ADMINISTRATIVE LAW AND THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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Introduction

The creation of the Independent Commission Against Corruption (ICAC) was the result of a general community perception that government had not been functioning satisfactorily and that radical measures were required. This was reflected in the second reading speech of Premier Greiner when he said:

> In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled forperverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.
>
> No government can maintain its claim to legitimacy while there remains the cloud of suspicion and doubt that has hung over government in New South Wales. I am determined that my Government will be free of that doubt and suspicion; that from this time forward the people of this State will be confident in the integrity of their Government, and that they will have an institution where they can go to complain of corruption, feeling confident that their grievances will be investigated fearlessly and honestly.[2]

The determination to remove doubt and suspicion was significant. Perhaps more important was the objective to ensure integrity of government. However, integrity is an imprecise word and not amenable to legal definition or objective determination. It embraces all the activities of government, extending far beyond the problems identified in Premier Greiner's speech. Integrity involves the political and personal dealings of the government and its members requiring compliance with acceptable levels of morality and ethics, in addition to compliance with the law. If the ICAC was required to determine whether the appropriate level of integrity has been maintained there would inevitably be

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arguments and debate. Premier Greiner did not offer a definition of integrity but later stated in that same speech that.[3]

> The independent commission is not intended to be a tribunal of morals. It is intended to enforce only those standards established or recognised by law. Accordingly, its jurisdiction extends to corrupt conduct which may constitute a criminal offence, a disciplinary offence or grounds for dismissal. The commission's jurisdiction will cover all public officials. The term public official has been very widely defined to include members of Parliament, the Governor, judges, Ministers, all holders of public offices, and all employees of departments and authorities. Local government members and employees are also included. In short the definition in the legislation has been framed to include everyone who is conceivably in a position of public trust. There are no exceptions and there are no exemptions.

It is difficult to reconcile these two statements. As a consequence when these concepts were incorporated in the legislation, an inevitable and fundamental tension was created. It was made more difficult by a failure to identify the function of the Commission and its place in the legal and administrative structure. The ICAC was always intended to be more than a mere law enforcement agency. Indeed many people would be surprised that the language of law enforcement was used by the Premier and would argue that if this was relevant at all, it was but a minor part of the Commission's functions. Was it to be a body similar to the ombudsman with powers of determination or was it to be merely investigatory? Was it intended to identify appropriate standards of integrity and require that conduct meet those standards? These questions were not answered. It is now apparent that this muddling of concepts has created difficulties for the functioning of the ICAC and has brought antipathy from the courts.[4] This paper seeks to explain some of the problems and attempts to identify the complex considerations necessary before the Commission can be provided with a satisfactory structure. Depending on the powers which it is given, the rules of procedural fairness which apply to it may require redefinition. But the primary question is if the Commission is to have a role in ensuring integrity of government, beyond criminal conduct, what powers should it have to perform the task.

It is essential now that the opportunity is available to the Parliament to review the ICAC Act, that care be taken to identify the intended role of the Commission and the limits of the legitimate use of subjective judgment. Essentially, this will involve defining its capacity to make adverse findings about the conduct of individuals and identifying the legal basis for such findings. If the Commission is to have a role in supporting the integrity of government, the statute must provide that corruption is not limited to the breach of an existing law. Integrity of government is as much about the quality of decisions which relate to rights, dispose of resources or grant statutory permission, as it is about complying with a statute.

The ICAC Act requires integrity of government - a new control on administrative actions

The Commission was given a variety of functions in the 1988 Act. In exercising its functions the Commission was to regard the protection of the public interest and the prevention of breaches of public trust as its

paramount concerns.[5] The tension referred to previously is immediately apparent. The public interest is a variable concept capable of articulation in respect of particular issues but not amenable to the application of objective legal standards. Furthermore, on any issue there may be competing public interests requiring the Commission to balance and make choices. Although a breach of public trust may be easily identified in many cases, this may not be so in others where the perspective of the decision-maker may be relevant. There is, not yet, and I suspect there never will be, a legislated description of the concept.[6] It is relevant to ask why the legislature provided this fundamental object for the Commission when to implement it was likely to embroil the Commission in controversy. The reality may be that the Commission was always intended to exercise subjective judgments.

