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The role of a corruption commission within the Constitution

I thank Curtin University for the opportunity to address you here this evening. I feel however there is a bit of misleading, and deceptive conduct on the part of the university as this is entitled "eminent speakers series". I am no more eminent than the farmer who spent every day in the paddock for 10 years watching over his sheep and was given an award for being outstanding in his field.

There is however profit in considering the role of what James Spigelman has described as "the integrity agencies". I shall of course be concentrating on anti-corruption commissions but the growth of other agencies, the Parliamentary Commissioner known as the Ombudsman, the increased power of the Auditor General, the rise of the public sector under an independent officer in most states, the Information Commissioner all, I will argue, have their genesis in the decline of the evolution of parliament from being a true representative of local communities, to a body largely controlled by the discipline of the party system.

The CCC's predecessors grew out of the politics surrounding what has become known as the WA Inc era, the era of the Burke and Dowding governments from 1983. Due to political pressure at the end of 1988, Parliament enacted the *Official Corruption Commission Act*. It was headed by a retired Supreme Court judge, the Hon. John Wickham QC. Its basic functions were to receive information about corruption, consider whether the matter should be referred to a body empowered by law to investigate and take action and consider any response from a body to which a matter was referred.

To the cynical, it might be thought that the Official Corruption Commission was designed to deflect attention and had few powers of its own. It had jurisdiction over public officers including members of Parliament.

The Official Corruption Commission morphed into the Anti-Corruption Commission (by change of name of the Act). Its powers were expanded to give it power to carry out further action in relation to allegations itself and to furnish general reports and make general recommendations. By this time, the Royal Commission into commercial activities of government (Royal Commission into WA Inc) had reported to Parliament

and the strengthening of the Anti-Corruption Commission was one of a number of measures that took place as a result of both its recommendations and those of the Commission on Government (the Gregor Commission). Another innovation was the Public Sector Standards Commissioner.

Continuing disquiet about the activities of WA Police led to a Police Royal Commission presided over by the same person who had been the Principal Royal Commissioner of WA Inc, the late Hon. Geoffrey Kennedy QC. Its final report was delivered in January 2004 and this presaged the introduction of the Corruption and Crime Commission, one of whose functions specifically was to take over the work of the Police Royal Commission. In effect, the CCC is partly a public sector commission, partly a police misconduct commission and partly a crime commission.

Role of commissions

It is useful to commence with royal commissions because an anti-corruption commission shares some of the characteristics but there is, as I will explain, a crucial difference.

The executive has long used royal commissions for a variety of purposes, the chief of which are to enable an impartial inquiry into a particular subject to inform government and parliament so that if necessary action may be taken. The first inquiry in Western Australia appears to have been an inquiry into the treatment of Aboriginal native prisoners of the crown in 1884. Since then, there have been royal commissions into topics such as the 'rabbit question', the reasons for substituting stucco for Donnybrook stone in the new Law Court buildings, the immigration of non-British labour, the prevalence of gold stealing. There have been royal commissions into particular people including, a royal commission into a judge, Justice Park. The chairperson of that royal commission was Chief Justice Stone. It would appear conflict of interest rules were a little laxer in those days. The royal commission into the dismissal from the railway services of one Hugh McLeod and his reinstatement, along with perhaps more weighty matters as the royal commission into the system of public elementary education and various royal commissions into the collapse of companies. In latter times, they tended to be taken over by corporate affairs and the appointment of an inspector with similar powers. An example is the appointment of Mr McCusker QC as an inspector to inquire into the failure of Rothwells Ltd.

The difference between a royal commission and an anti-corruption commission

There is a crucial difference between a royal commission and an anti-corruption commission. The answer lies in the definition of mission; "an important assignment given to a person or group of people". It is standard form these days in any organization to spend hours and often lots of resources developing a "mission statement". It is very important to have one of these as it dovetails nicely into your vision and your values. Apparently, you don't know what your organization does until you have worked these things out!

However, the management tool of 'mission' is misunderstood whenever members of an organization get together to 'workshop' mission. A mission is something given to someone: in the words of the old TV series "Your mission Jim should you decide to accept it …" The disciples were sent forth on a mission by Christ. That is the difference between a royal commission and an anti-corruption commission. A royal commission is given terms of reference which is its mission and typically, its job is done when it has carried out its mission and reported back to parliament. It is given a timeframe. I add in parenthesis, one that is invariably extended.

An anti-corruption commission on the other hand is a standing commission in the sense that it has no particular timeframe or lifespan. Crucially, neither parliament nor the executive decide what it will or will not investigate. It is independent from direction by either body and for this, if no other reason, does not fit neatly into either.

In Western Australia, there is an obligation imposed on CEOs in the public sector to notify the Commission whenever there is a reasonable suspicion of serious misconduct, essentially corrupt conduct. There is a corresponding obligation on the Commission to assess each notification, bearing in mind that a notification may have more than one allegation attached to it. However, there is no obligation on the Commission to take action. The Commission may choose to take no action, may refer a matter back to a department to be notified of the outcome, may refer a matter back but monitor the department's investigation, may refer a matter back and oversee a department's investigation or may conduct an investigation of its own, either cooperatively or with its own resources.

It is important to know that the Commission deals with few matters after assessment. So far in the year commencing 1 July 2016, we have

received just over 1,100 notifications, comprising nearly 2,500 allegations. The Commission takes no further action in relation to half of all allegations. The second most common action is to refer matters to an appropriate authority.

There are a number of good reasons for this despite the obvious one being lack of resources. Even if the Commission's resources were magically doubled, it could still not deal with more than a small number of matters. The principal responsibility for mitigating against corruption risk and dealing with corruption when it arises, lies with the CEOs. It is essentially a management issue. The Commission was never intended to replace a department's responsibility for corruption mitigation. This is made clear in the purposes: to continuously improve the integrity of and to reduce the incidence of misconduct in the Public Sector by investigating serious misconduct and by helping public authorities to prevent, identify and deal appropriately with misconduct.[1]

In 2015, parliament adjusted the misconduct regime in Western Australia, passing responsibility for minor misconduct, together with corruption, prevention and education to the Public Sector Commissioner, leaving the Commission to deal with the more serious forms of misconduct.

