INTEGRITY COMMISSIONS

PURPOSE AND PITFALLS

This paper will consider the principal facets of integrity commissions, their purpose and pitfalls.

Advances in legal innovation

Imperceptibly, in the past 50 years we have undergone major changes in our legal system.

For example, up to 1970, the courts could provide common-law remedies or equitable remedies. However, one was required to select one or other of the jurisdictions in an action would fail if instituted in the wrong jurisdiction. Now, at least New South Wales following the introduction of the Supreme Court Act 1970, law and equity have been fused.

In the realm of Criminal Law, the introduction of the Criminal Code (Cth) has codified criminal offences and has had a substantial impact upon the complicated task of imposing sentences.

The Introduction of the Trade Practices Act 1974 (Cth) provided a new ethos in commerce. The introduction concepts such as misleading and deceptive conduct where intent of the person making the statement, was irrelevant, was novel. Hitherto, actions only were available for fraud and misrepresentation. Such actions required very strict proof whereas this Act rendered intent irrelevant for misleading and deceptive claims. The new legislation created a new regime for individuals and for corporations.

In administrative law, judicial review, concepts such as the doctrine of legitimate expectation were unknown. However, since the creation of the Administrative Appeals Tribunal by the Administrative Appeals Tribunals Act 1975, administrative law is now a major feature of our legal system.

Creation of integrity agencies

But the law does not cease to develop. Since 1984 the concept of integrity commissions has been formulated and implemented in Hong Kong and in Australia. There are no equivalent agencies in the United States, Canada or in the United Kingdom. Integrity by public officials, members of parliament and contractors to Government, are all under public scrutiny, particularly with the advent of electronic media.

Corruption has been described in the forward to the United Nations Convention Against Corruption 2004 as follows:

"Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts

markets, erodes the quality-of-life and allows organised crime, terrorism and other threats to human security to flourish".

Common Features of existing Integrity Commissions

Common to the legislation setting up each integrity body is a definition of corruption which definition incorporates the concept of dishonesty or improper conduct in public office; a breach of code of conduct (if such code exists); misusing information obtained in carrying out duties; behaviour that could be expected to lead to a criminal offence; a conduct that involves failing to manage adequately and actual or perceived conflict of interest; a breach of public trust; the illegal unauthorised or otherwise inappropriate performance of public functions. It extends for example to collusive tendering; intentionally or recklessly providing false and misleading information in relation to various applications; misappropriating or misusing public resources; dishonesty obtaining or retaining employment or appointment as a public offer; bribery and similar conduct. It would include dishonestly using, for example, travel allowances and other allowances paid to public officials.

The work of all integrity agencies involves assessment of complaints, investigation and education of government officials and the public in understanding the meaning of corruption.

Creation of Australian Integrity Agencies

In Australia, the New South Wales ICAC was created in 1989, followed thereafter by similar bodies in Queensland in 2001, Western Australia 2003, Tasmania in 2010, Victoria in 2011, South Australia in 2012 and the Northern Territory in 2017.

The ACT is the final Australian State or Territory jurisdiction to initiate an oversight agency.

The Select Committee of the ACT Parliament noted that all of the anticorruption bodies created in the States and Northern Territory had powers over the public sector – but not private sector; that all possess coercive powers similar to Royal Commissions; that the overriding theme in the establishment of such bodies was the restoration and maintenance of trust in Government and public administration; and all (except South Australia) were established following revelations of corruption, a perception that corruption is going unchallenged, or that there were significant gaps within the existing integrity framework.

Purposes

It is convenient, by way of example, to refer to the Integrity Commission, ACT, as it is the most recent State or Territory Integrity Commission to be created in Australia.

The Integrity Commission Act, 2018 (ACT), provides an insight of the purpose of integrity agencies. Section 6 of that Act provides the objectives as:-

a. Providing for the identification, investigation and exposure of corrupt conduct; and
b. Providing for the commission to prioritise the investigation and exposure of serious corrupt conduct and systemic corrupt conduct; and

c. Achieving a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undie prejudice to a person's reputation; and
d. Assisting in the prevention of corrupt conduct; and
e. Co-operating with other integrity bodies; and
f. Educating public officials and the community about the detrimental effects of corrupt conduct on public administration and the community and the ways in which corrupt conduct can be prevented; and
g. Assisting in improving the capacity of the public sector to prevent corrupt conduct.

