

Prosecution of IBAC Act offences and offences arising from IBAC investigations

**Submission to the Joint Standing Committee on the
Corruption and Crime Commission**

September 2016

CD/16/34767

Table of contents

1	Introduction	3
2	Submission	4
2.1	Summary offences	4
2.2	Indictable offences (including those triable summarily)	5
2.3	Summary and indictable prosecutions – IBAC’s role	7
3	Conclusion	8

1 Introduction

The Independent Broad-based Anti-corruption Commission (**IBAC**) is Victoria's anti-corruption agency and is responsible for identifying, exposing and preventing serious public sector corruption and police misconduct. IBAC's jurisdiction includes state government departments and agencies, local councils, Victoria Police, the judiciary, and Members of Parliament.

IBAC's functions are set out in s 15 of the *Independent Broad-based Anti-corruption Commission Act 2011* (**IBAC Act**) and in summary they are to:

- Identify, expose and investigate corrupt conduct and police personnel misconduct ; and
- prevent corrupt conduct and police misconduct by informing the public sector, police and the community about the risks and impacts on public administration.

In the performance of these functions, IBAC has significant powers to combat corruption under the IBAC Act, including the ability to:

- compel the production of documents and objects as part of a preliminary inquiry or an investigation
- enter and search premises
- seize documents and things; and
- require a witnesses to give evidence at private and public examinations.

IBAC has the power to bring criminal proceedings for an offence¹, make recommendations to the relevant principal officer of a body, a Minister or the Premier,² and can refer any matter to the Office of Public Prosecutions (**OPP**) or another entity for consideration of disciplinary or other action.³

Such extraordinary powers are essential due to the complexities involved in fulfilling these important functions.

¹ IBAC Act ss 189 and 190

² IBAC Act s 159(1)

³ IBAC Act ss 73 and 74

2 Submission

The Joint Standing Committee has invited IBAC to make a submission addressing the second term of reference, being the arrangements in place under the IBAC Act for “the prosecution of offences associated with corrupt conduct and misconduct.”

This submission will consider:

- the provisions in the IBAC Act giving IBAC the power to bring proceedings, whether for offences under that Act or otherwise
- the rules and practice regarding IBAC retaining carriage of a prosecution or referring it to the OPP; and
- how the prosecution is managed in the event the OPP takes carriage of proceedings from IBAC.

IBAC may bring criminal proceedings under ss 189 or 190 of the IBAC Act:

- for an offence under the IBAC Act or *Independent Broad-based Anti-corruption Commission Regulations (2013)*, which include breaching a confidentiality notice, hindering or obstructing IBAC or making a false or misleading statement) [s 189]
- for an offence in relation to any matter arising out of an investigation conducted by IBAC [s 190].

In each case, proceedings may either be brought by IBAC (ie; in its own name), a sworn IBAC Officer who is authorised by the Commissioner, or a police officer. For a police officer to bring a charge under s 189, the officer must also be authorised by the Commissioner.

For proceedings commenced in accordance with ss 189 or 190 of the IBAC Act, the agency that retains carriage of the matter and the jurisdiction in which it is heard will be determined by whether it is a summary or indictable offence.

2.1 Summary offences

In Victoria, where an Act either creates an offence which is described as a summary offence or is silent as to its character, it is to be prosecuted as a summary offence in the Magistrates’ Court. All offences in Part 9, Division 2 and Part 6, Division 2 of the IBAC Act fall within this category, as does contravention

of a confidentiality notice⁴ and unauthorised disclosure of information and documents⁵. In essence, this refers to offences within IBAC's jurisdiction that are more minor in character and embraces offences against the IBAC Act, including hindering or obstructing an IBAC officer in the performance of the person's duty or making a statement to IBAC which is false or misleading in a material particular.

A summary offence attracts a maximum penalty of two years in prison. Proceedings for a summary offence must ordinarily be commenced within 12 months after the alleged date of commission. Generally, IBAC lawyers or external counsel (who are direct briefed) will retain carriage of a summary prosecution commenced under s 189 of the IBAC Act. IBAC and the OPP have agreed that the OPP will "provide advice and prosecution services to IBAC for matters that would be prosecuted on indictment and, in some limited circumstances, summary matters."⁶

In the event IBAC retains carriage of a summary prosecution, whether or not counsel takes carriage of the proceedings for IBAC, advice may be sought from a barrister in respect of matters including sufficiency of evidence, prospects of success and whether the charges are properly characterised.