I should pause to explain the difference between minor and serious misconduct. Of course, all misconduct is serious. Under the CCM Act however, minor misconduct is defined as conduct of such a nature that might reasonably lead to the termination of the officer's employment.[2] Serious misconduct under s 4, in a nutshell, is corrupt conduct or criminal conduct carrying a penalty of two years' or more imprisonment (carried out in the course of an officer's employment).[3] Serious misconduct includes police misconduct

The Commission also has power to make a proposition that misconduct has been, is, or may occur, on the basis of its own information.[4] This power enables the Commission to conduct relatively long running investigations particularly cooperative investigations into areas which the Commission assesses are at serious misconduct risk. The targets might be obvious but I will not name any.

[1] CCM Act ss 7A, 7B.
[2] CCM Act s 4(d).
[3] CCM Act s 4.
[4] CCM Act s 26.

So to summarize, the Commission has power to choose what it will investigate (or not) from the thousands of matters notified to it, and can also generate its own notification and take action. Obviously such a power, virtually unconstrained, could be misused.

The Commission's powers are in this respect fundamentally different from that of a royal commission, in that there is little practical or legislative control able to be exercised by the executive or parliament into the work of the Commission. Safeguards have been enacted including the appointment of the Parliamentary Inspector whose role is to review and audit the Commission when required, and the requirement for the Commission to provide an annual report to parliament. Parliament has also established a specific joint standing committee on the Commission to monitor and report to parliament on the exercise of the functions of the Commission and the Parliamentary Inspector. This committee was dissolved on the prorogation of parliament but is to be constituted at the commencement of every parliament.

Another safeguard is in the limited term of appointment of the Commissioner and staff. A Commissioner is appointed for five years and is eligible for one re-appointment. In other words to serve a maximum of 10 years. In some other states, for instance in Victoria, the IBAC Commissioner has a non-renewable five year appointment. These terms limiting appointments are what I like to refer to as the "J Edgar Hoover" clauses to prevent a despotism that long term exposure to the secrets and foibles of others might bring. A further safeguard is the requirement that an appointee have qualifications similar to those of appointment as a judge. The appointment is often a judge or former judge. A person who has been a police officer is ineligible for appointment.

I now turn to the inter-relationship of the Commission with the three traditional arms of the government, the judiciary, parliament, the executive. In the interests of time, I will not say as much about the last.

<u>The Judiciary</u>

As Professor McLaren describes in his book "Dewigged, Bothered, & Bewildered: British Colonial Judges on Trial 1800 - 1900", the life of a colonial judge involved an acute sense of political realities and the need to keep on the right side of the governor for fear of one's judicial commission being terminated. It has taken a further century for the convention of judicial independence to become so entrenched within the modern Australian democracy as to be hardly call for comment, save

perhaps in election cycles when it becomes fashionable to talk about how you are going to deal with "weak" judges who are not following the views of the community. Independence of the judiciary includes a proper separation from the other branches of government and bodies such as the Commons.

The relationship between a commission and a court is in many respects the same as the relationship between any other body and the judiciary. The Commission is an inferior tribunal, amenable to a prerogative writ or an action for declaration or injunction.

However, great discretion is reposed in the Commission under the CCM Act. An applicant might have a considerable difficulty in invoking the court's jurisdiction but nevertheless, the ultimate power of the court to control the Commission remains. In *A v Corruption and Crime Commission*[5] at issue was a decision by the Commissioner to release a CCTV recording for public dissemination. Martin CJ and Murphy JA in a joint judgement commented:

> *given the protean concept of the public interest in the context in which the Commission will be required to apply the evaluative standard imposed by s 152(4)(c), it may well be that reasonable minds differ on the question of whether disclosure is "necessary" in the particular circumstances at hand. However, that evaluative judgment is entrusted to the Commission, not the court. [82]*

The section referred to allows official information to be disclosed when the Commission is satisfied that disclosure is necessary in the public interest. Moreover, citing authority for the proposition their Honours said:

> *It is trite to observe that the fact the court may emphatically disagree with the decision reached by a decision-maker does not lead to the conclusion that it is unreasonable, irrational or illogical. [123]*

There are other ways where the independence of the judiciary is separated from that of the Commission. For example, a judge must resign on appointment as Commissioner. In New South Wales though not in Western Australia, a judge who is appointed Commissioner has a right of return to the court, a right recently exercised by former

[5] 2013 WASCA 28 306; ALR 491.

Commissioner, now again Justice Megan Latham. The New South Wales model is not generally followed in other jurisdictions.

Differences in Role

The roles of a Commissioner and a judge are quite different although some of the functions, conducting examinations, summonsing and swearing witnesses, requiring documents to be produced are analogous to each. Essentially, a judge makes findings of fact and declares rights of parties. A finding of fact is incontrovertible (leaving aside appeals). It binds at least the parties and on occasions, perhaps others. A judge's main function in a non-criminal jurisdiction is declaring rights between citizens, whether they arise under contract or through tort or some other reason. In criminal matters, a judge has sole power to enter judgment of conviction or acquittal, whether after plea or after trial by jury or judge. By contrast, the Commission does not make findings. It investigates and reports to parliament or a minister or perhaps a departmental head, on the results of its investigation. An examination under oath, whether conducted in private or in public, is only a small part of the Commission's wider investigatory function. The Commission is given power to form opinions of misconduct, those opinions are not legally binding:

Martin CJ in *Cox v Corruption and Crime Commission*:[6]

