"IS THE HIGH COURT HELPING TO FIGHT CORRUPTION?"

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Victorians may not realise that our State has the worst and least effective Government integrity system in Australia. Until recently it had no Anti-Corruption Commission; an FOI system subverted by governmental practices enabling exemption from disclosure; no regulatory system requiring disclosure of political donations (we have to rely on inadequate Commonwealth legislation); a *Public Disclosure Act* which fails to protect whistle blowers, and an *Audit Act* that prevents the Auditor-General from making proper investigations by "following the dollar". With no effective integrity system, it is hardly surprising that corruption has gone undiscovered, and that many may have believed that there was little corruption in the public service and that our State was pretty "clean" compared with New South Wales.

Any such belief must have been rudely shattered by IBAC's investigation, *Operation Ord*, into the Education Department which oversees $4 billion of the state school system's annual budget. The public disclosures of *Operation Ord* have already demonstrated that millions of dollars have been transferred to so-called

"banker schools," and used by senior officials as a slush fund to pay for travel, food, alcohol and other expenses. At least six schools have been involved and several senior officials of the Department. Similarly last year in IBAC's *Operation Fitzroy*, we learnt that two Transport Department project officers awarded $25 million of public money over a seven-year period to companies they had set up, making a personal profit of over $3 million, the work carried out being allegedly shoddy. Evidence from one of the officers was that a culture had developed within the Department of turning a blind eye to improper relationships between staff and contractors.

Anyone who believed Victoria was clean and largely free from corruption before these disclosures cannot have been following the very damning reports from the Ombudsman, George Brouwer, in the years before the IBAC was set up. Over a ten-year period, Mr Brouwer repeatedly in his reports to Parliament drew attention to matters such as the conduct of councillors at the Brimbank City Council, the problems of conflict of interest which pervaded local government, repeated examples of public officers misusing their position to obtain a personal benefit, maladministration in the Victorian Building Commission, and the consistency of complaints demonstrating conflict of interest both in local government and the public sector. Mr Brouwer's report in March 2014 on conflict of interest in the Victorian public sector is of particular significance, including a number of case studies demonstrating the loss to the community such a conflict of interest causes.

Given that corruption is insidious, usually secret, and hard to identify and eradicate, there are unsurprisingly numerous issues which in recent times have cried

out for investigation by a body such as IBAC. The position is made worse in Victoria by increasing secrecy over governmental policy development and decision making, and the process of arriving at government agreements. But even so, areas of concern ripe for an IBAC investigation would include urban planning, for example the Windsor Hotel and Phillip Island debacles, and the practice known as "flipping" when a developer obtains a permit for a city property and later sells it to a second developer at a massive profit created by the issue of the permit; the enormous time and expense of the development of Myki and the desalination plant; the activities of some construction unions and their interaction with public officials; public-private-partnerships; political funding, and the East-West Link side-letter.

Before the 2010 election, Ted Baillieu's then opposition party promised Victorians that if elected it would establish a broad-based anti-corruption commission modelled closely on the NSW ICAC. ICAC was introduced in 1988 by the Greiner Government. It is a body with great powers and it has been very effective. Until recently, its powers of investigation were thought to be almost unlimited. The *ICAC Act* defines "corrupt conduct" in such a way as to include any activity that could adversely affect the exercise of official functions by a public official and a wide variety of particular offences. The ICAC's jurisdiction is defined in such a way as to entitle it to investigate any allegation or complaint or any circumstances which in the Commission's opinion imply that corrupt conduct or conduct connected with corrupt conduct may have occurred, may be occurring or may be about to occur. ICAC is plainly entitled to investigate allegations amounting to misconduct in public office by a public official, including a Minister. ICAC's entitlement to investigate upon

suspicion of corruption, if it remains practically unlimited, would make it very difficult for an investigated party to obstruct or delay an investigation.

