THE IMPACT OF ADMINISTRATIVE LAW ON ANTI-CORRUPTION AND INTEGRITY AGENCIES

The Hon John McKechnie QC*

The land on which Corruption and Crime Commission's headquarters are located has deep significance to the Noongar people. In the present built environment of Northbridge, it is difficult to imagine this land 200 years ago. The first white settlers noted the wetlands to the north of the city in the area now encompassed by Northbridge, North Perth, Highgate and Leederville. They were known as Perth Great Lakes, and a memory of those lakes lives on in both the name of the nearby street and Hyde Park. According to the Noongar people, the Wagyl — a huge spirit serpent — moved across the land creating trails and hills and going underground before rising to form the lakes. These lakes were an abundant supply of fresh water and foods such as water birds, frogs, gilgies and turtles. Inevitably, the wetlands were drained to make way for the inner-city development with which we are familiar. To our eternal shame, between 1927 and 1945 Aboriginal Australians were not permitted in the region now known as Northbridge without a 'native pass'. So, mindful of their long-term connection to the land, I acknowledge and pay my respects to the Noongar people, particularly those of the Whadjuk and to their elders past, present and emerging.

In view of the calibre of previous speakers to this august body, I am honoured to have been asked to speak on the impact of administrative law on anti-corruption and integrity agencies. An anti-corruption commission under different names and some different functions now exists in every State and the Northern Territory. A partial body, the Australian Commission for Law Enforcement Integrity (ACLEI), deals with uniformed members of the federal government apart from the Defence Force. They form part of what James Spigelman, former Chief Justice of New South Wales, has described as 'the integrity agencies'. I shall be concentrating on anti-corruption commissions, but 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 have their genesis in the decline of Parliament from being a true representative of local communities to a body largely controlled by the discipline of the party system. So there has been a growth in administrative bodies to close the gap and, in consequence, a resurgence of administrative law revitalising the ancient remedies of prerogative writs and using flexible modern applications for injunctive or declaratory relief.

It is perhaps worth reflecting that, less than a century ago, the term 'administrative law' was pejorative. In his seminal and controversial book *The New Despotism*, published in 1929, the Lord Chief Justice, Lord Hewart, wrote that administrative law was profoundly repugnant to English ideas and it would be a strange use of terms if the name 'administrative law' were to be applied to that which, upon analysis, proved nothing more than administrative lawlessness.

---

* *The Hon John McKechnie QC is the Commissioner of the Corruption and Crime Commission of Western Australia. This is an edited version of a speech given as a seminar to the WA Chapter of the Australian Institute of Administrative Law at the Corruption and Crime Commission headquarters on 24 October 2018.*

Lord Hewart would not be comfortable in modern Australia, replete with administrative tribunals such as the State Administrative Tribunal (SAT) and the Administrative Appeals Tribunal (AAT) to deal with the exercise of non-judicial power. However, here we are.

Different commissions

Royal 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. Royal Commissions are amenable to judicial review. For example, in *Halden v Marks*,[1] there was a challenge by way of injunctive relief to a Royal Commission inquiry into the circumstances of the tabling of a petition in Parliament (the Lawrence affair). The challenge asserted improper motives by the executive in calling a Royal Commission. The challenge failed. The Court discerned a legitimate purpose for the peace, order and good government of the State.

In *Edwards v Kyle*[2] and, subsequently, *Bradshaw v Kyle*,[3] declaratory relief in the first and injunctive relief in the second was obtained in respect of an inquiry into the City of Wanneroo under the *Local Government Act 1995* (WA). The inquiry had the powers of a Royal Commission.

The executive has long used Royal Commissions for a variety of purposes, the chief of which is 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 Supreme Court, the immigration of non-British labour and 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.

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 organisation 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 do not know what your organisation does until you have worked these things out!

A Royal Commission's terms of reference 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 time frame — I add, in parenthesis, one that is invariably extended.

Anti-corruption commissions

Anti-corruption and crime commissions and, for that matter, other integrity agencies are invariably established by act of Parliament. They are commissions with perpetual succession.

