ICAC
WORKING IN THE PUBLIC INTEREST[1]

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The Independent Commission Against Corruption came into existence on 13 March 1989, and there had been a prior setting up period, so it is sensible to look on the Commission as being about 18 months old. That is a sufficient time to enable assessment to take place, and this is accordingly an opportune time to examine the procedures and achievements of the Commission, and such shortcomings as may exist. I also propose to clear up some common misconceptions concerning the ICAC and how it operates. Some would contend that the provisions of the *Independent Commission Against Corruption Act* 1988 or the approach taken by the Commission to its work, or a combination of both those things, to work against the public interest. It will be asserted to the contrary that in exercising its functions the Commission has, as it is required to do by s12 of its governing legislation, regarded the protection of the public interest and the prevention of breaches of public trust as its paramount concerns. However, some statutory changes are called for and they will be touched upon. Naturally the Commission always seeks to improve performance. I am sure that we can learn something from civilized discourse on an occasion such as this.

PROGRESS REPORT

Let me provide a very brief progress report. The Commission presently comprises 120 people, plus security which is provided on a contract basis. We see that as a relatively small staff. It requires a highly selective approach to what matters will be given full attention. That number will increase by about 20 over the now current financial year. No further increase is envisaged.

The budget of the Commission is about $10 million annually, plus one-off expenses, for example in upgrading premises and computer facilities. We are about to embark on the latter in a full-scale way. Our premises are in Redfern. The ground floor is largely open to the public and includes two hearing rooms. The public is encouraged to come and see the Commission at work.

The Commission's strategic headings are based upon the proposition that it cannot do more than a certain amount itself, and if it seeks to impose solutions upon others, then it is bound to fail. Accordingly we seek to reserve to ourselves only that investigative work which others cannot or will not do. We therefore see our hearings as in no sense a substitute for standard prosecution action. If a criminal brief can be built, then that should

1 Edited version of an address delivered at a public seminar entitled "ICAC: Lessons from the First Twelve Months" convened by the Institute of Criminology at Sydney University Law School, 29 August 1990.

be done, and it should at least ordinarily be done by others. The ICAC provides an alternative to the more traditional way of doing things.

The *Act* dictates a three pronged approach, one being investigation and report, another corruption prevention, and thirdly public education. The Commission consciously cultivates an attitude of openness in its dealings, that being in all respects consistent with the statute. It is also consistent with the Commission's self image: it exists to serve the public. While we try to be as forthcoming as is practicable, for obvious reasons current investigations are not discussed save with respect to material that gets on the public record through open hearings.

As to product, on the investigations side there have been five reports produced to date varying in size from 30 pages to 700 or thereabouts. There has been much delay caused by litigation, to which further reference is made. I anticipate that five more reports will be published by the end of 1990, although that depends to an extent upon any further steps that might be taken to prevent us from publishing any of those reports. There has also been a lot of work done in the corruption prevention area, more about which will be discussed later.

THE PUBLIC INTEREST

How does the Commission seek to protect the public interest? I submit that the only safe and proper approach is to recognize that rights are enjoyed by, and the Commission owes duties to, all members of the population, including those who become involved in investigations it decides to take on. The investigations are therefore carefully chosen and defined. Only 23 have been commenced to date. Whenever an investigation is commenced, its scope and purpose is formally defined and recorded. The special statutory powers, including coercive powers, can only be utilised with respect to a matter so commenced. Accordingly, Commission staff do not roam around town, knocking on doors and demanding answers to questions. They know the matters with respect to which they can (if authorised, and the authorisations have to be given individually) exercise coercive powers, and it is only in respect of that very limited number of matters.

To put that in perspective, as at 12 noon today we have received 1,956 approaches from the public, whether by way of complaint (which is the great majority) or provision of information, some of them having come from public sector managers under s11 of the *Act*. That has occurred over the period of nearly 18 months referred to at the outset.