A good example is the investigation of the Obeid family in *Operation Jasper*, the nature of which is expounded in full detail on ICAC's website. The inquiry investigated various activities of the NSW Minister for Primary Industries and Mineral Resources, the Hon. Ian Macdonald, which had the effect of opening a mining area in the Bylong Valley for coal-exploration, including whether his decision to do so was influenced by Mr Obeid or members of his family. This decision was not based on, indeed was contrary to, recommendations of the Minister's departmental officers.

At the outset of the investigation, ICAC merely had suspicions that some unidentified corruption might have occurred. At the opening of the public hearing it was alleged that the Obeid family had deliberately organised their business affairs so as to disguise their involvement with the relevant land, including through multiple layers of discretionary trusts and $2 shelf companies, the names of which were repeatedly changed. ICAC had investigated these matter for many months, during which more than 100 witnesses had been interviewed, search warrants had been executed, computer hard drives seized and downloaded, and tens of thousands of documents seized and assessed for relevance. Even then, on one view, the Minister's decisions might have been explained solely as bad government. The inquiry was to investigate whether the Minister's decisions were explained by corruption, since it was alleged that their effect was that the Obeid family was likely to profit by up to $100 million.

It is necessary to remember when examining the IBAC provisions, that, unlike most criminal offences which are investigated by a police force and prosecutorial bodies, the hidden nature of corruption makes investigation difficult. And when any investigation of suspected corruption commences, well-funded suspects will take any step they can to obstruct or delay the investigation, which in turn enables documents or evidence to be hidden or destroyed. So much was repeatedly obvious when the Painters and Dockers Commission of the 1980's conducted by Frank Costigan QC began to uncover evidence of the money-laundering and other activities of those involved in the Bottom of the Harbour schemes.

The IBAC legislation at first glance might indeed be thought modelled on ICAC - it contains powers in the investigation of corruption which are similar to ICAC's; powers which in the 1980's horrified many of those considering the activities of Costigan's Royal Commission, or the setting up of a National Anti-corruption Body which he recommended. Many still share the view that to grant an anti-corruption body such powers is completely inconsistent with a whole series of basic civil liberties which have been hard-won since the 16th century in the English law courts, starting of course with the preclusion of torture and the rule of evidence obtained by torture could never be used against the victim, as held by Chief Justice Coke at the start of the 17th century.

IBAC's difficulties start with the definition of "corrupt conduct" which is very narrowly defined. A "relevant offence" is defined as "an indictable offence against an act" or one of three common law offences, in effect bribery of a public official or perverting the course of justice. The definition of corrupt conduct concludes with the

words “being conduct that would, if the facts were found beyond reasonable doubt at a trial, constitute a relevant offence.” IBAC’s jurisdiction is then limited by s.60(2) which requires it not to conduct an investigation “unless it is reasonably satisfied that the conduct is serious corrupt conduct.”

Now misconduct in public office is an indictable offence at common law, not by statute, and is therefore plainly NOT covered by the definition of relevant offence. This is a very surprising omission since misconduct in public office is at the heart of conduct by public officials which would be likely to attract the attention of an anti-corruption body. But, worse, the effect of s.60(2) is that IBAC must not conduct an investigation – at all – unless reasonably satisfied that the conduct is “serious” corrupt conduct (not defined). The requirement that IBAC must be able to articulate those facts which if proved beyond reasonable doubt would constitute a relevant defence, means that before IBAC can commence an investigation, it must be able to state clearly the facts, amounting to serious corrupt conduct, that it wishes to investigate. It is no wonder that in his 2014 report to Parliament, the IBAC Commissioner made complaint as to these provisions. It is believed that the IBAC Commissioner, when his investigators wish to commence a preliminary investigation, first asks them to specify the indictable offence involved.

The obvious consequence is that, if circumstances similar to those involved in the Obeid family arose in Victoria, IBAC could be prevented from carrying out any investigation using IBAC’s extensive powers unless it had much better information as to what had occurred than was available to ICAC when it commenced to investigate the Minister’s grant of mining licences in the Bylong Valley. It should be noted that

the Victorian legislation does not at present even grant IBAC jurisdiction to commence preliminary investigations. Sensibly the IBAC Commissioner has presumed an entitlement to make preliminary inquiries, but if a suspect became aware that any investigation was being conducted, even at a very preliminary stage, there remains the prospect that that suspect would be entitled to seek a Supreme Court injunction asking for a halt to any such investigation with the inevitable consequent delay and obstruction and possible loss of evidence.