Section 13 - the catalogue of the Commission's principal functions - includes the advisory and educative roles which are consistent with an effective anti-corruption body not limited merely to investigation. The Commission was also empowered to investigate corrupt conduct but only if it was acting pursuant to a reference from Parliament could it determine whether corrupt conduct had occurred.[7] This limitation on its powers did not conform to any conventional model of an administrative body or tribunal.[8]

It is important that this power to make determinations was limited. It created difficulties in defining the true role of the Commission and its relationship to conventional administrative law doctrines. Although the Commission was to be required to investigate conduct - often conduct which was not "criminal" in nature - no guidelines were given as to its capacity to determine the character of the conduct. Unless the limited outcome derived from prosecution or disciplinary proceedings occurred the Commission's task did not lead to any formal act beyond reporting to Parliament.

It should also be remembered that the Ombudsman has power to determine the character of conduct which that office investigates and to bring in findings. Perhaps, because of the jurisdiction of the office we do not hear of problems of the type confronted by the ICAC.[9] It is appropriate to ask whether the ICAC should be different or whether in its area of jurisdiction it should be able to make determinations. The question should have been addressed in the original Act.

The legislative intention that the Commission would have concerns beyond corruption which involved criminal conduct is to be found in sections 8 and 9 of the Act, the sections which define its jurisdiction. Corrupt conduct is defined in section 8 to include conventional criminal activity including bribery, fraud and blackmail. Many other offences are included. So much was to be expected. But more was included - and it is of considerable significance. Conduct is also corrupt if it is a dishonest or partial exercise of an official function, constitutes or involves a breach of public trust or a misuse of confidential information. It is possible that many, including politicians, failed to appreciate that these matters had been included in the definition. The actions of Premier Greiner and Minister Moore were found by Commissioner Temby to be corrupt within section 8 being both partial and breach of public trust - findings which were supported by the Court of Appeal. If the Act was to make good the promise of bringing integrity to government this wide definition was essential, even if it intrudes into conventional administrative law doctrine and requires subjective judgments by the Commission.

There is no difficulty with dishonesty. But partial conduct and breach of public trust are concepts which have not been judicially defined. Both involve consideration of standards of behaviour which may be ascertained after appropriate enquiry. Only when a standard has been identified by reference to competing opinions (which may themselves be subjective) can an objective standard be applied. There is legitimacy in the idea that the Commission should be required to identify these standards (who else could do it) but there was a failure to make this clear in the legislation. There was a further problem. Although by 1988 it was reasonable to believe that the ordinary person would think such conduct was wrong, many would not have described it as corrupt.

There is a second limb to the definition of corrupt conduct. Conduct must not only come within section 8 but must not be excluded by section 9. This has been described as the "seriousness test". The concepts of criminal and disciplinary offences are readily understood. But what of "reasonable grounds for dismissing a public official"? That concept proved difficult when applied to ministers of the Crown and was made more so by the difficulties in the concepts of partial conduct and breach of public trust in section 8.

I have written elsewhere[10] that it is apparent that those who drafted the legislation were concerned that standards of public administration were under threat from activities which were not criminal. In a state which has no administrative appeals tribunal and where, in some areas, at least, there has been a demonstrated reluctance of the courts to intervene to circumscribe administrative action,[11] it is logical that the Commission should be concerned with gross abuses of the decision making power. There is a tendency for government decisions to be motivated by a political rather than a policy outcome. Integrity of government requires principled decisions, not those which serve a party's political objective or the interests of an individual.

The power to make findings of corruption - a limited capacity

The definition of corrupt conduct in the 1988 Act was primarily intended to provide the jurisdiction of the Commission. As I have indicated, only when Parliament required it was the Commission to attempt to determine whether corrupt conduct had actually occurred, and publish a finding to that effect. This structure was inherently unsatisfactory if the Commission was to function as a conventional administrative tribunal where a decision making function would be anticipated. If the intention was to address partial conduct and breaches of public trust by public officials including parliamentarians and ministers as well as criminal activity, the lack of a determinative capacity may limit its effectiveness.