There may be more than one Commissioner — Queensland and New South Wales are examples. An anti-corruption commission is a standing commission in the sense that it has no particular time frame or lifespan. Crucially, neither the legislative body 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 it does not fit neatly into either category to the despair of constitutional law purists.

The commission has jurisdiction over 'serious misconduct' as defined:

(a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment; or

(b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person; or

(c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment.[4]

Police misconduct is defined as:

(a) misconduct by —

(i) a member of the Police Force; or

(ii) an employee of the Police Department; or

(iii) a person seconded to perform functions and services for, or duties in the service of, the Police Department;

or

(b) reviewable police action.

Reviewable police action is defined as:

any action taken by a member of the Police Force, an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department that —

(a) is contrary to law; or

(b) is unreasonable, unjust, oppressive or improperly discriminatory; or

(c) is in accordance with a rule of law, or a provision of an enactment or a practice, that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or

(d) is taken in the exercise of a power or a discretion, and is so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or

(e) is a decision that is made in the exercise of a power or a discretion and the reasons for the decision are not, but should be, given;

It has power to form opinions on misconduct but lacks any power to enforce its opinions.

The difference between a commission and a court

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 judicial review in its various forms under RSC O56.

A commissioner's appointment is time limited, unlike a judge, who holds office until retirement age. A commission has a parliamentary committee and inspector for oversight.

A commission looks a bit like a court, especially in procedure. The roles of a commissioner and a judge are quite different, although some of the functions — conducting examinations, summonsing and swearing witnesses and 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 judgement 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. Its investigations are not adversarial but inquisitorial. They may range far and wide within the ambit of serious misconduct as defined, subject only to the scope and purpose of the investigation as set by the commission. 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, but those opinions are not legally binding.

In *Cox v Corruption and Crime Commission*[5] (*Cox*), Martin CJ set out the commission's role and functions:

> 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 instituted by the relevant employing authority, and not by the Commission.[6]

An applicant might have considerable difficulty in invoking the court's jurisdiction where there has been a discretionary exercise of power but, nevertheless, the ultimate power of the court to control the commission remains.

I say 'considerable difficulty' because of the wide discretion given to a commission and its evaluation of the public interest. Mr A was a police officer who, we will see, launched multiple challenges to the commission's powers. In *A v Corruption and Crime Commission*,[7]

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.[8]

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.[9]

Amenability to prerogative relief: an inferior tribunal

The commission's exercise of power may be challenged by judicial review and prerogative relief — theoretically mandamus, but more likely certiorari or prohibition, which is a less restrictive, less cumbersome and therefore more usual application for injunctive or declaratory relief.

There is an exception. While the Commission's chief remit is corruption, the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act) provides the exercise of certain exceptional powers. These relate to organised crimes, and exceptional powers are granted to police following application to the Commission. Many of those powers are now to be found in the *Criminal Investigation Act 2006* (WA), and it is unnecessary for the police to exercise them.

Another exceptional power is to summons a person for an examination. The examination protects the companion principle by providing under the CCM Act s 50(1):

> A person summoned on an organised crime summons cannot be examined about matters that may be relevant to an offence with which the person stands charged, but this section does not prevent any other person from being examined about those matters.

I will discuss the companion principle shortly. The CCM Act gives wide interpretation to the expression 'being charged', including when a person is informed that he or she will be charged and when persons investigating the event ought to have formed the view that a person should be charged with the offence, whether or not a prosecution notice has been made or sworn. In recent years, police have made little use of this power partly because a Commonwealth agency, the Australian Criminal Intelligence Commission, provided a quicker and cheaper method of examination. That may change pending a reserved decision in the High Court from Victoria.

The exception to which I refer, excluding judicial review, is s 83, which requires the Parliamentary Inspector's consent to initiating proceedings for prerogative relief during an investigation:

> (1) Except with the consent of the Parliamentary Inspector, a prerogative writ cannot be issued and an injunction or a declaratory judgment cannot be given in respect of the performance of a function for the purpose of this Part and proceedings cannot be brought seeking such a writ, injunction, or judgment.
>
> (2) Subsection (1) does not apply after the completion of the investigation that it was being sought to facilitate by performing the function.

Mandamus

An application for mandamus is unlikely to be successful because, although the Commission has the power to investigate serious misconduct, it is under no duty to do so.