Before the last Victorian election, the Coalition Government tabled amending legislation which would have had the effect that the offence of misconduct in public office was included in the definition of corrupt conduct, and new provisions were to be included which expressly permitted IBAC to conduct preliminary investigations. Furthermore, to conduct a preliminary investigation, IBAC would no longer have to be able to articulate facts which if found proved would constitute a relevant offence. But the amending legislation expressly provided that IBAC could not use its extended powers (bugging, *in camera* hearings, powers of entry, search and seizure, and search warrants) in preliminary investigations.

The only real advance in these amendments is however the inclusion of the offence of misconduct in public office. The IBAC Commissioner was already acting on the assumption that IBAC had power to make a preliminary investigation. On the other hand, the definition of corrupt conduct was still far too narrow. The legislation still contained the threshold which prevented IBAC investigating in circumstances where ICAC plainly can commence an investigation, using all its formidable powers. The amendments produce a new problem, that IBAC can commence an investigation

on a preliminary basis without being able to use any of its formidable powers, but cannot proceed to a full investigation unless it can articulate the facts which if proved amount to a relevant offence. This produces an added complicatory factor, the precise point at which IBAC can move from a preliminary to a full investigation, and which again may give a suspect a basis on which to seek a court injunction.

Victoria will not have a properly armed and empowered IBAC until the legislation is amended at least in the following ways. A much broader definition of "corrupt conduct" including misconduct in public office, must be introduced. The high threshold to a full investigation such as the absurd requirement that IBAC should at the outset be able to articulate facts amounting to an indictable offence, must be removed. Any division between a preliminary and a full investigation must be eliminated. In effect the Parliament must trust the Commissioner and his staff not to investigate trivial or frivolous complaints. The present requirement that IBAC only investigate "serious corrupt conduct" should be removed, the matter being left to the Commissioner's discretion.

Margaret Cunneen SC is a Deputy Senior Crown Prosecutor in New South Wales. In 2005 she was Crown Prosecutor in the horrifying case of a young woman who was raped by 14 men over a six hour period made worse by cultural differences. After a long trial, in which every possible point was taken, a number of them were convicted and long sentences were imposed. Cunneen's work was rightly regarded as heroic. Sometime later she gave a lecture to students at the University of Newcastle in which she raised the question whether the pendulum had swung too far to the right in the direction of protection of the rights of the accused. Her speech caused

headlines, great antagonism in the judicial community, and some have said that it delayed her promotion to Senior Counsel for a number of years. Consequently she was seen in some legal quarters as a tall poppy that had to be lopped.

Last year ICAC sought to investigate Cunneen and her son and his girlfriend over an allegation that, with intent to pervert the course of justice, she and her son counselled his girlfriend to pretend to have chest pains to prevent police officers obtaining evidence of the girl's blood alcohol level at the scene of a traffic accident. The girl had been involved in the accident, but had not been drinking, and did take a breath test and no alcohol was shown on it. It has been alleged that ICAC was tipped off to the matter by a hostile member of the family.

Ms Cunneen took proceedings seeking a declaration that ICAC did not have power to conduct the inquiry. The most relevant section of the *ICAC Act* is s.8(2) which says "corrupt conduct" is any conduct of any person that adversely affects or could adversely affect, either directly or indirectly, the exercise of official functions by any public official," and which could involve certain kinds of misconduct listed in the sub-section, including perverting the course of justice. The conduct did not concern the exercise of any of her duties as a prosecutor. ICAC contended that the conduct was corrupt because it could adversely affect the exercise of official functions by the investigating police officers and by a court that would deal with any charges arising out of the accident.

The principal argument in the High Court was directed to the meaning of the expression "adversely affect", which appears in several places. There were only two possibilities, either it means adversely affect or could adversely affect the **probity** of

the exercise of an official function by a public official, or it means adversely affect or could affect the **efficacy** of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision from that which would otherwise be the case.

