TACKLING CORRUPTION IN NEW SOUTH WALES*

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I. INTRODUCTION

The slogan "white collar crime"[1] is best avoided, because it may be seen to connote something more genteel and respectable than crime involving other collar colours, perhaps even less seemly articles of dress. There will be used in substitution for it "business crime", which involves a pleasing juxtaposition: many think of business as refined and crime as brutal. The reality is that the business criminal, for example the large scale tax fraudster, can do far more harm to the body politic and its citizens than can any number of ordinary criminals. There is much attraction in being involved in the prevention of business crime: it is an area in which deterrence manifestly works.[2]

The more serious types of corruption may be seen as being closely linked with, and sometimes a species of, business crime. The Independent

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1 The expression is attributable to Edwin Sutherland, in 1939. He recently described it as "a crime committed by a person of respectability and high social status in the course of his occupation".

2 See I. Temby, "The Pursuit of Insidious Crime", (1987) 61 *ALJ* 510.

Commission Against Corruption, which is dealt with below, has responsibility only for corrupt practices within, or as they affect, the public sector of Australia's most populous State. However even with that limitation, it must be obvious that from time to time the type of criminal who is involved in business enterprises and uses persuasion, rather than force, will pursue profits by paying bribes or otherwise seeking favourable treatment, and thus suborn proper political or bureaucratic processes. It is to be remembered that corruption necessarily postulates somebody able to do a favour, and accordingly in a position of some power.

New South Wales had had a significant corruption problem over a long period. In the last decade its citizens have seen the imprisonment of a Chief Magistrate,[3] a Cabinet Minister,[4] and various upper level functionaries, and a substantial cleaning out of the Police Force, including the discharge in disgrace of a Deputy Commissioner.[5] There was a public demand for more action and a different approach. To get the problem into proportion, it should be said that New South Wales may not have a corruption problem which is serious in world terms. That is something which, in the nature of things, it is difficult to measure. What can be said with confidence that in the view of the people generally, standards of integrity should be higher than they have been.[6] It is to be noted that most of the State's people live in Sydney, a large city which is a port, and a major and growing financial centre. It is trite to observe that size of population, proximity to seaboards, and a predominance of secondary and tertiary rather than primary economic activities, are factors tending to produce more crime of all sorts, including the more sophisticated. It is equally trite to observe that corrupt practices of various sorts represent an insidious evil, which reduce the trust and vitality of the people generally.

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3 Murray Frederick Farquhar was appointed as a Stipendiary Magistrate in 1962, and as Chief Stipendiary Magistrate in 1971. In March 1985 he was convicted of an offence relative to his office, and sentenced to imprisonment for four years. He was released on 17 January 1986.

4 Rex Frederick Jackson was an MLA from 1955 to 1986, and a Minister from 1976 to 1983. He was convicted of an offence relative to his office in August 1987, and sentenced to imprisonment for 71/2 years, which was increased to 10 years on appeal. As to aspects of the matter, see *R. v. Jackson* (1987) 30 A Crim R 230 and *R. v. Jackson and Hakim* (1988) 33 A Crim R 413. Mr Jackson has been a witness before the ICAC: see Report on Investigation into the Silverwater Filling Operation, February 1990.

5 William Allan Ruthven Allen was appointed as Deputy Commissioner on 27 August 1981, and suspended on 1 December of the same year. Following a hearing before the NSW Police Tribunal in early 1982, at which he was found to have paid money to an inferior officer to compromise him and render him susceptible to improper influence, and to have lied to the Tribunal, he retired.

6 The Government which introduced the Independent Commission Against Corruption Act 1988 (N.S.W.) (hereafter "the ICAC Act") was elected following considerable public disquiet as to public sector corruption, and a pledge to act as it did.

The typical method used to pursue most sorts of business crime has been investigation with a view to prosecution through the courts. It may be doubted whether that is the best approach, although it does have real attractions, not least because it is hallowed. Most would agree with the proposition that the courts administer a system which is both just and fair, and while that is not definitively true, nor does it lack justification. It is to be remembered, however, that the courts are essentially passive in character, and police investigators work best when dealing with a victim or complainant. The traditional approach leaves a lot to be desired when the crucial need is to identify the problem and root out the causes.

II. THE ICAC ACT

The Independent Commission Against Corruption Act 1988 (N.S.W.) (hereafter, "the Act") was enacted after considerable Parliamentary, and come community, debate. The statute, which contains provisions having the potential to reduce traditional freedoms, is premised upon the need to tackle the pressing problem of public sector corruption in an innovative manner. The Commission came into being in March 1989, and the procedures it follows - perhaps paradoxically - do in certain respects give individuals greater rights than subsist before the courts of the land. The Commission, as an independent but accountable body,[7] also has distinct advantages as against Commissions of Inquiry.