2.2 Indictable offences (including those triable summarily)

Indictable offences are deemed more serious and are triable on indictment before a jury in the County or Supreme Court. A charge for an indictable offence must be heard and determined through the committal stream, unless it fits a third category; an indictable offence that may be tried summarily (IOTS). Section 190 gives IBAC the power to charge a person, where the subject matter of the charge arises from an IBAC investigation. When IBAC commences proceedings under s 190, it will generally be for indictable matters, which attract a higher penalty than summary offences and the majority of common law offences and offences under the *Crimes Act 1958* are indictable in nature. The following offences particularly relevant to IBAC's investigations are indictable:

- (Attempt to) pervert the course of justice (common law)
- bribery of a public official (common law)
- misconduct in public office (common law)
- perjury (common law), perjury (*Crimes Act 1958*, s 314)

⁴ IBAC Act s 44(1)

⁵ *Victoria Police Act 2013*, s 227

⁶ Protocol between the Office of Public Prosecutions and the Independent Broad-based Anti-corruption Commission, clause B

- theft, obtaining property or financial advantage by deception (if amount greater than \$100,000), false accounting, falsification of documents, secret commissions if the amount is greater than \$100,000 (Crimes Act 1958, Part 1, Division 2)

In Victoria, IOTS offences are referred to in the Schedule 2 of the *Criminal Procedure Act 2009* and attract a penalty of 10 years imprisonment or less. Proceedings for offences of this nature may be by way of summary hearing in the Magistrates' Court or via committal proceeding before a jury in the County Court. It is a matter for the charged person to elect the forum. IBAC is in the process of settling arrangements with the OPP as to the manner in which an IOTS prosecution would proceed.

The OPP has the function of preparing and conducting proceedings in respect of indictable offences. This is reflected in the *Public Prosecutions Act 1994* and in the protocol IBAC has with the OPP⁷, which provides that:

- IBAC will prosecute summary offences. However, IBAC may request the OPP take over such matters (and the OPP may refuse such request).
- The OPP will prosecute indictable offences proceeding through the committal stream. The OPP may decline to prosecute where the OPP has previously provided contrary advice to IBAC in relation to the conduct of the prosecution.

When IBAC seeks to charge a person with an indictable or an IOTS offence, a hand-up brief is prepared and delivered to the OPP. Advice is then provided as to the appropriateness of the charges and sufficiency of evidence. In the event the OPP advises that IBAC should proceed, IBAC will draft and file the charges and arrange for the matter to be listed at the appropriate venue. IBAC is responsible for producing the brief of evidence and bearing the costs of same. IBAC must serve the brief and deliver a copy to the Court in accordance with the rules as set out in the *Criminal Procedure Act 2009* and within 5 days of service, provide two hard copies to the OPP.

The OPP conducts the matter from the First Hearing until final resolution and the OPP lawyer will:

- Prepare the matter for hearing
- Brief counsel to prosecute
- Instruct in court as required.

⁷ Clause B

The IBAC officer who is the informant on the brief must attend all hearings and will liaise with the OPP lawyer or counsel briefed in order to provide information and assistance as required.

2.3 Summary and indictable prosecutions – IBAC's role

Where the OPP conducts summary matters for IBAC and in all indictable matters, the protocol between IBAC and the OPP provides that IBAC remains responsible for a range of tasks as follows:

- Preparation of witness summonses
- Providing conduct money for witnesses
- Serving all summonses
- Any costs associated with service of summonses
- Provision of a witness list to the OPP that is updated as required
- Service of all subpoenas issued by the OPP
- Completing affidavits of service
- Meeting any costs associated with service of subpoenas
- Contacting the witnesses throughout the prosecution and advising them of when and where to give evidence
- Managing arguments and representation in relation to subpoenas, save for where relevance is the only issue to be argued.

This list is indicative and the IBAC informant and OPP solicitor with carriage of the matter work together to ensure tasks related to a prosecution are completed to the satisfaction of the Court.

3 Conclusion

To date, IBAC has conducted a successful prosecution of a summary offence in the Magistrates' Court of Victoria and proceedings have commenced in the County Court of Victoria of indictable matters pertaining to IBAC's investigation known as Operation Fitzroy. Charges may soon be brought in a number of summary matters in accordance with s 189 of the IBAC Act.

The successful prosecution of charges brought under s 189 or s 190 of the IBAC Act has required the development and maintenance of a positive relationship with the OPP. IBAC ensures compliance with the letter and spirit of the Victorian Model Litigant Guidelines and where relevant, with the 'Director's Policy – the Prosecutorial Discretion', published by the Director of Public Prosecutions.

Please contact Joanna Austin on 03 8635 6125 in the event you require further information or clarification.