> *The Commission does not perform the function of making binding adjudications or determinations of right. It is neither a court nor an administrative body or tribunal in the usual sense of those expressions. In the performance of the misconduct function it is an investigative agency. After conducting investigations, its role is limited to making assessments, expressing opinions and putting forward recommendations as to the steps which should be taken by others. In characterizing the findings made by the Commission as 'assessments' and 'opinions' it is clear that the legislature intended that the conclusions of the Commission should not be regarded as determinative or binding in any subsequent proceedings. So, if the Commission expresses an opinion that a member of the public service has been guilty of misconduct and that disciplinary proceedings are warranted, the question of whether or not a breach of discipline has been committed can only be authoritatively determined in the course of subsequent disciplinary proceedings*

[6] [2008] WASCA 199.

instituted by the relevant employing authority, and not by the Commission. [45]

A further distinction is in matters of crime. The Commissioner is expressly forbidden to form or express a conclusion about the guilt of any person.[7] This reflects the common law *Parker and Ors v Miller QC and Ors.*[8]

A court hearing is adversarial. An investigation is obviously inquisitorial and that is the difference. An adversarial hearing has rules for procedural fairness to parties and witnesses built in by the presence of opposing parties and their ability to test the statements of the other side. Evidence is admitted subject to rules. The process is not necessarily a search for truth. A party in a civil case does not have to establish truth, only a version that is probably true. An inquisitorial process is a search for truth so that parliament or the executive can be informed of facts in order to decide a course of action.

In life, important decisions are not arrived at solely on admissible evidence. Everyday people act on hearsay, for example ascribing weight to it, not excluding it entirely. So, and appropriately, a commission informs itself.

The real interaction

Recent interaction between commissions and courts has arisen in a series of cases in the High Court and intermediate courts, culminating in this State last year in the case of *A v Maughan.*[9]

An issue in the various cases is the intrusion of a compulsory examination of a suspect or an accused person into the central attributes of modern criminal law and in particular, the bundle of rights comprehensively, though often misleadingly known as the right to silence. Put starkly, can parliament enact a law which requires a person accused of a crime to be compelled to answer questions under oath relating to the alleged crime, even though those answers may not be admissible in a subsequent or current prosecution? Should an accused be compelled to disclose their defence, if they have one, or the lack thereof, at a time prior to the trial, or is that an impermissible impost on the functions of a court, especially a chapter 3 court?

[7] CCM Act s 43(6).
[8] [1998] WASCA 124.
[9] [2016] WASCA 128, (2016) 50 WAR 263.

The debate in Australia conveniently can start with *Hammond v Commonwealth of Australia.*[10] Mr Hammond was charged with conspiracy to export prohibited meat. Hammond was subsequently called to give evidence before the Commission in private session and refused to answer questions. Gibbs CJ with whom Mason J agreed said page 333:

> *Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial.*

The Chief Justice went on to hold the questioning would likely prejudice him in his defence. Murphy J based his decision on a wider issue that is to maintain the integrity of the administration of the judicial power of the commonwealth, perhaps foreseeing the later rise and expansion of the concepts of the judicial power of the commonwealth.

Murphy J is often overlooked as a jurist but this is an example of a concept that pre-dated Kable.[11]

There have been a series of cases in the High Court in the last four years where the court has had to construe various Acts giving commissions powers and whether those Acts with "irresistible clearness", to use the words of O'Connor J in *Potter v Minahan*[12] are intended to infringe any of the bundle of rights.

In *X7 v Australian Crime Commission,*[13] a person had been charged with criminal offences. The Australian Crime Commission proposed to conduct a compulsory examination of the accused with the respect of the subject matter of the offences. In common with similar statutes, the *Australian Crime Commission Act* 2002 (ACC Act) s 25A, the proceedings were held in private and the evidence could not be published if the examiner gave a direction on the basis that the

[10] (1982) 42 ALR 327.
[11] *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; 189 CLR 51.
[12] (1908) 7 CLR 277, 304.
[13] [2013] HCA 29; 248 CLR 92.

publication would prejudice the fair trial of a person whom may have been charged with an offence.

French CJ and Crennan J applied the rule of construction that statutory provisions are not to be construed as abrogating important common law rights and immunities in the absence of clear words or necessary implication to that effect. They concluded that nothing in the history of the examination provision throws any doubt on the conclusion based on the text and purpose of the provisions that the examination powers may be exercised after charges have been laid.

They also noted that legislatures have in different settings abrogated or modified the "deep rooted" privilege against self-incrimination and concluded that the ACC Act reflects the legislative judgment that the functions of the ACC would be impeded if the laying of a charge against one member of a group by a prosecutor prevented continuing investigation of the group's activities by way of examination of that member by the ACC.

> *It may be that the expression "the right to silence" is often used to express compendiously the rejection by the common law of inquisitorial procedures made familiar by the Courts of Star Chamber and High Commission. Be that as it may, "the right to silence" has been described by Lord Mustill in R v Director of Serious Fraud Office; Ex parte Smith as referring to "a disparate group of immunities, which differ in nature, origin, incidence and importance". Given the diversity of the immunities, and the policies underlying them, Lord Mustill remarked that it is not enough to ask simply of any statute whether Parliament can have intended to abolish the longstanding right to silence. The essential starting point is to identify which particular immunity or right covered by the expression is being invoked in the relevant provisions before considering whether there are reasons why the right in question ought at all costs to be maintained. (footnotes omitted)* [40]

French CJ and Crennan J however were in the minority. In a joint judgment, Hayne and Bell JJ also applied the same rule of construction. The notion of an accused persons right to silence encompasses more than the rights that the accused has at trial and includes the rights (more accurately described as privileges) of a person suspected of but not charged with an offence than the rights and privileges which that person has between the laying of charges and the commencement of the trial.

Their Honours laid emphasis on the trial of an indictable commonwealth offence, being at every stage accusatorial and that the provision of the ACC Act must be construed against that background:

> *If these provisions were to permit the compulsory examination of a person charged with an offence about the subject matter depending the charge it would affect the fundamental alteration to the process of criminal justice.*[25]

Kiefel J agreed with Hayne and Bell JJ.