Many complaints to the Commission and many investigations do not involve criminal conduct or that alone. Many reflect a decision making process which has been infected by an inappropriate concern for the benefits of the decision to persons or groups not legitimately part of the process. It has been said, and was central to the actions of Premier Greiner, that all decisions by politicians are partial "the political process is partial". If this is intended to suggest that party interests prevail over appropriate policy it reveals a significant malaise. This is not to suggest that the "political" position of the party in government may not be reflected in administrative action. Provided that position is reflected as a legitimate consideration in the decision, there is no difficulty even if the decision is thereby described as partial. But when the political position is irrelevant, the decision is flawed. It is clear that the ICAC Act *prima*

facie made all such decisions corrupt and depending upon the seriousness of the departure from an acceptable standard, defined them as corrupt conduct. However, when no standard existed by which to test the conduct a serious jurisdictional deficiency was revealed.

The first public investigation conducted by the Commission revealed part of the problem. It was concerned with the relationship between a developer, Balog, and Stait, the engineer and planner for Waverley Council. The decision and the response to it operated to mask the real difficulties confronting the Commission. There were likely to be few problems requiring the courts to intervene if the Commission was limited to investigating corruption, educating, and encouraging proper behaviour. But a body which determines the character of any conduct would inevitably confront powerful and significant interests, even if the determination has no legally binding effect.

The debate in *Balog v ICAC*[12] centred upon the capacity of the Commission to make findings of criminality or corrupt conduct in relation to an individual and publish them in a report to the Parliament. The trial judge and the Court of Appeal both said the Commission could make findings of corrupt conduct. Samuels JA said:

> I do not see how the [ICAC] could communicate the results of its investigations without stating whether it had accepted or rejected the allegations of corrupt conduct which it had been investigating.[13]

Clarke JA said:

> It seems to me that the power to investigate must include the power to evaluate the information gathered in the investigation and to reach appropriate conclusions. If it were otherwise the Commission would effectively be denied any useful function in those cases in which the investigation has revealed serious corrupt conduct.[14]

The High Court reached a different conclusion. In a joint judgment it said:

> the Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour.[15]

Elsewhere in the judgment the High Court cautioned against vesting a power to make findings that a person may have committed corrupt conduct in a body which has coercive powers which may "be exercised in disregard of basic protections otherwise afforded by the common law".[16]

The Act is amended to allow findings of corruption in every case

This caution was not persuasive to the NSW Parliament. No doubt as a reflection of the continuing concerns about corrupt conduct but more importantly because of a concern that without a capacity to determine the character of the conduct the role of the Commission would be inhibited, the Act was amended. This occurred notwithstanding the public debate in which the Attorney-General had indicated that the High Court's decision reflected the original intention as to

the operation of the Act.[17] His view did not prevail and the Act was amended to provide that the Commission could determine whether conduct was corrupt in all cases.[18]

The amendments represented a significant step in the effective identification of the role of the Commission. However, it is now obvious that the full implications were not appreciated. As I have indicated, the Commission was previously limited primarily to investigation of corrupt conduct (except in the circumstance of a parliamentary reference) but was now expressly given the function of determining the character, which may include the legal character, of the conduct under investigation. That conduct may involve a criminal act, in which event the Commission must rule whether in its view that act has occurred. It may involve a finding as to one of the extended elements of the definition of corruption. Although a Commission decision carries no legal sanction inevitably it could have serious and lasting consequences. Consistent with the expectations reflected in the amendment it has been usual for the Commission's terms of reference for an investigation to require a determination as to whether corrupt conduct has occurred.

It is interesting to contemplate the extent of judicial review which may have occurred if the Act had not been amended. If sections 8 and 9 had been limited to defining jurisdiction there may have been less intervention by the courts. Interestingly no challenge to jurisdiction has been brought before a report was published. But with the capacity to make determinations, the lawful exercise of the functions would inevitably be closely scrutinised by the courts. This has occurred in relation to ministers[19] and a senior public servant.[20] The Commission has also been subjected to intense scrutiny with respect to the application of the rules of procedural fairness.