In *Re the Corruption and Crime Commission; Ex parte Calabro*,[10] Beech J dismissed an application for mandamus on the basis that mandamus compels the performance of a legally enforceable duty and not the performance of a discretionary power. The Commission has no legal duty to conduct a particular investigation. Whether the carrying out of further action is in the public interest is a wide-ranging value judgement where there is limited scope for intervention by the Court. It is analogous to the position that applies when a complainant reports or alleges to the police that an offence has been committed.

In *Hinchcliffe v Commissioner of Australian Federal Police*,[11] Kenny J dismissed a claim for mandamus based on an allegation that the Commissioner had a duty to cause an investigation to be made.[12]

In *Re Rodger Macknay QC; Ex parte A*,[13] Beech J dismissed an application for writs of certiorari and prohibition to quash the Commissioner's decision to release CCTV footage in a public examination and disclose it to the media. The application focused on the power of the Commission conferred by s 152(4)(c), which granted power to the Commissioner to certify that disclosure of the material was necessary in the public interest. The Commissioner had asked and answered that question deciding in favour of disclosure. While there is a threshold that has to be crossed before the power conferred by s 152(4)(c) could be exercised, it is a broad discretionary decision entrusted to the decision-maker. The power was not exercised for a purpose other than the purpose for which it was conferred. Beech J did not fail to take into account relevant considerations or take into account irrelevant considerations.

In *A v Corruption and Crime Commissioner*,[14] A, as has been discussed, appealed against the decision of Beech J and the appeal was dismissed. The appellant sought to raise a new ground of unreasonableness, but this also failed. I have referred briefly to the opinion of the majority. An assessment was made as to what might be in the public interest.

A common ground on which proceedings or decisions of administrative tribunals are challenged is for lack of procedural fairness. The point at which a particular rule of procedural fairness becomes live varies from case to case. The Commission conducts private examinations. A person who may be reasonably suspected of serious misconduct will be summonsed to a private examination at some point. Evidence is taken under oath or affirmation and the witness is expected to be truthful. The purpose of an examination is to further an investigation which might be quite wide ranging. So the rule in *Browne v Dunn*[15] does not apply in full force and rigour at the point of an examination. The witness will often be given a non-confrontational opportunity to explain a particular transaction.

Should it turn out that the witness has been less than truthful or has omitted facts, there may be a second examination which is partly designed to ensure that the person has a full opportunity to be aware of the material which might indicate misconduct.

The rule of procedural fairness requiring a person to make representations on adverse matters is also enshrined in s 86:

> Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.

This is no mere formality. In my time as Commissioner, I have, on many occasions, changed part of a report following receipt of representations.

In *Cox*,[16] the applicant sought a prerogative relief to quash parts of a report in which adverse findings were made against him and declaratory relief to the effect that the Commission had exceeded its jurisdiction in making those adverse findings. Martin CJ noted the principles enunciated in the context of an administrative body or tribunal undertaking a determinative or adjudicative function were not necessarily applicable without modification to a body like the Commission undertaking a function which was primarily investigative. Applying *Ainsworth v The Criminal Justice Commission*,[17] the Chief Justice noted that the findings and conclusions of the Commission have no operative legal effect.

The Court was prepared to consider as a principle that injury to reputation may provide a sufficient basis for the grant of declaratory relief in cases where certiorari is not available.

In *Greiner v ICAC*,[18] certiorari was refused because the determinations of the Commission were extremely damaging to the reputations of individuals but had no legal consequences.

Notwithstanding the comments in *Cox*, in my view, it remains an open question as to whether declaratory relief will lie to protect reputations. The answer is 'probably'. In the absence of a remedy of certiorari quoting the Commission's opinion, the drafting of a declaratory order will be interesting and challenging.

The two issues for discussion

For the purpose of administrative law, there are a number of areas which may form the basis of judicial review:

- bias, prejudice;
- lack of procedural fairness; and
- exceeding jurisdiction.

These are fairly standard and I will not develop them. Instead, I will focus on two issues:

- the clash with the companion principle; and
- adverse opinions and publicity.