A reason independence matters stems from the fact that corruption will sometimes reach the highest level of society. It cannot be expected that a decent level of integrity in the public sector will be achieved unless those at the top set the best example. And the ordinary people will not accept their activities being scrutinised if those of leaders are not also. Accordingly Government, including the activities of Cabinet Ministers, should be within the purview of an anti-corruption body. It necessarily follows that such a body must be independent of Government. The independence must be both theoretical - and therefore the statutory provisions are vital - and also exercised in practice: sometimes one sees the former without the latter.

The Commission is empowered to investigate any circumstances implying, or any allegations, that corrupt conduct may have occurred, may be occurring or may be about to occur.[8] The expression "corrupt conduct" is broadly defined but essential requirements are a connection with the public sector of New South Wales, and the possibility of a criminal offence, a disciplinary offence, or reasonable grounds for dismissal of a public official.[9] For the purposes of an

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7 See I. Temby, "Accountability and the ICAC", (1989) 49 *Aust J of Public Administration* 1.

8 ICAC Act s.13(1)(a).

9 ICAC Act ss 7-9, and the definitions of "public authority" and "public official" in s.3(1).

investigation, the Commission may hold hearings, which must be in public unless a contrary direction is given in accordance with stated requirements.[10] If the hearing is in public then there must be a report by the Commission to the Parliament, and the Commission may also provide reports to the Parliament as a result of investigations supported by a private hearing, or no hearing at all, or otherwise than in the context of an investigation.[11]

The Commission may summon a person to appear at a hearing, to give evidence or to produce documents, or both.[12] There is an entitlement to legal representation by leave on the part of any person giving evidence at a hearing, or substantially and directly interested in the subject-matter thereof.[13] A witness summoned to attend at a hearing is not entitled to refuse to answer questions or produce documents on the ground of tendency to incriminate the witness, or any other ground of privilege, but any answer given or document produced cannot be relied upon in civil or criminal proceedings if the witness objects to give the answer or produce the document or thing.[14] The power to compel the giving of answers despite what would be a ground of privilege in a court of law, and the corresponding right in a witness to object and thereby protect himself or herself, are unusual although by no means unique.[15]

A search warrant may be issued, either by the Commissioner or an authorised Justice, on application by an officer of the Commission who has reasonable grounds for believing that there is in or on premises a document or other thing connected with a matter that is being investigated under the Act.[16] It is to be noted that this is broader than the power to issue search warrants in aid of investigation of crime.[17] For the purposes of an investigation the Commission

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10 ICAC Act Part 4 div 3 (ss 30-39) and especially s.31(4).

11 ICAC Act ss 74-77.

12 ICAC Act s.35(1).

13 ICAC Act s.33.

14 ICAC Act ss 37-38. One reaches the stated conclusion in an indirect way. A witness summoned is not entitled to refuse to answer any relevant question, on the ground of tendency to incriminate, or any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground. Any answer made is inadmissible in evidence in civil or criminal proceedings, or in any disciplinary proceedings. However nothing in the section makes inadmissible any answer in any such proceedings if the witness does not object to giving the answer. It may be thought anomalous that the protection extends to disciplinary proceedings.

15 See e.g. Companies (N.S.W.) Code ss 299(2) and 541(12), *Hamilton v. Oades* (1989) 63 ALJR 352; Royal Commissions Act (Cth) 1902 s.6A(2), *Sorby v. Commonwealth* (1983) 152 CLR 281; The Companies Acts 1961-64 (Qld) s.250, *Mortimer v. Brown* (1970) 122 CLR 493.

16 ICAC Act s.40.

17 See e.g. Search Warrants Act 1985 (N.S.W.) under which the general rule (s.5(1)) is that a police officer may apply to a Justice for a search warrant if he or she has reasonable grounds

may also, and by written notice, require any person to attend and produce any document.[18]

Then there are powers which apply only to public officials. An officer of the ICAC authorised in writing by the Commissioner may, at any time, enter any premises occupied or used by such an official, to inspect and copy documents in or on the premises. No prior warrant is necessary.[19] Finally as to powers, the Commission may require a public official to provide a statement of information for the purposes of an investigation, this being done by written notice which must specify the information sought.[20]