Greiner's case - no findings with respect to ministers unless criminal conduct - subjective view of the commission is irrelevant

By vesting the Commission with the capacity to make findings of corrupt conduct, the Parliament required the Commission to define, at least for its purposes, conduct which was partial and the nature of a breach of public trust. In so far as these concepts involve value judgments, and to differing degrees they both do, the Commission was being required to identify the limits of appropriate conduct for public officials. There is no difficulty in this provided the function is recognised as administrative and not judicial. The function was to be performed in the expectation that it would not only apply to appointed officials but also to elected officials including ministers. Indeed it is likely that the public expectation was that in so far as breaches of public trust were involved, it was primarily the activities of ministers which were sought to be examined.

In *Greiner v ICAC* the Court of Appeal[21] was comprised of Gleeson CJ, Mahoney JA and Priestley JA. Mahoney JA was also a member of the Court which heard *Balog's case*. It is arguable that there is a different perspective of the majority in *Greiner* to the view of the Court in *Balog*. Mahoney JA's views are consistent.

In *Greiner*, Gleeson CJ emphasises the fact that the Commission is not a court "but an administrative body that performs investigative functions and, in certain circumstances, makes reports".[22] But this is not all. He acknowledges that its determinations are fundamental to its task following the legislative amendment after *Balog's case*. However, primarily because of the absence of an appeal process, Gleeson CJ imposes strict rules on that determinative function. Unlike many

administrative decisions which legitimately reflect subjective views, Gleeson CJ finds that "Parliament has intended that adverse determinations should be made by reference to objective and reasonably clearly defined criteria".[23] If such criteria do not already exist, they cannot be created by the Commission, and no finding can be made.

It must be remembered that Greiner and Moore sought Metherall's appointment to the Environment Protection Authority to obtain a political advantage. Commissioner Temby found the conduct was both partial and a breach of public trust within section 8. Having found the facts as he did some might say this was not surprising. Gleeson CJ himself says:

> The Commission's findings of fact, in my view, were such that it was well open to him to conclude that the case came within the section.[24]

It is at least arguable that this finding reflects the subjective views of the Commission. There are no ascertainable legal criteria for the judgment made. Notwithstanding this finding in relation to section 8, Gleeson CJ held that because no ascertainable legal criteria for dismissal existed the requirements of s 9(1)(c) had not been fulfilled. He said:

> On the true construction of s.9, the test of what constitutes reasonable grounds for dismissal is objective. It does not turn on the purely personal and subjective opinion of the Commissioner.
>
> The context of s.9(1)(c) supports such construction. The immediate context is that of a section which deals with a number of matters, most of which are clearly capable of determination according to objective, ascertainable criteria: criminal offences, disciplinary offences and grounds for dispensing with or terminating services. That is the setting in which there is reference to grounds for dismissal. The wider context is that of legislation which exposes citizens to the possibility of being declared to have engaged in corrupt conduct; it should not be construed so as to make that outcome turn upon the possibly individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits. Furthermore, the legislative history of the statute shows that it was Parliament's intention that the test be objective and that determinations should be made by reference to standards established and recognised by law.

The rationale for this approach has been discussed by Associate Professor Allars.[25] The author challenges many of the assumptions in the judgment. Many of her criticisms address the difficulties of analysing the decision by reference to accepted administrative law principles. The position may be that ultimately Gleeson CJ found the decision of Commissioner Temby unreasonable in the *Wednesbury* sense.[26] Indeed, it is unlikely that this is the correct analysis. If it is not, it may be difficult to appreciate some of the detailed criticisms made of the Commissioner's reasoning process - a process undertaken by an administrative body.[27]

With some differences and without canvassing the same matters, the judgment of Priestley JA is to similar effect. He ultimately found that because the test of "reasonable grounds" required the application of objective standards, and none existed in relation to dismissal of ministers,

the findings made were not open to the Commission. Priestley JA would not allow the Commission to define reasonable standards for itself.[28]