Corruption

The definition of corruption is contained in section 9 of the act and is similar to that contained in legislation establishing similar integrity agencies. The definition includes conduct that could constitute a criminal offence; a serious disciplinary offence; constitute reasonable grounds for dismissing, dispensing with the services of a public official; conduct by a public official it constitutes the exercise of functions in a way that was not honest nor impartial; a breach of public trust; misusing information; conduct that adversely affects either directly or indirectly the honest or impartial exercise of functions by a public official or a public sector entity. It extends to conduct involves collusive tendering; fraud, dishonestly obtaining or assisting in obtaining or dishonestly benefiting from the payment or application of public funds; defrauding the public revenue; fraudulently obtaining or retaining employment or appointment as a public official.

There is also a definition of systematic corrupt conduct (section 11).

Specific considerations:

1. The Select Committee noted that the primary object of such a body should be the investigation, exposure and prevention of corruption and the fostering of public confidence in the integrity of the ACT Government;

2. That, according to some views, corruption could not be eradicated. However, the best form of mitigation of corruption lay in managing its deterrence, disruption, and detection. A former ICAC Commissioner observed of corruption :

> "The investigation and exposure of corruption is an extremely difficult task. Secrecy is at the core of corrupt conduct. Few paper trails are left, and false paper trails are created. Electronic communications and continuously developing sophisticated technology are formidable means of concealing misconduct. The persons likely to be involved in large-scale corruption are usually experienced and astute and have deep pockets. They surround themselves with skilled lawyers, accountants and technical experts and are often protected politically. So, if corruption involving public office is to be fought effectively, specialist anti-corruption agencies are needed with special powers and resources".

3. Extensive powers of investigation were required to deal with 'corrupt conduct' as defined in the ICAC Act (NSW). Further, arrangements would need to be implemented to ensure that the rule of Parliamentary Privilege was not infringed.

4. Care was required in determining the threshold at which a commission can commence an investigation; that is, whether 'reasonable suspicion' was sufficient for this purpose. The Select Committee considered that such a concept was appropriate.

5. The commission should have powers for the purpose of investigating, exposing, and preventing corruption as it considers necessary. Such powers would include the ability to apply for search warrants and engage in covert tactics including surveillance, undercover agents, and other means to obtain necessary evidence. However, such measures should not become tools of entrapment.

6. Protocols for the determination of any complaint would be required, and a formal notification given of any decision concerning a complaint.

7. Issues of confidentiality to protect the safety of any person providing assistance to the commission would be required.

8. The proposed body should have broad responsibility as it concerns government activities and public officials, but extended to the conduct of third parties, namely private individuals, where such conduct affects public administration;

Observations:

1. The Committee considered that it was necessary for the functions of the Commission to empower it to compel the production of documents or the giving of evidence which would otherwise be protected by legal professional privilege and privilege against self-incrimination.

2. The Commission would proceed in its investigations via an inquisitorial process and was not bound by the rules or practices of evidence.

3. The Commission would be empowered to make findings of fact that corruption has occurred, but that such finding is not to be taken as a finding of guilt.

4. The Commission would not constitute a court and could not usurp the functions of a court.

5. The Commissioner would not have power to make decisions of a disciplinary finding, for such a finding would transpose the Commission to a legal proceeding.

6. The Commission should not have power to manage a mediation program.

Scrutiny by courts

Two landmark decisions pose a reminder of the need for integrity bodies to observe certain basic boundaries.

In Queensland an enquiry was held into the proposed introduction of poker machines in that state. A company which manufactured gambling machines was not given notice of the intention of the CJC to make a report which affected the reputation of the manufacturer. The High Court held that as a statutory body, the CJC in preparing its report was bound by the rules of protocol fairness; that those rules had not been observed resulting in a denial of procedural fairness (*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564).

In *Greiner v ICAC* (1992) 28 NSW LR 125 the New South Wales Court of Appeal set aside a finding of the Commissioner of ICAC which found the premier had engage in corrupt conduct in arranging for a political benefit to flow to a member of the legislative assembly. The Court found that the definition of corrupt misconduct under the ICAC act required a finding the conduct would constitute or involve criminal conduct not merely corrupt conduct.

Accountability and Independence of the Commission

The Select Committee considered that the Commission should be subject to the oversight of an Assembly Oversight Committee. The Select Committee was of the view that there should be oversight by the Inspector (the Commonwealth Ombudsman).

The Select Committee recommended that the Commission should appoint its own staff and be allocated a budget for its operations.

The ACT Commission in operation

The ACT Integrity Commission commenced its operations on 1 December 2019. Since that time, there have been in excess of 150 complaints lodged with the Commission. The complaints raise matters which, in some cases, do not constitute 'corruption', but rather grievances in the workplace or dissatisfaction with the operation of a system. However, many are the subject of investigation.