The apparently entrenched principle reiterated in X7 did not long survive. In *Lee v NSW Crime Commission,*[14] the judges who formed the court in X7 were joined by Gageler and Keane JJ. These judges made the difference. The judges in X7 held to their same views. Hayne J, who will be remembered was in the majority in X7, appealed somewhat plaintively to the doctrine of precedent which underpins the proper exercise of the judicial power saying 'the principles recognised and applied by the majority in X7 apply with equal force to this case'.[15] That cri de coeur was insufficient to turn Gageler and Keane JJ who made only passing reference to X7 and when they did so to, French CJ and Crennan J in reference to *Hammond*. Of importance to their Honours was that the examination was before the Supreme Court:

> *When it is appreciated that the conduct of the examination remains at all times subject to the supervision and protection of the Supreme Court, the possibility that the implementation of the examination order might give rise to an interference with the administration of justice does not rise to the level of a real risk merely because the subject-matter of the examination will overlap with the subject matter of pending criminal proceedings against the person to be examined.* [340]

And so the examinations were allowed to continue.

Any jubilation felt by the officers of the state in their win against Mr Lee was however short lived. Mr Lee was duly convicted after trial, for drugs and weapon offences. Notwithstanding the direction from the examiner that the evidence was not to be published, it was nevertheless improperly supplied to police and to the DPP. The judgment in the High Court was short because of a concession made by the DPP. French CJ,

[14] [2013] HCA 39; 251 CLR 196.
[15] [42].

Crennan, Kiefel, Bell and Keane JJ jointly reaffirmed the fundamental principle that it is for the prosecution to prove the guilt of an accused person with the companion rule that an accused person cannot be required to testify. The court said:

> *the publication to the DPP, in particular, was for a patently improper purpose, namely the ascertainment of the appellant's defences.*[16]

The Court did not need to resort to questions of policy to determine whether a miscarriage of justice had occurred:

> *what occurred in this case affected this criminal trial in a fundamental respect because it altered the position of the prosecution vis-a-vis the accused.* [51]

For lawyers, anti-corruption and crime commissions must be the gifts that keep giving.

Next to come under scrutiny was the Victorian anti-corruption commission.

The High Court returned to the issue in *R v Independent Broad-based Anti-corruption Commissioner*.[17] IBAC had commenced an investigation into the conduct of certain members of Victorian Police stationed at Ballarat. IBAC issued witness summonses for various police officers to give evidence in public examination. The police officers submitted that the public examination should be held in private and that one of them could not be compelled to give evidence. The commission rejected the submission and review proceedings in the Supreme Court failed. The applicants appealed to the High Court. The submission on behalf of the appellant relied on the fundamental principle of the onus of proof and the companion rule that an accused person cannot be required to testify. The high court rejected this submission holding the companion principle was not engaged because the appellants had not been charged and there is no prosecution pending.[18] The Court declined to extend the principle.

Gageler J in a separate judgment concluded that the answer to an argument based on the companion rule is that:

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[16] *Lee v The Queen* [2014] HCA 20 [39].
[17] [2016] HCA 8; 256 CLR 459.
[18] [2016] HCA 8 [48].

> *whatever the temporal operation of the companion rule might be, the IBAC Act manifests an unmistakable legislative intention that a person summoned and examined might be a person whose corrupt conduct or criminal police personnel misconduct is the subject-matter of investigation.*[73]

Before moving to the case *A v Maughan* [2016] WASCA 128; 50 WAR 263, it is useful to distil some principles from the high court as to the interaction between courts and commissions with compulsory powers of examination over matters which might come before a court:

- The fundamental rule that the prosecution must prove a case against an accused. The companion rule is that a person cannot be compelled to testify.

- The fundamental principle and companion rule may be abrogated by express statutory language so long as it is irresistibly clear that a legislature so intended.

- A court will act to protect the trial process, in particular the fairness of the trial process to prevent a miscarriage of justice.

- Although not explicit within the decisions, a court has available to it a number of tools to ensure a fair trial including exclusion of evidence and if necessary, a stay of the indictment. As *Lee [No 2]* demonstrates however, interference with the fundamental principle may be sufficient to quash a conviction even if there was perhaps no practical unfairness in doing so.

And so I come to Western Australia.

A v Maughan[19]

Mr A was a serving police officer who was charged with assault offences arising out of an incident in the Broome lock-up. Mr A had been assiduous in challenging rulings of the Commission in earlier proceedings at earlier stages of the commission investigation but had been unsuccessful. *A v Maughan* was not strictly speaking an appeal but a referral by a primary judge to the Court of Appeal. There were a number of matters agitated in the appeal. One was the Commission's power to institute prosecutions. The court held that on proper

[19] [2016] WASCA 128; 50 WAR 263.

construction of the CCM Act, there was no such power. Nothing more need be said about this aspect. It appears to me that whether parliament did or did not invest the Commission with prosecution power, would have no effect on the judicial power enlivened on the institution of the proceedings and their subsequent course. The impportant parts of the judgment for present purposes are the other matters decided. Corboy J summarized the Commission's powers at paragraph 189 and 190:

> *I do not consider that the Commission has power to prosecute a person, at least where the offence alleged is under a statute other than the CCC Act. However, I consider that the Commission:*
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> *(a) may compulsorily examine a person who is suspected of having committed a criminal offence that would constitute serious misconduct but who has not been charged with an offence (a 'suspected witness');*
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> *(b) may examine a suspected witness for the purpose of investigating and assembling evidence about a suspected offence;*
>
> *(c) may possess and use the transcript and any other record of the evidence given by a suspected witness for the purpose of further investigating and assembling evidence about the suspected offence ('derivative use');*
>
> *(d) may furnish the DPP or another prosecuting authority with evidence that has been assembled, including the transcript and any other record of the examination evidence given by a suspected witness — the evidence that may be furnished is evidence that may be admissible in a prosecution of the witness;*
>
> *(e) must provide the DPP or another prosecuting authority with all materials that are required to be disclosed under the CPA where it recommends that consideration be given to prosecuting a suspected witness.[189]*
>
> *I further consider that the DPP or another prosecuting authority is authorised to receive and possess materials that must be disclosed in a prosecution and evidence that has been assembled by the Commission, including the transcript and any other record of the examination evidence given by a suspected witness.*

