

**Submission
No 21**

**PROSECUTIONS ARISING FROM INDEPENDENT
COMMISSION AGAINST CORRUPTION
INVESTIGATIONS**

Name: The Hon Justice Peter Hall

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SUBMISSION

Prosecutions Arising from Independent Commission Against Corruption Investigations

- 1 I have been invited by the Chair of the Committee on the Independent Commission Against Corruption (“the Commission”) to make a submission to its Inquiry into Prosecutions arising from Commission investigations.

- 2 The Committee of the Independent Commission Against Corruption is presently conducting an inquiry into the following:
 - Whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence should be a principal function of the Commission;
 - The effectiveness of relevant Commission and Director of Public Prosecutions processes and procedures including alternative methods of brief preparation;
 - Adequacy of resourcing;
 - Whether there is a need to create new criminal offences that capture corrupt conduct;
 - Arrangements for the prosecution of corrupt conduct in other jurisdictions; and
 - Any other related matters.

- 3 The discussion that follows is directed to the first two of the matters the subject of the present inquiry.

The Commission’s ‘Functions’

- 4 Section 13(1) of the *Independent Commission Against Corruption Act 1988* (“the Act”) sets out a number of the Commission’s principal functions.

These include its investigative functions (s 13(1)(a) and (b)), the communication of the results of its investigations to “*appropriate authorities*” (s 13(1)(c)) and, in addition, a number of other functions including those concerned with the elimination and prevention of corrupt conduct and related educational and advisory functions.

5 Section 14(1) of the Act provides that the Commission’s “*other functions*” include the gathering and assembling of evidence that may be admissible in the prosecution of a person.

6 The provisions of s 14(1)(a), (b) and s 14(1A) are as follows:

“(1) Other functions of the Commission are as follows:

(a) to gather and assemble, during or after the discontinuance or completion of its investigations, evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish such evidence to the Director of Public Prosecutions,

(b) to furnish, during or after the discontinuance or completion of its investigations, other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.

(1A) Evidence of the kind referred to in subsection (1) (b) may be accompanied by any observations that the Commission considers appropriate and (in the case of evidence furnished to the Attorney General) recommendations as to what action the Commission considers should be taken in relation to the evidence.

7 The provisions of s 14(1)(a) that refer to the function of gathering and assembling evidence that “*may be admissible in a prosecution*” reflects the fact that the question of the admissibility of such evidence in a criminal prosecution is a matter that the relevant prosecuting agency, the Director of Public Prosecutions, may in due course be required to consider.

Issue 1: Whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence should be a principal function of the Commission

(i) Response to Issue 1

8 The gathering and assembling of evidence that may be admissible in the prosecution of a person for a criminal offence should not, in my view, be made a principal function of the Commission. The reasons for that opinion are set out below. That, of course, is not to say that the function of gathering and assembling of evidence that may be admissible in a criminal prosecution is not both an important and a necessary one in relation to investigations concerned with or related to possible criminal activities referred to in s 8(2) of the Act. It is clearly an important function to be undertaken in the course of investigations.

(ii) Reasons for the above response

9 The first issue, in my view, is to be considered in light of the provisions of the Act concerning the jurisdiction, powers and processes of the Commission.

10 The Commission is a standing commission of inquiry established by Act No. 35 of 1988. It came into existence 25 years ago (March 1989). It is not a law enforcement agency and, as indicated above, its functions range beyond its investigative activities concerning corrupt conduct and include preventative and educative functions.

11 The Commission, of course, differs from other standing commissions, such as the New South Wales Crime Commission (“NSWCC”), that have responsibility for investigating criminal activity and obtaining evidence concerning the same. The NSWCC in particular is required to investigate criminal activity relevant to drug trafficking and to organised and other

crime. The investigations by the Commission are concerned with criminal or disciplinary offences and to breaches of established codes of conduct that may constitute “corrupt conduct” but, as discussed below, limitations apply to both its findings and reporting power.

12 It may be noted at this point that the Commission’s principal functions accounts for a differentiation in its evidence gathering function in terms of s 14(1) as compared to that of other commissions of inquiry which necessarily have a different focus in the collection of admissible evidence.

