SUBMISSION OF THE ACCOUNTABILITY ROUND TABLE REGARDING THE INTEGRITY AND ACCOUNTABILITY LEGISLATION AMENDMENT (A STRONGER SYSTEM) BILL 2015

The Amending Bill, if passed, will bring about the following changes. The Bill –

(a) Broadens the definition of "corrupt conduct" by inserting "misconduct in public office" into the definition of "relevant offence" (cl. 3(f)).

(b) Reduces the threshold before which IBAC may not conduct a full investigation by removing from the definition of "corrupt conduct", in s.4(1) of the Act, the words "if the facts were found proved beyond reasonable doubt at a trial"; and by providing that (for the purposes of s.60(2) of the Act) IBAC may assume that the required state of mind to commit the relevant offence can be proven (cl. 4).

(c) Directs IBAC to prioritise its attention to investigating and exposing corrupt conduct that IBAC considers may be serious or systemic, without restricting IBAC's discretion to investigate any matter that IBAC considers may constitute corrupt conduct (cl. 8).

(d) No longer limits IBAC to investigating "serious" corrupt conduct. IBAC must now not conduct an investigation unless it suspects "on reasonable grounds" that conduct constitutes corrupt conduct (cl. 8 & 23).

(e) Authorises IBAC during preliminary inquiries, to require the principal officer of a public body to provide any relevant information to IBAC and to require any person to attend and produce documents or other things (cl. 22).

(f) Gives power to IBAC to make certain delegations in appropriate circumstances (cl. 9 & 11).

(g) Establishes consistent requirements for mandatory notification to IBAC of possible corrupt conduct by other bodies (cl. 20).

(h) Authorises IBAC to apply to the Magistrates' Court for search warrants (cl. 28).

(i) Amends the Act in such a way as appears to avoid the difficulties faced by ICAC as a result of the decision of the High Court in *Independent Commission Against Corruption v. Cunneen* [2015] HCA 14 (cl. 4).

(j) Expressly authorises IBAC to conduct preliminary inquiries (cl. 22).

Those who drafted the amending Bill clearly assumed, since the IBAC Act does not expressly authorise IBAC to make preliminary inquiries, that IBAC has no power to do so. The same assumption was made by those who drafted the 2014 amending Bill which was tabled, but not debated or enacted, during the life of the previous Parliament.

This assumption is incorrect. IBAC's Commissioner and staff have acted on the assumption that it was necessarily implied in the legislation that IBAC should be entitled to make preliminary inquiries (without using the full powers granted by the

IBAC Act) to determine what matters justified an IBAC investigation. But IBAC's assumption was justified by High Court authority. In 1986, a Parliamentary Commission of Inquiry was appointed to inquire and advise the Parliament whether any conduct of the plaintiff, Justice Lionel Murphy, had been such as to amount in its opinion to proved misbehaviour within the meaning of s.72 of the Constitution. In June 1986, Justice Murphy's counsel applied for an injunction on the ground that the Act setting up the Commission did not authorise investigations to be made. The High Court in a joint judgment rejected the application forthwith, saying –

> "The mere conduct of private inquiries, in what we must assume would be a responsible manner, is not likely to cause any real damage to the plaintiff's reputation. Further no one requires special authority at law simply to make inquiries."
> (Murphy v Lush (1986) 65 ALR 651; 60 ALJR 523)

THE HISTORICAL CONTEXT

Before the 2010 Victorian election, the Baillieu-led Opposition proposed that, if elected, it would establish an Independent Broad-Based Anti-Corruption Commission that would be closely modelled on the NSW ICAC and that the IBAC, together with the Ombudsman and the Auditor-General, would provide a seamless coverage of the range of Victoria's integrity issues.