Moreover, in my view the DPP or another prosecuting authority may:

(a) use materials received from the Commission for the purpose of giving disclosure in the prosecution of a suspected witness;

(b) where necessary, make derivative use of materials and evidence assembled by the Commission;

(c) subject to s 145, use materials and evidence assembled by the Commission in the prosecution of a suspected witness.[190]

McLure P said:

If on the proper construction of the CCC Act, the Commission (1) has the power to compulsorily examine a suspect on matters relevant to the offences which he is suspected of having committed and (2) can, by itself or its duly authorised officers, commence and prosecute criminal proceedings in respect of those offences, it necessarily follows that the CCC Act authorises the possession and use of compulsorily acquired information in, and for the purpose of, such criminal proceedings unless otherwise excluded, expressly or by necessary implication. The only express exclusion is in s 145 of the CCC Act. Section 145 is confined to partial, direct use immunity. There is no express prohibition on the derivative (indirect) use by the Commission, as prosecutor, of compulsorily acquired information. There can be no implied prohibition on its derivative use unless it is to be inferred that the legislature intended the erection of Chinese walls within the Commission. Such a construction is unsustainable: Zanon [148] [160]. [164]

Martin CJ applying and following *R v IBAC* concluded that access by the prosecution to the transcript of the applicant's examination before the Commission does not involve any alteration to any fundamental principle of the common law or the criminal trial process, nor does it abrogate any fundamental freedom right or immunity. In deciding the question whether the CCM Act authorized prosecution access to the transcript, Martin CJ found of significance that the principal object of the CCM Act and primary functions of the Commission include the investigation of criminal

conduct. He also relied on the definition of misconduct which includes criminal conduct by a public officer.

Martin CJ noted that the Commission might exercise discretion to hold a public examination and although the Commission is empowered to make an order restricting disclosure of evidence given at a public examination, the default position is that there is no restriction upon disclosure of evidence given at a public examination. The Chief Justice also drew on the provisions of section 145 which is in some respects a curious provision:

> **145. Use of statements of witness against witness**
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> *(1) A statement made by a witness in answer to a question that the Commission requires the witness to answer is not admissible in evidence against the person making the statement in —*
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> *(a) any criminal proceedings; or*
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> *(b) proceedings for the imposition of a penalty other than —*
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> *(i) contempt proceedings; or*
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> *(ii) proceedings for an offence against this Act; or*
>
> *(iii) disciplinary action.*
>
> *(2) Despite subsection (1), the witness may, in any civil or criminal proceedings, be asked about the statement under section 21 of the Evidence Act 1906.*

Section 21 of the *Evidence Act 1906* provides:

> ***21. Cross-examination as to and proof of prior inconsistent statement***
>
> *Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.*

> *The same course may be taken with a witness upon his examination in chief or re-examination, if the judge is of opinion that the witness is hostile to the party by whom he was called and permits the question.*

The Chief Justice continued:

> *Three significant aspects of the section merit attention. First, the Act contains no prohibition upon the derivative use of evidence given by a witness examined under compulsion before the Commission. Put another way, the only limitation imposed by the Act upon the subsequent use of evidence given under compulsion before the Commission is in respect of the evidence admissible in subsequent criminal proceedings against the witness. The Act contains no other limitation upon the use to which such evidence might be put either by the Commission, or by any agency to whom the Commission might lawfully disclose the evidence pursuant to the terms of the Act. In a case such as this, where the relevant examination was conducted in public and the Commission has made no order restricting disclosure of the evidence given, the Act imposes no constraint upon disclosure of the evidence given. [83]*

As to the provision of information to a prosecuting authority, the Chief Justice referred to the function under s 18(2)(h) which includes the assembly of evidence obtained in the course of exercising its misconduct function and the provision of evidence which may be admissible in the prosecution for a criminal offence against a written law to an independent agency or other authority.

Finally, the Chief Justice drew on the *Criminal Procedure Act* which is referenced within the CCM Act at s 43(5) and imposes on the Commission a requirement when giving an agency a recommendation that consideration should be given for prosecution of a particular purpose or material in the Commission's possession which would be required for the purposes of the *Criminal Procedure Act* s 61; 95 if that prosecution took place. In other words, the Commission is legislatively bound to disclose to the prosecutor, who in turn has a legislative obligation to disclose to the defence among other material "any

evidentiary material that is relevant to the charge" (*Criminal Procedure Act s 42*[20]):

R v IBAC has also been applied by another intermediate court.

In *X v Callanan,*[21] the Queensland Court of Appeal dismissed an appeal against a challenge to a witness summons. The facts are illuminating:

> *Z was shot and killed at the Gold Coast in 2009. On 11 October 2011, the Crime and Misconduct Commission issued a notice to the appellant under s 82 Crime and Misconduct Act 2001 (Qld) to appear at a hearing. The appellant unsuccessfully challenged the validity of that notice. On 10 December 2015, the presiding officer of the Commission, the respondent, prohibited, under s 180(3) of the Act, the publication of any answer given or document or thing produced at the hearing or anything about any such answer, document or thing; and any information that might enable the existence or identity of the appellant to be ascertained, to any officer of any prosecuting agency with carriage of, or involvement in, any prosecution of the appellant for any charges, whether arising from the investigation or any other investigation. The respondent also ordered under s 197(5) of the Act that all answers given by the appellant in the proceedings were to be taken to be answers given under objection on the grounds of privilege against self-incrimination.*
>
> *At the hearing, the respondent asked the appellant the whereabouts of the firearm used in Z's shooting. The appellant declined to answer on the ground of reasonable excuse under s 190(1) of the Act. He claimed that the purpose of the question was to make derivative use of his answer; the whereabouts of the*

[20] ***evidentiary material*** *relevant to a charge, means —*

(a) a copy of —

(i)every statement that has been made in accordance with Schedule 3 clause 4 by; and