13 In *Royal Commissions and Permanent Commissions of Inquiry*, by Stephen Donaghue, (Butterworths 2001) the learned author of that work observed:

“When commissions are used because of the inadequacy of existing investigative mechanisms they will often focus their energies on gathering admissible evidence for use in subsequent prosecutions. This reflects the fact that commissions are often judged by reference to the success of prosecutions that follow them. The collection of admissible evidence is a major focus of the NCA (now the Australian Crime Commission), NSWCC, QCC and ASIC (in cases where criminal action is contemplated), and of some Royal Commissions. It is also a function of the ICAC and CJC, although it is not the major focus of those bodies.” [footnotes omitted]

14 The fact that the Commission’s function to gather and assemble evidence that may be admissible in the prosecution of a person for a criminal offence is not included as a “principal function” of the Commission is understandable. It is at least consistent with the fact that the Commission has not been established by the Act as a statutory investigative agency with the functions of a commission charged with criminal investigative functions such as, for example, the NSWCC.

15 It is accordingly appropriate to observe at this point that it is by reason of the nature of the Commission and its principal functions that it is in my view erroneous for commentators and others to adopt, as a measure of its performance, the number and success of prosecutions that follow the completion of its investigations. The basis of such error lies I believe, at

least in part, in a perception that a finding of “*corrupt conduct*” by the Commission is in the nature of a conclusion that the person the subject of such a finding *should* result in a prosecution. An erroneous perception of that kind would appear to be due to a misapprehension of the Commission’s processes and statutory functions, matters discussed in [18] and [19] below.

- 16 The Commission has conferred upon it “*special powers*” to inquire into allegations of corruption: s 2A(b) and Part I Divisions 2, 3 and 4 of the Act. Such powers are conferred upon it for the purpose of achieving the principal objects of the Act: s 2A(b).

- 17 The Commission’s principal functions, as noted earlier, include the investigation of corrupt conduct in relation to which it is authorised to prepare reports on its investigations: s 74(1)). Whatever be the basis for the legislature not having included the gathering and assembling of evidence that may be admissible in a criminal prosecution as a *principal function*, there are three matters, in my view, that justify not making it so:
 - (1) The Commission is, as discussed above, an investigative commission of an entirely different species to commissions that are established to both investigate and obtain admissible evidence of criminal activity.
 - (2) Not only does the Commission not have such a function, it is also prohibited from including any findings or opinions in any report as to the guilt of a person of a criminal offence. Additionally, it is also prohibited from including any recommendation that a specified person *should* be prosecuted for a criminal offence: s 74B(1)
 - (3) A finding of corrupt conduct by the Commission, though expressed as an unconditional one, is in fact conditional in nature as explained

by Gleeson CJ in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 129.

- 18 On this last point, in a case that is investigated by the Commission where an alleged criminal offence is involved, a determination that a person *has* engaged in corrupt conduct is necessarily based upon a finding that the conduct of the person *could* constitute a criminal offence. The conditional nature of the premise upon which it is based, Gleeson CJ noted in *Greiner v ICAC*, *supra*, could easily be obscured by the unconditional form of such a conclusion (at 129).
- 19 Whilst the Commission's functions do not include, as a *principal function*, the gathering and assembling of evidence that may be admissible in the prosecution of a person or persons for a criminal offence, the Commission, however, regularly does obtain such evidence. The reasons for that are at least twofold:
- (i) The Commission may make findings adverse to a particular person or persons that concern possible criminal conduct. Findings of the latter kind must be based on evidence that is strong and cogent: *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362-3; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; *Report of the Royal Commission into Commercial Activities of Government and Other Matters* ("the WA Inc" Royal Commission) 1992, Part II at [1.6.19]. Although the Commission is not bound by the rules of evidence (s 17(1)), it understandably strives to obtain and act upon the best available evidence before making adverse findings. Evidence that is or that may be admissible according to the ordinary rules of evidence, of course, meets that description.
 - (ii) Where an alleged criminal offence is involved, following the making of findings of fact, the Commission is then required to proceed to answer the question of whether, if there were evidence of those

facts before a properly instructed jury, such a jury could reasonably conclude that a criminal offence had been committed: see *Greiner v ICAC*, supra, at 136 per Gleeson CJ. Evidence gathered by the Commission and which may be admissible in a criminal prosecution would, of course, be relevant to a decision as to whether the Commission expresses an opinion under s 74A(2).

- 20 The Commission, of course, also gathers and relies upon evidence that is subject to objection under s 37 of the Act (privilege against self-incrimination), which evidence is not admissible in civil or criminal proceedings, save for the exception in s 37(4)(a) (offence against the Act etc).

