



New South Wales

# Independent Commission Against Corruption Amendment Bill 2015

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* to implement all of the recommendations of the report made on 30 July 2015 by the Independent Panel established to review the jurisdiction of the Independent Commission Against Corruption (ICAC) following the decision of the High Court in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14. That decision excluded certain conduct of private persons from the definition of “corrupt conduct” under that Act that had previously been assumed to be within ICAC’s jurisdiction. The Hon Murray Gleeson AC (Chair) and Mr Bruce McClintock SC were commissioned by the Government to conduct the review by letters patent issued on 27 May 2015.

The Panel made the following specific recommendations that are implemented by the Bill:

- (a) to extend ICAC’s jurisdiction in respect of “corrupt conduct” to include certain specified acts of non-public officials that could impair public confidence in public administration,
- (b) to provide that ICAC’s education, advisory and prevention functions can be used generally for the purpose of promoting the integrity and good repute of public administration,
- (c) to limit ICAC’s power to make findings of “corrupt conduct” against an individual to cases where the corrupt conduct is serious.

The Panel also recommended that ICAC be given jurisdiction to investigate possible criminal offences under electoral and lobbying laws (without extending the meaning of “corrupt conduct”) should Parliament consider that breaches of those laws should be made the subject of ICAC’s jurisdiction. The Bill implements this recommendation as follows:

- (a) Conduct that may involve possible criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the

*Lobbying of Government Officials Act 2011* may be referred to ICAC for investigation by the Electoral Commission (which has responsibility for enforcing compliance with those Acts):

- (i) if there are reasonable grounds to suspect that the conduct may involve possible criminal offences of a designated kind, or
- (ii) if the conduct is related to possible corrupt conduct that ICAC is already investigating.

ICAC is required to discontinue an investigation if, after a preliminary investigation, the conduct does not involve possible criminal offences of the designated kind and is not related to possible corrupt conduct that ICAC is already investigating.

- (b) Conduct that may involve possible criminal offences under any of those Acts that is already under investigation by ICAC in the investigations known as Operation Spicer and Operation Credo are taken to have been referred to ICAC so that it can complete and report on those investigations.
- (c) Persons who seek public office may be engaged in corrupt conduct for the purposes of ICAC's jurisdiction in respect of any proposed future exercise of their functions as public officials even if they do not succeed in being elected or appointed to the public office.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

## **Schedule 1      Amendment of Independent Commission Against Corruption Act 1988 No 35**

**Schedule 1 [3]** amends section 8 of the Act to insert proposed subsection (2A) to extend the definition of "corrupt conduct" to conduct of non-public officials that could impair public confidence in public administration and which could involve any of the following:

- (a) collusive tendering,
- (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
- (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
- (d) defrauding the public revenue,
- (e) fraudulently obtaining or retaining employment or appointment as a public official.

**Schedule 1 [1] and [2]** make minor amendments consequent on the insertion of proposed section 8 (2A).

**Schedule 1 [4]** amends section 8 (3) of the Act to provide that proposed section 8 (2A) extends to conduct occurring before the commencement of the proposed Act.

**Schedule 1 [5]** amends section 8 (4) of the Act to make it clear that persons who seek public office may be engaged in corrupt conduct for the purposes of ICAC's jurisdiction in respect of any proposed future exercise of their functions as public officials even if they do not succeed in being elected or appointed to the public office.

**Schedule 1 [6]** amends section 8 (5) of the Act to extend its application to proposed section 8 (2A) so that the offences or other matters related to impairing public confidence in the public

administration of the State extend to matters arising outside the State or under the law of the Commonwealth or another jurisdiction.

**Schedule 1 [7]** amends section 8 (6) of the Act to make it clear that proposed section 8 (2A) does not operate to either expand or limit the other provisions of section 8 that define “corrupt conduct”, and in particular the provisions of section 8 (2) that were the subject of the High Court’s decision in *Independent Commission Against Corruption v Cunneen*.

**Schedule 1 [8]** amends section 13 of the Act to provide that ICAC’s education, advisory and prevention functions can be used generally for the purpose of promoting the integrity and good repute of public administration.

**Schedule 1 [10]** inserts proposed section 13A into the Act to include in the functions of ICAC the jurisdiction to investigate conduct that could involve possible criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011* that are referred to ICAC for investigation by the Electoral Commission because:

- (a) there are reasonable grounds to suspect that the conduct may involve possible criminal offences of a designated kind, or
- (b) the conduct is related to possible corrupt conduct that ICAC is already investigating.