Also of importance are the provisions which make the Commission independent of the Government of the day, but accountable to the Parliament. The annual report of the Commission, and its other reports, are furnished direct to the Presiding Officers of the Houses of the Parliament, not to or through a Minister.[21] In exercising its functions, the Commission is required to regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.[22] It is subjected to oversight by a Parliamentary Joint Committee,[23] which has broad functions excluding operational matters, and an Operations Review Committee, which monitors whether the Commission is performing its investigative functions efficiently and fairly, especially in relation to matters within jurisdiction which are brought to it by members of the public. It exists to enhance the Commission's integrity and sound judgment in the handling of complaints and investigations.[24]

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for believing there is in or on premises a thing connected with a particular offence. The warrant holder should not take property which is not in any way connected with the suspected offence: *Chic Fashions (West Wales) Limited v. Jones* [1968] 2 QB 299; *Chief Constable of Kent v. V* [1982] 3 All ER 362; *Reynolds v. Metropolitan Police Commissioner* [1985] 2 WLR 93. See also Crimes Act 1914 (Cth) s.10. The warrant must refer to a particular offence by reference to the things which are to be seized. It is not sufficient to state "an offence against the Crimes Act" or "an offence against the Law of the Commonwealth": *R. v. Tillett; ex parte Newton* (1969) 14 FLR 101 and *Parker v. Churchill* (1986) 63 ALR 326.

18 ICAC Act s.22. While not restricted to public officials, this power may be seen as analogous to return of a subpoena duces tecum before hearings in a court commence, crossed with the power to direct discovery of documents, and therefore unusual but unexceptionable.

19 ICAC Act s.23.

20 ICAC Act s.21. This statutory right to compel answers to interrogatories is potentially very useful, and sometimes actually so.

21 ICAC Act Part 8 (ss 73-78).

22 ICAC Act s.12.

23 ICAC Act Part 7.

24 ICAC Act Part 6, and see ICAC *Annual Report* to 30 June 1989, 31, where terms of reference for the ORC can be found.

III. CONDUCT OF HEARINGS

Various measures have been taken and announced which are intended to ensure that the special powers given to the Commission are exercised in a prudent manner. So for example, it has been decided that search warrants will ordinarily be sought from Justices. Indeed that will happen except in the most unusual circumstances, which have not occurred and are quite unlikely to arise. Perhaps more importantly, no formal investigation which can attract the use of statutory powers is commenced except following written submission to and decision by the Commissioner, in which the scope and purpose of the investigation is laid down. As at the end of May only twenty investigations had been approved. Public hearings have been held in relation to eight of them. Another seven have been assisted exclusively by private hearings, or brought to a conclusion without hearing at all. The remaining five are at an earlier stage. The Commission has provided five investigation reports to the Parliament in some sixteen months of operation, two more will go forward as soon as protracted litigation has come to an end, and it is likely about five more will be the subject of report by the end of 1990.

As is well-known, witnesses appearing before courts of law have no right of legal representation. The position is otherwise before the Commission, where witnesses are ordinarily authorised to be represented by a legal practitioner.[25] Of greater significance is the procedure adopted by the Commission whereby any person who stands to be adversely affected by a Commission report or hearing is notified and given the opportunity to give evidence, or make submissions, or both of those things.[26] A distinction must be drawn between those persons in respect of whom adverse findings may be made on the evidence, and those persons who are named but because of the nature of the evidence would not be the subject of such findings. In the latter case, the Commission would not normally call such persons to give evidence but would (and does) notify them of the opportunity to make answer. The position is of course otherwise before the courts, where adversarial proceedings between State and subject, or citizen and citizen, are designed to conclude the issues as defined, and incidental harm to individuals foreign to the particular litigation is taken to be a matter of no moment. At least in that respect the procedure at Commission hearings is distinctly more solicitous of individual rights than is the case before the basic tribunals of the legal system.

It cannot be too strongly emphasised that the Commission conducts hearings in aid of investigations, and for no other purpose. Accordingly there are no

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25 ICAC Act s.33.

26 ICAC *Annual Report* to 30 June 1989, in Appendix II, contains Procedure at Public Hearings. Paragraph 14 makes clear that persons against whom corrupt conduct is alleged will generally be called and given an opportunity to answer, generally only after evidence of the alleged conduct has been given.

parties, no question of onus of proof arises, and while there is a clear obligation to be fair, the Commission can gather material as it will: it is not bound by the ordinary rules of evidence.[27] The civil standard of proof on the balance of probabilities is applied by the Commission.[28]

These special powers and responsibilities have been given to the Commission because of a public and Parliamentary perception that the problem of public sector corruption is sufficiently grave to warrant establishment of a specialist body, and the enactment of special supporting legislation. As what has been said demonstrates, it would be too sweeping and quite wrong to assert that in all respects individual rights must give way to public interest considerations in the course of Commission investigations. Rather a balance has been struck, this of course on the basis that each resident of New South Wales is, or ought be, entitled to insist upon the right to have public servants of all sorts act as such - as servants of the public - and not in the pursuit of personal interests.