Issue 2: The effectiveness of relevant Commission and Director of Public Prosecutions processes and procedures including alternative methods of brief preparation

- 21 The comments that follow in relation to Issue 2 are confined to the second part of the issue, that is, matters related to brief preparation and possible alternative methods.
- 22 Information and material obtained by the Commission in the exercise of its powers employed for the purpose of discharging its principal functions may be made available to other authorities and agencies. The forging of working relationships with authorised agencies and particular authorities potentially plays a part in the overall processes by which evidence that is admissible in a criminal prosecution may be obtained.
- 23 As noted above, one of the principal functions of the Commission under s 13(1)(c) is specified in the following terms:

“To communicate to appropriate authorities the results of its investigations.”

- 24 The expression “*appropriate authorities*” is not defined by the Act but it clearly extends beyond agencies concerned with law enforcement: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 632.
- 25 The exercise of the Commission’s powers to refer and furnish information to other authorities and agencies may be considered as part of the lawful consultation and co-operation between the Commission and other authorities/agencies. In particular, the Commission may furnish relevant information, including evidence that may be admissible in a criminal prosecution, to the Director of Public Prosecutions at any time during the course of an investigation being conducted by it. It is not necessary for the Commission to either complete an investigation or report upon the same before doing so.
- 26 As noted above, by s 14(1)(a) of the Act the Commission is charged with the function of furnishing evidence referred to in its provisions to the Director of Public Prosecutions “*during or after*” the discontinuance or completion of its investigations. There may be good reason for evidence of that kind to be furnished to the Director of Public Prosecutions during the course of an investigation rather than that being deferred until the completion of an investigation. The possible reasons for doing so include:
- (i) The desirability or the need, on one of a number of possible bases, for the Director to consider the evidence at a reasonably early stage or at a midpoint in the investigation;
 - (ii) The possible need for such evidence to be referred to a relevant law enforcement agency;
 - (iii) The scope and purpose of an investigation by the Commission, the likely length of time before its completion and/or the nature, magnitude or the complexity of the matter under investigation by the

Commission may make it advisable for the Director to be furnished with evidence, if necessary, on an ongoing or periodic basis for his or her consideration. This may arise, for example, where the evidence establishes, at least on a prima facie basis, the possible commission of an offence and one that may become the subject of a criminal prosecution.

- 27 Where with investigations of the kind referred to in (iii) the Commission determines, following consultation with the Director, that there exists a need for the ongoing co-ordination and co-operation between the Commission and the Director of Public Prosecutions for the furnishing of evidence during the course of an investigation undertaken by the Commission, a protocol or plan could be established whereby evidence furnished to the Director under s 14(1) is the subject of ongoing assessment for the purpose of determining whether the conduct under investigation could constitute or involve a criminal offence.
- 28 The possible or likely benefits to be served by a progressive or ongoing examination by the Director of Public Prosecutions of evidence furnished by the Commission under s 14(1)(a) is a matter that could be kept under review in order to ensure that time and resources are appropriately applied.
- 29 As noted above, the Act plainly envisages and permits evidence referred to in s 14(1)(a) that is obtained by the Commission to be furnished to the Director of Public Prosecutions at any stage of its investigations. The Commission is also authorised to communicate to appropriate authorities *“the results of its investigations”*: s 13(1)(c).
- 30 The Commission, in exercising its principal functions relating to the investigation of conduct, it is noted, is also required, as far as practicable, to work in co-operation with law enforcement agencies: s 16(1)(a).

- 31 Another approach that has on occasions been adopted following the investigations of Royal Commissions and Commissions of Inquiry involves the establishment of a task force or an office of Special Prosecutor for the purpose of dealing with criminal proceedings referred to the same. An example of the latter may be seen in the *Special Prosecutor Act 1988* (Qld) established to deal with proceedings referred by the *Fitzgerald Commission of Inquiry* (that Act was in due course repealed by the *Statute Law Revision No 2 Act 1995*). The former Act, inter alia, made provision for the Special Prosecutor to prepare, institute and conduct proceedings and for the Special Prosecutor to request further investigation by police in relation to criminal proceedings under consideration and/or conducted by the Special Prosecutor: s 11.
- 32 Finally, I note that the Commission is empowered by s 15(a) of the Act in connection with its principal functions to arrange for the establishment of task forces within the State. Additionally, s 16 of the Act confers wide powers on the Commission to consult with and disseminate information to other persons and bodies (including to any task force or any member of a task force), as the Commission thinks appropriate: s 16(3).

Peter M Hall
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