

PRESENTATION OF PAPER

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I've been asked to take the role of an independent commentator, and apply some sort of critique of the Independent Commission Against Corruption (ICAC). My specific interest is in making ICAC work, that is to say to perform the functions which Parliament has given to it and to do so properly, and not to abuse its position. Equally, an important part of the whole process is to build a rational informed environment for reviewing the operations of ICAC after it has had a fair chance to perform in practice. I would suggest a time-frame of around three-to-five years, using the experience of the National Crime Authority as something of a guide. I don't think that overnight you can make any kind of credible assessment. In fact, as the Joint Parliamentary Committee on the NCA reported last year, you couldn't do it on the NCA after five years because the kind of environment required to make that assessment simply didn't exist; the information hadn't been drawn out for it to make anything more than an initial evaluation. So, accordingly they postponed the task for a few years.

If I can make this my most important message to you, and I trust this is something that can be conveyed to a wider audience, if we are to make ICAC work we've got to build an environment of informed, open and rational debate right now, and continue over the next few years. It is in the public interest and it will help ICAC in the performance of its functions, and I believe it will ensure the public is involved democratically in the whole process, thereby bringing to bear some real accountability to the ICAC, which I argue in my paper requires considerable amelioration.

Early in my paper I list headings under which I discuss matters and I shall just pick and choose certain matters to highlight here. I'd like first to join in issue matters raised by Commissioner Strong in his paper, which go to the heart of the issue "Why do we need these extra investigative agencies? Why can't the police just do the job on their own?" and I shall address this at the end if possible.

I turn now to the relationship between ICAC and the media. The kind of public discourse that has occurred and will continue to occur, I suggest, has been in relation to personalities rather than institutions or social structure or broader political factors. Things like allegations about corrupt individuals or some sort of individualistic analysis of corruption in terms of evil people dominate to the exclusion of an analysis of the kind of routine and structural factors which may be important in making corruption likely or possible. The kind of people who are likely to get the greatest hearing in the media are those who will engage in an analysis in terms of 'law and order' against civil liberties, putting aside the issues which are, I think, in many ways as important, such as the question of whether the ICAC will be effective, efficient and accountable, that is, will it do its job or not. The kind of issues which I think will be excluded by the media, unless we guard very carefully, will be the following four:

1. the conditions which make corruption possible and likely;
2. measures dealing with corruption at an institutional and management level, such as corruption prevention;
3. measures dealing with public attitudes to corruption, such as education;
- and finally, as I underscore time and again in my paper
4. effectiveness, efficiency and accountability of anti-corruption measures, such as the ICAC.

One of the areas explored in some degree of detail in my paper are the criteria of success by which you evaluate whether the ICAC is doing its job. Without repeating those statements, perhaps I can frame the analysis in this particular form. I'm interested, firstly, in evaluating ICAC by relating what ICAC does in its operations to factors which make corruption possible and likely. Accordingly, I don't think that conviction rates are really what it's all about, and that's a matter I will take up in relation to Commissioner Strong's paper at the end of this commentary. ICAC is not solely an investigative agency, despite the fact that is the way everyone seems to talk about it. If you read closely the Parliamentary debates, which are the record of legislative intention behind the *ICAC Act*, you will see reference to other matters such as corruption prevention and education. You will see statements such as "The Commission will not be set up to pillory our political opponents or to engage in political witch-hunts" as Mr Greiner said in the second reading speech. You will see references to deterrence of corrupt conduct. This exercise is a qualitative one. Evaluation is not a question of quantities and if I may quote Mr Temby, he also "warns journalists that if they expect blood spattered on the floors and walls they would be disappointed. We can't measure our success by headlines." Moreover, I don't think that fighting corruption is a matter of warm feelings. The idea that somehow it's just a matter of public attitudes which can perhaps be measured by market surveys - getting university students to ring up a few thousand people and see whether they like it or not - is not really going to tell you whether the ICAC has been a particularly effective or successful agency. I suggest to you it's a question of relating the evidence of the operations of ICAC against specific criteria for evaluation.