The clash with the companion principle

In *Lee v The Queen*[19] (*Lee [No 2]*), the High Court noted that our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused.

The principle of the common law is that the prosecution is to prove the guilt of an accused person. The companion principle is that an accused person cannot be compelled to testify. Put another way, the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.

An issue in the various cases relating to crime and corruption commissions 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 court defined in Chapter III of the *Constitution?*

The discussion in Australia conveniently can start with *Hammond v Commonwealth of Australia*[20] (*Hammond*). Mr Hammond was charged with conspiracy to export prohibited meat. Mr 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:

> 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.[21]

The Chief Justice went on to hold that 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 predated *Kable v Director of Public Prosecutions (NSW)*.[22] There have been a series of cases in the High Court in the last few 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*,[23] are intended to infringe any of the bundle of rights.

In *X7 v Australian Crime Commission*[24] (*X7*), a person had been charged with criminal offences. The Australian Crime Commission (ACC) proposed to conduct a compulsory examination of the accused with the respect of the subject matter of the offences. In common with similar statutes, under the *Australian Crime Commission Act 2002* (Cth) (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 publication would prejudice the fair trial of a person who 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 judgement 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.[25]

French CJ and Crennan J, however, were in the minority. In a joint judgement, Hayne and Bell JJ, with whom Kiefel J agreed, also applied the same rule of construction. The notion of an accused person's right to silence encompasses more than the rights that the accused has at trial; it includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence other 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 on the charge it would affect the fundamental alteration to the process of criminal justice.[26]

The apparently entrenched principle reiterated in *X7* did not long survive. In *Lee v NSW Crime Commission*,[27] 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, it 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'.[28] 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 preference 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.[29]

And so the examinations were allowed to continue. However, any jubilation felt by the officers of the State in their win against Mr Lee was shortlived. 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 the Director of Public Prosecutions (DPP). The subsequent judgement in the High Court was short because of a concession made by the DPP. French CJ and 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.[30]

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.[31]

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*.[32] The Independent Broad-based Anti-corruption Commission had commenced an investigation of the conduct of certain members of Victoria Police stationed at Ballarat. The Independent Broad-based Anti-corruption Commission 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 was no prosecution pending.[33] The Court declined to extend the principle. Gageler J, in a separate judgement, concluded that the answer to an argument based on the companion rule is that:

> 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.[34]

Before moving to *A v Maughan*,[35] 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 is 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[36]

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 and 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. One was the Commission's power to institute prosecutions. The Court held that, on proper construction of the CCM Act, there was no such power. Nothing more need be said about this aspect. It appears to me that, regardless of whether Parliament did or did not invest the Commission with prosecution power, the result would have no effect on judicial power enlivened on the institution of the proceedings and their subsequent course. The important parts of the judgement for present purposes are the other matters decided. Corboy J summarised the Commission's powers:

> 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:

(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');

(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.

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.[37]

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 …[38]

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 authorised 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 s 145, which is in some respects a curious provision.

The CCM Act, s 145, provides:

> (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 —
>
> (a) any criminal proceedings; or
>
> (b) proceedings for the imposition of a penalty other than —
>
> (i) contempt proceedings; or
>
> (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 145(2) appears unique among anti-corruption Acts. It is logical: why should a witness be permitted to advance under oath a version of events different from that earlier advanced under oath without the court being able to assess the credibility of the version now advanced? The *Evidence Act 1906* (WA), s 21, provides:

> 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.

Section 21 is remedial in that it abrogated the rule in *Queen Caroline's case*.[39] Section 145 was enacted before the disclosure provisions of the *Criminal Procedure Act 2004* (WA). The result, which may have been unintended, is as Corboy J in *A v Maughan* explains.

In practice, this represents a narrowing of the companion principle because the State has full access to the transcript of a suspect witness. So does the accused, who knows that substantial departure from the evidence given before the Commission carries the risk that it will become admissible in the trial. Another possible narrowing of the companion principle is that the Commission's reasonable suspicions of misconduct do not translate into a charging or prosecuting agency's reasonable suspicion of a criminal offence.

In *X v Callanan*,[40] 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 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. [41]

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 Crime and Corruption Commission was an investigative 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.[42]

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 a 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 powers do 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.

