# ICAC
## A BARRISTER'S PERSPECTIVE[1]

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The Independent Commission Against Corruption (ICAC) has now been operating for more than twelve months. It is a permanent anti-corruption body with a large and growing budget. It was established following an election promise made during the last New South Wales state election in which "corruption" was an issue. There was some criticism of its intended structure when this was first made known. I understand there was also debate within government with respect to the appropriate nature of its powers.

Since the ICAC began operation, further reservations have been expressed and some who have carefully examined the legislation or been exposed to its processes have voiced criticisms. Mr Justice M.H. McLelland, in his paper "Disciplining Judges: A New South Wales Perspective",[2] was critical of the structure of the ICAC. Apart from his concern with the attack on the independence of the judiciary which the ICAC embodies, he expressed other criticisms. In so doing he drew upon the work of Mr G.E. Fitzgerald QC in his report of 3 July 1989 to the Queensland Government where, *inter alia*, Mr Fitzgerald said:

> With the best of goodwill and personal probity, the Chairman of an investigative body, knowing and sharing in the beliefs and suspicions which are part and parcel of the investigative process, will inevitably be susceptible to exercising subjective judgment rather than making objective assessment of the need for the exercise of invasive powers.

He further said:

> There is the risk that any autonomous body, particularly one infused by its own inevitable sense of importance and crusading zeal, may become increasingly insensitive to the delicate balance between conflicting public and private interests, which is traditionally and best struck by judges.[3]

Some who have been exposed to the investigative processes of the ICAC have been strong in their criticisms. They have described the investigation as unfair, similar to the "Inquisition", "McCarthyist" or by other strong language. Many of the criticisms have stemmed from one particular inquiry — that with respect to the North Coast development processes — but have not been limited to it.

Unfortunately, the response to many of the criticisms has been as strident as the criticism itself. Furthermore it is not apparent that any significant attempt has been made

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1 Paper delivered at a public seminar entitled "ICAC: Lessons From the First Twelve Months", convened by the Institute of Criminology at Sydney University Law School, 29 August 1990.

2 Mr Justice M.H. McLelland, "Disciplining Judges: A New South Wales Perspective", paper delivered 15 August 1989 at the 26th Australian Law Convention.

3 Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct pursuant to Orders in Council dated 26 May 1987 and others, para 9.5.4.

to examine the workings of the ICAC in an effort to understand why the criticisms are being made. Instead, the media has branded the critics as "headkickers" and resort has been made to opinion poll "results" to justify the ICAC's processes. The use of opinion polls is always troublesome when an issue requires decisions which express an understanding of significant principles. Their use in the present debate is quite unjustified. To ask six hundred people, of whom few, if any, will have ever been to the ICAC, let alone read the *Act* or any of its reports, whether the ICAC is doing a "good job" and thereafter rely on the response diminishes the debate.

Indeed resort to public opinion polls suggests a reluctance to address the real and significant issues which are being raised. My discussions with members of the legal profession who have appeared in the ICAC indicate that there is an almost universal concern with respect to the method of operation which it has so far pursued. Surely it is more important to seek out their views, and the views of those who have been investigated, rather than to rely on a public opinion poll of a few hundred people whose only knowledge of the processes will be an occasional media report.

In this paper I have attempted to identify the substantive causes of the present complaints. I should declare at the outset that I have appeared for interested persons in two of the ICAC's major inquiries and have advised others in relation to it.

## THE PROBLEMS

In my view there are two fundamental problems. The first is a misconception by the Commission of the role assigned to it by the legislation. It wrongly assumed a power to determine the guilt or innocence of persons investigated. This misunderstanding has motivated its conduct and lies at the heart of the submissions which it made to the Supreme Court during the course of the litigation in *Balog*, and *Stait*.[4] It was repeated in and rejected by the High Court.

With respect to the role of the ICAC, the High Court had this to say:

> The Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour.[5]

I note that in the public debate there appears to be some confusion with respect to the Commission's position on this question. In *The Sunday Telegraph* of 20 August 1990, Commissioner Temby is quoted in these words:

> We don't need to be told that we can't find guilt because we never thought that was our role.

