary investigation; and inferences that may be drawn from the matters specified in the complaint or notification or from the preliminary investigation.

The Explanatory Memorandum states that these amendments will:

...allow IBAC to make a subjective determination that the conduct, if proven, would constitute serious corrupt conduct, and establish a threshold of "reasonable suspicion" (contrasted with the current threshold of "reasonable satisfaction" equivalent to a threshold of "reasonable belief") as to whether the conduct is occurring or has occurred. IBAC may rely on specified forms of information, including inferences drawn from the information it has to hand, to satisfy these requirements.⁵²

Amendment of section 115 – Power to hold examinations

Clause 20 of the Bill amends section 115 of the IBAC Act which currently states that 'For the purposes of an investigation, the IBAC may hold an examination'. Clause 20 inserts further details which provide that the IBAC must appoint either the Commissioner or a person eligible to be appointed as Commissioner (who has taken an oath or made an affirmation under s 37(2)) to preside at the examination.

Amendment of sections 118 and 119 – Being 'present' at examinations

Clauses 21 and 22 of the Bill amend sections 118 and 119 of the IBAC Act and, among other things, clarify that being 'present' at an examination includes being 'remotely present' (for example by video link).

Part 3—Ombudsman Act

Amendment of section 13A – Conducting of enquiries

Clause 33 of the Bill amends section 13A of the Ombudsman Act, which deals with how the Ombudsman may conduct enquiries. The existing section 13A(1) provides that the Ombudsman may conduct an inquiry for the purposes of determining whether an investigation under this Act (other than a protected disclosure complaint) should be conducted; or whether the matter may be resolved informally.

Clause 33 amends section 13A(1) so that it instead reads that the Ombudsman may conduct an enquiry for the purposes of determining whether an investigation under

⁵² Explanatory Memorandum, p. 6.

this Act should be conducted; or whether the matter (other than a protected disclosure complaint) may be resolved informally.

The Explanatory Memorandum states that this change removes an existing restriction so as to provide that the Ombudsman may conduct an enquiry into ‘a protected disclosure complaint for the purposes of determining whether an investigation under the Act should be conducted, but not for the purposes of determining whether the protected disclosure complaint may be resolved informally.’⁵³

Amendment of section 15 – How the Ombudsman is to deal with certain complaints

Clause 36 of the Bill replaces the title of section 15 of the Ombudsman Act with a new title and replaces section 15(1) with a new extended section 15(1).

The existing section 15 is titled ‘Ombudsman must refuse to deal with certain complaints’. The existing section 15(1) provides that the Ombudsman must refuse to deal with a complaint that appears to involve corrupt conduct or police personnel conduct other than notifying the IBAC or the Victorian Inspectorate. (Notably, under sections 13(1)(a) and 13AA(1)(a) of the Ombudsman Act, the Ombudsman can only investigate ‘corrupt conduct’ if she receives a referral from the IBAC).⁵⁴

The new title for section 15 is ‘How the Ombudsman is to deal with certain complaints’. The new extended section provides that:

- (1) The Ombudsman must not deal with a complaint that involves police personnel conduct, other than to notify the IBAC or the Victorian Inspectorate.
- (1A) Subject to subsection (1B), the Ombudsman must not deal with a complaint that the Ombudsman suspects on reasonable grounds involves corrupt conduct *until* the Ombudsman notifies the IBAC or the Victorian Inspectorate.
- (1B) If the IBAC notifies the Ombudsman that it has determined to investigate a matter involving corrupt conduct or to refer it to another body, the Ombudsman must not continue to deal with a complaint that involves the matter or continue to conduct an investigation in relation to the matter unless— the IBAC and the Ombudsman agree, to the extent and subject to the conditions agreed; or where the IBAC refers the matter to another body, to the extent of the referral; or the IBAC completes or discontinues its investigation into the matter.