Recently there has been discussion concerning the role of an integrity commission and whether public hearings, with the attendant potential damage to a person's reputation, should be held. In the Tasmanian model, there is no provision for public hearings.

Whilst privacy is of paramount concern, especially under the Integrity Commission Act 2018 (ACT), there is also the competing public benefit in ensuring that issues of corruption in public office are ventilated as a deterrent to others.

The holding of a public enquiry carries risks that a person's reputationmay be damaged. However that must be considered against a competing issue, namely that the ventilation of an issue may encourage potential witnesses to come forward. It will also demonstrate that hearings are fairly conducted by an integrity commission. Further, it may afford an opportunity for a person to explain their conduct were allegations already exist in the public domain.

The ACT Integrity Commission has prepared a policy on reputational repair damage. It is very mindful of damage that can be occasioned to a person as a result of its legitimate operation.

Further, the holding of a public hearing could potentially jeopardise a criminal trial arising out of the conduct which has been the subject of investigation and which has been exposed publicly before the Commission, at least where eight nominal trial is heard by a jury. Adverse An adverse finding by the Commission on such a matter could severely impact upon the ability of a person adversely named, in achieving a fair trial. It must be remembered that the Commission is not a court, yet a public pronouncement of corruption could be most damaging.

Safeguards

There are a number of safeguards in the Act to protect the reputation of individuals, including, but not limited to:

- Confidentiality notices issues with Preliminary Inquiry Notices or Examination Summonses prohibit the discussion of the subject of preliminary inquiry or investigation, this limiting the number of people knowing about the investigation or individuals involved in the investigation;

- The requirement in s 143(2)(b) that consideration be given to whether a public examination can be held without unreasonably infringing a person's human rights, which includes the right to privacy in s 12 of the Human Rights Act 2004 (ACT), which provides:

  > 12 Privacy and Reputation
  > Everyone has the right –
  > (a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
  > (b) Not have his or her reputation unlawfully attacked.

- The requirement in s 144 of the act that the Commission notify the Inspector of the intention to hold a public examination, and the reasons why it is deemed necessary. It should be noted that the Tasmanian Integrity Commission has no power to conduct public hearings;
- The right of a person appearing before the Commission to have a legal representative (s 152);

- The requirement of the Commission to tell a witness of their rights and obligations as stated in s 148(3). This ensures a witness knows that they are likely to be questioned about, and their legal representative may seek a suppression order;
- The ability of the Commission to issue a suppression order prohibiting or restricting the publication of information or evidence given during a public examination if the Commission considers it necessary to prevent prejudice to the person's reputation (s 154(1)(a));
- The requirement the Commission develop reputational repair protocols (s 204) to account for certain information being included in an investigation report, special report or commission annual report.
- The rules of natural justice and procedural fairness are to be followed By the Commission.

Administrative law

Since the Integrity Commission is a creature of statute, and since it is not a court, all of its actions are susceptible to supervision by administrative law. For respect of each of the sections referred to in the schedule hereto, there is scope for the operation of administrative law. Any omission to follow the statutory requirements of the Act could result in administrative law review.

The schedule identifying the critical sections in respect of which administrative law challenges may be made is attached.

PITFALLS

There are several matters of concern relating to the power and jurisdiction of corruption agencies. They may be summarised as follows:

1. The powers invested in corruption agencies make substantial inroads into our traditional concepts of justice in the following ways:
    - compulsory attendance before an examination;
    - compulsory delivery of documents which might otherwise be privileged;
    - compulsory giving of evidence even though that evidence may incriminate;
    - compulsory delivery of personal items such as mobile telephones for the purpose of inspection and examination and obtaining information.
    - non-application of the rules of evidence
    - potential restriction on freedom of movement;

- reputational damage;

2. There exists a real possibility that the powers bestowed upon such agencies could be used for purposes never intended. Such agencies are not courts yet wield immense power. Powers referred to above could be applied in such a manner as to cause great injustice to individuals.
3. Usually the head of such agencies are persons of a prior judicial experience. Without such a safeguard, powers bestowed upon others could be manipulated.
4. Staff of such organisations often have prosecutorial or investigative experience. Their focus could well override the safeguards by believing a crime has been committed requiring punishment: but this practice exceeds the purpose of an integrity commission whose purpose is to expose corruption.
5. Such agencies require careful monitoring by the oversight body and potentially, courts.

CONCLUSION:

It has been said:

"For evil to flourish, it only requires good men to do nothing"

The ACT Parliament has laid the foundation for its Integrity Commission.