Mahoney JA adopted a different view. He accepted that the question was whether it would be reasonable for the Governor to dismiss the minister in the circumstances which the investigation revealed. Provided the answer given was open to the Commission, no error was revealed. His analysis is of some significance even when his conclusion was a minority view:[29]

> The reason for the difference was suggested by Mr Greiner in what he said to Parliament on 28 April 1992 ... The Commissioner, in his report confronted what was there said. He concluded that the standard of conduct in public life there adopted was not acceptable: at least, the view could reasonably be taken that it was not. The conclusion of the Commission was, in my opinion, one to which reasonably it could come. I am not able to say that, in coming to that conclusion, the Commission acted beyond the limits of what was reasonable.[30]

Greiner has been followed by Grove J in *Woodham v ICAC*.[31]

I have indicated that the *Greiner* decision has attracted some critical academic attention. For clear and substantial policy reasons the Commission did not appeal to the High Court. It would seem likely that special leave would have been granted and it may be suggested that the Court would have assessed the competing arguments with a greater concern as to the nature of the error if any committed by the Commission. It is perhaps regrettable that the "political realities" did not allow the High Court to consider the matter.

Central to the Commission's reasoning in not taking an appeal was the expectation that there would be legislative amendments at an early date to deal with these problems. Premier Greiner having resigned, there was little reason to pursue an argument which in practical terms was sterile. It was decided that the matter should be left to the legislature. The Commission could not have anticipated that the government would prove unable to put forward any legislative remedies until more than two years after the problem was identified.

Procedural fairness

The ability to make findings of corrupt conduct gave significant power to the ICAC. Obviously, with that power came the requirement that the Commission afford procedural fairness in its investigation. One inquiry, *The Report on Investigation into North Coast Land Development*, provoked considerable controversy. It also led to a number of prosecutions.[32]

In *Glynn & Ors v ICAC*[33] a challenge was brought to the Commission before it had published its report alleging, *inter alia*, that the plaintiffs had been denied procedural fairness. Problems had occurred during the course of the public hearings which meant that the representation for the company Ocean Blue Club Resorts Pty Ltd and various of its executives changed. An experienced solicitor advocate took up the cause of Ocean Blue. He asserted that he found great difficulty in presenting his client's case to Assistant Commissioner Roden.

The difficulties are reflected in the transcript of the hearing, of which relevant sections are produced in the judgment. It was said

that these difficulties were so great that Ocean Blue was denied a fair hearing. In his judgment, Wood J said:

> In substance it was submitted that the Commissioner behaved in a manner which was so intemperate, abrupt, condescending and sarcastic and involved so many interruptions in the submissions, as to leave a reasonable observer with the apprehension that he had preconceived views, was biased against OBCR, and did not permit Mr White a fair opportunity to press his case. This is a serious submission to advance, and it requires reference to some portions of the transcript.[34]

He then discussed the principles to be applied to the complaint made. Recognising the value of the oral argument,[35] the court said that "where a party is deprived of a proper opportunity to pursue his case, intervention may be necessary to ensure that natural justice is done".[36]

The transcript was examined and Wood J concluded:

> While these passages do reveal unfortunate and undignified expressions of irritation and, on occasions, sarcasm, which to some extent were understandable at the end of a long and wearing inquiry in which many technical and legalistic points were taken, they also reveal in a telling way that the Commissioner was carefully listening to and trying to follow the submissions which were being put. When they seemed irrelevant or incorrect, they were stopped and tested. It is clear that the learned Commissioner was doing his utmost to keep the inquiry to relevant matters and to understand what was being put. Others may well have behaved with more patience, politeness, and awareness of the possible risks attached to ill temper and sarcasm, but when read in their context and in the light of the foreshadowed issues, I do not believe that the Commissioner passed over the line between robust control of the inquiry and unfair and uneven-handed treatment.[37]

The case is of interest not so much for the debate reflected in the judgment but because of the assumptions underlying the proceedings. If the Commission was limited to performing an investigative function without a capacity to determine the character of particular conduct would the complaint have arisen? What if any rules are provided in relation to a mere investigation?[38]

The litigation brought by Detective Chaffey[39] is of greater significance. Although Chaffey failed, the decision is a reminder that the rules of procedural fairness are not confined. The courts will modify them to meet the circumstances of a particular tribunal depending upon that tribunal's function and the matter under consideration.