4 *Balog v ICAC* (1990) 64 ALJR 400.
5 *Ibid* p 405.

I can only assume the Commissioner was not correctly quoted for the reported comment is directly contrary to the submissions put on the ICAC's behalf at every level of the court proceedings noted above.

Furthermore, the ICAC submitted that it could determine both guilt with respect to an alleged criminal offence and also corrupt conduct. Both submissions were rejected by the High Court.

The *Act* provides for two different types of investigation. In some instances (but this has not, so far as I am aware, occurred) the Commission may be requested to investigate a matter referred to it by both Houses of Parliament (s13(2)). It is apparent that it was intended that this would be done in any case where, after public discussion and parliamentary debate, the matter was thought appropriate for investigation by the ICAC. An investigation which has been referred by Parliament is required to *determine* whether any corrupt conduct may have occurred. Clearly, as corrupt conduct involves a criminal offence, in these matters findings of criminality may be made. Whether they ought to be, having regard to the prospect of a future trial, is another matter.

By contrast, in relation to all other investigations (and they will be the overwhelming majority) the effect of the High Court's judgment is to inhibit all findings, restricting the Commission to the power in s74(5) which is in the following terms —

> A report may include a statement of the Commission's findings as to whether there is or was any evidence or sufficient evidence warranting consideration of —
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> (a) the prosecution of a specified person for a specified offence; or
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> (b) the taking of action against a specified person for a specified disciplinary offence;
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> (c) the taking of action against a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of a public official.

This is clearly a more limited power than that which is contained in s13(2) and is not as broad as the power often expressly given to or assumed by Royal Commissions of Investigation.[6]

I have indicated that, at the outset, the Commission resisted any suggestion that apart from an investigation pursuant to s13(2), it only had limited determinative and reporting powers. It embraced its investigative role (s13(1)) and set about using its extensive powers to obtain evidence and documents supported by the removal of the protection from self-incrimination. Much of this was done in a plethora of publicity which inevitably heightened public expectations of "guilty" persons being "convicted" by the Commission. Some of the Commission's activities enhanced this expectation and comments made in public hearings, together with media articles and personal profiles published in major newspapers, added to a community expectation that the Commission would report "convictions" of various people.

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6 For a discussion of the powers of the Royal Commissions see L.A. Hallett, *Royal Commissions and Boards of Inquiry.*

In substance, the Commission set about its activities as if it was a permanent Royal Commission with all of a Royal Commission's powers. It embraced the roles of investigator, prosecutor and judge in all cases, irrespective of the source of the reference and without any apparent appreciation of the fact that for centuries we have structured our legal system to try to avoid the inevitable conflicts of reposing all these functions in one body.

Suggestion was made to the Commission that even if it did not accept a limitation on its powers from the statute, it should nevertheless be careful to conduct its activities so that it did not adopt all these roles with their inherent conflicts. It was suggested that a good model for the Commission to embrace was to be found in the workings of the Fitzgerald Inquiry in Queensland. As many will recall, Mr Fitzgerald QC expressly refused to publish findings of criminality in relation to individual persons and referred his "results" in private to a special prosecutor for appropriate action. This suggested method of operating was resisted by the Commission.

For my own part, I do not believe there is other than benefit for the community if the Fitzgerald model is adopted. After all, if the Commission satisfactorily carries out its investigative function, evidence should be available to obtain convictions in the ordinary courts if a crime (which in the present context means corrupt conduct) has been committed. Nothing is gained by the community and great harm may be done if the Commission, having investigated an allegation, makes pronouncements as to whether, in its opinion, individuals have committed corrupt conduct. The very wide powers given to the Commission were quite obviously to allow effective investigation but, as the High Court has found, not so that the Commission may make findings of guilt, but rather so that the prosecuting authorities may be better able to prosecute. If the Commission had contented itself with an investigative role designed to assist effective prosecution, the criticisms may not have been so strident and some would not have come at all. I am not suggesting that the Commission was alone in pressing for an expanded role. Those who have pressed for a "permanent Royal Commission" (including prominent politicians), are, in truth, advancing the Commission's argument and as a consequence are embracing an institution which, because it so fundamentally contradicts the traditional structure, cannot ultimately survive.