The majority chose the former, which they said accorded with the **ordinary understanding of corruption in public administration**. The latter interpretation, in their view, would result in the inclusion of a broad array of criminal offences and unlawful conduct which had nothing to do with the ordinary understanding of corruption and enabled ICAC to exercise its extraordinary coercive powers in areas ranging well beyond the ordinary understanding of corruption.

The majority then proceed to instance a number of examples of criminal or unlawful conduct which might affect an honest public official's behaviour for example –

(a) a public authority losing money through relying on the advice of a fraudulent stockbroker;

(b) a thief stealing one or more of a public authority's vehicles;

(c) telling lies to a police officer to deflect the officer from instituting a prosecution –

and a number of others, in each case then leading to some adverse impact on the public authority or official's activities.

The High Court relied on the principle of legality, coupled with the lack of a **clearly expressed legislative** intention to override basic rights and freedoms on such a sweeping scale. The Court concluded that the provisions of the *ICAC Act* operate **more harmoniously on the footing** that the Act is directed towards promoting the integrity and accountability of public administration in the sense of maintaining probity in the exercise of official functions.

The dissentient, Gageler J, considered that ICAC was entitled to investigate if the criminal conduct had the potential to impair the **efficacy** of an exercise of an official function by a public official. In his opinion the ordinary grammatical meaning of "could adversely affect" included set situations where the conduct would affect the efficacy of the exercise of an official function. He agreed with Bathurst CJ, the dissentient in the Court of Appeal in New South Wales that conduct which could impair the Court's capacity to do justice in the particular case was conduct which could adversely affect at least indirectly the exercise by the Court of its official functions.

Next, Gageler J pointed out that the reasoning of the majority had the potential to exclude from the definition of "corrupt conduct" the case of fraud on a public official or of conspiracy to defraud a public official which involved no wrong doing on the part of the public official, no matter how widespread the conduct or detrimental its effect, thus, state-wide endemic collusion among tenderers for government contracts, or serious and systemic fraud in the making of applications for licences or permits, would be excluded from ICAC's jurisdiction. In his view it was improbable that ICAC was to be denied the power to investigate serious and systemic fraud of this

kind. He examined the legislative history of ICAC, that it had carried out a number of investigations on the wider basis (efficacy) preferred by Bathurst CJ and himself, after which the *ICAC Act* had been amended without any indication of comment or parliamentary disapproval on such an interpretation of the legislation. The Act on the whole in his view showed that it permitted ICAC to investigate over a wide area, but to refrain or disengage from a particular investigation of conduct which ICAC assessed to be trivial, or where it was thought to be neither serious nor systemic.

It will be seen that my view is that the much more convenient and sensible and indeed correct interpretation of the two available is that of Gageler J. I believe that in the High Court the tide of argument turned, as Janet Albrechtson contended in a scathing attack on ICAC in the *Australian* when Nettle J asked ICAC's counsel whether it was sufficient to be corrupt conduct merely because someone lied to a police officer to which ICAC counsel agreed. The majority had seen a mass of politicians on both sides of politics having their reputations destroyed by ICAC and this spooked them and took them one step too far.

ICAC, I think, bears some responsibility for what has happened. ICAC for years has had a rule of thumb, to have at least one public hearing a month. There has been a history of grand statements in opening by ICAC counsel, before any evidence had been tended. Particularly in the field of political donations, reputations (e.g. the NSW Premier, Mr O'Farrell) have been destroyed, almost by accident, when no allegation of corruption had been made against him. The Commissioner, former Justice Megan Latham was recently quoted telling young lawyers at the NSW Bar that inquisitorial litigation is "fantastic", "you are not confined by the rules of evidence,

you have a free kick, you can go anywhere you want and it's a lot of fun" and later, that questioning a witness in an ICAC hearing is "like pulling wings off a butterfly". These comments, made in public, and caught on a video, were I think a serious mistake and calculated to enrage many, as they did. ICAC itself was doubly at risk in pursuing Cunneen. She was not acting as a prosecutor, a state official even if she made the suggestion that was alleged against her. But on any view that conduct if corrupt was plainly not systemic, nor could it be seen as serious corruption. If anyone at ICAC took it seriously, it should have been referred to the police or the Chief Crown Prosecutor to pursue. To pursue it before a public ICAC hearing was guaranteed to provoke the hostile reaction it has produced on the community, Bar and the High Court.