The Explanatory Memorandum states that these amendments will:

...allow the Ombudsman to continue to deal with a complaint or investigate a matter where IBAC has determined to investigate or refer the same matter, while avoiding interference between investigations. For example, the amendment would allow IBAC and the Ombudsman to agree that the Ombudsman can continue investigating a

⁵³ *ibid.*, p. 9.

⁵⁴ Law Institute of Victoria (2014) [Integrity Legislation Amendment Bill 2014: Submission to the Attorney-General](#), 13 October, Melbourne, LIV, p. 3.

matter that involves maladministration, while IBAC investigates elements of the matter relating to serious corrupt conduct. The amendments do not change the position with respect to police personnel conduct.⁵⁵

Amendment of section 15D – Ombudsman must refuse to investigate certain protected disclosure complaints

Clause 39 of the Bill repeals sections 15D(2) and (3) of the Ombudsman Act. The Explanatory Memorandum states that these provisions impose unnecessary limits on the circumstances in which the Ombudsman can investigate protected disclosure complaints and are not reflected in the Protected Disclosure Act.⁵⁶

Amendment of section 16A – Ombudsman may conduct own motion investigation

Clause 40 of the Bill replaces section 16A(2) of the Ombudsman Act with a new section 16A(2) and (2A), and deals with the Ombudsman's power to conduct own motion investigations into matters of corrupt conduct.

The existing section 16A(2) provides that the Ombudsman must not conduct an own motion investigation in to any administrative action that appears to involve corrupt conduct. Notably, section 16D provides that the Ombudsman may deal with referred matters if the matter can be made the subject of an own motion investigation, and that section 16A(2) does not apply to a referred matter that is a notification from the IBAC.

The new section 16A(2) proposed by the Bill provides – subject to subsection (2A) – that the Ombudsman must not conduct an own motion investigation into any administrative action that the Ombudsman suspects on reasonable grounds involves corrupt conduct *until* the Ombudsman notifies the IBAC or the Victorian Inspectorate.

The new subsection (2A) then provides that if the IBAC notifies the Ombudsman that it has determined to investigate a matter or to refer it to another body, the Ombudsman must not conduct, or continue to conduct, an own motion investigation into any administrative action that involves the matter unless — the IBAC and the Ombudsman agree, to the extent and subject to the conditions agreed; or where the IBAC refers the matter to another body, to the extent of the referral; or if the IBAC completes or discontinues its investigations into the matter.

Amendment of section 16L – Disclosure of information by the Ombudsman

Clause 42 of the Bill inserts new subsection 16L(4) into the Ombudsman Act to provide that, if an Ombudsman report is referred to a Parliamentary committee to determine whether there has been a breach of Parliamentary privilege or contempt of the Parliament, the Ombudsman is required to provide information acquired during the preparation of the report if the committee requests it (as long as the information is

⁵⁵ *ibid.*, p. 10.

⁵⁶ *ibid.*, p. 11.

not likely to lead to the identification of a person who has made an assessable disclosure). This is the same provision as new section 41(5) inserted into the IBAC Act by clause 9 of the Bill.

Amendment of section 17 – Procedure relating to investigation.

Clause 43 of the Bill inserts new subsections 17(6B) – 17(6E) into the Ombudsman Act to provide the Ombudsman with the ability to *discontinue* an investigation in certain circumstances. It also provides that the Ombudsman must state the reasons for the discontinuation and inform the relevant people.

Part 4 — Public Interest Monitor Act 2011

Clauses 46 – 49 of the Bill make minor amendments to the Public Interest Monitor Act.

Part 5 — Amendments to Other Acts

Clauses 50 – 60 of the Bill make amendments to a number of other Acts. The majority of them relate to the mandatory notification provisions and directions issued under new section 57A of the IBAC Act.

Amendment of section 26 of the Protected Disclosure Act 2012

Clause 57 of the Bill amends section 26 of the Protected Disclosure Act to, as the Explanatory Memorandum states, give the IBAC a discretion to assess whether, in its view, a disclosure notified to IBAC through some other means than is specified in section 26(1) is a protected disclosure.⁵⁷

⁵⁷ *ibid.*, p. 15.