We seek to spread ourselves between areas of public sector activity. The reason for that is obvious. Were the ICAC active in one area only, then inevitably corrupt practices would flourish elsewhere. We seek to avoid preconceptions and are willing to exculpate anybody if the evidence on full consideration so requires, and that is made manifest by the reports published to date. As I hope would be expected, matters are pursued without fear or favour. The Commission seeks to do its job quickly as well as thoroughly and has been generally successful in that respect, save where held up by litigation.

I now wish to deal with several of the more common misconceptions concerning the ICAC, some of which I fear have been deliberately cultivated, although I suppose most of them are genuine.

CORRECTING THE RECORD

It has been contended of recent times that witnesses have no right to representation before the Commission. As anyone who has got even a nodding acquaintance with the statute knows, that is nonsense. The *Act* requires that all witnesses be granted legal representation on request. This is by leave but the Commission is required to give a reasonable opportunity for that to happen, and no request has been refused. We seek to give those who might be adversely affected, whether by evidence or the Commission's conclusions, every opportunity to respond. As an audience comprising lawyers and law students will understand, that is more than the courts do for witnesses. We are there, within defined limits, to seek the truth. The courts have to be activated by the Crown or by a litigant, and they are there to decide issues as defined by pleadings or otherwise. It is no part of their role to be particularly solicitous of witnesses.

It was suggested from one quarter that Commission investigations may drive away investment from the State. To say that is surely to suggest that the ICAC has a capacity for greater impact than is realistic. We are a small body, and we deliberately contain ourselves. Of the investigations commenced to date, I can think of only four which have centred upon or had a deal to do with business activities. In one of them, the Park Plaza matter, nobody suggested detriment. In the Walsh Bay matter such a claim was made, but certainly the *Australian Financial Review*, which may be looked upon as an authoratitive journal, saw the matter very differently. I am not aware of complaints of detriment in the Silverwater matter. The fourth matter, in relation to North Coast land development, was wide ranging. One only of its aspects had to do with business activities, and of recent times, proponents of a planned institution at Byron Bay have stated adamantly that it will in fact proceed.

It is thought by some that the Commission places great reliance upon hearsay evidence. Presumably those who hold that view are aware of s17(1) of the *Act* by which the rules or practice of evidence are not binding on the Commission, and leap to the conclusion that Rafferty's rules apply. Nobody who has been at the Commission hearings would think that for a moment. Our hearings look and feel like proceedings before a court of law, although I do not need to be reminded yet again that the Commission is not a court of law. Indeed, it may be that at hearings the Commission conducts itself in an excessively legalistic manner.

It needs to be clearly understood that the rule against hearsay is that:

> An assertion other than one made to a witness while testifying in the proceedings, is inadmissible as evidence of the truth of that which was asserted.

All depends upon the purpose for which the statement testified to by a witness is received. That is well illustrated by an incident that occurred early on in the North Coast public

hearing. A witness said in evidence that a development consultant had said that he did all his business through a particular, named, and prominent politician. Commission investigators did not know that the politician was likely to be named. Reference to him in the media was considerable. There was criticism about the use of hearsay evidence. However the statement would in any event have been admissible, before a court, because it served to illustrate the consultant's marketing practices, and in particular his claims of close associations with people in prominent positions. It illustrated a strong propensity for name dropping.

The witness was examined by counsel assisting, and vigorously cross examined by counsel for the consultant. When the consultant later gave evidence, he was given an opportunity to reply. The politician was offered the same opportunity. He lodged a statutory declaration denying the allegation, but chose not to give evidence. That is understandable because on the day after the publicity occurred, Assistant Commissioner Roden gave a brief overview of the evidence and concluded that even if the consultant did make the statement, there was nothing which could sustain the conclusion that the politician was in any way involved in any of the matters to which the evidence referred. I think the matter was handled reasonably.

The Commission does admit hearsay evidence from time to time. That has sometimes led to further useful information being obtained. Of course the cogency of such statements is scrutinised with great care. The application of the Briginshaw principle makes an adverse finding solely based upon hearsay evidence practically impossible to conceive.

