

**Submission
No 1**

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

Name: Mr Greg McCarry

Date Received: 26/06/2014

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The Secretary
Committee on the ICAC
Parliament House

Dear Sir/Madam,

Re: Inquiry concerning Prosecutions arising from Independent Commission Against Corruption investigations.

INTRODUCTION

The main purpose of this submission is to suggest that two non-criminal consequences should flow automatically from any finding of corrupt conduct by operation of the relevant legislation itself, but subject to certain protections for parties adversely affected. The two suggested consequences have the distinct advantage that they would take effect immediately and by operation of statute as soon as the Independent Commission Against Corruption (the Commission) published an adverse report against anyone. They would be in addition to any criminal process which may be instituted. These proposals are set out immediately after this introduction, together with an indication of some consequential amendments which would be advisable if they were implemented.

There then follows three short, but significant, submissions on other points. The most important of these is the suggested adoption of a concept of "culpable association".

Finally I offer some observations on problems associated with depriving corrupt office holders of the benefits of pensions or superannuation benefits to which they may be entitled. This is something which has been suggested in the media.

SUGGESTED AUTOMATIC AFFECTS OF ADVERSE FINDINGS BY
COMMISSISON

These two suggestions avoid delays of any kind upon the publication of a finding of corrupt conduct against a person and impose useful and effective non-criminal consequences on the conduct but with provisions to avoid excessive or unjust outcomes. They are in addition to any criminal proceedings which may be instituted,

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Removal from offices

First, it should be provided that upon a finding of corrupt conduct against a "public official," that person is, on publication of the finding and by virtue of the legislation, automatically removed from any public office he or she may still hold and is prohibited from holding any office in future unless permitted to do so by an order of the Supreme Court, for which the individual should be given the right to apply.

Freezing of tainted assets

Secondly, amendments should require the Commission, so far as it can, to identify any assets tainted by corruption, in which case all dealings in the identified tainted assets should be frozen by statute for not less than six months unless, otherwise ordered on application made to the Supreme Court by the State or by a person adversely affected by the freezing. The period of six months should also be able to be extended by the Supreme Court on application made by the State.

Effective implementation of this principle would require some consequential amendments to the legislation.

The first would be to allow the Commission to "trace" tainted assets and to provide that the tainted assets would be frozen irrespective of the person or entity who held those assets at the time of publication of the Commission's findings. The purpose of this is to thwart attempts by persons who had profited from their corrupt conduct to minimise possible consequences of that conduct by transferring assets to other persons or entities.

A second consequential amendment required would be to the effect that if at the end of six months no application had been made by the State to extend that period then the assets would be released from the freeze. The purpose of this is to afford the State a reasonable time to decide if it wished to seize the assets under existing proceeds of crime legislation or to seek to recover money lost by the State by civil action in the courts. However, injustice to individuals could occur if there was not some constraint on the period of the freeze, especially, say, to some one who had acquired the assets bona fide and without notice of their tainted origin. Hence the suggested time limit of six months unless that be extended by the Court on application as suggested previously.

It is worth repeating that if adopted, these suggestions would take effect automatically on the publication of adverse findings against a person, thus avoiding the delay necessarily occasioned while criminal proceedings are considered. The suggested consequences are not criminal in nature, but are protective of the integrity of the public sector and help support any attempts that may be made to recover gains obtained by corrupt conduct, as well as acting as a deterrent.

THREE SHORT SUBMISIONS ON OTHER MATTERS

First, I suggest the introduction of a concept of "culpable association" with corrupt conduct. As things stand, only the corrupt official can be investigated or adversely affected by findings of the Commission. It may well be that persons who do not hold a public office have been culpably associated with the corrupt conduct. For example, a person in the private sector may be the one to offer a bribe to a public official, or may otherwise aid or abet corrupt conduct. Such a person is culpably associated with the corrupt conduct and should be able to be investigated and, if evidence is available, should be able to be found to have been so associated.

If this is adopted, consequential amendments would need to provide that the person could be referred by the Commission for consideration by the DPP. Any tainted assets in the hands of that person would be frozen if the change previously suggested on tainted assets is adopted.

Secondly, even if no other changes are made, section 74A(2)(b) could usefully be amended so as to read "with respect to the prosecution of the person for any criminal offence including any specified in the Commission's report,". This would have the effect of enabling the Director of Public Prosecutions to widen consideration of what, if any, criminal offences were revealed in the Commission's report.

Thirdly, there is little to be gained by giving the Commission any specific or additional role in assembling evidence that would be admissible in criminal prosecutions. This would come close to duplicating the function of existing investigatory and prosecuting bodies and would inhibit the Commission in the way it goes about its quite different statutory role.

Moreover, even if additional criminal offences were created or if the Commission was given some role in gathering evidence for prosecutions, there would still necessarily be a delay, and perhaps a considerable one, before a decision could be made by the DPP on whether criminal proceedings could be commenced and then more time would pass before they were concluded. Indeed imposing a duty on the Commission to gather admissible evidence may only serve to delay the Commission in the performance of its functions.

Finally I turn to some considerations about deprivation of pension entitlements.

DEPRIVATION OF PENSION OR SUPERANNUATION BENEFITS

It has been suggested in the media that persons found guilty of corrupt conduct should be stripped of pension or superannuation entitlements.

There are serious difficulties with such a suggestion.

First, a distinction needs to be drawn between a pension properly so called paid wholly

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by the State, such as are provided for members of Parliament and Judges, and a benefit provided from superannuation funded by employee and employer contributions.

So far as pension properly so called is concerned, it would be possible to provide by legislation that this should be forfeited upon a finding of corrupt conduct by the office holder concerned. But this could produce draconian results. For example, the financial loss occasioned by the cancellation of the pension could be grossly disproportionate to the benefit gained by the corrupt conduct. Again, the corrupt conduct could be one blemish in a long career and a blemish which was not at the most serious end of the scale. Again, automatic cancellation could produce a demonstrably unfair result.

So if pension cancellation is to be considered, it could not be automatic but a decision would need to be made on each case. And who should be entrusted with the discretion to decide on cancellation? The Parliament and the Supreme Court are the two obvious entities. Moreover, criteria would need to be developed against which the issue was to be decided. It is not easy to think what they may be. The only one that suggests itself to the writer is if it were demonstrated that the pension entitlements were needed to recoup losses sustained by the State from the corrupt conduct which losses were not otherwise likely to be recovered.

Cancellation of benefits arising from superannuation suffer from the above difficulties and more besides. Foremost is that superannuation is governed by Commonwealth legislation. Any attempt by State legislation to derogate from entitlements under Commonwealth law would run a grave risk of being inconsistent with the Commonwealth law and therefore constitutionally invalid. Apart from that, would any cancellation of benefits go so far as to involve forfeiture of the official's own contributions to the fund?

For these reasons, forfeiture of retirement benefits seems to be fraught with imponderables and should be adopted, if at all, only in tightly prescribed and limited circumstances.

I trust the above is of some use.

Please let me know when the Committee's report is available for public perusal.

Yours faithfully,

Greg McCarry BA, LL.M (Syd).

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