

**The New South Wales Independent Commission Against Corruption
3rd ICAC Symposium - Hong Kong
9 to 11 May 2006**

THE NEXUS BETWEEN PRIVATE AND PUBLIC CORRUPTION

I have forwarded to the organisers of this Symposium a paper in which I have outlined, for those who may be interested, the history, structure and functions of the New South Wales Independent Commission Against Corruption.

The Commission was created in 1988 in response to unease and concern in the community about corruption in the public sector as evidenced by the jail sentences imposed on a magistrate and a Minister of the Crown for what were, in each case, corrupt conduct of a criminal kind.

New South Wales was the first of the Australian States to enact anti-corruption legislation. Since then the State of Queensland has enacted the Crime and Misconduct Act and Western Australia the Corruption and Crime Commission Act. Though wording of comparable legislation is a little different, the end purpose of all of it is the same. It is to expose corruption and to reinforce integrity in the public sector.

In my paper, I have set out in greater detail the definition of "corrupt conduct". It means, inter alia, the dishonest or impartial exercise of official functions or breach of public trust or misuse of information or material acquired in the exercise of official functions.

Because the Act was created to deal with corruption in the public sector there is a common, but misplaced, view that the jurisdiction of the Commission is confined to the conduct of public servants in the discharge of their official functions. However, definitions in the legislation make it clear that the jurisdiction of the Commission extends to activities of non-public servants. The definition of a "public official" in the legislation includes a person engaged by or acting or on behalf of a public authority. The modern tendency to outsource government activities to private operators has meant that the conduct of a non-public servant is amenable to the jurisdiction of the Commission as if that person were in fact a public

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official. Moreover the definition of corrupt conduct includes the conduct of any person (whether or not a public official) that adversely affects or could adversely affect the honest or impartial exercise of official functions by public officials. It also includes conduct which could not, in fact, effect honest or impartial exercise of a particular public function (because, for example, that public official might be incorruptible) but which if carried to fruition, could adversely affect the exercise of official functions. Thus the jurisdiction of the Commission extends to the conduct of people who conspire with public officials, those who conspire with non-public officials to deflect public officials from their official functions.

As I have said this means that the conduct of non-public official either alone or conspiring with another non-public official would be within the jurisdiction of the Commission even though it is plain that the conduct be unlikely to have what its proponents would regard as a successful outcome.

An illustration of the type of conduct that comes within the Commission's jurisdiction was evidenced in an inquiry recently conducted by the Commission into the Roads and Traffic Authority of New South Wales. A number of people (not public servants) were involved in, not only the stealing of motor vehicles but their "rebirthing". The effect of the "rebirthing" was to give the impression to anyone searching the registry that the vehicles were legally owned by the persons who had stolen them or to whom those persons had sold them. At the time (and it remains so to the present day) the Roads and Traffic Authority had outsourced to private enterprise service station the function of examining and recording information about motor vehicles. These people were part of the conspiracy to achieve the result referred to above and, in some cases, actually transferred chassis and engines numbers on damaged vehicles to those that were stolen. The Roads and Traffic Authority officials at the registry had registered these vehicles knowing that some of them were stolen and that the details they were registering were false. But however not all did, some did because they were deceived by the outsourced inspectors to accept the details as genuine.

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It was argued by the Roads and Traffic Authority that the private enterprise service station proprietors could not be regarded as public officials because their function was merely the provision of expert evidence given to the Roads and Traffic Authority concerning the suitability of motor vehicles for registration. The definition of public official included an employee "otherwise engaged by or acting for or on behalf of or in the place of a public authority". The Commission determined (and its determination was not challenged) that when one had regard to the legislation governing the registration of motor vehicles it was clear the function being undertaken by the private enterprise service station owners was, in effect, a function for which the Roads and Traffic Authority was responsible.

Although, as I have said, the legislation is concerned with public sector corruption and maintaining public confidence in the integrity of the public sector the Commission's jurisdiction travels far beyond public servants. Most of the investigations undertaken by the Commission to date have extended to individuals who are not public servants but whose activities are designed to corrupt public servants whether or not public servants were or could have been corrupted in any given case.