I think there may be a belief that the Commission is a litigous body. In fact the only proceedings the Commission has ever commenced were for contempt, on two occasions. We have quite often been sued, particularly by interests who have sought a series of injunctions to prevent a particular report being published. In the litigation mentioned against the Commission, we have been largely successful, but the High Court in *Balog*, and *Stait v ICAC* brought down a judgment which said that the Commission could not in a report to the Parliament following investigation, include a statement of findings that a person was or may have been guilty of a criminal offence or corrupt conduct, save precisely as permitted by the statute. The Commission never intended to find criminal guilt, and if I can quote from an unpublished report in the form in which it was before the High Court spoke:

> ...the Commission is not a court exercising criminal jurisdiction, it cannot and does not seek to convict or punish and it ought not usurp functions which properly reside elsewhere.

On the first day of the North Coast hearing, Assistant Commissioner Roden said:

> ...this is not a court case. No one has been charged with a criminal offence. No one can be convicted in these proceedings. The hearing is part of an on-going investigation being conducted by the Commission. The object of the investigation is to get to the truth...

Nobody could look for a statement more clear and satisfactory than that.

The High Court decision has given rise to considerable difficulties of a practical sort. It is hard to know just where the line is to be drawn between that which is permissible and that which is not, and varying views of the decision can be taken. At the very least the Commission is, in the present state of the statute and authorities, driven to fine semantic distinctions, which do not get anybody anywhere much.The most important amendments of the *Act* which are called for have to do with the Commission's reporting powers and s18. There is nothing surprising about statutory change being necessary, remembering that the statute broke entirely new ground and was substantially amended during the legislative process. As to reporting powers, I have urged before now that the *Act* should clearly state what a report must say, what it may say and what it must not say.

Section 18 prohibits the Commission from reporting during the currency of other proceedings, whether before courts or tribunals. The section has not been tested but appears to be very sweeping in its scope. It is hard to understand the justification for it beyond criminal proceedings which will lead to a jury trial (perhaps only an early jury trial) as to which the justification is obvious enough. The contempt cases make pretty clear that Judges and Magistrates who sit alone and are trained in the law can be relied upon not to be affected by information which is foreign to that which is before them.

The Commission cannot be heard to complain that all of the attention devoted to it has concentrated upon investigations and hearings. I say that because we decided early on to start in that area, and it has naturally attracted attention and some publicity. But several things must be borne in mind. The first is that absent public hearings, we could not have a discussion such as this. There would not be the opportunity for anybody to come along and make sure that the Commission comports itself in a proper manner.

Secondly, not everything is done in public. Twenty out of the 132.5 hearing days over which I presided in the last financial year were held in private. Thirdly, like any statutory body, we must observe the statute, which has a clear and strong bias in favour of public hearings. I have expressed previously, in particular in one of the reports, the arguments for public hearings which in my view continue to be strong. And fourthly, a very great deal of work is done elsewhere. For example, assessment of nearly 2,000 other complaints and reports of possible corrupt conduct, and especially corruption prevention work.

CORRUPTION PREVENTION

Corruption prevention has to do with improving systems before they have been suborned, rather than waiting until a system has been attacked and then attempting to ascertain the conduct in question and find the culprits. The corruption prevention strategy, which is a public document available for anyone to see, is based upon these three propositions. First, prevention is better than cure. Secondly, corruption prevention is a managerial function. Thirdly, accountability makes for committed management.

What is the Commission doing in this important area? We are following up what was said in the Silverwater report in order to help departments and agencies get their

tendering rules and practices right. A deal of work is being done in the stores procurement area. That arises largely from an investigation, the hearing into which has been completed and the report concerning which is being written presently, which had to do with the supply of carpet to the Department of Housing. A great deal of corruption prevention work is being done in relation to the driver licensing system. My belief is that, working with the Roads and Traffic Authority, it will be possible to give people of this State a driver licensing system that cannot be suborned, at least on a systematic basis. That would be a break from tradition that goes back at least 20 years. Finally, we do a great deal of advisory work at the request of senior public servants, who are approaching the Commission to an increasing extent.

I have little doubt that in the medium to long-term, the most important work the Commission will do is in the corruption prevention area. It is by means of systems improvement, coupled with attitudinal improvement which is a public education function, that lasting long-term benefits can be achieved.