4. Stakeholder Comment on the Bill

At the time this Research Brief was prepared, comment on the Integrity Legislation Amendment Bill included published articles by Adjunct Professor Colleen Lewis and Ian Killey, former general counsel to the Victorian Ombudsman, Office of Police Integrity and Department of Premier and Cabinet, as well as a submission to Members of Parliament by the Law Institute of Victoria, and a critique by the Accountability Round Table sent to the major parties.

Newspaper Articles by Lewis and Killey

Lewis states that there are positive elements in the amendments proposed by the Bill, particularly that they will allow the anti-corruption body to investigate misconduct in public office. She emphasises, however, that the IBAC will not be able to use coercive powers in preliminary investigations and that it needs to be able to do so to function effectively.⁵⁸

Killey asserts that as (with the exception of the police) the IBAC is only empowered to investigate 'serious corruption', the Ombudsman's office is the only body empowered to investigate corruption matters that do not fall within the scope of 'serious corruption'. He says that this is not the traditional role of the Ombudsman and that the current Ombudsman, Deborah Glass, has stated that her office will be focussing on its traditional role. Killey states that the Bill does not address this matter but rather seeks to expand the Ombudsman's corruption jurisdiction. He argues that under the amendments proposed by the Bill, the Ombudsman:

...will be obliged to investigate or otherwise deal with all complaints of corruption made to her office until such time as the IBAC deals with them. Currently, she is prevented from dealing with such matters until IBAC refers them to her. Furthermore, those amendments will provide her with jurisdiction to conduct own-motion investigations of corruption matters, a jurisdiction she does not have now. And she will remain, as she said to a parliamentary committee in June, obliged to investigate whistleblower disclosures referred to her by IBAC and she has not been provided with the power she sought to further refer those disclosures to other bodies.⁵⁹

Law Institute of Victoria Submission

The Law Institute of Victoria states that it welcomes the amendments contained in the Bill as a step towards strengthening Victoria's anti-corruption system. For example, it welcomes the amendments that require all public sector heads to notify the IBAC of any matter that they suspect on reasonable grounds involves corrupt conduct, and the amendments that lower the threshold for investigating corrupt conduct from the previous test that the IBAC had to be 'reasonably satisfied' that the conduct was serious corrupt conduct (s 60(2)) to the new 'reasonable suspicion' test (subject to comments below). The LIV also said that it welcomes the amendment that broadens

⁵⁸ Lewis (2014) 'Latest IBAC incarnation is still not roadworthy', op. cit.

⁵⁹ Killey (2014) op. cit.

the definition of 'relevant offence' (s 3) to include the common law offence of misconduct in public office.⁶⁰

The LIV also states, however, that further reforms are required. Firstly, it asserts that the IBAC's investigative powers continue to be limited by the narrow scope of offences within the definition of 'corrupt conduct' (ss 3-4) and the lack of guidance about the criteria of 'serious' corrupt conduct (s 60(2)). It emphasises that if the IBAC's 'powers are not clearly defined and expressed, then there is a real risk that any evidence gathered will be inadmissible in subsequent prosecutions because it was gathered in breach of technical provisions of the IBAC legislation.'⁶¹

The LIV suggests that the IBAC would be more effective if the definition of corrupt conduct was broadened to include all common law offences, or at least all indictable common law offences; the threshold for commencing investigations was further lowered to suspicion on reasonable grounds that conduct, if proven, would constitute corrupt conduct; and legislative guidance is given as to what might constitute 'serious' corrupt conduct.⁶²

Secondly, the LIV states that under the current integrity framework, it is unclear which body should investigate non-serious corruption allegations (other than those concerning police). It asserts that the Bill should be amended to clarify the Ombudsman's role in relation to the investigation of non-serious corrupt conduct. The LIV states that clauses 36 and 40 of the Bill arguably broaden the Ombudsman's jurisdiction to deal with allegations of corrupt conduct, but that the Bill does not amend section 13 of the Ombudsman Act which:

...establishes that the 'principal function' of the Ombudsman *does not* include investigation of administrative action that might involve corrupt conduct. Nor does it amend s 13AA(1), which provides the Ombudsman with the limited jurisdiction to enquire into or investigate any administrative action that appears to involve corrupt conduct on a referral from IBAC.⁶³

Thirdly, the LIV states that it welcomes the Bill's inclusion of a power for the IBAC to perform preliminary investigations. It further states, however, that to be effective 'the preliminary investigation power should include some limited coercive powers held by IBAC for conducting an investigation'.⁶⁴ The LIV suggests, for example, that the 'power to summons documents, similar to s 120(1)(b) of the IBAC Act, would in particular assist IBAC to make preliminary inquiries'.⁶⁵

⁶⁰ Law Institute of Victoria (2014) [Integrity Legislation Amendment Bill 2014: Submission to the Attorney-General](#), op. cit., p. 1.

⁶¹ *ibid.*, p. 2.

⁶² *ibid.*, p. 3.

⁶³ *ibid.*, pp. 3-4. Note: emphasis in original text.

⁶⁴ *ibid.*, p. 5.

⁶⁵ *ibid.*

Fourthly, the LIV states its concern that protected disclosures made about Members of Parliament must be made to the Presiding Officers (under s 19 of the Protected Disclosure Act) and suggests that the Bill be amended to allow disclosures relating to MPs to be made directly to the IBAC.⁶⁶

Accountability Round Table Critique

The Accountability Round Table (ART) has also published a critique of the Bill written by the Hon. Tim Smith QC and the Hon. Stephen Charles QC. It emphasises the limitations of the IBAC Act and the differences between Victoria's IBAC and New South Wales' ICAC.⁶⁷

In the critique, the ART states that it supports the Bill's proposed amendment to include 'misconduct in public office' in the definition of 'relevant offence'.⁶⁸ The ART also states that it is desirable for the IBAC to be formally authorised to make preliminary investigations, but that its effectiveness will be constrained if it is unable to use the coercive powers, granted in particular by Part IV of the IBAC legislation.⁶⁹ The ART states that:

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.⁷⁰

The ART also states that if the Bill is passed, further amendments to the IBAC Act will still be required to broaden the definition of 'corrupt conduct' (for example along the lines of section 8 of the *Independent Commission Against Corruption Act 1988* (NSW)) and to remove the thresholds in section 4 and section 60(2) that restrict investigations.⁷¹

⁶⁶ *ibid.*, p. 6.

⁶⁷ T. Smith & S. Charles (2014) '[The Independent Broad-based Anti-corruption Commission \(IBAC\): The Government's Proposed Amendments](#)', Accountability Round Table.

⁶⁸ *ibid.*, p. 2.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*, pp. 2-3.

5. Other Jurisdiction – New South Wales’ ICAC

This final section of the Research Brief provides a short overview of aspects of New South Wales’ Independent Commission Against Corruption that are relevant to the Integrity Legislation Amendment Bill 2014. Readers are advised that further information on interstate anti-corruption commissions is provided in the Parliamentary Library’s previous publications on IBAC Bills.⁷²

The ICAC was established in New South Wales in March 1989, under the Independent Commission Against Corruption Act 1988 (the ‘ICAC Act’), in response to community concern following exposure of corruption in various areas of the NSW public sector.⁷³ There have been six Commissioners of the ICAC since it was established, all serving statutory five year terms.⁷⁴ Between 1989 and 2009, the ICAC made corrupt conduct findings against more than 600 individuals over the course of 93 public inquiries and close to 290 formal investigations.⁷⁵ According to its most recent annual report, during 2012–13 the ICAC:

- Commenced 71 new preliminary investigations, and 22 new full investigations;
- Conducted six public inquiries over 108 days;
- Delivered six investigation reports to Parliament;
- Conducted 257 compulsory examinations over 118 days;
- Made corrupt conduct findings against 56 people; and
- Sought advice from the Director of Public Prosecutions on 18 occasions.⁷⁶