Any such conduct may be referred to ICAC for investigation whether or not it involves corrupt conduct. The proposed section sets out the matters that must be considered when the Electoral Commission decides whether to refer conduct for investigation and when ICAC decides, after a preliminary investigation, to investigate the conduct. ICAC may decide not to continue an investigation and is required to discontinue an investigation if the conduct does not involve possible criminal offences of the designated kind and is not related to possible corrupt conduct that ICAC is already investigating. The designated offences that may be referred to ICAC for investigation are as follows:

- (a) *Election Funding, Expenditure and Disclosures Act 1981*:
  - section 54 (False statements—registration),
  - section 75 (False statements—campaign funding),
  - section 96GE (7) (Provision of false or misleading information with regards to a determination by Electoral Commission that person not a prohibited donor),
  - section 96H (1), (2) and (3) (Failure to make disclosure and false statements relating to disclosures),
  - section 96HA (Offences relating to caps on donations and expenditure),
  - section 96HB (1) (Offence relating to scheme to circumvent the donation or expenditure prohibitions or restrictions),
  - section 96I (1) (Unlawful acts relating to donations etc),
  - section 97M (False statements—administrative and policy development funding),
  - section 110A (7) (Provision of false or misleading documents and information),
- (b) *Parliamentary Electorates and Elections Act 1912*:
  - section 66L (False statements—applications for registration of parties),
  - section 81L (False child-related conduct declarations),
  - section 106 (Provisional voting),
  - section 112 (False answer to questions etc or multiple voting),
  - section 114A (3) (False statements in relation to application for postal vote),
  - section 114AA (8) (False statements in application to be general postal voter),
  - section 114J (1) (Person other than voter marking vote on postal ballot paper),
  - section 114P (3), (4) and (5) (False or misleading statements in application for permission to vote before polling day),

- section 114V (Person other than voter marking vote on pre-poll ballot paper),
- section 114ZU (Person other than voter marking vote on pre-poll ballot paper (declared institutions)),
- section 115 (Untrue declaration to vote outside electoral district),
- section 120AH (False and misleading statements in technology assisted voting),
- section 120AI (Protection of computer hardware and software),
- section 122A (6) and (7) (Ballot papers not to be informal in certain circumstances),
- section 147 (Bribery etc),
- section 149 (Electoral treating),
- section 151 (Intimidation),
- section 151A (Printing etc false information),
- section 176D (Untrue statements in forms),
- section 176F (Forging or uttering electoral papers),
- section 177 (Offence of stuffing ballot box),
- (c) *Lobbying of Government Officials Act 2011*:
  - section 15 (Ban on success fees),
  - section 18 (Cooling-off period for ex-Ministers and ex-Parliamentary Secretaries),
- (d) an offence against any of the above Acts, or the regulations under any of the above Acts, that is prescribed by the regulations for the purposes of the proposed section.

**Schedule 1 [11]–[13]** amend section 14 of the Act to authorise ICAC to gather and assemble evidence of possible criminal offences the subject of a reference from the Electoral Commission and to furnish any such evidence to the Electoral Commission or (if considered appropriate) to the Director of Public Prosecutions, together with any observations or recommendations for action ICAC considers should be taken in relation to the evidence.

**Schedule 1 [14]** amends section 16 of the Act to require ICAC to work (as far as practicable) in co-operation with the Electoral Commission in exercising its proposed function relating to the investigation of possible criminal offences referred to it for investigation by the Electoral Commission.

**Schedule 1 [15]** inserts proposed section 74BA into the Act to limit ICAC’s power to make findings of “corrupt conduct” against an individual in its reports to cases where the corrupt conduct is serious. **Schedule 1 [9]** makes a consequential amendment to section 13 (4) of the Act to apply that limitation to findings made, or opinions or recommendations formulated, by ICAC otherwise than in ICAC reports.

**Schedule 1 [16]** amends Schedule 4 to the Act to insert savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular:

- (a) the clarification in the amendment made by Schedule 1 [5] in relation to persons who fail to be elected or appointed as a public official is applied to conduct occurring before the enactment of the proposed Act, and
- (b) the proposed power of the Electoral Commission to refer possible criminal offences to ICAC for investigations is applied to offences that may have been committed before the enactment of the proposed Act and ICAC is taken to have had a referral to investigate possible criminal offences that have come to light as a result of the investigations of ICAC known as Operation Spicer and Operation Credo, and
- (c) the proposed limitation on the power of ICAC to make findings of corrupt conduct only in the case of serious corrupt conduct is applied to reports made after the enactment of the proposed Act and is so applied even if the report relates to investigations commenced or undertaken before that enactment.