The NSW ICAC had and has, powers to start an investigation that are very broad. "Corrupt conduct" is defined in the ICAC Act 1988 as including any activity that could adversely affect directly or indirectly the exercise of official functions by a public official, together with a broad variety of particular offences. ICAC's jurisdiction is very widely expressed and ICAC is entitled to investigate (using its full powers) "any allegation or complaint that, or any circumstances which, in the Commissioner's opinion imply that … corrupt conduct … may have occurred, maybe occurring, or

maybe about to occur". ICAC is plainly entitled to investigate an allegation amounting to misconduct in public office, including by a Minister. ICAC is also required, as far as practicable, to direct its attention to serious and systemic corrupt conduct. ICAC's powers to commence investigations are so widely expressed that the entitlement to investigate upon suspicion of corruption is, for practical purposes, unlimited. This, in turn, makes it very difficult for an investigated party to obstruct or delay an investigation by launching proceedings in the Supreme Court of NSW for an injunction.

In 2011 the IBAC legislation was enacted. The Act contained a very narrow definition of "corrupt conduct" which did not even include misconduct in public office. The expression "relevant offence" was very narrowly defined, including only three specific common law offences, and an "indictable offence against an act", committed in Victoria. The definition of "corrupt conduct" was tied to the definition of "relevant offence", further limiting it by the words "being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence". The IBAC Act then added that "the IBAC must not conduct an investigation … unless it is reasonably satisfied that the conduct is serious corrupt conduct".

The IBAC Act thus produced an IBAC which certainly not could be said to be "closely modelled on the NSW ICAC". It was inexplicable that IBAC's jurisdiction did not include misconduct in public office. It was equally inexplicable that IBAC was not to be entitled to investigate a complaint unless it was able to articulate facts which if proved beyond reasonable doubt would constitute one of the narrow range of relevant offences, and also constitute serious corrupt conduct. The high threshold which the Act imposed before IBAC could commence any investigation led to IBAC 's officers being required to identify the indictable offence or offences involved before any investigation could commence. The reality was that IBAC required a well-informed insider's complaint before it could investigate. IBAC's staff were told that

they had to be able to identify the indictable offence involved before they could start an investigation under the Act.

The Baillieu Government clearly did not fulfil its promise to produce an IBAC closely modelled on ICAC. The version enacted was an IBAC stifled by the thresholds deliberately built into the Act, unable to commence any investigation using the great powers which the Act included until it was already so well-informed as to the specific details of the corruption in question as to be able to articulate them. IBAC was also hamstrung by the narrow definition of corrupt conduct, which did not include misconduct in public office, the obvious and essential tool for investigating public service corruption. These defects in the legislation inevitably aroused immediate criticism that the Government had created a paper tiger, a sham anti-corruption commission which was intended not to have the necessary powers or ability to be able to investigate those who had created it.

Before the 2014 Victorian election, amending legislation had been proposed which, if enacted, would have lessened the problems and thresholds facing IBAC in any investigation. The most important amendment was to be the inclusion of misconduct in public office in the definition of “relevant offence”. But the proposed amendments then sought to introduce a distinction between preliminary and full investigations, the effect of which was first to permit IBAC to make preliminary investigations. IBAC, however, was not to be allowed to use its full powers in a preliminary investigation and could only use these powers once it was able to articulate facts which would constitute a relevant offence. The result of these proposals was to retain the original threshold, and also set up a new potential barrier, the point at which IBAC was to become entitled to embark on a full investigation, at the end of the preliminary stage. The proposed amendment to grant express power to make preliminary investigations was, as has already been submitted, therefore no real advance and arguably was a complicating factor, since it enabled IBAC to use its full powers as at a later time. As

soon as a suspect became aware that an IBAC investigation was to progress, he or it could seek an injunction from the court, and IBAC would then be obliged to lay bare its suspicions and the results of its inquiries to that stage in order to demonstrate the indictable offence supposedly in question.