(ii)every recording that has been made in accordance with Schedule 3 clause 6 of evidence given by; and

(iii)every recording that has been made under the Evidence Act 1906 of; and

(iv)every other recorded statement, whether oral or written, by, any person who may be able to give evidence that is relevant to the charge, irrespective of whether or not it assists the prosecutor's case or the accused's defence; and

(b) if there is no statement or recording referred to in paragraph (a) of a person who the prosecutor intends to call as a witness, a written summary of the evidence to be given by the person; and

(c) a copy of any document or object to which a statement or recording referred to in paragraph (a) refers; …

[21] [2016] QC A 335.

firearm could be used to further investigate Z's killing and as evidence against him in a future criminal trial. The respondent determined the appellant had no reasonable excuse to decline to answer. The appellant applied for leave to appeal to a trial judge of this Court, seeking an order that the respondent's decision be set aside and declaratory relief that the appellant was entitled to refuse to answer questions insofar as those questions asked anything of his knowledge of the circumstances surrounding Z's murder. This appeal is from the primary judge's order dismissing that application. [1]-[2]

The Court (McMurdo P; Gotterson JA and Atkinson J agreeing) rejected a submission that *R v IBAC* was not binding. The court saw as important that the CCC was an investigation body without power to charge or prosecute.

This Court must construe the common law privilege against self-incrimination and the companion principle in light of the plurality's binding decision in IBAC. But in any case, although the respondent suspected the appellant had committed an offence when he questioned him under the Act, the Commission is an investigative, evidence gathering body without general powers to itself charge suspects or prosecute criminal offences. Neither Lord Hughes's statements in Beghal nor anything else to which the appellant has referred us suggest that in the present case there has been a breach of the common law companion principle, or, indeed, of art 6, if it be relevant.

Third, nothing said in X7 supports the appellant's contention that the companion principle is engaged prior to the actual charging of the person claiming its protection, at least where "charging" is broadly construed as including the point at which those with the power to charge a person, suspect he or she has committed an offence. That wider construction of "charging" does not assist the appellant as the respondent had no power to charge him for the matters the Commission was investigating.

...

The companion principle was not engaged in this case. When the respondent required the appellant to answer his question as to the whereabouts of the firearm used in Z's shooting, the appellant had not been charged and no prosecution had commenced. It did not

> *matter that the respondent had formed a suspicion that the appellant had committed a criminal offence as the respondent could not charge him and was not an officer of a prosecuting authority. The appellant's first ground of appeal must fail.* [24]-[27]

What I might term the High Court's wariness about Commissions and their intrusion into the judicial power has evolved since Hammond and no doubt will continue to do so. The court seems now more willing to acknowledge legislative intention to equip commissions with strong investigative powers. I would strongly argue that such powers are necessary in the national and state interest where institutions may be threatened by terrorism, criminal trafficking and corruption.

But such power does have to be balanced against the democratic institution of a fair trial under the rule of law and there will from time to time be turbulence at the intersection.

Parliament

In one sense, the Commission is parliament's agent in that the Commission might investigate a matter and is permitted to report directly to parliament, unlike a royal commission whose report is to the executive, formally to the governor. In the event of serious misconduct within the executive, the Commission's ability to report directly to parliament is an important aspect of its independence.

However, the Commission is restrained from reporting about members of parliament. Members of parliament are public officers as defined in the Criminal Code.[22] However, members of parliament are not subject to investigation by the Commission or anyone else in respect of minor misconduct.

Nor can members of parliament be subject to investigation for serious misconduct. Such an investigation may offend the principles of parliamentary privilege, in particular Article 9 of the *Bill of Rights 1688* (UK):[23]

[22] CCM Act s 3.

[23] The *Bill of Rights Act 1688* Ch2 I Will and Mar Sess 2 received royal assent on 16 Dec 1689. Parliament convened on 13 Feb 1689 but until 1 Jan 1752, the new year commenced on 25 March, the session 1 and session 2 of the reign of William and Mary were combined.

'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

Parliamentary privilege is the sum of the peculiar rights enjoyed by parliament and its members. The *Parliamentary Privileges Act 1891* s 1 sets out the privileges and immunities enjoyed by the Legislative Council and Legislative Assembly of Western Australia and includes 'privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989'. Article 9 of the *Bill of Rights 1689* (UK) is one such privilege.

The words 'proceedings in Parliament' 'impeached or questioned' and 'place out of Parliament' are not defined but have been the subject of some judicial attention.

The Court in *Halden v Marks*[24] noted that it is settled that Article 9 is to be given a wide interpretation. Similarly, Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 at 638 observed that:

Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech).

The phrase 'proceedings in parliament' is wider than the activities that occur in the Chamber or a committee room. Business which involves actions and decisions of the House are 'proceedings' while other communications may fall outside the category.[25] Erskine May in *Parliamentary Practice* states: 'not everything said or done within the precincts forms part of proceedings in Parliament'.[26] It is a question of proximity of the activity to the proceedings. For example, it is widely agreed that Members' drafts and notes which precede speeches and questions are protected by parliamentary privilege on the basis that it is

[24] (1995) 17 WAR 447, 461.

[25] *Re Parliamentary Privilege Act 1770* [1958] AC 331 concerned a Members letter to a Minister which could be used by the court.