New South Wales

# Independent Commission Against Corruption Amendment Bill 2015

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New South Wales

# Independent Commission Against Corruption Amendment Bill 2015

No. , 2015

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## A Bill for

An Act to amend the *Independent Commission Against Corruption Act 1988* in relation to the jurisdiction and powers of the Independent Commission Against Corruption.

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**The Legislature of New South Wales enacts:**

1

**1 Name of Act**

2

This Act is the *Independent Commission Against Corruption Amendment Act 2015*.

3

**2 Commencement**

4

This Act commences on the date of assent to this Act.

5

|  |  |    |
|--|--|----|
| <b>Schedule 1</b>                                      | <b>Amendment of Independent Commission Against Corruption Act 1988 No 35</b>   | 1  |
|  |  | 2  |
| <b>[1] Section 7 Corrupt conduct</b>                   |  | 3  |
|  | Omit “corrupt conduct in either or both of subsections (1) and (2) of section 8” from section 7 (1).   | 4  |
|  |  | 5  |
|  | Insert instead “corrupt conduct in section 8”.   | 6  |
| <b>[2] Section 7 (2)</b>                               |  | 7  |
|  | Omit “section 8 (1) or (2)” wherever occurring. Insert instead “section 8”.  | 8  |
| <b>[3] Section 8 General nature of corrupt conduct</b> |  | 9  |
|  | Insert after section 8 (2):  | 10 |
|  | (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:                 | 11 |
|  |  | 12 |
|  | (a) collusive tendering,   | 13 |
|  |  | 14 |
|  | (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources, | 15 |
|  |  | 16 |
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|  | (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,                               | 19 |
|  |  | 20 |
|  |  | 21 |
|  | (d) defrauding the public revenue,   | 22 |
|  |  | 23 |
|  | (e) fraudulently obtaining or retaining employment or appointment as a public official.  | 24 |
| <b>[4] Section 8 (3)</b>                               |  | 25 |
|  | Omit “corrupt conduct under this section even though it occurred before the commencement of this subsection”.  | 26 |
|  |  | 27 |
|  | Insert instead “corrupt conduct under subsection (1), (2) or (2A) even though it occurred before the commencement of that subsection”.   | 28 |
|  |  | 29 |
| <b>[5] Section 8 (4)</b>                               |  | 30 |
|  | Insert “This subsection extends to a person seeking to become a public official even if the person fails to become a public official.” after “becoming a public official.”.  | 31 |
|  |  | 32 |
| <b>[6] Section 8 (5)</b>                               |  | 33 |
|  | Omit “matters listed in subsection (2)”.   | 34 |
|  | Insert instead “matters listed in subsection (2) or (2A)”.   | 35 |
| <b>[7] Section 8 (6)</b>                               |  | 36 |
|  | Insert “or expanding” after “limiting”.  | 37 |



|   |                            |
|---|----------------------------|
| <b>[8] Section 13 Principal functions</b>   | 1                          |
| Omit section 13 (1) (e)–(j). Insert instead:  | 2                          |
| (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated and the integrity and good repute of public administration promoted,  | 3<br>4<br>5<br>6           |
| (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration,  | 7<br>8<br>9<br>10<br>11    |
| (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration,   | 12<br>13<br>14<br>15       |
| (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct and to promote the integrity and good repute of public administration,   | 16<br>17<br>18             |
| (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity and good repute of public administration,   | 19<br>20<br>21             |
| (j) to enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration,   | 22<br>23                   |
| <b>[9] Section 13 (4)</b>   | 24                         |
| Omit “section 74B (Report not to include findings etc of guilt or recommending prosecution)”.   | 25<br>26                   |
| Insert instead “section 74B or 74BA”.   | 27                         |
| <b>[10] Section 13A</b>   | 28                         |
| Insert after section 13:  | 29                         |
| <b>13A Function of investigating matters referred by Electoral Commission</b>   | 30                         |
| (1) The Commission has the function of investigating conduct that may involve possible criminal offences under the <i>Parliamentary Electorates and Elections Act 1912</i> , the <i>Election Funding, Expenditure and Disclosures Act 1981</i> or the <i>Lobbying of Government Officials Act 2011</i> that the Electoral Commission refers to the Commission for investigation under this section. | 31<br>32<br>33<br>34<br>35 |
| (2) The Electoral Commission may refer any such conduct to the Commission for investigation:  | 36<br>37                   |
| (a) if there are reasonable grounds to suspect that the conduct may involve a possible criminal offence to which this section applies (as set out in subsection (9)), or  | 38<br>39<br>40             |
| (b) if the conduct is related to possible corrupt conduct that the Commission is already investigating,   | 41<br>42                   |
| whether or not the time within which proceedings for the possible criminal offence may be instituted has expired.   | 43<br>44                   |