THE EFFECT OF THE PROPOSED AMENDMENTS

Before the 2014 election, the then Labor opposition indicated that, if elected, it would amend the IBAC Act by the inclusion of the offence of misconduct in public office in the definition of "corrupt conduct" and that it would reduce the thresholds in the legislation that prevented IBAC from commencing investigations. The changes mentioned above in the amending Bill achieve these results, and clearly show that the Government has met its pre-election commitments. The Bill, if passed, will therefore be a good start in providing Victoria with a more effective anti-corruption commission. But the Bill is only a good start. Substantial further improvement is necessary before Victoria will have an effective integrity and accountability system – which the opening words and clause 1 of the amending Bill show is the Government's stated intention. The IBAC Act, as amended by the Bill, will still fall far short of what is required to address the risks of corruption.

Even after the amending Bill is enacted, the Victorian IBAC will be in a much weaker position than ICAC. IBAC will be permitted to conduct a preliminary inquiry, but not to proceed to a full inquiry until a threshold has been passed. That threshold require**s** IBAC to "suspect on reasonable grounds that the conduct constitutes corrupt conduct". IBAC must, therefore, have a degree of knowledge of the conduct, sufficient to have reasonable grounds to enable it to identify the facts which would constitute one of the offences, indictable or otherwise, which make up a "relevant offence" and, thus, corrupt conduct. Although it will no longer be necessary for IBAC to establish the required state of mind (or mens rea) for the relevant offence, which it

is now entitled to assume, IBAC must still be able to articulate the other facts necessary to establish a relevant offence.

One of the consequences of the setting-up of such a threshold is that as soon as IBAC seeks to use any of its powers under the IBAC Act, the suspected person is likely to become aware of IBAC's interest and may seek an injunction to stay the investigation. It will then become necessary for IBAC to establish it has reasonable grounds for suspicion, and it will probably have to expose all of its investigation and the results thereof for the suspected party to examine. The inevitable consequences will be delay and an opportunity to hide or destroy incriminating evidence.

It must also be borne in mind that in criminal proceedings all accused persons have the right to apply to the trial judge to exclude evidence on the ground that it was obtained illegally or improperly. As a result, where the prosecution is relying in a trial upon evidence obtained during an IBAC investigation, the accused and their representatives will look for opportunities to apply to the court for the exclusion of evidence on the grounds that it was obtained illegally or improperly – e.g. that the threshold requirements for an investigation have not been met at the time IBAC obtained the evidence sought or tendered at the trial. That principle is also available in respect of evidence obtained in subsequent investigations carried out as a result of evidence that was illegally or improperly obtained.

THE NEED FOR THE IBAC ACT TO BE CLOSELY MODELLED ON THE ICAC LEGISLATION

The Accountability Round Table (ART) accepts that the enormous powers granted to a body such as ICAC raise serious concerns for the legislature. Basic civil liberties are seriously at risk; such as the right not to be required to incriminate oneself, the potential effect on those publicly named in open hearings, the intrusions into persons' homes and the seizure of property, and the bugging of telephones all raise entirely

legitimate concerns for Members of Parliament who are asked to enact the IBAC (or ICAC) legislation. It must be remembered that the Chief Examiner under the Victorian Major Crimes Investigation legislation has had very similar powers to those sought for the IBAC for more than a decade, without any major complaint as to the Chief Examiner's use of his powers. In reality, the only significant power IBAC is given by the IBAC Act not possessed by other law enforcement agencies is the power to conduct coercive examinations – a power also conferred on Royal Commissioners and, more recently, on Coroners. Royal Commissioners are not constrained by "thresholds" (apart from their terms of reference) or by "preliminary investigation" provisions. The question for Parliament becomes how to balance the community's need to expose and eradicate corruption against the damage done to basic civil liberties potentially involved in anti-corruption legislation. This is a debate which has continued since 1983, when the results of the Costigan Commission's investigations into the Painters and Dockers Union led to demands for the establishment of a National Crime Authority.