[26] 24th Ed, p241.

reasonable for a Member to obtain assistance and advice and that it is absurd to protect a speech but not the preparatory material.[27]

None of the Australian enactments on parliamentary privilege contain a definition of the expression 'place out of parliament'. In her text 'Parliamentary Privilege' Professor Campbell notes that this question has 'not been answered completely by judicial decisions'.[28] The phrase 'place out of Parliament' does not apply to every place out of Parliament as it would prevent the public and media from freely discussing and criticising proceedings in Parliament. The freedom of political communication is well established *(Lange v Australian Broadcasting Corporation*[29]). However, it is also wider than merely 'courts'.[30]

A narrow approach was adopted by Hunt J in *R v Murphy* where the word 'place' was to be interpreted 'ejusdem generis' with "court"', so as that Article 9 should apply only to 'courts and similar tribunals'.[31] The Privy Council in *Prebble v TV New Zealand*[32] regarded Hunt J's view as erroneous. The ejusdem generis approach was approved by Davies JA in obiter in *Laurence v Katter*.[33]

A Joint Committee on Parliamentary Privilege in the UK expressed the view that it also applies to tribunals that enjoy the same powers as courts. Similarly The New South Wales Parliamentary Library Research Service Report, *Parliamentary Privilege: Major Developments and Current issues* concludes that commissions of inquiry are 'places' out of Parliament because they have the power to compel evidence and to make findings and recommendations which may result in Legal proceedings.

The limits of parliamentary privilege are not always clear. Some privileges have been long established by custom, hard won by disputes between the executive in the person of the king, and the Commons. The *Bill of Rights* is an example.

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[27] Joint Select Committee, *Parliamentary Privilege - First Report* 30 March 1999, UK [113]. See also - *O'Chee v Rowley* (1977) 150 ALR 199; *National Tertiary Education Industry Union v Commonwealth* [2001] FCA 610.
[28] E Campbell, *Parliamentary Privilege,* The Federation Press (2003), p 19.
[29] [1997] HCA 25; 189 CLR 520.
[30] Joint Select Committee, *Parliamentary Privilege - First Report* 30 March 1999, UK [92].
[31] [1986] 5 NSWLR 18 at 29-30.
[32] [1995] 1 AC 321.
[33] (1996) 141 ALR 447, 488-9.

It may be that accepting a bribe is also covered by parliamentary privilege under the *Parliamentary Privileges Act* and thus amenable only to the jurisdiction of parliament.

The Commission was recently taken to task by a select committee for reporting on answers prepared by staff for the Minister to respond to a parliamentary question.[34] Parliamentary privilege was held to extend to the preparation of those answers by public officers. The privilege was thus extended beyond members. There is no bright line limit to parliamentary privilege. In a particular case, the limit will not be known until a Privileges Committee declares it. The extension of parliamentary privilege to cover these answers, did not however in the committee's view extend to the drafting and preparation of the Commission's report to parliament, even though it exposed a matter about which parliament was hitherto unaware.

Being unwilling to follow the unfortunate example of the Sheriff of Middlesex,[35] I will adopt a prudent, some might say timorous course in future on any matter which could conceivably fall within parliamentary privilege.

There was a procedure heretofore where the Commission would affectively investigate possible parliamentary contempt on parliament's behalf. Until 1 July 2015, the CCM Act provided for a system of referral and cross-referral. If the Commission received an allegation about a member in the performance of the functions of that office, it was required to refer the matter to the presiding officer of the relevant house who in turn, was required to offer it to a Privileges Committee. If the committee resolved to carry out its own enquiry, it was required to refer it to the Commission which was given effectively parliamentary privilege in its investigation. This slightly cumbersome system preserved the supremacy of parliament over a process involving one of its own while efficiently initializing a body specifically equipped for investigation.

This arrangement was revoked[36] and a Commission power or function is not to be exercised if it relates to a matter determinable by a House of Parliament.[37]

[34] Standing Committee on Procedure and Privileges: Report No. 44 (Nov 2016).
[35] Sheriff of Middlesex's Case (1840) 11 Ad & E.
[36] Act No. 35 of 2014, s 6, No. 4 of 2015, s 84(2).
[37] CCM Act s 3(2).

By this amendment, parliament has reclaimed the supremacy over proceedings in respect of its own members that it always enjoyed until it established the Commission with the double referral just outlined.

The case for an independent corruption agency to investigate and monitor serious misconduct in the public sector which was sufficiently persuasive to establish the Commission was insufficient to sustain when members of parliament are considered.

Though the case originally invoked a recognition that the parliamentary process was no longer adequate in respect of other public officers, parliament has reaffirmed its exclusive jurisdiction over its own.

The consequence is that the Commission has jurisdiction to investigate allegations of serious misconduct in respect of all public officers except members of parliament.

Members are privileged and protected from scrutiny unless parliament makes a referral to a Privileges Committee. That committee has power to order a person's attendance and to produce documents. The committee does not have access to the full suite of powers, covert and otherwise available to the Commission.

Although Report 44 directed that a Memorandum of Agreement with the Commission be explored, perhaps recognizing the limited resources available to parliament to investigate itself, it is difficult to see how a Memorandum of Understanding can fill a legislative gap, particularly when parliament intentionally removed the possibility of intervention by the Commission.

The same prohibition may not apply in respect of public officers who hold dual positions such as, ministers of state who are also members of parliament: *Nuttall v The Queen*.[38] In *Nuttall,* a member of the Queensland Legislative Assembly, and a Minister in the Beattie Ministry, promoted projects to his Department from which he was to benefit. He was questioned by the Crime and Misconduct Commission and gave false testimony resulting in convictions for five counts of perjury. He was also convicted for five counts of official corruption. The court held that his acts were not privileged under Article 9. It is often difficult to determine in what capacity a person is acting when they enter into a corrupt bargain or take a bribe.

[38] (2011) 209 A Crim R 538.

However, questions will arise, as in the case of Mr Nuttall, to the functions being performed which gave rise to the bribe. The answer may not only control the exercise of Commission power but also the exercise of judicial power. Judicial power, invoked by the presentation of an indictment is constrained by Article 9 as well.

The executive

Although it reports to parliament and is in that respect an agent of parliament, it would be wrong to view the Commission as entirely an agent of the parliament. In many ways, it sits firmly within the executive function of government, similar to police. Although the Commission does not have power to prosecute, agents have power to arrest, seek warrants, and execute searches. Witnesses can be compelled to attend before it on pain of arrest and detention. These are traditional executive functions.