Adverse opinions and publicity

The Commission may not give authoritative rulings and is enjoined against reporting a finding or opinion that a particular person is guilty of, or has committed, is committing or is about to commit a criminal offence or disciplinary offence. Indeed, a finding or an opinion that misconduct has occurred is not to be taken as a finding or opinion that a particular person is guilty of a criminal offence or disciplinary offence.[43]

The common law reached the conclusion that is now in statutory form. In *Parker v Miller*,[44] the Anti-Corruption Commission appointed a special investigator, who presented a report that found a number of police officers guilty of criminal conduct and serious improper conduct.

A police officer sought and obtained (by majority) prerogative relief by way of certiorari. Malcom CJ and Ipp J held that the finding were ultra vires, although their views as to why certiorari was granted differ. Malcolm CJ considered that certiorari would likely quash the decision of the Police Commissioner to dismiss the officers because the findings, conclusions and recommendations by the special investigator as adopted by the ACC were intended to be a step in the process of altering rights, interests or liabilities. Ipp J considered that prerogative relief should be granted on the basis that the findings of the special investigator, if published, were capable of causing far-reaching prejudice to those affected by it. Franklin J dissented and would have discharged the order nisi.

The matter came again before the full court in *Parker v The Anti-Corruption Commission*.[45] Murray J AC (with whom Pidgeon and Wheeler JJ agreed) was of the opinion that a report of the ACC, with or without recommendations, might be seen as a step in the process capable of affecting the rights of the individual. However, as a matter of statutory construction, the power confirmed on the ACC included a power to report and a report to summarise the outcomes of an investigation to make an evaluation of the evidence gathered and to comment upon it. The order nisi for certiorari was discharged.

In the well-known authority of *Ainsworth v Criminal Justice Commission*,[46] a report was prepared by the Criminal Justice Commission and tabled in Parliament. It contained adverse recommendations about certain persons involved in the poker machine industry. The Court held that the Commission was required to comply with the rules of procedural fairness in preparing the report because reputation, whether personal, business or commercial, is an interest which attracts the rules of procedural fairness.

The Court went on to discuss relief. Mandamus was inappropriate because the Commission was under no statutory duty to investigate and report about the person and might in the future be of a different view as to whether it should investigate and report. Certiorari did not lie because there was no legal effect or consequence attached to the report. However, the persons whose reputations were affected had a real interest in declaratory relief.

In *Cox*,[47] Dr Cox sought both a prerogative writ to quash parts of the Smiths Beach Report in which adverse findings were made against him; and declaratory relief to the effect that the Commission exceeded its jurisdiction in making adverse findings against him and that those findings are of no force or effect. Neither prerogative writ nor declaratory relief was awarded, as none of the grounds advanced by Dr Cox sustained the proposition that the Commission had exceeded its jurisdiction in expressing opinions adverse to him in the Smiths Beach Report.

Greiner v Independent Commission against Corruption[48] was another attempt to quash adverse findings. The New South Wales Supreme Court declined to grant an order of certiorari to quash a determination of Independent Commission Against Corruption because determinations of the Commission, although extremely damaging to the reputations of individuals, did not have legal consequences.

Can a commission be prevented from reporting to Parliament?

Under the CCM Act Part 5, the Commission is granted power to report to Parliament and that report may contain statements as to the Commission's assessments, opinions and recommendations and statements as to any of the Commission's reasons for the assessments, opinions and recommendations. There is a question that arises but has not been resolved.

Around Christmas 2008, the Commission sought a writ of prohibition against the Parliamentary Inspector. This was unusual and I make no comment on the propriety of such a course. Ultimately, it appears that the proceedings were settled. In the first judgement, which was in the nature of a directions hearing, *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex parte Corruption and Crime Commission*,[49] Martins CJ noted that 'The boundaries of the respective jurisdictions of the courts and the Parliaments have been in issue in this country and in England for centuries'.[50] In the second decision, *Corruption and Crime Commission of Western Australia v McCusker AO QC*,[51] the Chief Justice remained sufficiently concerned about the issue as to require that the presiding officers of each House of Parliament have an opportunity to indicate whether they wished to be heard.