- (3) After a preliminary investigation, the Commission is to discontinue the investigation if: 1  
2
- (a) the conduct does not involve any possible criminal offence to which this section applies and is not related to possible corrupt conduct that the Commission is already investigating, and the Commission is not otherwise authorised to investigate the conduct, or 3  
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  - (b) the Commission determines it should not carry out any further investigation. 7  
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- (4) Conduct may be referred under this section to the Commission for investigation whether or not it involves corrupt conduct. The fact that the conduct could be so referred does not prevent the Commission from investigating the conduct without a referral if it is otherwise authorised by this Act to do so. 9  
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- (5) The following matters are to be taken into account in determining whether conduct should be referred under this section for investigation and, if referred, whether the Commission should investigate: 14  
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- (a) the primary responsibility of the Electoral Commission to investigate and prosecute the possible criminal offences concerned, 17  
18
  - (b) the seriousness or systemic nature of the matter being investigated, 19
  - (c) the complexity of the matter being investigated, 20
  - (d) the relationship between the matter being investigated and any other ongoing investigation of the Electoral Commission, 21  
22
  - (e) the relationship between the matter being investigated and any other ongoing investigation of the Commission, 23  
24
  - (f) the availability of any other public authority or official with the responsibility or jurisdiction to investigate or prosecute the possible criminal offences concerned, 25  
26  
27
  - (g) any other relevant matter. 28
- (6) The Electoral Commission, when it refers conduct for investigation under this section, must provide the Commission with a statement of the reasons it referred the matter for investigation. 29  
30  
31
- (7) The Commission, when it determines to investigate conduct referred under this section after a preliminary investigation, must provide the Electoral Commission with a statement of the reasons it determined to investigate the conduct. 32  
33  
34  
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- (8) A report of the Commission under section 74 that relates to an investigation under this section is to include the statements of reasons under subsections (6) and (7) in relation to the investigation. 36  
37  
38
- (9) This section applies to the following criminal offences: 39
- (a) *Election Funding, Expenditure and Disclosures Act 1981*: 40
    - section 54 (False statements—registration), 41
    - section 75 (False statements—campaign funding), 42
    - section 96GE (7) (Provision of false or misleading information with regards to a determination by Electoral Commission that person not a prohibited donor), 43  
44
    - section 96H (1), (2) and (3) (Failure to make disclosure and false statements relating to disclosures), 45  
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    - section 96HA (Offences relating to caps on donations and expenditure), 48