The criminal law which protects the Victorian community, is supervised by the courts, and the police force is the community's guardian for this purpose, seeking out criminals and bringing them to trial. Criminal activity is generally obvious and unmistakable – e.g. perjury, murder, theft, assault and rape. But corruption is usually hidden, secret, insidious and difficult to discover, identify and eradicate. A lack of adequate whistle-blower protection in Victoria also discourages the revelation of corruption. The failure of Victorian governments to adopt best practice to regulate and bring transparency to political funding and lobbying has increased the opportunities and therefore the risk of corruption.

The recent investigation by IBAC into the Department of Education has shown that millions of dollars in the state school system's annual budget was siphoned off to "banker schools", and that these funds were then used by senior officials as a slush

fund. But there would have been nothing surprising at first in large sums being transferred to individual schools. Similarly, the IBAC investigation into the Transport Department has shown that large contracts were awarded by two departmental budget officers to companies they had set up. In both cases ART argues that it is likely that IBAC received a well-informed tip-off from some disaffected person, and a paper trail was accessible without which no investigation would or could have occurred.

One of the most recent serious investigations of corruption in Australia was the investigation by the NSW ICAC into the Obeid family's involvement in the grant of mining licences in the Bylong Valley. The public record shows that at the outset ICAC had no knowledge of what was occurring. Even in the opening of the public hearings (in November 2011, after many months of secret investigations), ICAC's counsel said that what had taken place might simply be explained as "bad government".

The NSW ICAC legislation was introduced in 1988 by the Greiner Government. There is little or no threshold ICAC must cross before it can commence an investigation. Since IBAC already has the power to make preliminary inquiries, what the Bill will add is a statutory power to require a "relevant principal officer" (departmental head) to provide information. But there will in reality be serious limits – particularly in the Obeid type of situation. The proposed section 59D probably does not entitle IBAC to require information from, for example, a Minister. A departmental head may not know what corrupt behaviour is occurring in the department in question. Insofar as IBAC's investigations (of the Education and Transport Departments) are concerned, it would, without the necessary tip-offs, have been difficult for IBAC to frame a request for any information to the head of either Department, or to frame an appropriate request for documents or other things "to any person". In either case, IBAC might be aware of money being paid to schools or

transport contracts being awarded to companies. But it is no easy matter to determine how IBAC could, at the outset, frame the relevant request or when IBAC will obtain the necessary amount of information to have reasonable grounds for suspecting corruption. In either case the prospect of an early application for an obstructive stay remains, which IBAC would have to surmount by putting its cards on the judicial table. Similar practical difficulties will arise in respect of the other proposed statutory power (s.59E – the power to compel people to produce documents or other things to the IBAC). Neither proposal will adequately address the limitations that will be introduced by the proposed new threshold for investigations by the IBAC.

If the IBAC Act is amended in the manner proposed by the Bill, IBAC will, ART submits, plainly be weaker than the NSW ICAC. It will remain unable to use its full investigatory powers at the outset of an investigation, which will be hampered during the preliminary phase of an investigation by the difficulty of knowing what information to seek from a departmental head, or what documents or other things to seek from other persons, and it will still have the threshold to cross before it can mount a full investigation.

THE ART's ADDITIONAL CONCERNS

The first additional concern raised by the ART is that the creation of a power to make preliminary inquiries with limited assistance involves a further threshold for IBAC to cross, and therefore a further opportunity for a suspect to seek a court injunction. It also creates opportunities in subsequent criminal proceedings for arguments to be raised challenging the admissibility of evidence obtained as a result of the use of these powers in preliminary inquiries. In ART's submission, IBAC should have the same untrammelled discretion and opportunity at the outset to commence an

investigation, for the same reasons and in the same manner as ICAC was able to proceed in the investigation of the grant of mining licences in the Bylong Valley.

ART previously submitted that the present definition of "corrupt conduct" is too narrow and, even after the amendments proposed by the Bill, **it** will remain too narrow. As with ICAC, it should be for the IBAC Commissioner to determine what is significant and, if any conduct is "corrupt", IBAC should have the discretion to investigate it. Similarly ART submitted that the thresholds that presently prevent IBAC investigating any state of affairs which give rise to a reasonable suspicion of corrupt conduct should be removed.