The idea that corruption is so bad in New South Wales that we should abandon the traditional separation of the roles of investigator, prosecutor and judge is difficult to accept. It is only necessary to look at the matters which have so far been publicly investigated and examine their reported findings to form an appreciation of the real situation. They do not suggest a crisis so great that these important conventions should be totally abandoned. References to "the Inquisitions", "McCarthyism" and similar are merely a reflection of the fact that many in our community do not readily accept a blurring of the traditional roles and removal of trial by a Court. And, lest anyone believe that criticism of the role adopted by the ICAC is confined to prominent politicians and former politicians, I can assure them this is not correct. Many lawyers who have appeared before some of the Commission's hearings and many who have been investigated have expressed similar views.

It is necessary to remember that it was never suggested that the legislation under which the ICAC is constituted was intended to take the Commission outside the traditions which have controlled our society for hundreds of years. If that had been intended, I doubt that an election promise made at one closely fought election could provide a sufficient mandate for a government to create such a fundamental change. Although quite obviously there have been great developments since Magna Carta, it is difficult to believe that the removal of trial by jury and the continuance of the protection offered by the courts against excesses of the Crown (both traditions extending back to the thirteenth century) can be overthrown in New South Wales as a result of a single election victory, especially when these important principles for the protection of the ordinary citizen were not even mentioned, let alone detailed or discussed.

I have indicated that the Commission did hold a belief that its function was to evaluate the evidence and express findings about guilt with respect to criminal offences and corrupt conduct and otherwise in respect of the evidence. It is important to remember that the Commission is empowered to collect evidence which can never be used at a person's trial (s37) and, as a consequence, any finding which it intends to pronounce might not only never be made by a court, but because of the lack of admissible evidence might not even be the subject of a charge. As the High Court has now clearly indicated that the Commission's view of its powers was erroneous, it may be that this problem will not be so acute in the future. However, a reading of the report on North Coast Development would not give confidence that future statements will necessarily be restrained in a manner which will avoid the problem.

In recent years there has been an increasing trend in government to invoke Royal Commissions of Inquiry to investigate particular problems. The frequency of such inquiries and the sensational reporting which they have attracted has tended to create a belief in some people that this is an appropriate method of handling any matter of public controversy. This view is expressed by the press. However, it is often overlooked that, although Royal Commissions may affect great community good, they may also cause considerable harm to persons unfairly trapped by the blaze of sensational publicity which can be created. It may be easy to accept that some may be unfairly damaged when the topic for investigation has been considered by the Executive and carefully defined for the inquiry. It is more difficult when it is suggested that persons may be damaged as a result of a permanent "Royal Commission" able to range through infinite areas of government and semi-government activity without any apparent constraint. In the former case it may be presumed that any view that the terms of reference have allowed an unfair treatment of individuals will rebound on the Executive and, as a consequence, caution will be exercised in framing the terms. This same balance cannot be achieved by the Commission.

Thus the second major problem stems from the fact that the legislative scheme provides for the Commission to carry out its investigations in public. It is a process which I have heard described as not unlike the Director of Public Prosecution ruminating in public. On any view it will do, and has already done, great and irreparable harm to entirely innocent people.

Section 31 makes provision for private enquiry but in subsection (4) gives a strong indication that the hearing should be public. Section 31(4) reads —

> (4) The Commission shall not give a direction under this section that a hearing or part of a hearing be held in private unless it is satisfied that it is desirable to do so in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given.

I have no doubt that there was earnest consideration of the wisdom of enquiring in public before this section was finally drafted. I am aware that some newspaper writers suggest that some investigative agencies which do not operate in public are consequently made less effective. The argument is that unless the public can "see" what is happening, the body will be under suspicion and its effectiveness hampered. The argument also assumes a fair and balanced press reporting. Such an argument is not made about the police force and the experience of the Commission demonstrates it to be absolute nonsense. If the principle that one should protect the innocent means anything at all then the public inquiry process must, in my view, be substantially modified. I note that the former President of the Court of Appeal, The Hon A.R. Moffitt has written on this subject.[7] I share many of his views.

