Law Council
OF AUSTRALIA

Interaction between a federal anti-corruption commission and the federal courts

Speech delivered by Fiona McLeod SC, President, Law Council of Australia, at the Accountability and the Law Conference Parliament House, Canberra.

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Introduction

First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their Elders, past and present.

This year we have witnessed the extraordinary global events unfolding in our region.

We watch with fascination, and some degree of horror, as once sacred conventions and institutions are trashed before our eyes, sometimes in tweets of 140 characters or less. But pick any decade of the last century and you will find, in many places in the world including those observing, in theory, parliamentary democracy and the separation of powers – and any number of corrupting influences.

- Oligarchs asserting wide discretionary executive powers protected by laws unchecked by the judiciary and with powerful military and intelligence assets at their command;
- The vast profits of illegal conduct pouring through the accounts of subterranean operatives, often working in the shadows on behalf of individuals or organisations through obscure networks of influence;
- Politicians and officials influenced by those who have purchased access, by corruption and graft and the odd lavish dinner or more blatant gifts and bribes;
- Public servants and authorities spending public funds without compliance with due process or spending in response to nepotism;
- Growing economic and social inequality and gross violation of human rights including the trafficking and exploitation of the world's poor;
- Environmental catastrophes where few are held to account and future generations bear the cost;
- A captive or disorganised press unable to protect whistleblowers effectively, to pierce through propaganda and influence just outcomes;
- Courts and law enforcement agencies, jurisdictionally and morally confined in their capacity to confronting issues of inequity beyond the case before them; and
- At the extreme end, a vast network of 'economic hitmen', murky intelligence activity, jackals and assassins operating brazenly and with impunity.

So while it is interesting to reflect upon the erosion of trust in our precious institutions, our public servants and our instruments of government in more recent times, by reference to offence and the outright lies of elected officials, history teaches us that in fact democracy and the rule of law have always been fragile.

That law enforcement has always struggled to keep pace with the ingenuity of crooks, and that for the most part the bad guys get away with it.

While we are informed by excellent reports noting corruption and in depth analysis long after the hope of justice has faded, most people instinctively understand these influences, and the fact they are powerless in the face of them – and will only put up with so much before the erosion of trust turns to anger, boiling over all areas of life from the protest at the ballot box to outbursts of violence.

In this context, our efforts to build integrity and accountability are crucial – both in maintaining trust in the system and social cohesion, and in addressing the causes of inequality and instability.

There is always something human beings want or are afraid of sufficiently to make us corruptible.

It is therefore vital that our institutions are continually strengthened and improved to protect as we can against human need, greed or protection of those we hold dear.

But that strengthening must be balanced so that the grant of powers does not, of itself create the very environment for misuse of power.

Open Government Partnership

Late last year the Australian Government committed to our first National Action Plan on Open Government; with 15 commitments aimed at promoting transparency, the empowerment of citizens, fighting corruption and use of technology.

Our participation in the global partnership movement was the result of our Prime Minister revisiting an early show of interest by the former Attorney-General, Mark Dreyfus.

By a combination of persistence, ambition and happenstance, commitment 4.2 was included.

That commitment boldly aspires to the strengthening of our ability to prevent, detect and respond to corruption in the public sector by reviewing the capacity of various agencies and holding a Business Roundtable.

Procurement and campaign finance are known to be high-risk areas of public administration.

So we need adequate resourcing of existing public sector mechanisms, and a comprehensive national integrity body.

We need a comprehensive national integrity framework and a national corruption commission.

Federal Independent Commission Against Corruption (ICAC)

With that said I want to turn to some of the specifics around a federal ICAC:

A deliberate decision should be made about whether the primary focus of any federal ICAC should be investigating and exposing corruption, or gathering evidence for the prosecution of corruption offences.

If both, then careful work needs to be done to define how the difference in objectives between the federal ICAC and the relevant prosecution service will be managed.

And if it should it have the capacity to refer matters for prosecution, then adequate resources and mechanisms must be provided to ensure it can proactively share all disclosable information.

Any federal ICAC should be constituted as a purely investigative body and not be given power to commence prosecutions, except for perjury or failure to attend or be sworn.

Any evidence that may support a criminal prosecution should be referred to the relevant prosecutorial service.

After a person has been charged with an offence, a federal ICAC should not have the power to conduct a compulsory examination of a person on matters the subject of the charge.

A transparent mechanism should be designed to make any necessary adjustments to a federal ICAC's functioning following its inception.

The role of a federal ICAC

Tensions have arisen in State bodies where the legislature vests anti-corruption commissions with the power to lay criminal charges or decide questions of guilt or regulatory culpability.

In the 1990 decision of *Balog v ICAC*,[1] the High Court of Australia found that the NSW ICAC 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.[2]

The judgment also cautioned against vesting power to make findings that a person may have committed corrupt conduct in a body which has coercive powers.

These coercive powers, the judgement found, might 'be exercised in disregard of basic protections otherwise afforded by the common law'.[3]

Nonetheless, legislatures *have* tested the boundaries.

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[1] (1990) 169 CLR 625 [16].
[2] Ibid 636.
[3] Ibid 635.

Some State anti-corruption commissions, for example, are empowered to commence prosecutions for certain types of statutory or disciplinary offences.

The Crime and Corruption Commission in Queensland has the power to bring prosecutions for corrupt conduct in disciplinary proceedings before the Queensland Civil and Administrative Tribunal.[4]

In Victoria, the IBAC may bring proceedings for an offence in relation to any matter arising out of an IBAC investigation.[5]

Yet even where the focus of a federal ICAC is purely investigative, close consideration should be given to the manner in which material is generated, and shared with other agencies.

It is necessary to consider, for example, how a federal ICAC, gathering evidence under its compulsory powers, may impact the admissibility of that evidence in any subsequent criminal prosecution.