IV. A BRIEF CASE STUDY[29]

Stephen Lennon worked as a driving examiner between 1981 and 1986. According to his account, he was recruited to a corrupt network of driving

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27 ICAC Act s.17(1). Paragraph 13 of the Procedure at Public Hearings reads in this way:

> Hearsay and other legally inadmissible material will generally only be received insofar as it appears to the person presiding that it may further the investigation for the purposes of which the hearing is being held. The Commission will not permit public hearings to become vehicles for the purveying of gossip, rumour or speculation. Questions must not be asked of, or propositions put to, a witness, without justification on the basis of the knowledge of, or instructions given to, the person asking the question.

28 This matter was addressed in the Commission's Report in December 1989 on the Investigation Relating to the Raid on Frank Hakim's Office. In dealing with the question of standard of proof, the Commission adopted the remarks contained in the Report of the Commission of Inquiry into Certain Allegations Concerning Mr Justice Vasta, conducted by Sir Harry Gibbs, Sir George Lush and the Hon. Michael Helsham. There at paragraph 1.6 it was observed:

> The Commissioners considered that the civil standard of proof on the balance of probabilities was a proper standard to apply. When this standard is used as a measure of proof, it is sufficient if a fact is proved to the reasonable satisfaction of the tribunal evaluating the evidence. However, since the High Court decision in ***Briginshaw v. Briginshaw*** (1938) 60 CLR 336, it has been recognised that the degree of persuasion necessary to establish facts on the balance of probabilities may vary according to the seriousness of the issues involved.

29 The facts stated below are taken from uncontroverted evidence led at an ICAC public hearing, and may therefore be recited although the Investigation Report has not yet been written.

examiners shortly after he started and thereafter took bribes from driving instructors for the issue of licences many times each week, at times working on a pool basis and sharing his illicit earnings with corrupt colleagues. Subsequently he resigned and became a police officer. When he was approached by members of a police task force which had been formed to investigate such practices, he agreed to co-operate. He gave a number of induced statements to the investigating police (on the basis that an indemnity from prosecution would be sought from the Attorney General) and at the request of the officer in charge of the task force, he went to talk to many of his former work colleagues and persons who had paid him. This happened in the first half of 1989, and many of them made incriminating statements. Unknown to them, he was wearing a transmitting device and many of the meetings were recorded on film. As a result of the graphic testimony thus produced, a considerable number of his colleagues have admitted to similar conduct on their part. Lennon has resigned from the Police Force, several others have resigned as driving examiners, and the activities of many driving examiners, instructors and registry clerks have come under close scrutiny.

At an early stage it had to be decided how the investigation would best be conducted. One option, considered but discarded, was to charge criminal offences and proceed through the courts in the hope of obtaining convictions. The difficulty was that the evidence was general rather than specific in nature. While some substantive charges against a small number of offenders could have been laid, the evidence gathered from both Lennon and various other sources indicated a wide-spread system among many driving examiners and some clerical staff to solicit bribes. What appeared to be a continuing criminal enterprise could be looked upon, in legal terms, as a series of conspiracies which would however have been almost impossible to particularise as to time, place and circumstances. More particularly that which lawyers call "corroboration" was not generally available to prove the offences, whether substantive or involving conspiracy charges. Further and more significantly, the evidence against many of the persons who could be shown to be involved was not sufficient to discharge the criminal onus, and charges laid in such circumstances would not have succeeded.

To proceed by way of prosecution would have been to run the risk of another Social Security Conspiracy Case,[30] that is to say much social discord with few results. Even if the courts could have provided early hearing dates, which in

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30 That unhappy saga produced much litigation and comment, a lot of bitter experience which might prove useful to some, an Inquiry which lead to many large compensation payments, and arguably contributed to a change of Government. But despite troubling evidence of widespread malpractice, nobody went to prison. See *Moss v. Brown* [1979] 1 NSWLR 114, *Gerakiteys v. R.* (1984) 153 CLR 317, *Tahmindjis v. Brown* (1985) 7 FCR 277, and *Report of Commission of Inquiry into Compensation arising from Social Security Conspiracy Prosecutions* (1986), AGPS.