## SOME ILLUSTRATIONS OF THE PROBLEMS

To illustrate these major difficulties and some others I shall briefly outline some experiences of the Commission. (There are others of which I am aware or which have been reported to me with a similar outcome.)

As part of the North Coast investigation, the Commission received an allegation which related to a property in respect of which there had previously been litigation between an environmental group and the owner/intended developer. The property was within a proposed Nature Reserve. The environmental group brought proceedings for injunction in the Land and Environment Court, where it challenged the consent granted in respect of the property. It engaged to represent it the Environmental Defenders Office (a public interest legal centre which acts only for environmental groups seeking to preserve the environment), which was then headed by an exceptionally able solicitor. This solicitor is now, and was by the time of the ICAC hearings, a highly respected, although recently admitted, member of the junior bar who had achieved a very successful practice, containing a significant environmental component. The Commission apparently obtained a statement from the landowner in which, inter alia, he asserted that during the course of a view of the property this barrister (then representing the Environmental Defender) was implicated in an attempt to solicit a bribe in return for the termination of the proceedings. On any view this was a sensational allegation. It was both totally untrue and also quite improbable. It necessarily meant that an environmental group of high standing and 14 years of opposition to development of the area would allow its solicitor to compromise that opposition. A moment's reflection would lead to the inevitable conclusion that the

7 Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputation, The Hon A.R. Moffitt, August 1990.

allegation was without foundation, as was pointed out in the letter written to the ICAC by the environmental group of its own initiative.

Although the ICAC had obtained the statement, it did not tell the barrister about it nor invite him to attend when it was tendered. The statement was read to the Commission and eagerly taken up by the press since the North Coast sittings of the ICAC had generated great media interest, including television. One television channel (Channel 9) decided to run the story as its lead item on the 6.00 pm evening news. It did so together with film footage of the unfortunate junior barrister obtained without indicating it was to be used to support a news story on the inquiry. Amongst other people, his parents happened upon the news item which, as you can imagine, caused them and many others great distress.

The first the barrister knew of the allegation was when a Channel 9 journalist rang him late in the afternoon for comment on it. Not surprisingly he declined to comment — he did not even know with any precision *who* was making the allegation.

In my opinion this one episode reveals many of the problems of the Commission in its present form. The first identifiable problem is that the conduct complained of could on no view of the legislation have been described as corrupt conduct. It was an allegation by one private person against another and did not involve a public official. It should never even have been ventilated before the Commission.

Secondly, if the allegation was to be ventilated before the Commission, surely the barrister implicated was entitled to be notified in advance and be given an opportunity to publicly defend himself. He was entitled to see and hear the witness state the allegation and at some time have an opportunity to test its veracity. He was also entitled to an opportunity to deny it on oath. Not only was the barrister unable to be present either personally or by a representative when the allegation was made (as he did not know it was to be made), he was later denied an opportunity to challenge the witness or to give sworn evidence in contradiction. As to the latter aspect it may be possible to argue that to leave the allegation unchallenged was a better method of assigning it to the irrelevant category. On that I have no concluded view although the wishes of the barrister should, in my opinion, have been paramount. What is clear is that this sequence of events should not have occurred.

This episode is obviously a product of the public investigation process. If the investigation had been in private the publicity would have been avoided and a more dispassionate evaluation of anything which might be released would have been possible. Later in the proceedings the Assistant Commissioner, in response to an application on behalf of the barrister who sought to give evidence to contradict the allegations, refused to receive evidence, saying that the Commission was not interested in the allegation and never had been. This statement was never reported on Channel 9 and was carried at the end of a story on page fourteen of *The Sydney Morning Herald.* These events give added weight to the addendum of The Hon A.R. Moffitt in his submission to the Committee on the ICAC.