Might I turn to corruption prevention, which is something related to ICAC because it's a question of ICAC balancing its three main functions: investigation, prevention and education. How much emphasis it gives to investigation will affect how much emphasis it gives to the other two. Some of the relevant matters ICAC could take into account are mentioned in my paper. Systematic study of the public sector to identify the conditions which make corrupt conduct possible and likely. This is an institutional or management analysis. Key points in decision-making and service delivery and project management, where benefits or losses monetary or otherwise can be conferred corruptly would be covered. There should be some sort of 'risk analysis' to rank areas of most likely corrupt conduct, and I would assume the experiences of the investigative wing of the ICAC could be quite informative on that matter. There should be a focus on accountability in relation to discretions and decisions vested in particular officials or agencies, and I might raise here the wide definition of 'public official' - it does include the Governor acting on the advice of the Government, and Ministers of the Crown. They exercise important discretions. The clear issue here is the accountability that applies to the exercise of their discretions as well as to those who are in the more structured bureaucracy of the Public Service.

Finally, a matter which I think is contemplated under the *ICAC Act* is that the ICAC as far as possible co-operate with other agencies, and in corruption prevention I would think this must include the Auditor-General, the Ombudsman, the Public Accounts Committee of the Parliament and the Office of Public Management.

Regarding the discretion to investigate, I would suggest its importance lies in the relationship between ICAC and other investigative agencies such as the police and the Ombudsman. In my view ICAC should never be investigating matters which could be appropriately investigated by other agencies. Here, co-operation is very important. ICAC should reserve for itself 'hard cases' and these are of two sorts: the first sort where the special powers of ICAC would need to be used to crack the case, and the second sort is where investigation by an agency other than ICAC would be ineffective, perhaps because of corruption within other agencies.

The use of informers and protected witnesses should be done most circumspectly. Without excluding it as a possibility, the experience of other agencies may suggest a mood of caution before rushing to use uncorroborated evidence from informers.

I don't see that ICAC should be investigating matters which lack contemporary relevance, even if they may be of some political interest. By 'contemporary relevance' what I mean is that key figures subject to the investigation still hold positions of influence, or the institutional setting in which the corrupt conduct occurred or is alleged to have occurred is still open to the same kinds of abuse, in other words there could be a role for prevention in the future. Finally, I don't think ICAC should be involved in investigations where through the passage of time all that would result would be a stale prosecution.

Concerning the accountability issue, I refer in my paper to the discharge of ICAC's responsibilities in relation to its Annual Reports. In my view this is where ICAC can inform the environment in which it is to be evaluated. It should take its annual reporting function very, very seriously.

ICAC is unusual in that it is perhaps one of the few investigative agencies in which no guidelines can be given to it in the general conduct of its functions. The NCA, the AFP, the New South Wales Police, DPPs around Australia are all subject to the possibility of guidelines being issued to it in relation to such matters. Police in England, under the *Police and Criminal Evidence Act* are subject to quite strict guidelines in relation to almost all matters of policing.

To conclude, several matters which Commissioner Strong raised I agree with, such as the effectiveness of police in relation to certain drug cases. However I'd like to raise a few points of a critical nature which I think show some difference between my approach and that of the Commissioner.

The reasons you have these new agencies are really threefold: firstly, a record of police ineffectiveness over the past twenty years, despite the record in drug cases he observed; secondly, the need for agencies to investigate where police may well be involved in crime or corrupt conduct; and thirdly, special powers can be given to the ICAC and NCA, for example, which cannot be given to the police at large, because of the degree of potential interference with civil liberties.

Conviction rates are not the criteria of success of any agencies, despite the success which might be attributed to the Joint Drug Task Force. I think there are many other matters such as the scale by which you measure the impact of agencies and evaluating a range of other qualitative non-law enforcement criteria to determine whether you think investigators are doing a good job or not.