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| section 96HB (1) (Offence relating to scheme to circumvent the donation or expenditure prohibitions or restrictions),    | 1  |
| section 96I (1) (Unlawful acts relating to donations etc),   | 2  |
| section 97M (False statements—administrative and policy development funding),  | 3  |
| section 110A (7) (Provision of false or misleading documents and information),   | 4  |
| (b) <i>Parliamentary Electorates and Elections Act 1912:</i>   | 5  |
| section 66L (False statements—applications for registration of parties),   | 6  |
| section 81L (False child-related conduct declarations),  | 7  |
| section 106 (Provisional voting),  | 8  |
| section 112 (False answer to questions etc or multiple voting),  | 9  |
| section 114A (3) (False statements in relation to application for postal vote),  | 10 |
| section 114AA (8) (False statements in application to be general postal voter),  | 11 |
| section 114J (1) (Person other than voter marking vote on postal ballot paper),  | 12 |
| section 114P (3), (4) and (5) (False or misleading statements in application for permission to vote before polling day), | 13 |
| section 114V (Person other than voter marking vote on pre-poll ballot paper),  | 14 |
| section 114ZU (Person other than voter marking vote on pre-poll ballot paper (declared institutions)),                   | 15 |
| section 115 (Untrue declaration to vote outside electoral district),   | 16 |
| section 120AH (False and misleading statements in technology assisted voting),   | 17 |
| section 120AI (Protection of computer hardware and software),  | 18 |
| section 122A (6) and (7) (Ballot papers not to be informal in certain circumstances),                                    | 19 |
| section 147 (Bribery etc),   | 20 |
| section 149 (Electoral treating),  | 21 |
| section 151 (Intimidation),  | 22 |
| section 151A (Printing etc false information),   | 23 |
| section 176D (Untrue statements in forms),   | 24 |
| section 176F (Forging or uttering electoral papers),   | 25 |
| section 177 (Offence of stuffing ballot box),  | 26 |
| (c) <i>Lobbying of Government Officials Act 2011:</i>  | 27 |
| section 15 (Ban on success fees),  | 28 |
| section 18 (Cooling-off period for ex-Ministers and ex-Parliamentary Secretaries),                                       | 29 |
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| (d)         | an offence against any of the above Acts, or the regulations under any of the above Acts, that is prescribed by the regulations for the purposes of this section.  | 1<br>2<br>3                   |
|             | Section 117 (4) does not apply to a regulation made under paragraph (d).   | 4                             |
| <b>[11]</b> | <b>Section 14 Other functions of Commission</b>  | 5                             |
|             | Insert after section 14 (1) (a):   | 6                             |
| (a1)        | to gather and assemble, during or after the discontinuance or completion of an investigation into conduct under section 13A, evidence that may be admissible in the prosecution of a person for a criminal offence in connection with the conduct and to furnish such evidence to the Electoral Commission and (if considered appropriate) to the Director of Public Prosecutions, | 7<br>8<br>9<br>10<br>11<br>12 |
| <b>[12]</b> | <b>Section 14 (1A)</b>   | 13                            |
|             | Omit “subsection (1) (b)”. Insert instead “subsection (1) (a1) or (b)”.  | 14                            |
| <b>[13]</b> | <b>Section 14 (1A)</b>   | 15                            |
|             | Insert “or the Electoral Commission” after “the Attorney General”.   | 16                            |
| <b>[14]</b> | <b>Section 16 Co-operation with other agencies</b>   | 17                            |
|             | Insert after section 16 (1) (a):   | 18                            |
| (a1)        | shall, as far as practicable, work in co-operation with the Electoral Commission in connection with a referral by the Electoral Commission under section 13A, and  | 19<br>20<br>21                |
| <b>[15]</b> | <b>Section 74BA</b>  | 22                            |
|             | Insert after section 74B:  | 23                            |
| <b>74BA</b> | <b>Report may only include findings etc of serious corrupt conduct</b>   | 24                            |
| (1)         | The Commission is not authorised to include in a report under section 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.   | 25<br>26<br>27                |
| (2)         | The Commission is not precluded by this section from including in any such report a finding or opinion about any conduct of a specified person that may be corrupt conduct within the meaning of this Act if the statement as to the finding or opinion does not describe the conduct as corrupt conduct.  | 28<br>29<br>30<br>31          |
| <b>[16]</b> | <b>Schedule 4 Savings, transitional and other provisions</b>   | 32                            |
|             | Insert at the end of the Schedule:   | 33                            |
|             | <b>Part 14 Provisions consequent on enactment of Independent Commission Against Corruption Amendment Act 2015</b>  | 34<br>35<br>36                |
| <b>36</b>   | <b>Definition</b>  | 37                            |
|             | In this Part:  | 38                            |
|             | <i>amending Act</i> means the <i>Independent Commission Against Corruption Amendment Act 2015</i> .  | 39<br>40                      |

|           |  |  |
|-----------|--|--|
| <b>37</b> | <b>Application of amendment to section 8 (4)</b>   | 1  |
|           | The amendment to section 8 (4) made by the amending Act extends to conduct occurring before the commencement of that amendment.  | 2<br>3                                     |
| <b>38</b> | <b>Application of section 13A</b>  | 4  |
| (1)       | Section 13A, as inserted by the amending Act, extends to possible criminal offences referred to in that section that may have been committed before the commencement of the amending Act.  | 5<br>6<br>7                                |
| (2)       | The Electoral Commission is taken to have referred to the Commission under section 13A the investigation of conduct that may involve possible criminal offences under the <i>Parliamentary Electorates and Elections Act 1912</i> , the <i>Election Funding, Expenditure and Disclosures Act 1981</i> or the <i>Lobbying of Government Officials Act 2011</i> that have come to light as a result of investigations and proceedings of the Commission known as Operation Spicer and Operation Credo. The Commission is taken to have determined under that section to continue that investigation. | 8<br>9<br>10<br>11<br>12<br>13<br>14<br>15 |
| <b>39</b> | <b>Application of section 74BA</b>   | 16   |
|           | Section 74BA, as inserted by the amending Act, applies to reports made by the Commission after the commencement of that section, and so applies even if the report relates to an investigation commenced or undertaken before that commencement.   | 17<br>18<br>19<br>20                       |