If these submissions are accepted, IBAC will have wide powers conferred upon it. There is a risk that such powers will be misused. The interests of the community, and of those who are subject to investigation, demand that the risk be minimised – but without detracting from the efficacy of the powers themselves. This can be done by careful selection of IBAC staff, and especially the Commissioner. A criterion for selection of senior IBAC staff should be a demonstrated capacity for the balanced, fair and impartial exercise of executive power. The existence of the Inspectorate (under the *Victorian Inspectorate* Act 2011) which supervises the activities of IBAC and a committee of Parliament to examine its conduct, should minimise that risk. There are other protections contained in the Act, such as the fact that evidence given by a suspect under compulsion cannot be used against that suspect in further proceedings. Furthermore, Victoria already has the most stringent requirements of any State in Australia which must be satisfied before IBAC can carry out a public examination, which will be tested in the High Court in February. The involvement of a Public Interest Monitor also gives some protection against abuse of the IBAC's ability to overhear and tape telephone calls. Each of these matters must be taken into account when considering the risk of abuse of IBAC's powers and in comparing

those powers to the similar powers already given to and used by the Chief Examiner in relation to Major Crimes, or to Royal Commissioners, or the Coroner.

But it must be borne in mind that the intrusion into civil liberties that is potentially involved in IBAC's activities is limited to use in the investigation and any information provided by persons who are questioned cannot be used against them. It should also be borne in mind that people being questioned will be holding public office and people dealing with those holding public office. Those who hold public office are under obligations to account for their actions within their agencies when exercising their powers to others who hold public office. All holders of public office have not only an ethical but also a legal obligation always to put the public interest ahead of their own personal or other private interests, recognised in the law as a fiduciary obligation. What the legislation does is create an independent statutory body to which any holder of public office has to account, as well as to their agency superiors, when it embarks upon an investigation of events in the public sector, typically, where the accountability processes of the public sector may have failed or been avoided.

There is now abundant evidence of the presence of corruption in Victoria and Australia. From the facts reported in the media about the nature and extent of the conduct in the Education and Transport departments, including the numbers of people aware of what had been happening over a number of years, it seems likely that eventually one or more people blew the whistle in each case. This would have been necessary for IBAC to investigate. The question then is how many other such areas of corrupt behaviour exist in this State, which will continue to fester in the absence of a tip-off from someone who happens upon evidence of it, or from a disaffected person or disillusioned insider (not receiving a fair share?) and who finds the courage to decide to blow a whistle?

It should also be borne in mind that people in departments and agencies who may be engaged in similar corrupt conduct, or are considering doing so, have increasingly become aware of IBAC's presence, role and performance, as have all people wishing to encourage them to do so. As a result, they will apply their minds to ways to maximise the secrecy of their conduct. The more secretive that conduct is, the greater the challenge facing IBAC under the present Act and under the proposed Bill.

ART submits that the real question for Parliament in considering the present amending Bill, and further improvements to the IBAC legislation, is whether IBAC should be left in its present, half-strengthened state, with or without the Bill's amendments. In making that decision, the Parliament needs to be mindful of the price associated with leaving IBAC in a weak position, which is that scandalous corruption, such as occurred in the Education and Transport departments, will be allowed to continue undiscovered for a significant period of time without well-informed tip-offs. If this were to happen, the consequences for a government and the relevant departments, not to mention the Victorian community, could be considerable. The alternative is that IBAC should be given the full powers and discretions to investigate, without the present proposed thresholds, which would then reconduct themselves.

Ultimately, the question is whether Victorians are serious about addressing the risk of corruption in this State. ART submits that the existing safeguards against risk of abuse of the powers given are adequate and enable the people of Victoria and their Government and their Parliament to entrust the IBAC Commissioner with the full powers required to exercise the discretion to commence and conduct an investigation appropriately.

Accountability Round Table

1 February 2016