The executive assigns a responsible minister, currently the Attorney General, to oversee the Commission. The Commission is required to report to the Attorney General on certain aspects of its functions, such as when it obtains telephone intercept warrants. Obviously, the executive effectively controls the budget of the Commission. Governments can neuter the Commission or any other independent agency by starving it of funds. There would however be, probably a severe political cost to such an effort. Apart from that rather crude method of control, one unlikely to be used in practice, the executive has little authority over the Commission. Again, this has both good and bad points. On the one hand, nobody would wish the executive to improperly intervene in a Commission investigation, particularly an investigation into some aspect of serious misconduct relating to a minister or member of the department. On the other hand, the rise of independent agencies is coupled with a corresponding erosion of ministerial responsibility. It would be unfair for parliament to hold the Attorney General, for example, personally or ministerially responsible for the act of an independent body over which they have no control.

I return to what I said at the commencement of this address, about the rise of so called integrity agencies as a consequence of party discipline. Modern democratic institutions such as Australian parliaments are governed by party discipline. The governor asks the member who leads the party with the most seats in the lower house to form a government. Fundamentally, this is because the leader can guarantee supply. I am

not here to criticize the party system. It has much to commend it. By the discipline of members, a party can have some confidence in carrying out its program and platform. The current senate is an example where the lack of party discipline makes governing much harder.

Party discipline comes with a cost. In times gone by, members were more independent minded; they were more truly representative of their community, the electorate which returned them. They had a vested interest to respond to and raise questions in parliament about matters of concern to their electorate. Raising matters of concern however may very often mean criticizing either explicitly or impliedly, the actions of the executive formed as I have said from the party with the majority in parliament.

This may not be an impediment to an opposition member (unless the issue also breaches that parties own policy) but is an impediment for a government member. We now can only pay lip service to accountability within the parliamentary sphere. Leaders will come and go by vote in the party room rather than vote in the house. Issues which might have been raised are either raised quietly or not at all for fear of offending or damaging the party and the executive.

In times gone by, the upper house functioned more freely as a house of review. Perhaps members of the legislative council like to believe that they still do. However, the party system now also dominates the upper house. So again, there is inhibition on a government member alleging misconduct in relation to a minister or even in relation to a departmental officer where such an allegation may reflect poorly on the minister. Opposition members are not so constrained but generally lack the resources to gain information from those unwilling to provide it.

And so it is that a range of bodies has grown up to fill the void. All these bodies have a measure of independence, some more, some less. The Parliamentary Commissioner, the Ombudsmen, the Auditor General, the Freedom of Information Commissioner and the Commission, are all independent. The Public Sector Commissioner is so independent that he is effectively the employer of the public service and particularly all the CEOs. He also sets the standards and deals with minor misconduct.

The Public Sector Commissioner wields immense power and is the ultimate employer for public service CEOs and indeed all. It was this power that the Chief Justice drew attention to and was in part critical of

in the 2013 Whitmore lecture.[39] The power granted to the Public Sector Commissioner echoes a continuing trend to absolve ministers of direct responsibility for important decision making. The Director of Public Prosecutions is another example.

In each case, parliament has established officers that are independent. That is, independent of direction to further political purposes. While most would applaud this development, it is has two structural weaknesses. The first is that it entirely depends on the quality and integrity of the person in the post. The removal of such a person from such an office may be protracted. For example, the Commissioner of the Corruption and Crime Commission may only be removed by parliament in a process similar to that of removal of a judge.

Secondly, political responsibility can be abrogated. For example, the Attorney General may give general policy directions to the DPP but can give no direction in a specific case. The remedy is for the Attorney General, who retains power, to act directly. This has so far only been a power exercised to my knowledge once when the Attorney General took an unsuccessful appeal against a suspended sentence imposed for manslaughter.

The disadvantage or structural weakness is that ministers may evade responsibility for unpopular decisions. There is a strong argument that ministers should be politically accountable for difficult decisions that must be made. The contrary position is that politics should not enter into the making of certain decisions. The balance between the two can alter from time to time. However, in relation to contentious decision involving the affairs of state, there is an argument that a minister should make those decisions and defend them in parliament if necessary. In the case of an under-performing CEO of a government department, the Public Sector Commissioner may exercise power without effective accountability because of the separation of power between Minister and Public Sector Commissioner.

So it is to a degree with the Commission. Is the Commission a boon to democracy by being fiercely independent and investigating possible corruption wherever it may be found (except in parliament), or might it on occasion be a threat to democracy if it uses its powers to initiate investigations in order to trample over rights or target behavior which may not fill the criterion?

[39] The Hon Wayne Martin AC, 'Whitmore Lecture' 2013.

It may be that the safeguards I have mentioned earlier, particularly the J Edgar Hoover clause, are sufficient for the benefit of an independent function to outweigh the possible detriments but it is a matter for discussion in the community from time to time. Those discussions are best done in dispassionate fora such as this, but tend in fact only to arise within the heightened emotional arousal of some particular issue.

Conclusion

The constitutional role of corruption commissions is starting to be explored in academic writing but is still evolving.[40]

A hallmark of a peaceful democracy is that evolution tends to be incremental. I am not sure whether at the moment the balance between parliament, the executive and the Commission is quite right. The power of the Commission has been paid for in part by a responding loss of power by both parliament and other arms of the executive such as a minister. Even the integrity of the judiciary or more accurately the practices and procedures, long established by common law, may be infringed by express powers given to the Commission including the derogation of the right to silence. It is an interesting time to be part of the evolution.

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- Spigelman, 'The Integrity Branch of Government' (First Lecture in the 2004 National Lecture Series by the Australian Institute of Administrative Law, Sydney, 29 April 2014), 4.
- Chris Field, 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability' (2013) 72 *Australian Institute of Administrative Law* Forum 24.
- David Solomon, 'What is the Integrity Branch?' (2012) 70 *Australian Institute of Administrative Law Forum* 26.
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- Joseph Wenta, 'The Integrity Branch of Government and the Separation of Judicial Power' (2012) 70 *Australian Institute of Administrative Law Forum* 42.
- Professor Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633.