The two major problems I have identified can also be illustrated by a brief examination of the fate of Mr Robert Steel, a man investigated in the course of the North Coast inquiry. Mr Steel was accused of offering a bribe to various politicians by the mechanism of a political donation. The morality of political donations good or bad and whether they could ever constitute a bribe, and as a consequence whether they could ever amount to corrupt conduct, is a subject for discussion in itself. I need only state that the Commission steadfastly refused until final addresses to direct its mind to the question of whether the events which it had under the microscope, even if proven, could ever constitute "corrupt conduct". It stated throughout that it would worry about those matters at a later time preferring initially to pursue the chain of events in public, irrespective of whether it was within "jurisdiction". Many will say why not seek relief from the courts. To do so is difficult. In my experience, to seek to control by resort to the courts a Commissioner who is obviously hostile to such a process is not to be lightly undertaken if you maintain any hope of being able to salvage favourable findings for your client. In one case the response to an intimation of court process was described by the Commissioner as a threat and was apparently not accepted as merely a part of the orderly process which we describe as the "rule of law".

In another case a discussion of the role of the ICAC elicited this response:

> Everything conceivable is being done to be fair to people, but you don't judge fairness by applying rules of law.[8]

With this background, Mr Steel's conduct, along with others, was investigated. All of the major metropolitan newspapers and the electronic media were present when evidence was given and much of it was reported. No doubt every reader of newspapers has some vague idea of that evidence, although he or she may not now remember much of the detail. However, if Mr Steel was a relative, friend or more importantly perhaps your business or professional colleague, I venture to suggest your recollection may be somewhat more acute.

After all the evidence had been taken in public, counsel assisting addressed the Commission in a manner which did not appear to suggest an in depth consideration of the actual structure of the legislation. Indeed, it appeared that identification of any possible criminal charge was only being undertaken when the submission was being made. I should add that no criticism of counsel assisting is intended. His difficulties were a product of the excessive haste with which he was required to undertake his onerous tasks. However of Mr Steel and others, he was reported as submitting —

> ...that prosecution for bribery of the two developers Mr Steel [and another] and their lobbyist, clearly was supported on the evidence.

That statement was very damaging to Mr Steel and its publication in *The Sydney Morning Herald* (21 November 1989) gave widespread publicity to it.

Discussion ensued between counsel assisting and the Commissioner. Counsel assisting was reported as saying further —

8 (North Coast Inquiry, Transcript p 6217).

> ...the circumstances, including the fact that Mr Loosley was not a public official, appeared to rule out prosecution, although there was evidence of an attempt to bribe by Mr Steel and (and the others).

At this point the Commissioner was reported as commenting —

> My mind tells me no offence in the circumstances, but instincts tell me that cannot be so.

There are a number of striking matters about this exchange. It is obvious to most people that the public investigation of the actions of Mr Loosley had the potential to cause great damage to his reputation. Notwithstanding this potential, his name was constantly in the newspapers as the subject of investigation with respect to an allegation of bribery. And yet at the end of the inquiry, and at a time when any damage was almost irreparable, counsel assisting concedes that no offence could ever have been committed because Mr Loosley was not a public official. Mr Loosley was never a public official and as a consequence the investigation of him for this matter was entirely misconceived. Given these events, it is, in my view, understandable that Mr Loosley has publicly criticised the ICAC.

The second matter is the comment by the Commissioner. It is difficult not to interpret these remarks as a further concession that the Commission was acting outside its jurisdiction and had done this knowingly. It is not acceptable to maintain a public investigation in circumstances where the Commissioner was of a mind that no corrupt conduct could have occurred.

Having suffered this public damnation by both counsel assisting and the Assistant Commissioner, it was not surprising that Mr Steel and the others awaited, with some real expectation, the opportunity for their counsel to reply and put the facts into the perspective they believed appropriate. They also had an expectation that the media, which so often pleads for public enquiries and trumpets its capacity for fairness, would report the submission. Mr Steel's counsel did address. He analysed the evidence and the law and made a submission that any suggestion of wrongdoing by Mr Steel was entirely without foundation. The journalist from *The Sydney Morning Herald* was present in court throughout the submission and appeared to be taking notes. Rather than a full report or indeed any report of Mr Steel's reply, not a single word of the submission was printed in any edition of the newspaper available to me.

Indeed the day after these submissions were made the edition of *The Sydney Morning Herald* which I read did not even carry a story from the Commission. In the cases of some other persons, although a reply has been reported, it is common that it is a brief report often buried without headline in some obscure part of the story.