Recent investigations of interest include those into:

- alleged misuse of position by the Hon. Edward Obeid with respect to retail leases at Circular Quay (Operation Cyrus), decisions favouring Direct Health Solutions Pty Ltd (Operation Meeka) and water licences at Cherrydale Park (Operation Cabot);⁷⁷

⁷² See: Ross, Merner & Delacorn (2011) [‘Independent Broad-based Anti-corruption Commission Bill 2011’](#), op. cit.; Ross, Richardson & Lesman (2012) [‘Independent Broad-based Anti-corruption Commission Amendment \(Investigative Functions\) Bill 2011’](#), op. cit.; Ross et al. (2012) [‘Independent Broad-based Anti-corruption Commission Amendment \(Examinations\) Bill 2012’](#), op. cit.

⁷³ Independent Commission Against Corruption (NSW) (2014) [‘History’](#), ICAC website.

⁷⁴ *ibid.*

⁷⁵ Independent Commission Against Corruption (NSW) (2014) [‘Achievements’](#), ICAC website; For a full list of, and access to, the ICAC’s investigations see: Independent Commission Against Corruption (NSW) (2014) [‘Past Investigations’](#), ICAC website.

⁷⁶ Independent Commission Against Corruption (NSW) (2013) [Annual Report: 2012–13](#), ICAC, October, p. 3.

⁷⁷ See: Independent Commission Against Corruption (NSW) (2014) [‘NSW public sector – allegations concerning Circular Quay retail licences and other matters \(Operations Cyrus, Meeka and Cabot\)’](#), ICAC website.

- alleged misconduct between the Hon. Ian McDonald and the Hon. Edward Obeid in opening an area in the Bylong Valley for coal exploration (Operation Jasper);⁷⁸ and
- allegations of misconduct between public officials and Australian Water Holdings Pty Ltd (Operation Credo), and of concealed payments being received by certain NSW Members of Parliament (Operation Spicer).⁷⁹

Notably, Operation Spicer is an ongoing investigation that has seen a number of key NSW and federal politicians implicated.⁸⁰

Key Statutory Provisions

The ICAC has broad investigative powers under the ICAC Act.⁸¹ Under section 13(1), the principal function of the ICAC (amongst others) is to investigate any allegation, complaint or circumstances that the ICAC considers implies:

- (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.

Corrupt conduct includes any conduct by a public official that: constitutes or involves dishonest or partial exercise of their official functions; involves a breach of public trust; or involves the misuse of information or material acquired in the course of official functions, whether for their benefit or for the benefit of another person. Corrupt conduct can also include the conduct of any person (whether or not they are a public official) that adversely affects the honest or impartial exercise of official functions by any public official, or group, body or authority of public officials (section 8(1)).

Specific actions that may adversely affect the exercise of official functions, either directly or indirectly, are listed under section 8(2) and include conduct such as official misconduct (including breach of trust, fraud in office, malfeasance and extortion), bribery, blackmail, tax evasion, illegal drug dealings, illegal gambling, forgery and homicide or violence. Actions that can be considered corrupt are limited by section 9 whereby, for conduct to be considered corrupt, it must constitute or involve a criminal offence, disciplinary offence, reasonable grounds for dismissal or termination,

⁷⁸ Independent Commission Against Corruption (NSW) (2014) '[NSW public sector – allegations concerning mining exploration licences \(Operations Jasper and Acacia\) and the provision of a motor vehicle to a former NSW government minister \(Operation Indus\)](#)', ICAC website.

⁷⁹ Independent Commission Against Corruption (NSW) (2014) '[NSW public officials and members of parliament – allegations concerning corrupt conduct involving Australian Water Holdings Pty Ltd \(Operation Credo\) and allegations concerning soliciting, receiving and concealing payments \(Operation Spicer\)](#)', ICAC website.