The facts are well known but may be briefly described. Chaffey and others were police who were to be adversely named by Smith, a notorious criminal, in evidence which the Commission knew would be given during the course of the investigation into the NSW Police Service. Smith had indicated, before giving his evidence, that although he would subject himself to cross-examination, he would not answer all questions. Specifically, he would not answer questions which implicated non-police in criminal activity.

Before the Commission had finally decided how to deal with the problem, proceedings were commenced. Cole J made two declarations finding that the Commission had acted contrary to the principles of natural justice by permitting counsel assisting to disclose the allegations during his opening address and by allowing Smith to give evidence when it was known he would not answer all material questions to be put to him.

The finding by Cole J surprised many including Gleeson CJ.[40] Accepting that the Commission was bound to observe the rules of procedural fairness, Gleeson CJ observed that this did not mean its actions had necessarily to be perceived as fair to all. Observing that fairness in judicial procedure does not encompass a requirement to protect people from adverse publicity, Gleeson CJ determined that the rules of procedural fairness did not require the Commission to investigate the matter in private. Provided, when it decided whether to sit in public, the Commission acted fairly and its decision was reasonably open to it, the Court could not intervene.

Mahoney JA (agreeing with Gleeson CJ) recognised the Commission's function as quasi-judicial.[41] He concluded that in deciding whether to hear evidence in private procedural fairness must be afforded. However, agreeing with Gleeson CJ, he did not suggest that procedural fairness required a private hearing - the matter was one for the discretion of the Commissioner.

Kirby P took a different approach. He reasoned that the Commission was not a court from which it followed that the principles of open hearings which applied to courts may not apply to the Commission. He held that procedural fairness included a right to protection of a person's reputation. Unless Kirby P is suggesting the common law includes such a right (which may be the situation), his decision is perhaps another application of the *Wednesbury rule.*[42]

It is apparent that the judgments of Gleeson CJ and Mahoney JA reflect the conventional view of the limits of procedural fairness. Kirby P would significantly expand them. It is appropriate to recognise that if the ICAC is to be viewed as a special form of administrative body with extraordinary powers of investigation and determination, it may be legitimate to require it to observe different rules of procedural fairness. This is the fundamental position adopted by the judgments of both Cole J and Kirby P and it has considerable force. However, it could only be accepted if there is an agreed position as to the nature and role of the Commission.

Future directions

It should now be apparent that despite the good intentions of Premier Greiner's speech, the legislation which created the Commission contained a fundamental problem. There was a failure to adequately identify and provide for its capacity to make decisions about the conduct of individuals. This came largely from the fact that the true nature of the body had not been defined. Was it a standing royal commission as some have suggested, was it an administrative tribunal with a special jurisdiction in relation to public corruption, or was it a lesser body limited to collecting evidence to be deliberated on by others? If its jurisdiction had been limited to conduct involving a crime there may not have been great difficulty. But it extended to actions and decisions which although not criminal involved partiality and breach of public trust.

Even when the problem emerged following *Balog's case*, the legislative amendments were not made after consideration of the appropriate role for the Commission. The

failure to do this has significantly contributed to the problems which the Commission has faced. For the reason that it has enormous power, it may investigate the Governor, judges and ministers of the Crown and require them to answer publicly to any allegation which may have been made, it could never appropriately be classified as an ordinary administrative body. Because it can make such potentially damaging findings after collecting evidence by means not available to courts, it is apparent that great care was required when defining the legal principles which should be applied to its tasks. These difficulties are the source of the divergent judgments in both *Greiner* and *Chaffey*. It can be confidently stated that unless this analysis is undertaken and effective endorsement of a revised legislative arrangement is made the Commission will continue to be subject to ill-informed and strident criticism and the courts will have difficulty formulating the rules which should control its functions. If this is the case, its work will be impaired.