In my opinion, these events and others, of which I am aware, are a complete rebuttal of any suggestion that open inquiries, with full rights of reporting, are a suitable vehicle for the investigation of allegations of corruption. An Assistant Commissioner, in an article published in January 1990 in *The Sydney Morning Herald*, suggested that the most important part of the process was the publicity given to the investigation and not the outcome in terms of trial and convictions for any criminal offence. How can this be

seriously suggested when the reporting of the investigative process can fail so abysmally to approach anything like a fair and balanced outcome?

The final report of the North Coast inquiry carries a conclusion with respect to Mr Steel. It was expressed at p 675 being —

> There neither is nor was sufficient evidence to warrant consideration of the prosecution of Mr Steel for any offence.

This finding was never reported by the press. No doubt it was not thought newsworthy. Mr Steel has to be content with the fact that the newspaper reported a list of the names of people against whom prosecutions were recommended for consideration by the Commission and he is not in the list. Can there be any wonder that in fair-minded people with a knowledge of the Commission's workings there is considerable disquiet?

A further illustration of these problems is the fate of Mr Schaefer before the North Coast Inquiry. Mr Schaefer is the effective owner and prospective developer of land at Byron Bay. The development has become known as the Cape Byron Academy, an intended educational establishment. The public investigation of this project has caused major financial damage to Mr Schaefer.

In brief, the sequence of the investigation commenced with an allegation that Mr Schaefer, although seeking approval for an educational establishment, was in truth attempting to establish a tourist resort. It was said that Mr Schaefer had accordingly deceived the council and that this constituted corrupt conduct.

Counsel assisting opened the allegation in these terms —

> In considering whether there has been corrupt conduct in connection with the Cape Byron International Academy development applications, it will be necessary to examine whether by procuring a zoning of part of its land for the construction of buildings for an educational purpose, the developers were obtaining a benefit by deception or attempting to obtain a benefit by deception *which would fall roughly within section 8(2)(e)* of the *Independent Commission Against Corruption Act*, corrupt conduct relating to fraud and 8(2)(y), any conspiracy or attempt in relation to any of the above.

It is clear from this opening that at the outset Mr Schaefer was regarded by the Inquiry as a person substantially and directly interested in the subject matter of the Inquiry. He was therefore entitled to make application to appear and participate in the Inquiry (s32). He was entitled to be legally represented.

Instead he was simply summoned to appear as a witness. He was not told allegations would be made against him. He was therefore not present when counsel assisting opened with the words I have quoted. When he appeared as a witness in answer to the summons, he was not legally represented. He had to wait several months before the Commissioner, Mr Roden QC declared that he was a person "substantially and directly concerned" with the subject matter of the Inquiry. By the time that declaration was made, all oral evidence had been given.

What should the ICAC have done?

- First, it should have told Mr Schaefer that allegations would be made against him and when they would be made;
- Second, it should have advised him of the substance of the allegations;
- Third, it should have drawn his attention to the provisions of the *Act* by which he may have sought leave to appear and to be represented;
- Fourth, it should not have waited several months to declare him a person substantially and directly interested when it was obvious they so regarded him at the outset.

In fact, as the documents show, the allegation was totally without foundation and even if true could never have constituted "corrupt conduct". The fact was that a tourist development had been suggested by Mr Schaefer at a time when he expected that it may have been viable but upon realising it was not, he had varied his proposal to an educational establishment. All of his thoughts and expectations were documented and disclosed to the Council and no misrepresentation (even if a matter falling within the ICAC's jurisdiction) could even be suggested.

The damage to Mr Schaefer has been considerable. His reputation has been tarnished. As a result of the publicity the project and its financing have been halted. The tertiary educational institution intended to be involved with the project withdrew support pending the outcome of the inquiry. All this could have been avoided if the inquiry had proceeded in private, examined the documents with expedition and reached the inevitable conclusion that the allegation was baseless. The Commissioner, after many months of innuendo and speculation, expressed his conclusion in these terms —

> The evidence does not establish that there was any misrepresentation made to the administrator of the Council or the Council. (report p 286)

A similar fate occurred with the investigation involving Bradshaws Waste Industries. It was suggested that when entering an agreement for a site on which to dump waste the company had been involved in corrupt conduct. The allegation was given great publicity and the investigation had a devastating effect on its business. All capacity for it to deal with government was taken away because the bureaucracy did not want to deal with a possibly corrupt company.