The debates of Parliament and the recommendation of the Select Committee demonstrate that the Parliament was anxious to ensure that there be put in place the best possible integrity agency model for the residents of the ACT.

The legislation is designed to ensure that a person's reputation will not be the subject of potential public ignominy unless there are sound reasons for the Commission embarking upon public hearings and public findings which might be adverse to a person.

The Integrity Commission Act 2018 embodies the most advanced features for an Integrity Commission, and achieves an appropriate balance for the rights of individuals.

We must bear in mind the observations which appear on the wall of the library of the Supreme Court of the United Kingdom. They are:

"Injustice anywhere is a threat to justice everywhere. Whatever effects one directly affects all indirectly".

In English law, where an injustice was perceived to be done, and the courts could not offer a remedy, it was open to the public to petition the British sovereign under a procedure known as Petition of Right. The motto for the inaugural Integrity Commission of the Australian Capital Territory, the words used in such a petition namely:

"Let right be done"

I thought that those simple words would convey the true purpose of the ACT Integrity Commission.

Dennis Cowdroy

Inaugural Integrity Commissioner, ACT

The Schedule

Divisions 3.1.3**: section 69 – 71** of the Integrity Commission act requires the commission to dismiss, refer or investigator corruption report.

Section 72: requires a complainant to be kept informed by the Commission and section 74 requires the Commission to notify an informant who is a head of a public service sector entity who has made a mandatory corruption report, to be kept informed.

Part 3.5: gives part of the Commission for entry, search and seizure. Where a claim for privilege is made in answer to a search warrant, the claim must be referred to the Supreme Court: section 128.

Section 115: an investigator in exercising his power that affect an individual must first show identity card.

Part 3.6: Commission examinations:

Section 142(1)(a) requires the Commission to comply with the rules of natural justice and procedural fairness.

Section 142(2): the Commission must make guidelines about the conduct of examinations described as the "examination conduct guidelines" which are a notifiable instrument (section 142(3)).

Section 143: the Commission may hold examinations in public or in private and the commission must decide whether it is the public interest to do so: section 143(2).

Section 144: the Commission must notify the inspector of a public examination by giving not less than seven days' notice.

Section 146: The Commission may give directions about the people who may be present during an examination or part of an examination or who must not be present at such an examination: section 146(1) and (2).

Section 146(a): a direction must not prevent the presence, when evidence is being taken of an examination of a lawyer representing the person attending in accordance with an examination summons.

Section 147: power to issue an examination summons: the Commission may**,** if it is satisfied that it is reasonable to do so, issue a summons to a person requiring a person to attend at a stated time and place to appear before the commission to give evidence or produce documents: section 147(1).

In deciding whether to issue the examination summons the commission must have regard to whether the production of the document is necessary for the investigation; whether it is reasonable practicable to obtain information in any other way…: See section 147(2)(a) – (e).

Examination summons – section 150

This section empowers a commission to attend or otherwise comply with an examination summons. The summons must be served seven days before the date of the attendance: section 150(1).

If it cannot be served personally, the Commission may apply to the Supreme Court for an order the summons be served in another way.

Legal representation:

Section 152(1) provides that a witness may be represented at an examination by a lawyer.

Suppression orders:

Section 154 provides that the Commission may issue a suppression order prohibiting or restricting publication of any information or evidence given during a public examination.

Criminal offence:

Section 155 renders it a criminal offence if a suppression order is contravened.

Arrest warrant

The Commission may apply to a magistrate for the issue a warrant to arrest a person if the commission believes on that the person has been given an examination summons and has failed to appear: see section 159(1)**.**

A magistrate may issue arrest warrant if satisfied of these requirements and also that reasonably practicable steps have been taken to contact the person; and that the issue of a warrant is in the interests of justice: section 159(2).

Section 159(3): contains the considerations that must be taken into consideration in determining whether it is in the interests of justice to issue an arrest warrant.

Failure to appear:

Section 160: describes a procedure where a witness fails to appear after the issue a warrant.

Division 3.6.2: Examinations – privilege

Section 162 requires an application of the Supreme Court by the Commission to determine privilege.

Division 3.6.3 Examinations – Contempt

Section 166: a person is in contempt of the Commission of the person has been served with a preliminary enquiry notice and refuses or fails to produce the document or thing or has been served with an examination summons and fails to attend: section 166(1)(a) and (b).

Contempt also arises where a person gives an answer which is false misleading or obstructs or hinders the Commissioner in the performance of their Commissioners functions at an examination: section 166(1)(c) and (b).

Section 167: the Commission may apply to the Supreme Court for the person to be dealt with in relation to the contempt.