NSW Premier Baird has now said that Parliament will legislate to validate past investigations, and do so retrospectively. This has been vigorously criticised particularly in the *Australian* by writers such as Chris Merritt and Janet Alstergren, on the ground that granting retrospective immunity to ICAC in effect endorses unlawful conduct in public administration, and that unlawful conduct has no place in the public sector. I do not agree. The effect of such legislation would not be to make lawful and permissible, conduct that was corrupt and illegal at the time. What it will do is validate past investigations and findings, which otherwise might have to be carried out again, and also leave the State possibly open to actions for substantial damages.

The majority's reasoning has the following consequences. ICAC now has no power to investigate State-wide endemic collusion among tenderers for government contracts. It now has no power to investigate serious and systemic fraud in the

making of applications for licences permits or clearances under health and safety laws; or for licences to permit exploitation of State-owned natural resources. Similarly typical cartel activity: if a cartel of companies seeking to exploit oil found under NSW waters agree that the highest tenderer shall be 'X' company, possibly at great cost to the State, or if a cartel of builders seeking to bid for a desalination plant agree that the lowest tenderer shall be 'Y' company, ICAC cannot investigate. Australian Water Holdings was investigated by ICAC for obtaining a financial benefit adversely affecting the official functions of Sydney Water Corporation by including a variety of incorrect expenses. This has been found outside ICAC's jurisdiction, as will almost certainly be the investigation of the company's chairman, Arthur Sinodinos. Likewise the investigation of the directors of Cascade Coal, who were investigated for deliberately and corruptly concealing the interests of former Labor Minister Eddie Obeid in an exploration licence over the Obeid family's farm in the Bylong Valley. In the Obeid matter itself, if the family had supplied entirely false material in support of their application, and if the Minister and his staff knew nothing of this and merely made a decision on the material, no ICAC investigation could proceed. It surely cannot be right that potentially widespread and systemic corruption should escape ICAC's jurisdiction.

The anti-corruption commissions of both Victoria and Queensland will also be seriously affected and inhibited by the High Court's decision in the Cunneen case. In both cases the relevant legislation makes frequent use of the phrase "adversely affect" and the opening words in the *IBAC Act* definition of "corrupt conduct" are that corrupt conduct means conduct of any person that "adversely affects the honest performance by a public officer". However in the case of IBAC, both major parties

have promised at least substantial amendment of the legislation. Plainly the draughtsman of any such amendments must ensure that the Victorian legislation cannot be interpreted in the way the High Court has decided in the Cunneen case. As to ICAC itself, its reaction was that the High Court's narrow interpretation of the legislation would severely restrict its investigative capabilities, and that it expected to lose at least 30% of its present work. Many past and present ongoing investigations are likely to have been found invalid and ICAC's findings invalidated, if the amending legislation had not been passed. The question whether the ICAC legislation should be amended to broaden it in the future has been left by the Premier to a Court of Inquiry headed by former Chief Justice Murray Gleeson AC.

The answer to the question involved in the title to this talk is that the High Court is plainly **not** helping to fight corruption. On the contrary it is making it substantially more difficult to expose and eradicate widespread corruption. But it is not the High Court's task to fight corruption, rather it is to interpret and lay down the law, and to act as a balance and brake on the excesses of Australian governments. Of course from time to time there will be people who strongly disagree with the High Court. Jerrold Cripps, a past Supreme Court judge and former ICAC Commissioner, said the decision overturned two decades of understanding of what ICAC could investigate. Those who conspired to stop public servants from discharging their duties would no longer be captured by the legislation. He continued "I wonder whether the courts when they make these decisions ever think about the implications". There will be many who agree with Jerrold Cripps.