

“Considerations on the Federal ICAC.” Guest Speaker The Hon Anthony Whealy QC. 2 Aug 2022

After his retirement from the Bench, Tony Whealy described how he was enlisted to handle the Obied case for NSW ICAC, and his work as Chair of the Centre of Public Integrity. These sparked his keen interest in the need for a federal ICAC and the structure needed for it to be effective in improving public administration at the federal level.

In looking at its scope, he noted that there is a need to focus on matters that will address a real problem. Hence an effective filter mechanism will be needed to weed out potentially numerous complaints that are frivolous or vexatious

It will be important to have a public report, so the public can see what is happening and be assured that the process is fair. Publication of the report and its finding should not be unduly delayed.

Secrecy is critical in cases of national security, but should not be used without good reason, ie not just to avoid political sensitivities. The prosecution of Bernard Collaery concerning Timor Leste was a case in point, as was the impact on his professional and personal life though delays of many years (until the case was recently withdrawn by the new Attorney General).

In formulating the structure and procedures in the Bill to be presented for parliamentary debate (possibly as soon as next month), the Government will need careful attention on the need to:

- a. Define corruption, and
- b. Make public hearings as safe as practical from damaging people’s reputation needlessly or unfairly.

The Centre for Public Integrity has made submissions to the Government in the hope that the definition of corruption is reasonably broad, and that the public has access (in balance with the need to avoid reputations being treated unfairly).

He argued that the definition of corrupt conduct should go beyond criminal offences in public administration, noting that public servants are bound by a code of conduct, while federal politicians do not have a code of conduct (unless they are Ministers). As an aside, he believes that all parliamentarians should have a Code of Conduct, so they know what is the right way to behave. It seems possible that the scope of corruption within the proposed federal ICAC may be limited to serious and systemic corrupt conduct. This is a good limitation to impose.

He considers that potential favourable treatment as a response to large political donations needs to be regulated, as it can fall within the definition of corrupt conduct. Hence ICAC should be able to investigate this publicly to ensure it does not transgress probity. Similarly, he argued Ministers hold a position of trust to act in the public interest, and it is misconduct in public office or potentially corrupt if they dispense public funds predominantly for personal, political or partisan gain. While police can handle simple criminal matters, ICAC should cover the broader concept of corrupt conduct.

For public hearings, Counsel Assisting has a very important role in carefully dealing with the issues while also treating reputations fairly. Also control of the media is vital in keeping the process on the rails, so that witnesses are not unfairly treated as corrupt. NSW ICAC has guidelines now that

are effective, and could be a useful template for the proposed federal ICAC. Also the Commissioner can give directions to the media eg by saying that a witness is appearing to help the inquiry and with no implication of corrupt conduct. In addition, procedural fairness is important (eg allowing legal representation, requiring exculpatory material to be made available to a witness before a public hearing, etc).

Proper oversight of the process is very important, so that any unreasonable unfairness etc can be dealt with and corrected promptly as much as possible. This can be through a strong Commissioner. Additional independent oversight could be through an Inspector, and a bipartisan parliamentary committee. Also there should be a mechanism for administrative appeals to heard by the Federal Court if procedural unfairness or serious law errors arise that cannot be resolved within the ICAC hearing.

A federal ICAC will provide a mechanism to educate Ministers, parliamentarians and their staff as well as the federal public service, in ethical behaviour. It may also be a useful educative role in providing advice and clearance to the Government, especially on difficult opaque procurement arrangements at the federal level.

He foresees the establishment of an effective ICAC will facilitate great improvement in federal administration of donations, grants, lobbying rules, etc in the years ahead

After several wide-ranging questions were deftly answered, Rob Thomas thanked Tony Whealy on our behalf for such a stimulating, thorough, interesting and timely coverage of the key issues that a federal ICAC needs to be effective.

Peter James