When the inquiry was completed, the company was exonerated and the finding made that it had merely acted in accordance with prudent business practice. The fact that the inquiry took place in public caused great harm to the company, its employees and shareholders. Given the damage caused, it is not surprising that that company and its principals should feel greatly aggrieved.

A further and often troublesome aspect of the ICAC's activities has been a tendency, in some enquiries, to look beyond conduct which might fall within the definition of corrupt conduct and pronounce upon matters of general morality or behaviour. This has occurred notwithstanding the Premier's remarks in his second reading speech —

> The Independent Commission is not intended to be a Tribunal of morals. It is intended to enforce only those standards established or recognised by law. Accordingly, its

> jurisdiction extends to corrupt conduct which may constitute a criminal offence, a disciplinary offence or grounds for dismissal.[9]

An illustration drawn from *The Sydney Morning Herald* of 21 November 1989 is in this paragraph —

> In respect of Mr Beck, Mr Toomey suggested that Mr Roden's report, which is expected to be finished early in the New Year, could have something 'very stringent' to say about his 'parliamentary ethics'.

Quite why it was ever conceived that the Commission had jurisdiction to deal with matters of parliamentary ethics was never explained. The quote serves to illustrate the concern which has been expressed about the Commission, becoming an arbiter of morals and in conjunction with a press which is neither fair nor objective, becoming a vehicle for the criticism of individuals in respect of matters falling outside its charter.

## SOME CONCLUSIONS

It is apparent that the ICAC has been able to complete some successful inquiries. However, I have indicated that from the outset the ICAC has been criticised. For my own part the initial experiences of the ICAC persuade me that a permanent institution of the type which has been provided is inappropriate. In my opinion, the concerns expressed by Mr Fitzgerald have already been realised in some of the ICAC's activities. However if the ICAC is to continue as a permanent body, the following matters need to be considered.

Firstly, any attempt to restructure it so as to provide it with powers of determination should be resisted. Its powers should remain confined in all cases (except a reference under s13(2)) to powers of investigation with other bodies exercising powers of prosecution and determination. Unless this is accepted, the Commission will certainly fail. The lack of recognition of this distinction is a fundamental component of the present criticisms. As more people come into contact with the Commission, these criticisms will be more widespread. I doubt whether an informed community would accept that the problem of corruption is so great that the traditional processes should be completely abandoned.

Secondly, the inquiry process must be modified to ensure that allegations which could never amount to corrupt conduct are not ventilated. If the Commission comes across matters falling outside its jurisdiction but which warrant investigation, it has ample powers to report such matters to the appropriate authorities for investigation and action. It must not allow itself to adopt the role of keeper of public morals or protector of the community at large. If it seeks to do this, in my opinion failure is again inevitable.

Thirdly, the Commission's public investigative process should be substantially curtailed. These processes must be in private at least until the investigation has established a degree of confidence in any allegation which justifies the damage which will accompany

9 The Premier — *Hansard*, 26 May 1988 p 676.

its public ventilation. Unless individuals have this basic protection, the Commission processes will always be perceived as unfair.

Fourthly, and accepting that there has been considerable variance between the public statements of the Commissioner and Assistant Commissioners, it is essential that if there is an investigation in public, the Commissioner must not by his words or demeanour allow a view of the evidence to be offered which will thereafter be disseminated in the media. Comments which are offered as "throw away" lines have a capacity to greatly damage people when reported in the media.

The ICAC will ultimately be effective only if its performance justifies its extraordinary powers. If the Commission is to justify those powers it must be scrupulously fair, value the rights of individuals and accept that persons should only be convicted after due process in the relevant court. The experience of the first twelve months is that as a result of the ICAC's actions, some of which are a direct result of the legislation, great harm has been done to many innocent people.