Sydney at the moment is simply not possible, the various cases would have taken years not months to go through the system one after the other, and at the end of the day only those convicted would have been weeded out. The cost of such protracted litigation in a jurisdiction where technical points are often taken would have been mammoth. In addition as to cost, generally those charged with such offences have been suspended on pay pending disposition. The courts would have handled a number of single instance prosecutions, without getting to root causes and removing them. There had been over the preceding years a number of such prosecutions, a small proportion of which resulted in convictions, but no discernable reduction in the incidence of corrupt conduct. The same applied to dismissals of driving examiners for like conduct. None of these actions dealt with the culture which had demonstrably grown up within the Department, nor did it catch the facilitators, such as clerks said to have been involved in matching corrupt examiners with corrupt instructors.

The alternative chosen was to proceed with an ICAC investigation and hearing. The emphasis has been upon ascertainment of the size of the problem, the identification of key relationships, examination of systems to see where and why they failed, all of this with the object of helping put in place a system which will be practically immune from at least group subornation. The Roads and Traffic Authority, which is responsible for the issue of licences, has to date worked in co-operation with the ICAC, and it can be prophesied with confidence that a greatly improved public facility will result from the approach taken.

This is a good example of the work which the Commission is best suited to do. The ICAC adopts a very selective approach to its investigations, and seeks to investigate only the more difficult matters that others cannot or will not pursue. If a matter can be dealt with by way of investigation, charge and prosecution, then ordinarily that is what should happen. Indeed that has occurred in some cases, for example what became known as the "staged incidents" frauds upon the Government Insurance Office. But there will be cases in which a solution cannot be found except by first ascertaining the weaknesses of a system of administration, and in what manner and with what success it has been attacked. The obvious second step is the taking of measures to ensure that the risk of repetition is slight. The courts have no function in that respect, and accordingly no capacity. If work of that sort is to be done, it must be done by a specialist body, having special powers and responsibilities.

V. ICAC OR COMMISSION OF INQUIRY?

A Royal Commission or Commission of Inquiry operates as an arm of the Executive Government. Typically one or more people is or are appointed to conduct an inquiry pursuant to terms of reference, and provide a report thereon. An ad hoc body is thus brought into existence, working to Government through

a Minister appointed for the purpose. Generally sweeping powers are conferred by statute, but the Commissioner becomes functus officio when the final report is submitted.

The process generally demonstrates two failings. One is that the inquiry becomes protracted and expensive. The other is that recommendations made tend not to be implemented. There are of course exceptions, particularly to the latter proposition, and the Fitzgerald Commission of Inquiry in Queensland achieved such high success that all sides of politics vowed to implement the recommendations made without fail: indeed they competed as to the earnestness of the vow. Nonetheless the two propositions remain generally true, the former has lead to Government disaffection with the Royal Commission or Commission of Inquiry process, and the latter to considerable public cynicism into the reasons why politicians embark upon such a course.

It cannot be claimed that the ICAC does everything with admirable promptitude. Some would doubtless see the Commission as lawyer-ridden, and accordingly pedantic in approach. However the Commission does have general responsibilities, which means there are always competing demands upon its resources, which in turn means that it has a strong incentive to get on with the job. As the Commission is empowered to write its own terms of reference, which can be changed as appropriate, and need not be pursued to the very last letter and punctuation mark, and as it is not given a job to do by Government, but is rather generally answerable to the Parliament and through it to the people of the State, the tasks it embarks upon can be carried through with that degree of thoroughness which seems appropriate. I think that the rate at which its two largest investigations and hearings[31] have progressed provides positive evidence of the benefits that flow from such work being done by a body having responsibility not just to complete a particular investigation, but rather to use the investigative tool so as to minimise public sector corruption across the board. Because it is a standing body, and has broadly defined functions including corruption prevention, systems improvement and law reform, and because it does not cease to have powers or responsibilities when any particular investigation is completed by submission of a report to the Parliament, the Commission can and will push to have its recommendations adopted. The experience to date in that respect gives cause for reasonable optimism.

There will doubtless be occasions when a Royal Commission or Commission of Inquiry will serve a useful purpose. However when a substantial problem area is identified, and the public demands action, a standing body like the ICAC has many attractions. Perhaps the most important point to be made is that the courts of law, the function of which is adjudication and esolution rather than investigation and systems improvement, cannot be seen as a sensible alternative.

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31 Into land development and associated matters on the North Coast of NSW, and the issue of drivers licences in and around Sydney and cognate matters.