The *Greiner* judgment was handed down in August 1992 - more than two years ago. There has been considerable public discussion about the outcome and it was decided that the Committee on the Independent Commission Against Corruption (the Parliamentary Joint Committee) should review the situation. It did this and published a report in May 1993. To date, nothing has been done. It is impossible not be critical of the delays. Perhaps it can be explained by the difficulties which are involved, some of which I have discussed. However, it is more likely that there is a lack of will to achieve an effective outcome.

The Parliamentary Committee report discussed ten issues. All are important. Eight issues were resolved to their satisfaction - two were not. These were the capacity of the Commission to make findings about individuals and the related question of whether an appeal mechanism should be established with a capacity to review findings of fact.

With respect to the problem of members of Parliament, the Committee's recommendation, adopting the submission of the Commission was that section 9 should be repealed. This would mean that all conduct, including partial conduct or a breach of public trust committed by a member of Parliament or minister could be investigated by the Commission leaving it to the Commission to identify conduct which was sufficiently serious to justify the application of its resources. This was an appropriate direction for amendment but was criticised by some, including some involved with the original legislation. The argument was raised that politics is about partiality and this amendment would conflict with the political process. Given the original Act was intended to restore integrity to government and accordingly was designed to extend to decisions which, although not criminal were infected by dishonest or partial considerations, this response is surprising. It suggests that the promised integrity may have proven troublesome in reality. Even if section 9 is amended it is to be hoped that the Parliament will not resile from the expectations raised by the Premier's speech in 1988.

The Committee found itself unable to resolve the question of whether the Commission should be able to make findings of corrupt conduct. One view was that the Commission should be limited to finding the primary facts. The contrary view - and the view advanced by the Commission - was that this would be too limiting. The different views are set forward and discussed in the Committee's report. The Hon. A. Moffitt Q.C. has provided a suggested definition of primary facts which

is complex and likely to provoke litigation - at least initially.[43]

I have previously expressed the view that if the Commission is to make findings of corrupt conduct difficulties will inevitably arise.[44] Later events have demonstrated this to be correct. It is interesting to contemplate the political outcome in *Greiner's* case if a finding of corrupt conduct had not been made. The conduct would nevertheless have been described as partial and a breach of public trust and within section 8 of the Act. Although Premier Greiner and Minister Moore may not have been found to be corrupt, it is inconceivable that significant political ramifications would not have occurred. As it happened, the nature and consequences of the factual findings made by Commissioner Temby were completely overshadowed by the debate about his capacity to make a finding of corruption. It is arguable that although the finding of corrupt conduct was important to the immediate political process, it was the conduct itself which was more significant and required the response of the Parliament. Would that response have been any different without the formal finding?

In the ultimate, the difficulty which the ICAC has faced is that it has been required to investigate and adjudicate upon matters which are the responsibility of the conventional investigation and court processes. In my opinion, the object of the legislation is adequately provided if the Commission is able to investigate and report the facts which it has found which must include conclusions as to the motivations of persons and the outcome they intended. It must be able to determine the truth of the situation. By this means utilising its special powers to obtain information, the Commission should be able to expose corrupt activities and will be likely, as has already occurred to significantly improve the quality of public administration.

The legislation should avoid the necessity for the Commission to reach ultimate conclusions about conduct described by reference to defined legal concepts. If it exercises such a function there is little to distinguish it from a court. Full appeal rights would be irresistible and the Commission would be in reality a parallel "criminal justice" system. Perhaps there is a need to examine the effective workings of the criminal justice system when dealing with public corruption but it should not be modified by accident. This should only occur after an informed community is aware of the nature of the proposed changes. Whether the ultimate powers of the Commission require the development of the rules of procedural fairness will depend upon the changes which are made. There may be significant reasons to conclude that special rules should be created.

Endnotes

1 It is appropriate to disclose that I have appeared in a number of the matters referred to in this paper and have been for two years an Assistant Commissioner of the ICAC.