⁸⁰ See: M. Whitbourn (2014) '[Operation Spicer: From bag men to big man. ICAC shines spotlight on Liberals](#)', *Sydney Morning Herald*, 12 September. The ABC's [interactive graph](#) of how the investigation interrelates provides a useful breakdown of the issues. See: T. Leslie, S. Elvery & B. Spraggon (2014) '[Untangling the web: how the ICAC scandal unfolded](#)', *ABC News*, 21 August.

⁸¹ A useful comparison of the IBAC and ICAC legislation is available at: Smith (2012) op. cit., pp. 9–16.

or a substantial breach of an applicable code of conduct (in the case of Ministers or Members of Parliament).

In exercising its functions, the ICAC is required under section 12A, as far as practicable to 'direct its attention to serious corrupt conduct and systemic corrupt conduct', although under section 12 'the protection of the public interest and the prevention of breaches of public trust' are paramount.

The ICAC can commence investigations based on its own initiative, or in response to a complaint, report or reference, and such an investigation can be conducted even though no public official or other person has been implicated (sections 20(1) and (2)). Further, the ICAC can consider such matters it thinks fit when deciding whether to commence or continue an investigation, and it is dependent on the Commission's opinion whether the subject-matter of the investigation is trivial or whether the conduct is too remote to justify an investigation (section 20(2)). Section 20A gives the ICAC the express power to conduct preliminary investigations, which can be conducted to, for example, 'discover or identify conduct that might be made subject of a more complete investigation'. These preliminary investigations are 'in the nature of an investigation (section 20A(1)), and so the coercive powers of investigations can be used.

Appendix A: Current Definition of ‘Corrupt Conduct’ in the IBAC Act 2011

Section 3 *relevant offence* means—

- (a) an indictable offence against an Act; or
- (b) any of the following common law offences committed in Victoria—
 - (i) attempt to pervert the course of justice;
 - (ii) bribery of a public official;
 - (iii) perverting the course of justice.

Section 4 *Corrupt conduct*

- (1) For the purposes of this Act, *corrupt conduct* means conduct—
 - (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
 - (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
 - (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
 - (d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
 - (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d)—
being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a **relevant offence**.
- (2) Conduct may be *corrupt conduct* for the purposes of this Act if—
 - (a) all or any part of the conduct occurs outside Victoria, including outside Australia; and
 - (b) the conduct would be corrupt conduct if it occurred in Victoria.
- (3) This Act does not apply to any conduct of any person that can be considered by the Court of Disputed Returns in proceedings in relation to a petition under Part 8 of the **Electoral Act 2002**.

Appendix B: IBAC Performance (Annual Report 2012–13)

IBAC performance at a glance

	No.
Number of investigations carried over from Office of Police Integrity	31
Assessable disclosures/complaints made to IBAC	638
Assessable disclosures referred to IBAC by the Chief Commissioner of Police or other entities	29
Disclosures determined by IBAC to be protected disclosure complaints	131
Protected disclosure complaints endorsed for investigation by IBAC ¹	6
Protected disclosure complaints referred to another investigating entity	105
Protected disclosure complaints dismissed by IBAC	19
Disclosures that IBAC has been unable to investigate or refer to another investigating body	4
New investigations commenced	5
Technological support to another agency's investigations	11
Enquiries	495
Interpreter/translator-assisted enquiries	3
Corruption-prevention initiatives, including educational presentations ²	72

¹ As at 30 June 2013, one of the six endorsed investigations had not commenced.

² Education initiatives were delivered by OPI and IBAC during the financial year.

Source: Independent Broad-based Anti-Corruption Commission (2013) [Annual Report 2012–13](#), IBAC, p. 10.

Note: The IBAC became fully operational in February 2013. At the time this Research Brief was prepared the IBAC's Annual Report for 2013-14 was yet to be published.

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Ombudsman Act 1973 (Vic)
Audit Act 1994 (Vic)
Public Interest Monitor Act 2011 (Vic)
Protected Disclosure Act 2012 (Vic)
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