The Chief Justice noted that the proceedings raised a question with respect to the capacity of the Court to entertain the proceedings and provide the relief on the basis they were not justiciable, including for the reasons they would interfere with the internal workings of Parliament. The matter was never resolved, as I have said, because they settled. The Parliamentary Inspector may, on one view, be closer to Parliament and therefore its internal workings because the Parliamentary Inspector is an officer of Parliament and is responsible for assisting the Standing Committee in the performance of its function.[52]

The Commission is not an office of the Parliament but does have statutory power to report at any time to Parliament, and the question is whether that power can be in any way fettered by a court. Looming in the background, of course, is Article 9 of the Bill of Rights 1688:

> 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.

Time does not permit an exegesis of the extent of parliamentary privilege.

As earlier discussed, in 2013, the Commission was challenged by Mr A as to the release of CCTV footage of an incident in the Broome lock-up. This was not quite a challenge to tabling a report in Parliament. The footage had been played during a public examination and the Commission proposed to release a pixilated version prior to report. Nevertheless, similar issues could arise if the Commission includes CCTV or other footage within its report.

In *A v Corruption and Crime Commissioner*,[53] the Court divided over the question whether the Commission had made an error. Martin CJ and Murphy JA dismissed the appeal. McLure P would have upheld the appeal. The judgements, particularly that of the majority, contain a restatement of the general principle in relation to jurisdictional error:

> Questions with respect to the ascertainment of the public interest will rarely have one dimension — *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423 [55] (Hayne J); *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 [137] (Hayne J); *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* [80] (Buss JA). Very often the ascertainment of the public interest will require the consideration of a number of competing factors or considerations,

> or differing features or facets of the public interest — see *Osland v Secretary to the Department of Justice* [137].
>
> Further, the ascertainment of what is 'necessary in the public interest' for the purposes of the grant of a certificate in accordance with s 152(4)(c) of the Act will be undertaken in a context in which the range of 'official information' received by the Commission may be extremely broad (see *Corruption and Crime Commission v Allen*), and in a context in which the functions to be performed by the Commission in the furtherance of the public interest are many and varied. In such a context it is difficult to envisage many, if any, circumstances in which disclosure could be said to be 'essential' to the advancement of the public interest in the sense of absolutely essential or indispensable to its maintenance or advancement. The multi-faceted nature of the public interest, and the likelihood of a discretionary judgment balancing competing considerations being required in the exercise of the power conferred by s 152(4)(c) in this statutory context are, in our view, incompatible with the proposition that a certificate can only be issued if the Commission concludes that disclosure is 'essential' to advance the public interest. Rather, these considerations reinforce the view that s 152(4)(c) imposes 'an evaluative standard requiring restraint in the exercise of the power', and require a value judgment to be made 'subjected to the touchstone of reasonableness'.
>
> Given the protean concept of the public interest, and 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.[54]

On the same theme:

> It is trite to observe that the fact the court may emphatically disagree with a decision reached by a decision-maker does not lead to the conclusion that it is unreasonable, irrational or illogical. Applying a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of the decision-maker — *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*, 432 (Latham CJ); *Foley v Padley* (1984) 154 CLR 349; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20* [2003] HCA 30; (2003) 77 ALJR 1165 [5] (Gleeson CJ); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 [40] (Gleeson CJ and McHugh J); [1999] HCA 21; *Li* [30] (French CJ), [66] (Hayne, Kiefel and Bell JJ); *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611. In *Li*, French CJ noted that:
>
> > The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker [30].[55]

The majority concluded:

> Because the public interest is likely to be multi-faceted, and because of the assessment of the public interest will very likely involve the evaluation of competing considerations, the evaluation of which is vested in the Commission and not the court, it will be a rare case in which such a process of evaluation and assessment could be said to lack an evident or intelligible justification.[56]

McLure P concluded that the discretion had miscarried to the point of error. She stated that disclosure of CCTV footage was positively contrary to the public interest in the due administration of criminal justice and that it was not open to the Commission to be satisfied on reasonable grounds that the disclosure was necessary in the public interest. In the end, all judges approached the issue broadly on the application of the *Wednesbury* principle, differing only in the factual result as to whether error was disclosed.