Last year the Commission was concerned with hundreds of fraudulent building licenses issued by the Office of Fair Trading which relied on dishonest qualifications from privately financed educational institutions. As well, the Office of Fair Trading had also outsourced to assessors in the private sector, its obligation to properly assess the qualifications of builders applying for licenses to build. A number of them were found to have taken bribes to record a successful assessment. The fraudulent conduct was serious matter because the Office of Fair Trading was holding our persons competent to undertake building work when they were not. The potential consequences for occupational health and safety of people working on building sites and ultimate owners and occupiers of the site was self evident.

At the same time the Commission investigated a similar scam. This time it was the fraudulent conduct of WorkCover a government agency established by the government to certify

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competency of people who drive, manage and control dangerous equipment used on construction sites.

The Road and Traffic Authority, the Office of Fair Trading and WorkCover had one function that could be described as being in common with each other. It was the function of licensing people to undertake potentially hazardous work and the function of registering as safe dangerous machinery and equipment. In each case there had been a failure by the outsourcing government agency to ensure that people doing their outsourced work were discharging their functions competently and honestly. Sometime agencies were investigated on more than one occasion for the same sort of corruption. It seems to be a characteristic of outsourcing activities from the public to the private sector that the public sector, thereafter washes its hands of the supervisory role it should continue to undertake. It is said that budget allocations are made on assumption that a government instrumentality no longer has a particular function without recognising that some allowance should be made to accommodate the agency's obligation to supervise the proper carrying-out of the work it no longer does.

A recent sensational investigation by the Commission was concerned with corruption attendant upon efforts by developers and certain local government councillors to secure for the developers favourable zonings and favourable development application decisions. In New South Wales planning laws are administered by elected local councils. Prior to 2004 the previous Strathfield Municipal Council of nine was composed of five Labor councillors and four non-Labor councillors. Hence, Labor controlled council's decisions and one of it's members was elected Mayor who was assumed to have more influence and greater voting power than other councillors.. Following the election in 2004 the Labor majority was reduced to four and there were five non-Labor members of the Council. The five non-Labor councillors appointed a non-Labour member as the Mayor. A consequence of this was that a number of developers who were closely associated with the Labor team and, in particular, the previous Mayor, believed (correctly) that their interests would be prejudiced unless the former Labor Mayor was again made the Mayor of the Council.

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The matter came to the Commission when the new Mayor said that a developer had given him \$2,500 in cash at a lunch and at the same time had offered him a further \$200,000 if a certain development were allowed to go ahead. Some time after the cash was handed over the former Labor Mayor, claiming to be friend of the new Mayor, called the new Mayor and told him that he had received information suggesting that the Mayor was corrupt. The former Labor Mayor said that he had even heard that the handing over of the \$2,500 in cash had been captured on a tape recording of the new Mayor receiving a bribe. The new Mayor, of course, knew he had received \$2,500 but he did not know whether the former Labor Mayor was correct in stating that his receipt of it had been caught on tape

The new Mayor then made a decision to refer the matter to the Commission because he was convinced (correctly as events turned out) that he was being blackmailed although at the time he did not know who the blackmailers were. The Commission investigated the complaint. It intercepted telephone calls, conducted a controlled operation and executed a number of search warrants and, towards the end of its inquiry undertook a public hearing.

The intercepted telephone conversations and the listening devices lawfully installed made it clear that the Labor Mayor moved from telling the new Mayor that, although he didn't believe the allegation the new Mayor should probably stand down to the point where he was telling the new Mayor that unless he stood down and joined with other members of the Labor faction to have the old Labor Mayor reinstated as the Mayor he would publicise the tape.

The investigation revealed that the former Labor Mayor, together with a developer friend was responsible for the new Mayor being taped accepting a bribe and that the new Mayor was being blackmailed. The taping was undertaken unlawfully by a serving police officer who recorded the events in contravention of the provisions of the Listening Devices Act and, moreover, who could not explain why he did not report the criminal offence (the receipt of a bribe) to the police.

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In the event findings of corrupt conduct were made against all those involved including the new Mayor, the former Labor Mayor, the developer and the serving police officer. Criminal prosecutions for bribery, extortion and breach of the laws regulating privacy are still pending.

Hon Jerrold Cripps QC
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