It is also necessary to consider how any federal ICAC tasked with gathering evidence to support successful criminal prosecutions will balance that task with the function of investigating and exposing corruption at the federal level.

For example, the NSW Parliament Committee on the Independent Commission against Corruption (**ICAC Committee**) has found there is considerable public interest in successful prosecutions of persons investigated by the ICAC who have committed criminal offences.[6]

Therefore, it has noted that, if sufficient admissible evidence emerges during the course of an ICAC investigation to successfully prosecute a person for a criminal offence, it could be argued that the ICAC should discontinue its investigation and refer that evidence to the Department of Public Prosecutions (**DPP**) in NSW.[7]

However, the ICAC Committee raised the question as to whether, as a matter of policy, the ICAC should do that, given its primary function is to investigate, expose and prevent corrupt conduct in the NSW public sector.

Gathering and assembling evidence that may lead to a criminal prosecution is only a secondary function.[8]

And, indeed, sometimes, the two functions may be at odds.

For example, as a former NSW ICAC Commissioner explained during ICAC Committee hearings, *"[for ICAC], corrupt conduct is defined in such a way that it does not necessarily neatly fit into what might be a prosecutable criminal offence"*.[9]

The ICAC Committee considered that if the ICAC were to refer sufficient admissible evidence to the DPP as a matter of policy, it would likely require legislative change to its primary functions.[10]

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[4] *Crime and Corruption Act 2001* (Qld), s 50.
[5] *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), s 190.
[6] Ibid.
[7] Ibid 29 [2.78].
[8] Ibid 29 [2.76].
[9] Ibid 29 [2.77].
[10] Ibid 29 [2.79].

Consideration should therefore be given to any potential crossover in roles between a federal ICAC as an investigatory body and the Commonwealth DPP as a prosecutorial service.

As I've noted, the Law Council considers that any federal ICAC should not have the power to commence prosecutions, with the exception of perjury or failing to attend or be sworn.

Its purpose should be a purely investigative, to ensure its independence and efficacy.

In addition, once a person has been charged with a criminal offence, the Law Council considers that any federal ICAC should not have the power to conduct compulsory examinations of that person on matters relevant to the offence.

Ensuring that a person has a meaningful right to avoid self-incrimination when they are subject to criminal proceedings is essential to avoid prejudice to the right of an accused to a fair trial.[11]

Public hearings

A further tension that may arise between a federal ICAC and the federal courts is if public hearings are permitted by default.

The issue is not uncontroversial.

The NSW ICAC has the power to conduct public hearings, as does Victoria's IBAC.

However, not all Australian corruption commissions are so empowered.

For example, South Australia's ICAC conducts all examinations in private.

Key advantages associated with the conduct of public hearings include transparency, instilling public confidence in dealing with corruption, and deterrence to engaging in corruption.

Conversely, public hearings can significantly impact on the rights of individual persons appearing before the ICAC. Appearances before a corruption inquiry may generate substantial media interest, and taint a witness's reputation.

These issues might be compounded by a range of factors:

- Persons of interest ordinarily have no right to subpoena witnesses or documents;
- Usually only part of an investigation is conducted in public, which may distort the public's understanding of events; and
- Members of the public may fail to appreciate the distinction between a commission of inquiry, often presided over by a former judge, and a court.

[11] See *X7 v Australian Crime Commission* (2013) 248 CLR 92 (French CJ and Crennan J). See further Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015* (7 January 2016) 5-9 <https://www.lawcouncil.asn.au/lawcouncil/images/3090_-_Crimes_Legn_Amdt_Proceeds_of_Crime_and_Othr_Measures_Bill_2015.pdf> for a discussion of the caution that should be exercised and issues that should be considered when crafting measures that risk infringing an accused's right to a fair trial.

What is clear is that if the implementation of a federal ICAC includes the power to hold public hearings, then it is vital that there be an appropriate balance between transparency – and the abrogation of rights and reputation of individuals.

The Queensland model – which enables the Crime and Corruption Commission to conduct private hearings – should, in the Law Council's view, be the default model adopted.

Judicial oversight

Another issue that arises in the context of the interaction between a federal ICAC and the Federal Court is judicial oversight.

How should the corruption agency's actions and decisions be reviewed?

It may well be that a federal ICAC has powers similar to the NSW ICAC, which the High Court described in *ICAC v Cuneen* as 'extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges.'[12]

If such powers are proposed, they should be subject to judicial oversight.

Decisions of the federal ICAC need to be readily reviewable.

So any legislation should permit judicial review on the grounds of jurisdictional error as well as subject to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

However, experience with state-based corruption agencies show that, as a general proposition, state-based anti-corruption agencies are not obliged to provide reasons for their decisions.

Now are they required to respond to freedom of information requests or otherwise produce information.

This can lead to difficulties in challenging decisions.

But as noted, the purpose of anti-corruption bodies is not just to investigate corruption, but to ensure there is trust and accountability in the processes of government.

A federal ICAC should therefore be held to those same standards: it should be held to account for its decisions and it should be clear that proper decisions are being made on a proper basis.

Meaningful judicial review, by the Federal Court, can ensure this happens.

[12] (2015) 318 ALR 391, at [4].

Conclusion

Corruption is one of the most potent forces eroding our trust in democracy and the rule of law.

Corruption can therefore have significant economic, social and environmental consequences.

It concentrates wealth and increases inequality.

It fosters social and political instability. It leads to fear and mistrust.

And that is why we must forge ahead to create effective and transparent measures aimed at preventing, detecting, investigating, and addressing corruption at all levels of government.

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Patrick Pantano

Senior Adviser, Public Affairs

T. 02 6246 3715

E. Patrick.Pantano@lawcouncil.asn.au