The judgement is of general application to reports by the Commission to Parliament and illustrates the difficulties in the way of a successful injunction, preventing the Commission from making a report to Parliament.

The indefatigable A applied for special leave to appeal to the High Court and sought an injunction in the interim: *A v CCC (No 2)*.[57] In refusing the injunction, Martin CJ made

remarks which, though obiter dicta, are an important indicator in respect to an attempt to constrain the Commission from reporting to Parliament:

> Given the nature of the injunctive relief sought and its context, there is a very real question as to whether it would be appropriate in any circumstance for this court to restrain a statutory agency from exercising its duty and responsibility to report to the Parliament even if there was an arguable case for relief. That question would properly raise important issues relating to the relationship between the courts and the Parliament and might raise issues with respect to the privileges of the Parliament and the possibility that any such order might constitute a contempt of the Parliament. However, as I have concluded that there is no arguable basis for the grant of injunctive relief, it is unnecessary to address those issues.[58]

Special leave was refused by the High Court. A was partially successful in *A v Maughan*. As we have seen, the Court held the Commission did not have authority to prosecute. Therefore, the charges were dismissed. However, the DPP laid a fresh charge of assault. A eventually pleaded guilty, notwithstanding the many applications to the Supreme Court seeking to avoid that outcome.

Conclusion

This has been a relatively brief overview of some of the administrative law issues affecting crime and corruption commissions. In particular, I have focused on two aspects. The first is the intersection between the administration of criminal justice and its fundamental principles and the power of a commission compulsorily to examine witnesses who may be suspected of or charged with an offence. The second is the all-compassing nature of the public interest (which, wisely, few judges have attempted to define) and the limited challenge available to the exercise of a discretion in the public interest, even when the results, at least to reputation, might be significant. I have also touched on the border between judicial review and parliamentary privilege.

Endnotes

1 (1925) 17 WAR 447.
2 (1995) 15 WAR 302.
3 (1995) 15 WAR 327.
4 *Corruption, Crime and Misconduct Act 2003* (WA) s 4(a)–(c).
5 [2008] WASCA 199.
6 Ibid [45].
7 (2013) WASCA 28 306; ALR 491.
8 Ibid [82].
9 Ibid [123].
10 [2012] WASC 355.
11 [2001] FCA 1747.
12 Ibid [17]–[18].
13 [2013] WASC 243.
14 [2013] WASCA 288.
15 (1893) 6 R 67 (HL).
16 [2008] WASCA 199.
17 (1992) 175 CLR 564.
18 (1992) 28 NSWLR 125.
19 [2014] HCA 20; 308 ALR 252.
20 (1982) 42 ALR 327.
21 Ibid 333.
22 [1996] HCA 24; 189 CLR 51.
23 (1908) 7 CLR 277, 304.
24 [2013] HCA 29; 248 CLR 92.
25 Ibid [40] (footnotes omitted).
26 Ibid [25].
27 [2013] HCA 39; 251 CLR 196.
28 Ibid [42].
29 Ibid [340].

30 *Lee v The Queen* [2014] HCA 20, [39].
31 Ibid [51].
32 [2016] HCA 8; 256 CLR 459.
33 Ibid [48].
34 Ibid [73].
35 [2016] WASCA 128; 50 WAR 263.
36 Ibid.
37 Ibid [189], [190].
38 Ibid [164].
39 (1829) 129 ER 976.
40 [2016] QC A 335.
41 Ibid [1]–[2].
42 Ibid [24]–[27].
43 *Corruption, Crime and Misconduct Act 2003* (WA) s 217A.
44 [1998] WASCA 124.
45 Unreported, Supreme Court, WA Library No 990162.
46 (1992) 175 CLR 564.
47 [2008] WASCA 199.
48 (1992) 28 NSWLR 125.
49 [2008] WASC 305.
50 Ibid [30].
51 [2009] WASC 44.
52 *Corruption, Crime and Misconduct Act 2003* (WA) s 188(4).
53 [2013] WASCA 288.
54 Ibid [80]–[82].
55 Ibid [132].
56 Ibid [129].
57 [2014] WASCA 33.
58 Ibid [32] (Martin CJ).