2 Hansard, 26 May 1988, p 673.

3 Hansard, 26 May 1988, p 676.

4 See the discussion in Allars: "In Search of Legal Objective Standards: The Meaning of *Greiner v ICAC*", *Current Issues in Criminal Justice*, Vol 6 No 1, p 107.

5 *Independent Commission Against Corruption Act 1988*, s 12.

6 See the discussion in Margaret Allars "A New Morality in Administrative Law", in *Administrative Law & Public Administration: Happily married or living apart under the same roof?*, edited by Stephen Argument, at p 250.

7 *Balog v ICAC*, (1990) 169 CLR 625.

8 These provisions were later changed following *Balog v ICAC* - see discussion below.

9 *Ombudsman Act*, 1976 (Cth) s 15(1); *Ombudsman Act*, 1974 (NSW) s 26

10 "Elements of Corruption in Local Government", by PD McClellan, March 1994.

11 See the chapter by Wilcox J "Retrospect and Prospect", in *Environmental Protection and Legal Change*, edited by Tim Bonyhady, 1992, at p 217.

12 *Balog v ICAC* (1989) 13 NSWLR 356; (1990) 169 CLR 625.

13 *Balog v ICAC* (1989), supra, p 361.

14 *Balog v ICAC* (1989), supra, p 380. It is interesting to review the statement having regard to the later correspondence between Clarke JA and the Parliamentary Joint Committee included in the Committee Report on the Review of the ICAC Act - May 1993.

15 *Balog v ICAC* (1990) 169 CLR 625 at 636.

16 *Balog v ICAC* (1990), supra, p 635.

17 *The Australian*, 29 June 1990.

18 *Independent Commission Against Corruption Act 1988*, ss 13(2) and (5).

19 Premier Greiner and Minister Moore: *Greiner v ICAC* (1992) 28 NSWLR 125.

20 *Woodham v ICAC*, unreported, Supreme Court of New South Wales, Grove J. 16 June 1993.

21 *Greiner v ICAC* (1992), supra, p 125.

22 *Greiner v ICAC* (1992), supra, p 129.

23 *Greiner v ICAC* (1992), supra, p 130.

24 *Greiner v ICAC* (1992), supra, p 144.

25 *Faimess and Objectivity in the Independent Commission Against Corruption: A Tribunal in Need of Judicial Discipline*, paper presented to a seminar held by the NSW Chapter of AIAL and the NSW Bar, 9 June 1993.

26 *Wednesbury Corporation v Ministry of Housing and Local Government* (1965) 1 All ER 186.

27 *Public Service Board of NSW v Osmond* (1985-86) 159 CLR 656.

28 *Greiner v ICAC* (1992), supra, pp 192-3.

29 *Greiner v ICAC* (1992), supra, pp 175-6.

30 *Greiner v ICAC* (1992), supra, p 176.

31 *Woodham v ICAC*, unreported, NSW Supreme Court, Grove J, June 1993.

32 One of the prosecutions *R v Glynn* (1994) 33 NSWLR 139 is of particular interest, relating to political donations.

33 *Glynn & Ors v ICAC*, unreported, Wood J, 22 March 1990.

34 *Glynn & Ors v ICAC*, supra, p 43.

35 *Vakuata v Kelly* (1989) 63 ALJR 610; (1989) 167 CLR 568; *Escpbar v Speidelberi* (1956) 7 NSWLR 51.

36 *Stead v State Government Insurance Commission* (1986) 67 ALR 21.

37 *Glynn & Ors v ICAC*, supra, pp 55 and 56.

38 The recent investigations by Carmel Niland in relation to the conduct of Mr Griffiths raises this point for consideration.

39 *ICAC v Chaffey* (1993) 30 NSWLR 21.

40 *ICAC v Chaffey* (1993), supra, p 27.

41 *ICAC v Chaffey* (1993), supra, pp 60 and 61.

42 See the comment by Allars, "Fairness and Objectivity in the Independent Commission Against Corruption: A Tribunal in Need of Judicial Discipline", supra.

43 "Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person".

44 The Independent Commission Against Corruption - Lessons from the First Twelve Months, 1990.